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petitioner, they may act according to Law after the petitioner is set free under this order of the Court."

I can see no reason why a similar order should not be passed in the present case.

For these reasons I am of the opinion that the detenu is being illegally or improperly detained and is entitled to be released from custody. I would order accordingly.

Falshaw J.

Falshaw J. I agree.—

CIVIL APPELLATE

Before Falshaw and Kapur, JJ.

HARI KISHAN DAS,—*Plaintiff-Appellant,*

versus

RAJESHWAR PARSHAD, ETC.,—*Defendants-Respondents.*

1951

Nov. 12th

Regular First Appeal No. 383 of 1946

Hindu Law—Partition between father and sons—Father dying and leaving property which fell to his share on such Partition—Whether the sons succeed to such property as co-parceners or as tenants in common.

Held, that the statement of law in section 31 of Mulla's Hindu Law (1946 Edition) is not a correct statement of law. The sons when succeeding to the property of their father which fell to him on partition with his sons, succeed as tenants in common and not as co-parceners and the property does not become co-parcenary property in their hands. Co-parcenaryship and survivorship are incidents of a joint family and not of a separated family.

First Appeal from the decree of Lala Kirpa Ram, Sub-Judge, 1st Class, Karnal, dated the 1st day of July 1946, passing a decree for possession of half share in the house in dispute in Plaintiff's favour against the defendants and leaving the parties to bear their own costs and disallowing the claim for mesne profits.

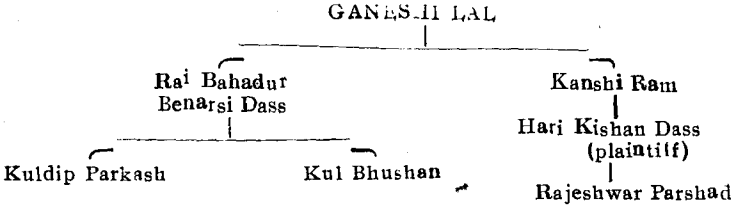
F. C. MITTAL and N. L. WADHERA, *for Appellant.*

H. L. SIBBAL and J. L. BHATIA, for Respondents.

JUDGMENT

KAPUR, J. This judgment will dispose of two first appeals filed by the plaintiff—Regular First Appeals Nos 383 and 384 of 1946. The main points involved in both the appeals are the same though the details of the properties are different.

It will facilitate in understanding the facts of the case if I were to give the pedigree-table which is as follows :—



In 1901 there was a partition between Ganeshi Lal, Kanshi Ram and Benarsi Das by which the three of them separated *inter se* and properties were partitioned. The *haveli* which is in dispute in Regular First Appeal No. 383 of 1946 fell to the share of Ganeshi Lal, and the agricultural land which is in dispute in Regular First Appeal No. 384 of 1946 also fell to the share of Ganeshi Lal. In 1902 Kanshi Ram died. Ganeshi Lal died in 1906 and R. B. Benarsi Das died on the 10th March 1938.

On the 27th October 1936 Rai Bahadur Benarsi Das made a will appointing Rajeshwar Parshad as the executor. On the 3rd March 1938 Rai Bahadur Benarsi Dass executed a deed of trust in respect of the land in Regular First Appeal No. 384 of 1946. By this deed of trust the property in this latter appeal was transferred to the name of Rai Bahadur Benarsi Dass Sada Barat Trust. The plaintiff Hari Kishen Das brought two suits—one in respect of the house and the other in respect of the land—alleging that both the will and the deed of trust in the respective suits were ineffectual and void as against him as he was entitled

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to both the house as well as the land by right of survivorship. He asked for mesne profits. These allegations were denied and the learned Judge in both the suits held that Hari Kishan Das was entitled to half share in the house and in the land in dispute but was not entitled to any mesne profits. The plaintiff has filed two appeals—Regular First Appeal No. 383 of 1946 being in respect of the house and Regular First Appeal No. 384 of 1946 in respect of the land.

Plaintiff's counsel has raised two points. Firstly, he has submitted that as both the house and the land in dispute had fallen to the share of Ganeshi Lal, on his death Benarsi Das and the son of Kanshi Ram succeeded to it as coparceners and not as tenants-in-common, and he has relied on a passage in Mulla's Hindu Law in section 31 at page 23, where it is stated—

> "According to the Mitakshara School two or more persons inheriting jointly take as tenants-in-common except the following four classes of heirs who take as joint tenants with rights of survivorship :—
>
> (a) Two or more sons, grandsons, and great-grandsons, succeeding as heirs to the separate or self-acquired property of their paternal ancestor."

He has then referred to the illustration given at the same page of Mulla and submits on the basis of this that the properties in dispute in the two suits were the separate properties of Ganeshi Lal and as the plaintiff and Rai Bahadur Benarsi Das come within the rule (a) as given above they had become joint tenants with right of survivorship and therefore Benarsi Das had no right either to make a will or create a trust in regard to those properties. The argument comes down to this, that where a father dies leaving separated sons, the property which fell to him on partition with his sons will become coparcenary property

in the hands of the sons although they and the father had as between themselves already separated. The passage in Mulla's Hindu Law even though it may be capable of that meaning is not supported by the rulings cited and is not in my opinion a correct statement of the law. The cases that have been referred to by Mulla are *Raja Jogendra* v. *Nityanand* (1), *Madiwalappa Irappa* v. *Subbappa Shankarappa* (2), and *Shyam Behari Singh* v. *Bameshwar Prasad Sahu* (3). After going through them I am unable to find any support for the proposition contended for by Mr F. C. Mital. In none of these cases was there a separate family as in the case now before us.

In *Jogendra* v. *Nitayanand* (4) it was held that where the father is separate from his collaterals and dies leaving a legitimate son and an illegitimate son (in this case a dasiputra), the illegitimate son becomes a corparcener with the legitimate son with right of survivorship even in regard to impartible estates. In this case there was no question of separated sons and a separated father.

In *Madiwalappa* v. *Subbappa* (2) the rule laid down by Mulla was quoted with approval but the facts there were entirely different and the decision on this point was obiter. The facts were that one Doddappa died in 1878 leaving 3 widows. One of the widows adopted a son who incurred a loan of Rs 3,000 and on his death a decree was obtained against his widow and the property in dispute was sold in execution to Madivalappa's predecessors in title. Subsequently the property was inherited by Kalyanappa who died in 1922 leaving two sons Ayappa and Doddappa. The former being elder sold in his capacity of manager of the joint Hindu family to one Subbappa who brought a suit for possession against

(1) I. L. R. (1891) 18 Cal. 151 (P. C.)
(2) I. L. R. (1937) 61 Bom. 906.
(3) I. L. R. (1941) 20 Pat. 904
(4) 17 I. A. 128.

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the auction purchasers who were in actual possession and it was held that the decree against the widow was properly obtained and was binding on the reversioners and therefore the sale in execution of the decree passed good title to the auction purchaser. This was held to be sufficient to dispose of the case.

A further argument was raised by the Auction-Purchaser that the sale by one of the sons of Kalayanappa would not pass any title to the plaintiff as both sons did not join the sale. Relying on the passage in Mulla it was held that as the property was joint family property of the two sons the *karta* could pass good title to the vendee. This was in the first place obiter and then is no authority for the proposition contended for by Mr Mital, as Kalayanappa and his sons still formed a joint family which is not the case before us.

In *Shyam Behari's case* (1) the head-note is—

> "Self-acquired property of the father is taken by sons, who formed a joint family with the father, as joint family property and is not taken by them as tenants-in-common".

In this case the father Fateh Bux Singh formed a joint family with his four sons and it was held that on his death his sons took the Imli estate which had been granted to the father and was therefore regarded as his separate property as joint family property. Sir Trevor Harries, C. J., observed at p. 913 as follows :—

> "The rule of Hindu Law is, in my view, clear and that is that self-acquired property of the father is taken by sons, who formed a joint family with the father, as joint family property and is not taken by them as tenants-in-common."

Reference is then made in that judgment to paragraph 271 of Mayne on Hindu Law and to *Madivalappa Irappa's case* (2).

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(1) I. L. R. (1941) 20 Pat. 904
(2) I. L. R. (1937) Bom. 906

Two other cases are helpful to resolve this controversy. One is *Raja Ram Narain Singh* v. *Pertum Singh* (1) where at p. 191 Phear, J., observed :—

> "The distinction between a joint property, and separate property under the Mitakshara Law appears to me to be simply of a temporary, not of an abiding, character. Property is joint, when it belongs to all the members, who may be many, of a joint family. Property is separate when it belongs only to one member of a joint family alone, and not to the others jointly with him. As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property—the property of several persons united together as a joint family with regard to it—the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only."

The other case is *Venkayamma Garu* v. *Venkataramanayamma* (2), in which the point to be decided was whether two grandsons—the sons of a daughter—took the separate property of their maternal grandfather jointly with benefit of survivorship. Both the sons were members of a united family. Lord Lindley said at p. 165 :—

> "The High Court proceeded on the principle that although persons who succeed to joint family property take jointly if their inheritance is unobstructed, yet that in

(1) 20 South. W. R. 189
(2) 29 I. A. 156

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cases of obstructed inheritance those who succeed take as tenants in common and not as joint tenants. But the authorities referred to by Mr Mayne in his very able argument show that this last proposition is by no means universally true. Members of a joint family who succeed to self-acquired property take it jointly : *Rajah Ram Narain Singh* v. *Pertum Singh* (1) and *Rampershad Tewarry* v. *Sheochurn Dass* (2) ".

The appellant's counsel then relied on *Marudavi* v. *Doraisami Karambian* (3), where it was held that the right of divided sons, grandsons and great-grandsons of the last male holder to succeed to his divided property, is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case, and the divided son will not, on the principle of exclusion of remoter by nearer sapindas, exclude the divided grandson in the succession to divided property of the ancestor. In this case it had been found that there was a complete partition, the father taking one share and the plaintiff and his three deceased brothers taking four shares. All that was decided was that because the plaintiff was a nearer sapinda to his father than defendants Nos. 2 to 4, who were only grandsons, he was not entitled to the whole property to the exclusion of the others, and it was in these circumstances that the Madras High Court held that a right of representation existed and that the sons and grandsons of other sons shared equally with the sons. I do not think that this case can in any way help the case set up by the appellant.

Coparcenaryship and survivorship are incidents of a joint family and not of a separated family. In

(1) 20 Suth. W. R. 189
(2) 10 M. I. A. 490
(3) 30 Mad. 348

Katama Natchiar v. *The Rajah of Shivagunga* (1) their Lordships observed :—

> "According to the principles of Hindu Law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

This passage was quoted with approval by Lord Lindley in *Venkayyama Garu's case* (2). In a family where all the members have separated from each other there can neither be community of interest nor unity of possession between all the members of the family and thus enabling the others to take by survivorship.

I am, therefore, of the opinion that the passage in Mulla's Hindu Law in paragraph 31 quoted above is not a correct statement of the law. It is significant that this view is not given in any other treatise on Hindu Law neither in Mayne, nor in Sarkar and Sastri nor in any other book. I have not been able to find any such rule and none was quoted by the appellant.

On the other hand in Sarkar and Sastri's Hindu Law at p. 382 (1940 Ed.) the law has been stated as follows :—

> "A son takes even the father's separate estate by survivorship and not by succession except when he has been separated from the father."

The next submission of the appellant's counsel was that in the matter of mesne profits the learned

(1) 9 M. .. A. 539 at p. 611
(2) 29 I. A. 156, 164

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judge had erred in so far as he had refused to allow him mesne profits on the ground that of the other lands which were in his possession he had not rendered accounts. In my opinion that is hardly a ground for refusing to give a decree for mesne profits. Whether on the evidence which has been led the cost of repairs of the *haveli* was more or less than the amount received as rent, the matter still remains one of accounts, and, therefore, the plaintiff was entitled to have accounts of the rents of that *haveli,* so also in the case of the lands which were in possession of the defendants, the plaintiff was entitled to get a decree for mesne profits.

I, therefore, allow the two appeals to this extent that the plaintiff will be entitled to get the mesne profits as from the date claimed by the plaintiff. The claim in regard to the possession of half the *haveli* and of the land in dispute, however, must be dismissed. In the circumstances of this case the parties will bear their own costs throughout in both the appeals.

Falshaw J.

Falshaw J. I agree.

REVISIONAL CIVIL

Before Eric Weston, C.J., and Harnam Singh, J.

1951

Nov. 15th

R. B. P. C. KHANNA,—*Petitioner,*

versus

L. MALAK RAM,—*Respondent.*

Civil Revision No. 685 of 1949

Delhi and Ajmer-Merwara Rent Control Act (XIX of 1947), section 9 (i) (e)—Expression "Purely residential premises", meaning of.

Held, that the expression "purely residential premises" is not a term of art and an attempt to give exact definition of the expression would not serve a useful purpose as each