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case; and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law.

Upon these grounds their Lordships are of opinion that no case has been made for interfering with the decrees under appeal; and they must humbly advise Her Majesty to affirm those decrees and to dismiss this appeal.

The respondents not having appeared there will be no order as to costs.

Agents for the appellant: Messrs. *Keen* and *Rogers*.

Appeal dismissed.

PRIVY COUNCIL.

P. C.* 1877. Feb. 9, 10, 15, 16.

PAULIEM VALOO CHETTY, ONLY SURVIVING SON OF PAULIEM CHUCKERAY CHETTY, DECEASED (PLAINTIFF) *v.* PAULIEM SOORYAH CHETTY (DEFENDANT).

[On appeal from the High Court of Judicature at Madras.]

Concurrent judgments on facts—Devise to heir—Acquisitions by a Hindu subject to the Mitákshara law—Education.

The rule of the Judicial Committee of the Privy Council not to permit the concurrent judgments of two Courts on a question of fact to be disputed may be relaxed in a case where the question of fact is closely mixed up with questions of law.

Quære, whether when a Hindu devises to his sons property which in the absence of such devise they would take as his heirs, the sons shall be considered to take as devisees or as heirs?

Quære, where a member of a joint Hindu family subject to the Mitákshara law has received a general education at the expense of the joint family funds, but is shown to have derived no material wealth from these funds, does property which he afterwards acquires by the exercise of his industry and intelligence in successful trading become joint in the contemplation of the Hindu Law? Decisions of the Indian Courts bearing on this question observed on.

THIS was an appeal from a decision of a Full Bench of the High Court at Madras, bearing date the 11th March 1875,

* *Present*:—Sir J. W. COLVILE, Sir B. PEACOCK, Sir M. E. SMITH and Sir R. P. COLLIER.

affirming the decision of a Division Bench of the same Court, dated the 3rd February 1875, which reversed a decree pronounced on the 14th July 1874, by Mr. Justice Kernan, on the original side of the High Court.

The suit in which the appeal arose was brought by one Chuckeray Chetty, now deceased, father of the present appellant, against Sooryah Chetty, executor of the will of the plaintiff's father, Aroonachellum Chetty. The object of the suit was to set aside the will of Aroonachellum wholly or in part, and in case it should not be wholly set aside, to ascertain the plaintiff's rights under it.

By the will in question the testator bequeathed to his only son the plaintiff an absolute legacy of Rupees 10,000 and the interest of a sum of Rupees 35,000, for life. But the bulk of his property, which was over five lakhs of Rupees in value, he directed to be invested and the interest to be expended by his brothers Cothundaram and Sooryah Chetty during their life, with power to the survivor to dispose of the corpus of the estate by will.

The questions raised by the suit were as to whether the testator had a right to dispose of his property by will, and as to the construction to be given to the power contained in the residuary clause of his will. The testator's right to dispose of his property by will depended on whether it was in its nature joint ancestral property, or was to be regarded as his separate self-acquired property.

Mr. Justice Kernan, by whom the case was originally tried, held that the property in dispute was the self-acquisition of the testator who had full power to deal with it by will; but he held that under the residuary clause of the will the plaintiff was entitled to a decree.

The case coming on appeal before a Division Bench of two Judges, the Court were agreed in reversing the decision of Kernan, J., as to the construction of the residuary clause, but differed as to the nature of the testator's property, Holloway, J., holding it to be ancestral, while Morgan, C. J., concurred with the lower Court in the view that it was self-acquired. The latter opinion prevailing, the plaintiff's suit was dismissed.

On appeal from the judgment of the Division Bench it was unanimously held by the Full Bench that the plaintiff's claim to benefit under the residuary clause of the will was premature

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during the defendant's lifetime. It was also held by a majority of the Court (Morgan, C.J. and Kindersley and Kernan, JJ. Holloway, J., dissenting) that the property in dispute was not ancestral, and could rightly be disposed of by the testator by will.

A decree was accordingly made against the plaintiff who thereupon brought the present appeal to Her Majesty in Council.

The material facts of the case are set forth in their Lordships judgment.

Sir *J. F. Stephen*, Q.C., and Mr. *J. D. Mayne* for the appellant.—We shall not contest that portion of the decision of the Full Bench which declares the appellant's claim to benefit under the residuary clause of the will to be premature. We contend that on the facts found and admitted, the Courts below should have held that the property dealt with by the testator was under the Mítákshara system of law joint property as being in its nature ancestral. On this point the judgments appealed from did not bring the case within the rule of the Judicial Committee not to disturb concurrent findings of two Courts on questions of fact. The decision as to whether the property was ancestral turned chiefly on considerations of law. The presumption of the Hiudu law was in favor of joint possession. The expressions used by the Indian Courts did not exclude the possibility of a nucleus of ancestral property having come into the testator's hands. It appeared that the testator had been educated by his father. Where a man is educated at the expense of the joint family funds, or is maintained from such funds while his education is going on, the gains which his education enables him to acquire are joint. The present case came within the rule of the Mítákshara respecting the gains of an art or science acquired "to the detriment of the ancestral estate." Under the Mítákshara as construed by the Bengal Courts an alienation *inter vivos* by one coparcener without the consent of the others of any portion of the joint property would be wholly invalid. According to the Madras decisions such an alienation would be valid to the extent of the share of the coparcener making the alienation. The Bengal view was the sounder, but, assuming the Madras construction to be correct, all alienations by the testator during his lifetime in excess of his own share would have been invalid. The plaintiff

on his birth became entitled to share with his father. Assuming that Aroonachellum had power to alien a half of his property while he lived, he had not the same power to devise. As regards joint property the principle of survivorship operates at the moment of death to the exclusion of the power of bequest. [SIR BARNES PEACOCK.—If any nucleus of property came to the testator from his father, it would seem that he took it under his father's will. Would property coming to the testator under his father's will come to him as joint ancestral property?] There was nothing in the judgments of the Courts below to show that the testator took from his father by devise. Where a Hindu father says in his will my sons shall take my estate, then since his sons are his natural heirs they take by descent and not under the will. [SIR JAMES COLVILE.—When it is said the testator's education was acquired to the detriment of ancestral property, we must look to the property at the time when the education was given. The evidence seemed to show that any property in the hands of the testator's father was not ancestral but self-acquired.]

In the course of the argument for the appellant the following authorities and cases were cited. Mítákshara, Chap. I, Sec. 4, paras. 6-12. Smriti Chandrika, Chap. VII, Secs. 1—12. Mádhávya, Burnell's translation, pp. 48, 49.

Rámashésháya Panday v. *Bhagavat Panday* (1).
Sadanund Mohapattur v. *Bonomallu Doss Mohapattur* (2).
Umritnath Chowdhry v. *Gourunath Chowdhry* (3).
Chalakonda Alasáni v. *Chalakonda Ratnáchalam* (4).
Durvasula Gangadharudu v. *Durvasula Narasammah* (5).
Bai Manchha v. *Narotamdas Kashidas* (6).
Vírasvámi Gramini v. *A'yyasvámi Gramini* (7).
Palanivelappa Kaundan v. *Mannáru Náikan* (8).
Vitla Butten v. *Yamenamma* (9).
Cosserat v. *Sudaburt Pershad* (10).

(1) 4 Mad. H. C. R. 5.
(2) 6 W. R. 256.
(3) 13 Moore's I. A. 542.
(4) 2 Mad. H. C. R. 56.
(5) 7 Mad. H. C. R. 47.
(6) 6 Bom. H. C. R. (A. C.) 1.
(7) 1 Mad. H. C. R. 471.
(8) 2 Mad. H. C. R. 416.
(9) 8 Mad. H. C. R. 6.
(10) 3 W. R. 210.

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Sadabart Prasad Sahu v. *Phoolbas Koonwur* (1).
Nathu Lal Chowdhry v. *Chadi Sahi* (2).
Hanuman Dutt Roy v. *Kishen Kishore Narayan Singh* (3).
Narotam Jagjivan v. *Narsándás Hárikisandás* (4).
Gangabai v. *Rámanna* (5).
Vásudev Bhat v. *Venkatesh Sanbháv* (6).
Udarám Sitaram v. *Rinu Pánduji* (7).

Mr. *T. H. Cowie*, Q.C., and Mr. *J. B. Norton* (with them Mr. *Eardley Norton*) for the respondent.—Three questions had been raised by the argument for the appellant: 1st, whether the father of the testator left any property to which the testator succeeded as heir? 2nd, whether any nucleus of ancestral property came to the testator on which his acquisitions were formed? 3rd, whether the acquisitions of the testator partook of the nature of ancestral property by reason of his having been educated by his father? The first two questions had been answered in the negative by all the Courts below. There were concurrent decisions that no ancestral property had devolved on the testator, and that his acquisitions had not been made on a material nucleus of ancestral property. It had been found that the testator took no property whatever from his father. Had there been any property to take it would have come to the testator as devisee under his father's will and not as heir. So taken it would not have been in its nature ancestral. There remained only the question as to the effect of education. On this point the appellant's argument proved too much, for if, as he contended, the effect of being educated made all the gains of an educated man joint, then no educated man could ever acquire anything for himself. As to the authorities cited the texts of the Mítákshara were alone to have weight given to them. The Smriti Chandrika and Mádhávya were not of the same authority. What the texts of the Mítákshara say as to property acquired to the detriment of the father's estate must be understood to relate to a sensible diminution of a joint estate in which others than

(1) 3 B. L. R., (F. B.) 32; on appeal I. L. R. 1 Calc. 226, s. c. L. R. 3 Ind. Ap. 7.
(2) 4 B. L. R. (A. C.) 15.
(3) 8 B. L. R. 358.
(4) 3 Bom. H. C. R. (A. C.) 6.
(5) 3 Bom. H. C. R. (A. C.) 66.
(6) 10 Bom. H. C. R. see p. 157.
(7) 11 Bom. H. C. R. 76.

the father have acquired a vested right. The facts found by the Courts below did not raise the question of law. There was no proof that the plaintiff had been educated to the detriment of a joint estate. The evidence was that the plaintiff had been educated by his father out of his separate estate. The case of *Dhunnookdharee Lall* v. *Gunput Lall* (1), decided by L. S. Jackson and Mitter, JJ., showed what interpretation was to be put on the expression used in the Mítákshara as to acquisitions "made without detriment to the father's estate." In that case it was decided that the mere fact of the defendant having received his education from the joint estate did not give the plaintiff a right as a member of the joint family to participate in all property which the defendant might acquire by the aid of that education. Moreover the rules of the Mítákshara as to gains of science or art did not apply to acquisitions by trade. To make such acquisitions joint the common fund must be directly instrumental. See the judgment of the Civil Judge of Vizagapatam in the case of *Chalakonda Alasani* v. *Chalakonda Ratnáchalam* (2), and the authorities there cited. As to there being a full testamentary power over self-acquired property, see *Narávyanasvámi Chetti* v. *Arunáchala Chetti* (3). The only restriction is that the testator is not wholly to disinherit his male descendants, *Beer Pertab Sahee* v. *Rajendro Pertab Sahee* (4). Here the male descendants had not been disinherited.

Sir J. P. *Stephen* replied.

SIR ROBERT P. COLLIER.—This case has been argued at considerable though not unnecessary length, and in the course of the argument several questions of law of much importance have been raised, but, in the view which their Lordships take of the case, it ultimately resolves itself into one or two questions of fact attended with no great difficulty.

Those questions arise in this way: Chuckeray, the original plaintiff, upon whose death the present plaintiff, his son, was substituted on the record, was the son of Aroonachellum. Aroonachellum was one of four brothers, sons of Mauree. Chuckeray brought his suit for the purpose of setting aside the will of Aroonachellum, made in favor of his brothers, upon

(1) 10 W. R. 122.
(2) 2 Mad. H. C. R. 56.
(3) 1 Mad. H. C. R., Append. p. 487.
(4) 12 Moore's I. A. 1.

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various grounds; but the only ground now necessary to refer to is that the property of Aroonachellum was joint, because it was ancestral—derived from his father,—and, therefore, that Aroonachellum could not dispose of it by will, or at all events could not dispose of more than a part of it.

This case has come before three Courts in India. It was first heard by Mr. Justice Kernan, who held that the property of Aroonachellum was not ancestral but was self-acquired. The case then came before the Chief Justice and Mr. Justice Holloway, who differed in opinion; the Chief Justice holding that the property was self-acquired, Mr. Justice Holloway holding that it was ancestral. The opinion of the senior Judge prevailing, there was an appeal to a full bench High Court, which, with the exception of Mr. Justice Holloway, held that the property was self-acquired, and that the will was valid. Their Lordships have not in this case insisted on the rule that they will not permit under ordinary circumstances the concurrent judgments of two Courts on a question of fact to be disputed, because the questions of fact appeared to be a good deal mixed up with questions of law.

On the part of the appellants, it was not denied that Aroonachellum had, in the ordinary sense of the word, made his own fortune, that the property which he devised to his brothers was acquired by his successful trading and by the exercise of his industry and intelligence; but it was contended that that property was to be deemed in point of law to have been derived from his father Mauree, firstly, because he had orginally received a certain amount of property from Mauree, with which he had commenced his trading, and which became, as it has been termed, the nucleus round which his fortune gathered; and, secondly, because, even if he did not acquire anything from his father, nevertheless, inasmuch as he was educated out of the funds of the family, all his acquisitions became joint in contemplation of law.

The first question is a pure question of fact. Upon it Sooryah, the defendant, the executor of the will of Aroonachellum, was examined, and he is reported by the Judge of the Court of first instance to have been a satisfactory and trustworthy witness. This witness, amongst other things, says, "The sons of Mauree got no property of our father, on the contrary, we supported the father. He was dubash in Baker's house in 1805 or 1806.

Kistnamah"—he was the eldest son—"was not assisted by any funds derived from my father. Mauree suffered loss to 25,000 or so, and Kistnamah paid that out of his own money." Then he further says, "Mauree's assets were not enough to pay debts, —insolvent, in fact. The debts Mauree left were ten times larger than the property he left. We paid a lakh for Court costs after his death from '14 to '34. Kistnamah carried on on his own account; so did Aroonachellum; so did Cothundaram and self" that is, the other brothers. "During the life of father we were always in the same house living, and also Svámi"—he was a cousin—"and cooked and ate together. Up to the death of Mauree there was no division. We each worked separately, and the brothers had to pay 30,000"—rupees or pagodas, it does not appear which—"for the debts of father, owing to security given by him, but we labored separately, and had our property separate."

In their Lordships' opinion, if this evidence, uncontradicted as it is, had stood alone, it would have amply supported the finding of fact of the three Courts. But it is materially corroborated. In the first place, it is corroborated in this way: a suit was brought against Mauree in 1805 (Mauree died in 1814) by one Devaljee, who had obtained a loan from Mauree on a mortgage, Devaljee alleging that Mauree held possession of the mortgaged premises and received the proceeds for a long time after the mortgage had been paid off. This suit was attended with considerable expense to Mauree in his lifetime; and it went on, and was a source of great expense, and considerable loss, to his sons, until it was finally decided in 1835. We have the Master's various reports in the course of it; and it is enough to say that from those reports it appears that Mauree at the time of his death had been overpaid to the amount of more than 8,000 pagodas, which he owed to Devaljee, and that this sum exceeded considerably any assets which Mauree had. Mauree left a will leaving his property to his sons. But their Lordships do not think it necessary to determine a question raised here, though apparently not in India, whether, if there had been a surplus after satisfying Mauree's liabilities, his sons would have taken by descent or by devise. Three of his sons renounced probate. The eldest son, Kistnamah, took out administration with the will annexed, and, as administrator with the will annexed, obtained

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possession of the property. It appears that Kistnamah up to the time of his death retained this property, as it was right and prudent for him to do, in order to meet the possible adverse result of the suit of Devaljee; that in defending the suit, and in the expenses of administration, he disbursed considerably more than the whole value of the property; and that, although the greater part of these disbursements were ultimately disallowed as against the creditors, the representatives of Devaljee, the deficiency was made good out of his estate; that after his death, which occurred in 1826, no assets of Mauree came to the hands of his surviving sons, except the half share of a garden at Athepattam and some other immoveable property of small value, all of which was afterwards sold under the final decree of the Court in satisfaction of the claim of Devaljee's estate.

The statement of the witness Sooryah is also further corroborated in this way: one Narrainsawmy, the son of Kistnamah, the eldest son of Mauree, brought a suit very much of the same description as the present for the purpose of disputing the will of Kistnamah, on the ground that Kistnamah's property was joint. In that suit the whole of the family agreed in treating the property of Kistnamah as self-acquired; and if Kistnamah's property was self-acquired, and not derived from Mauree, some presumption arises that the property of Aroonachellum was not derived from Mauree.

On these grounds their Lordships entirely concur with the finding of the Courts upon the first question; namely, that Aroonachellum did not receive any property from his father on which he commenced his trading, or which could in any sense be properly called the nucleus of his trading fortune.

The next contention is: that Aroonachellum having been educated out of the joint funds of the family, his acquisitions became in point of law joint. In support of the allegation of fact on which it is sought to found this legal inference the only evidence produced is the answer of the defendants, Sooryah among them, in a suit filed by one Svámi, a grandson of Nullamuttu, who was the father of Mauree; Svámi contending, amongst other things, that the property of Mauree was ancestral, derived from Mauree's father Nullamuttu; and the four brothers, Kistnamah, Aroonachellum, Cothundaràm, and Sooryah, contesting that proposition, and contending that the property

of their father Mauree was self-acquired. That answer contains this passage: "Aroonachellum was educated by his said father Mauree by and out of his separate funds or means; and when this defendant Aroonachellum was of sufficient age he was put forward in life by his said father, and by and through his means and influence only, and afterwards by and through the industry and exertions of this defendant Aroonachellum on his own behalf." If this passage be relied upon as an admission it must be taken as a whole, and it contains a distinct assertion that whatever were the charges of Aroonachellum's education—and it nowhere appears what sort of education he had—those charges were borne by the separate estate of his father, over which he had an absolute power of disposition. There was, therefore, at that time, no joint estate in the proper sense of the word; and the foundation of fact then fails upon which the legal inference was to have been based.

This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant,—which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the 10th volume of Sutherland's Weekly Reporter (1), in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in Madras; the first being to the effect that a woman adopting a dancing girl, and supplying her with some means of

(1) *Dhunookdharee Lall* v. *Gunput Lall*, 10 W.R. 122.

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carrying on her profession, was entitled to share in her gains (1); and the second to the effect that the gains of a vakeel who has received no special education for his profession are to be shared in by the joint family of which he was a member (2), decisions which have been to a certain extent also acted upon in Bombay (3). It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras.

For these reasons their Lordships are of opinion that the judgment of the Court below was right, and they will humbly advise Her Majesty that that judgment be affirmed, and this appeal be dismissed with costs.

Agents for the appellant: Messrs. *Keen* and *Rogers*.

Agents for the respondents: Messrs. *Talbot* and *Tasker*.

Appeal dismissed.

FULL BENCH.

Before Sir W. Morgan, C.J., Mr. Justice Holloway, Mr. Justice Innes, Mr. Justice Kernan and Mr. Justice Kindersley.

PROCEEDINGS, 24TH NOVEMBER 1876.

1876. November 24.

RAMAKRISHNA CHETTI (COMPLAINANT), *v.* PALANIYANDI KUDAMBAR AND ANOTHER (DEFENDANTS).

Penal Code, sec. 430—*Causing a diminution of water-supply—Definition of offence of causing such.*

Held by the majority of a Full Bench, INNES, J., dissenting, that it is not part of the definition of the offence of causing a diminution of water-supply for agricultural purposes that the act of the accused should be a mere wanton act of waste. It is sufficient that the act is done without any show of right.

UPON reading a letter from the Acting District Magistrate of Madura, referring the proceedings of the Second-class Magistrate of Dindigul in case No. 38 of 1876 on his file, and upon reading the records in the said case, the High Court made the following

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(1) *Chalakonda Alasani* v. *Chalakonda Ratnachalam*, 2 Mad. H. C. R. 56.

(2) *Durvasula Gangadharudu* v. *Durvasula Narasammah*, 7 Mad. H. C. R. 47.

(3) See *Bai Manchha* v. *Narotamdas Kashidas*, 6 Bom. H. C. R. (A. C.) 1.