or what they ought to have done, but they did, what was put up for sale, and what was purchased. If what was put for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest.

The High Court having carefully reviewed the whole of the evidence, and the whole of the documents, came to the conclusion that the first Court was right in finding that all that was intended to be sold, and all that was sold was the life-interest of the father, and not the whole interest in the zamindári.

Their Lordships entirely agree with the conclusion at which the High Court has arrived, and they will therefore humbly advise Her Majesty to affirm the decree of the High Court, and the appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Burton, Yeales, Hart, and Burton.*

Solicitors for the respondent—*Messrs. Lawford, Waterhouse, and Lawford.*

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAYYA (PLAINTIFF), APPELLANT,

and

SÚRAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1886. July 27. 1887. March 22.

Hindú Law—Self-acquired immovable property—Nuncupative will—Disinherison of an undivided son.

Under Hindú law, a father has power by a nuncupative will to dispose of self-acquired immovable property as he pleases and to the complete disinheriting of an undivided son.

A, a Hindú, took up some abandoned waste land and brought it into cultivation:

Held, that the true test as to whether the land is his self-acquired property or not, is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter.

APPEAL against the decree of T. Ramasámi Ayyangár, Subordinate Judge of Cocanada, in Appeal Suit No. 87 of 1884, confirm-

* Second Appeal No. 703 of 1885.

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ing the decree of A. F. Elliot, District Múnsif of Cocanada, in Original Suit No. 188 of 1883.

This was a suit for a declaration of the plaintiff's title to certain land, and, to set aside a lease, by which part of it was demised for three years to plaintiff by defendant No. 3. Defendants Nos. 1 and 2 were the sons of one Chowdry, deceased, and defendant No. 3 was his widow. The land in question was found to have been the self-acquired property of Chowdry, being waste land brought under cultivation by self-acquired funds, and the evidence showed that the day before his death he told defendant No. 1 that he should divide the land with defendant No. 3 in equal portions. The land was divided shortly afterwards, and by the lease sought to be set aside, part of it was demised by defendant No. 3 to the plaintiff for three years. Defendant No. 2, who had been disinherited, objected to the plaintiff's taking possession, but he subsequently executed a sale-deed to the plaintiff of the whole of the land, under which the plaintiff now sought to have his title declared.

This suit was dismissed in both the Lower Courts, and the plaintiff appealed.

Mr. *Norton* for appellant argued that the father of defendant No. 2 had no right to dispose of the whole of the family property, even if it were his self-acquisition, without making any provision for his son, and that a mere expression of intention on the part of Chowdry to divide the property between defendants Nos. 1 and 3 could not deprive defendant No. 2 of his rights over it.

Mr. *Michell* for respondents.

The further arguments adduced on this Second Appeal appear sufficiently for the purpose of this report from the order of the Court (Collins, C.J., and Parker, J.).

"ORDER.—The plaint land appears to have been taken up by Chowdry at the request of the Tahsildar when it was waste, and had been abandoned by other cultivators. We cannot infer from that fact alone that it is necessarily to be regarded as self-acquired property. The ordinary presumption would be that Chowdry acquired it for the benefit of his family and brought it under cultivation by the aid of family funds, in the absence of evidence that he had self-acquired funds which he utilized for that purpose. The District Múnsif says that Chowdry *acquired the land* without the use of any patrimony, and he might have said, without the expen-

diture of any funds at all, since the land was taken up from the Revenue authorities when it was waste. The true test is whether it was brought under cultivation by family or self-acquired funds, and the *onus probandi* lies upon those who alleged the latter. The Subordinate Judge has clearly put the issue upon the wrong side.

"We must ask the Subordinate Judge to re-try this issue upon the evidence on record and upon any further evidence which the parties may adduce and in the event of his again finding that the land was the self-acquired property of Chowdry he will proceed to try the further issue whether according to Hindú law a father has power by a nuncupative will to dispose of self-acquired immovable property as he pleases and to the complete disinheriting of an undivided son.

"We are clearly of opinion that the evidence as to what took place the day before Chowdry died—if it is true—would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*."

The Subordinate Judge having found the above issues in the affirmative, the Court delivered the following

JUDGMENT:—We must accept the finding of the Lower Court that the land is the self-acquisition of Chowdry, and we have already expressed our opinion that the evidence of what took place the day before Chowdry's death would establish a bequest to take effect after the death of the testator and not a gift, *inter vivos*.

The power of a Hindú governed by the law of the Mitákshará to make a testamentary disposition is unquestioned, as also his power to make it by nuncupative will—*Vallináyagam Pillai* v. *Pacheke*,(1) *Crinivásammal* v. *Vijáyammál*,(2) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Perdab Sahee*.(3) The only contested question is as to his power to make such a testamentary disposition to the complete disinheriting of any one of his male descendants.

We can see no reason to differ from the view expressed by the late Chief Justice of this Court in *Ponnappa Pillai* v. *Pappuváyyangár*,(4) that the power of the father to deal with self-acquired immovable property at his pleasure is unfettered by legal obligation, though the exercise of the power to the extent of depriving his family of the means of support would still be considered as

(1) 1 M.H.C.R., 326.
(2) 2 M.H.C.R., 37.
(3) 12 M.I.A., 1.
(4) I.L.R., 4 Mad., p. 42.

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contravening a moral duty. These observations were concurred in by our learned colleague Muttusámi Ayyar, J.

The same rule was followed in *Baba* v. *Timma*(1) as far as self-acquired property was concerned; and the Allahabad High Court in a case precisely similar to the present, *Sital* v. *Madho*,(2) which was also a case under Mitákshará law, has taken the same view as to the validity of an exclusive gift to one son of self-acquired property. It is admitted that in Bengal a father has such powers.

It is urged that the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(3) have thrown out doubts upon the former Madras rulings, but that decision was anterior to the Full Bench case—*Ponnappa Pillai* v. *Pappuváyyangár*, and the doubts expressed were as regards ancestral and not self-acquired property.

We may refer also to the remarks of this Court in the *Sivagiri case*(4) on the distinction between ancestral and self-acquired property. But in Chapter 1, s. V, cl. 9, the author of the Mitákshará says: "The grandson has a right of prohibition, if his unseparated father is making a donation or sale of effects inherited from the grandfather, but he has no right of interference if the effects were *acquired* by the father. On the contrary, he must acquiesce, because he is dependant." In clause 10 he states: "Consequently the difference is this; although he have a right by birth in his father's and his grandfather's property, still he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest *as it was acquired by himself*, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating it)." According to Vignyanésvara Yogi, the author of the Mitákshará, the son's ownership in ancestral estate is not subordinate but co-ordinate, and it is dependent only when the father himself acquires the property.

That decision was subsequently varied by the Privy Council—*Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar*(5) on the ground that the Court should have followed the rule laid down in *Girdharee Lall* v. *Kantoo Lall*,(6) and that the whole interest in the zamíndárí, which defendant had taken by heritage from

(1) I.L.R., 7 Mad., 357.
(2) I.L.R., 1 All., 394.
(3) L.R., 7 I.A., 181.
(4) I.L.R., 3 Mad., 370.
(5) L.R., 9 I.A., 128.
(6) L.R., 1 I.A., 321.

his father, was liable as assets by descent for the payment of his father's debts. That, however, does not detract from the weight of the remarks distinguishing between the son's rights in ancestral and paternal self-acquired property.

On these grounds, we are of opinion that the finding of the Subordinate Judge was correct, and we dismiss this Second Appeal with costs.

APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, and Mr. Justice Brandt.

QUEEN-EMPRESS

against

KOTAYYA AND ANOTHER.*

1887. February 22. March 18.

Penal Code, ss. 22, 378, 379—Theft—Movable property.

A dug up and immediately carried away, without any authority or right, several cart-loads of earth, part of unassessed lands of a village:

Held, that A was not guilty of theft.

THIS was a case referred for the orders of the High Court, under s. 438 of the Code of Criminal Procedure, by W. R. Weld, Acting District Magistrate of Kistna.

The case was stated as follows :—

"The two accused in this case have been convicted of theft punishable under s. 379 of the Indian Penal Code for taking some cart-loads of earth from a piece of poramboke land."

The accused did not appear.

The Government Pleader (Mr. *Powell*) for the Crown.

The arguments adduced in the support of the conviction appear sufficiently for the purpose of this report from the judgment.

The Court (Collins, C.J., and Brandt, J.) being equally divided in opinion recorded the following opinions, under s. 429 of the Code of Criminal Procedure :—

COLLINS, C.J.—The defendants have been convicted of theft under s. 379, Indian Penal Code, and fined 5 rupees each.

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* Criminal Revision Case No. 340 of 1886.