The District Judge has made no provision for debts due by the family. It is admitted on both sides that he was also in error in decreeing mesne profits for six years before suit when only mesne profits from date of suit were prayed for in the plaint.

With reference to civil miscellaneous petition No. 170 of 1892, we are of opinion that the proportionate share to be decreed to plaintiff must be that to which he is entitled on the date of the final decree. No final decree has yet been passed, since no issue except the first has been tried. As the father has died during the pendency of these proceedings, the plaintiff is apparently at the present moment entitled to one-fourth share. We must set aside the decrees of the Court below in both appeals and remand the suit in order that the District Judge may frame and try fresh issues and after recording findings on them pass a fresh decree for partition. The costs hitherto incurred will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

RATHNAM (DEFENDANT), APPELLANT,

v.

SIVASUBRAMANIA (SUPPLEMENTAL PLAINTIFF), RESPONDENT.*

1892. November 18. December 23.

Hindu law—Legacy by an undivided father of a Hindu family—Bequest for religious purposes.

A Hindu made his will, whereby he bequeathed Rs. 600 to supply a silver image for a pagoda, and died leaving the defendant, his undivided adopted son, him surviving. He was not shown to have been possessed of any separate property. In a suit by the trustee of the pagoda to recover the above amount:

Held, that the legacy was not binding on the defendant.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 161 of 1889, confirming the decree of M. A. Tirumalachariar, District Munsif of Kulitalai, in original suit No. 10 of 1889.

Suit brought by the manager and trustee of a Hindu pagoda to recover from the defendant a sum of Rs. 600 for a silver Vrishabhavahanam for the temple in accordance with the will left

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* Second Appeal No. 396 of 1892.

RATHNAM v. SIVASUBRAMANIA.

by the adopted father of the defendant. The testator was not shown to have left any self-acquired property. The Lower Courts held that the legacy was valid and binding on the defendant and passed decrees accordingly.

Defendant preferred this second appeal.

Bhashyam Ayyangar and *Ranga Ramanujachariar* for appellant.

Parthasaradhi Ayyangar for respondent.

WILKINSON, J.—It is contended that the Lower Courts erred in giving plaintiff relief on grounds not alleged in the plaint. The Lower Courts have decided that the defendant, the adopted son of one Narayanasami Ayyar, is bound to pay to plaintiff Rs. 600 bequeathed by the deceased Narayanasami Ayyar in his will for a silver Vrishabhavahanam. It appears from the plaint that the plaintiff rested his case on two grounds—the direction in the will and the liability of the deceased to repay a loan. The latter cause of action, however, was relinquished and the plaintiff relied on the bequest alone.

It is then contended that the legacy is void and that the defendant is not bound to carry out the promise made by his father. The District Judge upheld the legacy on the ground that it was a gift to religious uses which the son can be compelled to carry out. There is no Madras case in support of this contention. So long ago as 1874 it was decided (*Vitla Butten* v. *Yamenamma*(1)) that a member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death the right by survivorship is at conflict with the right by bequest, and the title by survivorship being the prior title, takes precedence to the exclusion of that by bequest. This principle has been recognised by the Privy Council—*Suraj Bunsi Koer* v. *Sheo Proshad Singh*(2) and *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(3). In the case of *Baba* v. *Timma*(4) it was decided by the Full Bench that a Hindu father, if unseparated, has not power, except for purposes warranted by special texts, to make a gift to a stranger of ancestral estate, movable or immovable. No special text has been cited in support of the gift of a silver Vrishabhavahanam to a kovil. It certainly was not an indispensable act of duty, nor a gift through affection or

(1) 8 M.H.C.R., 6.
(2) L.R., 6 I.A., 88.
(3) I.L.R., 5 Bom., 62.
(4) I.L.R., 7 Mad., 367.

for support of the family or relief from distress, which are specified in the Mitakshara (ch. I, s. I., s. 27) as gifts which a father has power to make. I am not prepared to say that the gift of Rs. 600 for a silver Vrishabhavahanam was a gift for a religious purpose. It is evident from the form of the plaint and from exhibit B that the Rs. 600 had been received by the testator in the year Yuva on a promise to repay it in four months' time, and that the bequest was, in truth, made with the intention of repaying a barred debt.

The decrees of the Lower Courts must be reversed and the plaintiff's suit dismissed with costs throughout.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The averment in the plaint that the money sought to be recovered was a debt due by defendant's adoptive father has since been abandoned. The claim that it was a legacy to the temple is untenable. For the reasons and on the authorities mentioned by my learned colleague, the defendant's father had no testamentary power over family property common to himself and his adopted son for any purpose. The contention that the legacy can be treated as an executory gift made for religious uses is not tenable, inasmuch as the defendant's father had no testamentary power at all either to give legacies or make gifts out of joint property.

APPELLATE CIVIL.

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

ABBU (PLAINTIFF), APPELLANT,

v.

KUPPAMMAL (DEFENDANT), RESPONDENT.*

1892. Dec. 15, 21.

Hindu law—Bequest to a boy directed by the testator to be adopted by his widow—Direction for the boy's maintenance—Rights of the legatee—No adoption having been made.

A Hindu made his will whereby he provided that his property should be enjoyed by his widow, who should maintain certain persons, including the plaintiff, whom she was thereby directed to take in adoption, and added: "my aforesaid wife "shall enjoy all my abovementioned properties in every way as long as she may be

* Appeal No. 13 of 1892.