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declarant has made a statement therein that is false to his knowledge touching any point material to the object for which the affidavit is to be used, the declarant will be guilty of an offence under section 199, Indian Penal Code. We cannot therefore hold that the Courts below acted illegally or with material irregularity in the exercise of their jurisdiction within the meaning of section 622, Civil Procedure Code, in granting and upholding the sanction for an offence under section 199, Indian Penal Code, and if the matter to which the sanction relates had not come before us on its merits in Civil Miscellaneous Petition No. 1319 of 1902 in which we have just held that the case was one in sanction for a criminal prosecution ought not to have been granted, we should have simply rejected this petition and should not have thought it necessary to exercise the extraordinary power of superintendence conferred on this Court by section 15 of the Charter Act.

As however we have already had to quash the sanction accorded in the same matter, though under different sections of the Indian Penal Code, we think it right and proper that in this case also, in exercise of our powers under section 15 of the Charter Act, we should set aside the sanction granted and we accordingly do so.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1903. August 11, 12, 13, 28.

TOTTEMPUDI VENKATARATNAM (PLAINTIFF), APPELLANT,

v.

TOTTEMPUDI SESHAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Will by member of joint family—Nature of property bequeathed—Self-acquired or family property.

The question raised in a suit was whether certain property which a Hindu testator had purported to deal with by his will was his self-acquired property or was the family property of the testator and his son and grandson:

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* Second Appeal Nos. 798 and 799 of 1901, presented against the decrees of W. C. Holmes, District Judge of Kistna, in Appeal Suit Nos. 342 and 314 of 1900, presented against the decree of S. Gopala Chariar, Subordinate Judge of Kistna, in Original Suit No. 7 of 1899.

Held, that the separate property of the testator would be (1) property acquired by his own exertions, (2) without the aid of family funds, (3) which he did not mix with family property with the intention of adding it to the family funds. *Also*, that a statement contained in the will was not evidence on the question whether the property dealt with by the will was or was not self-acquired; nor was the conduct of the testator's son in not objecting to the will; nor was a so-called reference to arbitration by the son and grandson.

The fact that the property in the hands of the testator had increased during a long period to a considerable value from a small nucleus of family property was not sufficient to rebut the presumption that it was all family property. *Ramanna v. Venkata*, (I.L.R., 11 Mad., 246), distinguished and explained.

SUIT for a declaration of the invalidity of a will, and for the recovery of property dealt with by the will. T. Subbayya died in 1897 having married two wives by whom he had issue as follows:—By his first wife (since deceased), two sons, the elder of whom predeceased him, and the younger of whom was now impleaded as sixth defendant. Plaintiff, who was the natural son of sixth defendant, claimed that he had been adopted to the elder son, by his widow. By the second wife (who survived the testator and was impleaded as first defendant), Subbayya left four daughters, who were impleaded as defendants Nos. 2 to 5. Subbayya left a will (exhibit VI) in the following terms:—

"I married two wives. Of them, the first wife had two sons; and of these, the elder named Punnayya, lived 25 years, was married and died without issue about 20 years ago; his wife named Pichamma is living in her parent's house. My second wife, the said Seshamma, has four daughters, named (1) Chukkamma, (2) Mahalakshmi, (3) Sowbhagyam and (4) Manikyam. Besides this, there is no other male issue. Out of the said daughters, I performed only the marriages of the first and second daughters. I possess all the properties mentioned in the schedules hereto annexed, viz., immoveable properties—the dry seri lands remaining under my rightful enjoyment in . . . villages, house-sites, houses, etc., in the said Yerlagadda village, and the house-sites, thatched houses, etc., in villages; moveable properties—cattle, utensils, carts, debts due to me from others and cash on hand. One (fourth) part of this immoveable property is my ancestral property, and the other three parts of immoveable and the entire moveable property is my self-acquisition. There are no debts due by me to others. The particulars of division I intend making of my property in the villages aforesaid are:—Since, out of the said property, three parts of immoveable property and the entire moveable property are my

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self-acquisitions, since my second wife has no male issue and since her daughters are very young and their ceremonies (marriages, etc.), have yet to be performed, the property mentioned in the schedule annexed hereto out of the said property is given to my second wife Seshamma with powers of gift, sale, etc., for the marriages and other auspicious ceremonies of girls whose marriages have yet to be performed, for the maintenance of the said girls and for your maintenance throughout your life-time, so that you shall give the same in equal shares to your four daughters after your death. The property mentioned in the schedule annexed hereto is given away to my son Veerayya with powers of gift, sale, etc. The costs to be incurred for my funeral rites after my death shall be defrayed out of the whole estate. It is arranged that Venkataratnam, the three years old son of my younger son Veerayya, should be given in adoption to Pichamma, the widow of Punnayya, the elder son of my first wife, and that a fourth of the schedule mentioned property assigned to Veerayya should be given to that boy, and that the said property should remain in Veerayya's charge during the minority of the said boy."

It appeared that defendants Nos. 1 and 6 had, by exhibit VII, empowered the defendants' eighth witness to settle the disputes between them with reference to the will and the division of the properties. He made an award which followed the directions in the will and assigned certain properties to first defendant and others to sixth defendant. The first defendant was awarded about one-fourth of the immoveables and a little over one-third of the moveables and outstandings. The remaining properties were allotted to sixth defendant. Plaintiff sought to establish his own and sixth defendant's right to the whole of the properties left by Subbayya and he asked for a declaration that neither the will nor the submission to arbitration nor the award affected their rights. The third issue raised the question whether the properties in question (except some 16 acres) were the self-acquired properties of Subbayya or the common family property; and the fourth had reference to the validity of the will. The Subordinate Judge found that the entire property held by Subbayya at the time of his death was the joint property of himself, his son (sixth defendant) and his grandson (plaintiff). He said it was "true that from small beginnings Subbayya expanded the dealings to so large a sum as Rs. 20,000, but this was really the work of over

half a century, for he was 75 years old when he died." He said there had been a considerable nucleus of property to start with, and there was no evidence of the existence and application of separate funds of Subbayya for the purchase of new properties, or for the carrying on dealings, and that what had been so acquired had never been kept apart. He found that the product was joint family property and was ancestral in Subbayya's hands. On the fourth issue he held that the defendants could not claim under the will of an undivided coparcener. He gave plaintiff a decree for partition and possession of a half share in all the immoveable property, and he gave plaintiff and sixth defendant the whole of the jewels and cash.

Defendants Nos. 1 to 5 appealed to the District Judge, who said :—"The main question of fact is whether Subbayya possessed any and how much self-acquired property. The lower Court did not discuss fully the evidence on the point and although this appeal was argued at vast length, the facts were not brought out clearly, perhaps this was unavoidable. So there is no little difficulty in dealing with the question. The law on the point I take to be thus: Subbayya's separate property would be property (1) acquired by his own exertions, (2) without the aid of family funds, and (3) which he did not mix with family property intending to add it to the family funds. The lower Court considered that Subbayya left no self-acquired property. In coming to this conclusion the lower Court did not take into consideration what Subbayya stated in his will. It is contended for the appellant in Appeal Suit No. 314 of 1900 that what Subbayya stated is evidence under section 32, clauses 2 and 7 of the Evidence Act, and for the respondent it is contended that the statement is a statement of a fact in issue and not merely of a relevant fact and so cannot be taken into consideration (*Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (1)) and the wording of the section is relied on. What Subbayya stated in his will was this. He stated in paragraph 2 and in schedules referred to in the paragraph what property he had possession of and stated 'one-fourth of this immoveable property is 'my patrimony and the remaining three-fourths of the immoveable 'property and all the moveable property is my self-acquisition.' Section 32 of the Evidence Act allows statements of 'relevant facts'

(1) I.L.R., 15 Bom., 565.

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to be considered, but does not say that statements of 'facts in issue' can. It is contended that 'relevant facts' as used in section 32 includes 'facts in issue,' but that was not the view taken in *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal*(1). The third issue as framed was 'whether the properties in question except some 'eight acres form the self-acquisition of Subbayya or the common 'family property.' Some eight acres of the plaint property admittedly formed part of the family property. As to the rest of the plaint property the issue, I think, should have been, was it the common family property? The plaintiff's right to recover depends on his proving that it is. If it is not, the plaintiff cannot recover. In Subbayya's hands the property was either his private property or his family property. All the defendants admit is that Subbayya had some family property. No presumption can be made under the Evidence Act, I think, that all Subbayya's property was family property. On the issue that, as I think, arises on the pleadings, the statement in Subbayya's will to which I have referred is admissible. I would attach great weight to what Subbayya said in his will because he was really the only person who probably knew personally how the property was acquired. The statement of Subbayya in his will does not stand alone. The statement was not made in secret. The will was written by the family gumastah and was attested by the village munsif and curnam and several others. Subbayya's son, the sixth defendant, was with him when he made his will and his conduct in not objecting, is an admission by conduct of the correctness of the statements made in the will. Besides, the karar exhibit VII is to my mind the clearest admission by the sixth defendant of the right of defendants Nos. 1 to 5 to the share bequeathed to them. All that was referred to the arbitrator, was what property should be given to defendants Nos. 1 to 5 to satisfy their claims. This reference is an admission of the rights of defendants Nos. 1 to 5 under the will and that is equivalent to an admission of Subbayya's right to bequeath property to those defendants and the only right to bequeath would be because Subbayya had self-acquired property. The evidence of the statement in Subbayya's will that all but certain portions of his property was his self-acquired property taken with the conduct of the sixth defendant in not objecting to the assertion in

(1) I.L.R., 15 Bom., 565.

the will and his conduct in executing the karar VII, seems to me to be evidence of the strongest possible kind that Subbayya had self-acquired property."

In the result he found that, with the exception of the immoveable property which was admitted to be ancestral, none of the property was Subbayya's family property. He found the award was binding on all the members of the family, and dismissed plaintiff's suit.

Plaintiff preferred this second appeal.

The Advocate-General (Hon. Mr. *J. P. Wallis*), *T. V. Seshagiri Ayyar*, *P. R. Sundara Ayyar* and *S. Rajagopala Ayyangar* for appellant.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for first to third respondents.

JUDGMENT.—The first question for determination in these second appeals is whether the property which T. Subbayya purported to deal with by his will (exhibit VI) was the family property of the plaintiff and the sixth defendant or the self-acquired property of T. Subbayya. The Subordinate Judge held that the property in question was family property. The District Judge was of opinion that it was self-acquired. The will recites that one-fourth of the immoveable property dealt with by the will was ancestral property and that the whole of the moveable property was self-acquired. It is common ground that one-fourth of the immoveable property was ancestral. The District Judge, in paragraph 4 of his judgment, states correctly the law applicable to the question which he had to decide. He says: "The law on the point I take to be thus: Subbayya's separate property would be property (1) acquired by his own exertions, (2) without the aid of family funds, and (3) which he did not mix with family property intending to add it to the family funds." The District Judge was of opinion that these three conditions were satisfied. In coming to this conclusion he relied mainly (1) on the statement in Subbayya's will, (2) the conduct of Subbayya's son (the sixth defendant) in not objecting to the will, and (3) the so-called reference to arbitration by the first and sixth defendants embodied in exhibit VII.

In our opinion none of these matters is evidence upon the question whether the property dealt with by the will was ancestral or self-acquired. At the time the will was executed, the testator

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would seem to have been under the honest belief that he had full disposing powers over the property on the ground that it was self-acquired; but the statement in the will that the property was self-acquired is clearly not evidence of the fact that it was self-acquired. As regards the conduct of the sixth defendant in not opposing the will, he no doubt, so far as he was capable of forming an opinion at all, shared Subbayya's belief that the property dealt with by the will was self-acquired; and his acquiescence was based on the supposition that Subbayya had full disposing power over the property.

As regards exhibit VII it is clear that at the time the so-called submission to arbitration was made, no question had arisen between the parties to the submission as to whether or not the testator had disposing power over the property. The so-called 'arbitrator' was appointed to divide the property in accordance with the provisions of the will. The submission to arbitration therefore carries the case no further than the statement in the will. The District Judge apparently attached little weight to the oral evidence and observed that the witnesses probably had but little personal knowledge of Subbayya's affairs. Here we agree with him. Eliminating, then, the matters upon which the District Judge based his conclusion, what is left to rebut the presumption that the property was family property except the fact that from small beginnings the property became something considerable, worth about Rs. 20,000? This is not enough. As the Subordinate Judge points out the growth of the property was the work of over half a century and was partly at least the product of the skill and labour of Subbayya's father; and, admittedly, there was a considerable nucleus of joint property to start with. We agree with the finding of the Subordinate Judge on the third issue and we think there was no evidence to support the finding of the District Judge.

It was contended on behalf of the respondents that even assuming the property to be family property, the disposition effected by the will could not be impeached by the plaintiff. It was argued that if such a disposition of family property had been effected *inter vivos* by Subbayya as the manager of the family, with the consent of the sixth defendant, the only adult member of the family, it would have been binding on the plaintiff, that the handing over of a proportion of the property for the maintenance and marriage expenses of Subbayya's second wife and the daughters

of his second wife, was an arrangement which it would have been reasonable and proper for him to have made, that it would have been competent to him to have made such a disposition of the property *inter vivos* in his capacity as managing member, and that being so, it was equally competent to make the disposition by the will. In the present case we feel no doubt that Subbayya made his will under the belief that he had full disposing power over the property. We hold that in law, he had no such power and for the purposes of this branch of the appellant's argument it was conceded he had no such power. But we are asked to presume that a man who, acting on the assumption that he could make any testamentary disposition he pleased with reference to his property, deals with that property by will, would have made the same disposition of his property *inter vivos* if he had been aware that his rights over the property were only those of the manager of an undivided family property. We do not think we are entitled to make any such presumption or to speculate what Subbayya would or would not have done if he had been aware that the property in question was, in law, not self-acquired but ancestral. This being so, it is not necessary for us to consider how far Mr. Krishnaswami Ayyar's proposition that, with reference to an ancestral estate, testamentary disposition stands on the same footing as a gift *inter vivos* is supported by the authorities. We may observe, however, that the general proposition in the judgment of the Privy Council in the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajendar Pertab Sahee*(1), "Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised, at least within the limits which the law prescribes to alienation, by gift *inter vivos*" was made, as the context shows, with reference to self-acquired property, and that the authorities which go to show that as regards an undivided share of coparcenary property the powers of giving and bequeathing are co-extensive (see, for instance, *Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao*(2) do not help the respondent, since the disposition which Subbayya purported to make by his will, cannot, in any view, be regarded as a disposition of an undivided share of family property. The will does not purport to deal with an undivided share but with the whole property.

(1) 12 Moo. I.A., 38. (2) I.L.R., 20 Mad., 167 at p. 183.

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Mr. Krishnaswami Ayyar also contended that the award was binding on the plaintiff. The award is not binding on the plaintiff so far as the question before us is concerned for the reason, amongst others, that the question whether the lands were ancestral or self-acquired was no part of the subject-matter of the submission to arbitration or of the award. As has been pointed out, the arbitrator was appointed to divide the property in accordance with the provisions of the will.

The plaintiff's claim in this case was in the alternative. He asked that either he or his father (the sixth defendant) should be put in possession of the whole of the properties in question or alternatively, that he (the plaintiff) should be put in possession of a moiety of the properties after partition. The Subordinate Judge held that the plaintiff was only entitled to a moiety. The plaintiff appealed against the decree of the Subordinate Judge in so far as it only gave him a moiety. In his appeal to this Court the point that he is entitled to the whole is not taken in the grounds of appeal, but the question was argued before us. We think the Subordinate Judge was right. The sixth defendant also appealed against the decree of the Subordinate Judge in so far as it only gave a moiety of the lands to the plaintiff, and this appeal was dismissed. He appealed to this Court against the decree of the lower Appellate Court and then abandoned his appeal. As regards one undivided moiety the plaintiff is suing on behalf of his father. In these circumstances we think the plaintiff's case, in so far as he claims to be entitled to the whole, fails. In *Ramanna* v. *Venkata*(1) the son succeeded in setting aside an alienation, though an earlier suit brought by the father to set aside the same alienation failed, the result being that the father succeeded in recovering through his son what he could not recover himself and what he was estopped from recovering by a suit instituted in his own right. But this case is distinguishable. It appears from the papers in the case, though it is not made clear in the report, that the father's suit was to set aside the alienation, not on the ground that he had no power to alienate, but on the ground that he had been coerced into making the alienation. Second Appeal No. 798 of 1901 is, therefore, dismissed. We allow Second Appeal No. 799 of 1901, set aside the decree of the lower Appellate Court and restore the decree of

(1) I.L.R., 11 Mad., 246.

the Subordinate Judge. The order as to costs in the Court of First Instance made by the Subordinate Judge will stand. Both in the lower Appellate Court and in this Court the plaintiff's case has been that he was entitled to the whole of the property in question. This being so, the parties will bear their own costs in this Court and in the lower Appellate Court.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

BANDANU ATCHAYYA AND OTHERS (ACCUSED), APPELLANTS,

v.

EMPEROR, RESPONDENT.*

1903. September 15.

Criminal Procedure Code—Act V of 1898, ss. 366, 367—Mode of delivering judgment and its contents—Judgment written and delivered after conviction of prisoners—Defect vitiating conviction.

Where a judgment, in a criminal trial, was written and delivered some days after the prisoners were convicted and sentenced:

Held, that this was a violation of sections 366 and 367 of the Code of Criminal Procedure and was more than an irregularity. It was a defect which vitiated the convictions and sentences.

Queen-Empress v. *Hargobind Singh*, (I.L.R., 14 All., 242), approved.

CHARGE of murder. Three persons were charged with murder before a Sessions Judge and assessors. The assessors expressed the opinion that the accused were not guilty. The Sessions Judge found the first accused guilty of murder and passed the extreme sentence on him. He found the other two accused guilty of abetment of murder and sentenced them to transportation for life. The judgment was (as is found in the judgment of the High Court), written and delivered some days after the prisoners were convicted and sentenced.

The accused appealed.

V. Krishnaswami Ayyar and *V. Ramesam* for accused.

The Public Prosecutor in support of the conviction.

* Referred Trial No. 36 of 1903 referred by J. J. Cotton, Sessions Judge of Vizagapatam Division, for confirmation of the sentence of death passed upon the first prisoner in case No. 11 of the calendar for 1903. The second and the third accused preferred Criminal Appeal Nos. 436 and 437 of 1903.