APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Reilly.

1926, November 19.

A. L. P. R. PERIAKARUPPAN CHETTY (PLAINTIFF), APPELLANT,

v.

R. M. A. R. ARUNACHELAM CHETTY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint family—Self-acquisition—House built on ancestral site—No co-parceners at the time of building—Use of self-acquired funds for building—Adoption of a son, subsequent to construction—Son and father living in the house—Superstructure, whether joint family property—Mixing of funds, effect of—Intention to make it joint family property, necessity for—Evidence—Presumption.

Where a Hindu, who had no co-parceners, built a house worth about forty thousand rupees, with his self-acquisitions, on an ancestral site worth a few rupees, and several years thereafter adopted a son and lived with him in the house but did not otherwise evidence an intention of treating the house as joint family property, on a creditor of the son claiming to attach and sell the son's share in the house and site,

Held, that the mere fact that the superstructure, which was built out of self-acquired funds, was raised on the ancestral site, did not render it joint family property;

that the presumption was that the father intended it to be his self-acquired property, especially when there were no other co-parceners;

that it would not become joint family property unless he had intended to make it such property, and the mere fact that he allowed his major son to live in the house along with himself, did not disclose an intention to make it joint family property; and

that, consequently, the father was solely entitled to the superstructure and to a half of the site, and the son's creditor

* Appeal No. 325 of 1925.

was entitled to attach and sell the son's half share only in the site and not the superstructure :

Vithoba Bava v. *Hariba Bava*, (1869) 6 Bom. H.C.R., 54 (A.C.J.), followed ;

Lala Muddun Gopal Lal v. *Khikhinda Koer*, (1891) I.L.R., 18 Calc., 341 (P.C.), referred to ;

Subbiah v. *Gundlapudi*, (1923) I.L.R., 46 Mad., 104, distinguished.

APPEAL against the decree of V. S. NARAYANA AYYAR, Subordinate Judge of Sivaganga, in Original Suit No. 58 of 1923.

The material facts appear from the judgment.

A. Krishnaswami Ayyar (with *M. Patanjali Sastri*) for appellant.—Where a Hindu, who has at the time no co-parceners with him, builds a house on a small ancestral site, it does not ipso facto become incorporated into joint family property. It is not a matter of law, but is still only a rule of evidence: See Trevelyan's Hindu Law (second edition), page 370 ; *Lahaso Kuar* v. *Mahabir Tiwari*(1). Reference was made to *Vithoba Bava* v. *Haliba Bava*(2) and *Lala Muddun Gopal Lal* v. *Khikhinda Koer*(3).

S. Varada Achari for respondent.—There has been a mixing of self-acquired funds with ancestral property. The self-acquired property was not kept separate. It acquired the character of joint property, as its character was not kept distinct. Reference was made to *Subbiah* v. *Gundlapudi*(4).

JUDGMENT.

KUMARASWAMI SASTRI, J.—The plaintiff is the appellant. The second defendant is the adopted son of the plaintiff and the first defendant is an attaching creditor who obtained a decree against the second defendant and attached the second defendant's interest in the house and ground now in dispute, alleging that the property is the joint family property of the plaintiff and the second defendant and that the second defendant is

(1) (1915) I.L.R., 37 All., 412. (2) (1869) 6 Bom., H.C.R., 54 (A.C.J.)
(3) (1891) I.L.R., 18 Calc., 341 (P.C.). (4) (1923) I.L.R., 46 Mad., 104.

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entitled to a half share therein. The plaintiff's case is that the property is his self-acquisition and that the second defendant has no interest. He filed a claim which was disallowed and hence the suit out of which this appeal arises.

The plaintiff adopted the second defendant in the year 1914 when he was about ten years old. The finding of the Subordinate Judge which is amply supported by the evidence is that the only property which the plaintiff and his brothers got from their father was a thatched house and that all the other properties to which the plaintiff is now entitled are his self-acquisitions. As this finding is not disputed by the respondent except to the extent that the house now attached though built out of self-acquisitions has become joint family property owing to its having been built on the ancestral house site, it is not necessary to refer to the evidence in detail.

It is contended by the appellant that the learned Subordinate Judge was wrong in finding that any portion of the house stands on the ancestral house-site on which the thatched house stood. He states that the thatched house was on a plot adjacent to the land on which the house in question was built, that it was only about 10 or 12 feet broad and is now a pathway, the old thatched house, a shed, having fallen down several years ago. His case is that he got the site on which the house is built on partition from his brother who purchased the site.

We do not think the appellant has made out this case. Plaintiff admits that the disputes which led to the partition between himself and his brother were in 1891 that there was an arbitration and a "muri" evidencing the partition. This *muri* is not produced nor is there any document showing that the plot was

purchased by his brother. No accounts are produced to evidence the purchase by the brother and there is nothing except the plaintiff's statement to show that the land on which the house stands was the self-acquisition of the plaintiff's brother which plaintiff got on partition.

The probabilities are against this story. It is hardly likely that the site on which the thatched ancestral house stood was only 10 or 12 feet broad, especially as the evidence shows that several members were living in it and that plaintiff's marriage was celebrated in it. It appears from the evidence that what the plaintiff says is a pathway has really been incorporated in the house. There is an arch put up and there are steps on it leading to the house. The Subordinate Judge does not believe the evidence on plaintiff's side as to the house being built on a site acquired by plaintiff from his brother and we do not see sufficient grounds to differ from him.

There can be little doubt that the house on the site was built by the plaintiff long before the adoption, out of his self-acquisitions. When he built the house he was the sole owner of the site and had no co-parceners who had any claim. The site when he built was worth very little, the thatched house which stood on it having fallen down and the question is whether the fact that he built on the site a house worth according to the evidence Rs. 30,000 or Rs. 40,000 would give his adopted son, who was adopted long afterwards and who never contributed anything, a claim to a half-share. The second defendant far from earning anything got into bad ways and incurred debts.

The only grounds on which the second defendant can acquire any interest in the house are that the plaintiff though he built the house with his own funds made it

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joint family property because he built it on the ancestral site and so mixed up his self-acquisition with the joint family property by building a house on the site, and (2) he intended it to become joint family property to enure for the benefit of co-parceners who may come into existence in future.

As regards the question of intention there is no evidence that the plaintiff by any act or declaration evidenced an intention of treating the property as joint family property. A person who by his own exertions makes considerable acquisitions presumably wants to keep his acquisitions to himself. It would be a violent presumption to draw that a person, who builds with his acquisitions a house worth Rs. 30,000 or 40,000 on a site worth a few rupees, intended to impress on it the character of joint family properties, especially when at the time of building he had no son, natural or adopted, or any co-parceners. As observed by Mayne, the question whether a person has by his acts made property which was originally his self-acquisition joint property

> "is entirely one of fact to be decided in the light of all the circumstances of the case; but a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection."

Mayne's Hindu Law, paragraph 278, page 360.

The fact that after adoption the second defendant lived with his adoptive father in the house would not affect the question as amongst Hindus an adult son usually lives with his father even when there is no joint family property and it cannot be said that a father whose property is self-acquired intends to make it joint family property simply because he does not turn out his son as soon as he is of age and can earn his living. In the present case the second defendant was not earning or contributing anything to the family, but on the contrary

was a spendthrift. In *Lala Muddun Gopal Lal* v. *Khikhinda Koer*(1), their Lordships of the Privy Council observe

"Their Lordships think it would not be reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them by inferring a gift when it is plain that no gift could have been intended."

I do not think that, by building with self-acquired funds on the ancestral site worth a few rupees a superstructure costing several thousands, the house became joint family property. As pointed out before, the adoption was several years after the building of the house and when the plaintiff was the only person entitled to the site. If the adopted son had been in existence before the building commenced and had sued for a partition he would only have been entitled to a half share in the land and there is no reason why he should be in a position to claim a half share in the building simply because he was adopted some years afterwards. When a person builds with his self-acquisitions on land which is ancestral and in which a person subsequently gets an interest by birth and when it cannot be said that the builder built with knowledge of another person's rights in the land and without his consent or against his will the proper rule on partition is to allot the building and site to the person who built the superstructure and taking into consideration the value of the site to give the share of its value or equivalent joint property to the other co-parcener. I can find no decisions which compel me to hold that the co-parcener claiming a share is entitled under such circumstances to the value of the building also or to require its demolition.

(1) (1891) I.L.R., 18 Calc., 341 (P.C.).

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In *Vithoba Bava* v. *Hariba Bava*(1), it was held that where a member of an undivided family built at his own expense a house on ground belonging to the joint family the other co-parceners were only entitled to a share equal to the value of their shares in the site. SIR RICHARD COUCH observed.

"According to the Hindu Law if one builds a house on ancestral land with separate funds of his own the other members of the family have only a claim on him for other similar land equal to their respective shares [2 Macnaghten's P.H.L., page 152]. The plaintiff in this case must therefore be compensated for his share of the ground used for building the house."

Reference is made to Macnaghten's Hindu Law, Vol. II, page 134, where we find the following reply given by the Pandit to the question as to the son's rights when a father with his funds purchased a zamindari and built a house on land purchased.

"If the grandfather of the respondent purchased the zamindari singly, with the produce of his separate industry, and without any aid from funds ancestral or paternal, such zamindari is property exclusively his, in which no other can have a right to participate. And if he obtained a burmotur sunnud for land in his own name (which appears he did) no one else can participate in it. And supposing him to have built a brick house on ancestral land, with separate funds of his own, even in that case such houses should not be property in which shares might be claimed by any co-parceners he might have. Co-parceners in the land would only have a claim on him for other similar land equal to their respective shares. Such is the custom or unwritten law. On the mere circumstance of messing conjointly co-partnership in property does not follow."

I have been unable to find anything in the Hindu texts or commentaries laying down a rule to the contrary.

Where co-parceners do not object to the building it is clear that on partition they will not be allowed the

(1) (1869) 6 Bom. H.C.R., 54 (A.C.J.).

value of the building or require the building to be demolished, *Lahaso Kuar* v. *Mahabir Tiwari*(1), and the case is stronger where the co-parcener was not in existence and the builder was the only person then entitled to the land.

Subbiah v. *Gundlapudi*(2) relied on by respondents' vakil was a case where a tenant-in-common built on a portion of the land without the concurrence of the other co-owners and there were other co-owners whose consent was necessary and the case is clearly distinguishable. If the case lays down a principle at variance with the rule in *Vithoba Bava* v. *Hariba Bava*(3), and to give a member of a joint family a right to buildings put up irrespective of the source of the money or the existence of other co-parceners at the time of the building or any equities, I must respectfully dissent from the view. *Vithoba Bava* v. *Hariba Bava*(3), embodies an equitable rule and there is nothing in Hindu texts or commentaries at variance with the ruling. I think that MUKERJEE, J., has laid down the correct rule in *Upendranath Banerjee* v. *Unnes Chander Banerjee*(4). I am of opinion that the only right of the second defendant is to get a half share in the land and that the first defendant, an attaching creditor, will only be entitled to attach and sell the right title and interest of the second defendant in the land on which the superstructure stands. The decree of the lower Court will be modified by declaring that plaintiff is solely entitled to the superstructure and to a half of the land on which it is built, that the second defendant is entitled to a half share of the land only, and that the first defendant is only entitled to attach and sell the right title and interest of the second defendant in his share of the land. As the appellant, though

(1) (1915) I.L.R., 37 All., 412.
(2) (1923) I.L.R., 46 Mad., 104.
(3) (1869) 6 Bom. H.C.R., 54 (A.C.J.).
(4) (1886) 12 L.J., 25.

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he has failed as regards the exclusive claim to the land, has succeeded as to the superstructure we direct that the first respondent do pay appellant Rs. 250 for his costs in appeal and Rs. 250 as costs in the lower Court. Second respondent will bear his own costs throughout.

REILLY, J.—I agree that the site on which the plaintiff built the house in question was ancestral property in his hands. It is undisputed that, when the plaintiff built the house, he was sole owner of the land; it had come to him on partition, and at that time he had no son. It is also undisputed that he built the house with self-acquired funds. Mr. Varadachariar contends that by the very act of building the house on ancestral land the plaintiff made the house ancestral property; the house and the funds which it represented were "mingled" or "blended" with the land on which the house stood and were, therefore, impressed with the character of the land as ancestral property. That contention appears to me to involve some misconceptions. A Hindu's property is either ancestral property (which, if he is a member of a joint family, is joint family property) or his own separate property, which is often, described generally as self-acquired property. Strictly nothing which is not in relation to its owner for the time being directly or indirectly ancestral in origin can become ancestral property in his hands; though by his volition the incidents of ancestral property may be attached to it. That criticism of Mr. Varadachariar's contention is, however, little more than a question of words. The important point is that we should keep clearly in mind how the characteristics and incidents of ancestral property become attached to property which is not ancestral but is the separate or self-acquired property of the owner for the time being. We speak of that result being caused by the separate property being

"blended" with the ancestral property or, in the usual case of the owner of the separate property being a member of a joint family, of the separate property being "thrown into the common stock." These are in practice convenient expressions; but they may at times obscure the essence of the matter. The separate property of a Hindu ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by any physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. It is unnecessary to labour that point, as it underlies all the authoritative decisions on the subject from *Hurpurshad* v. *Sheo Dyal*(1), onwards, though in few of them is it expressed. A man's intention can be discovered only from his words or from his acts and conduct. When his intention in regard to his separate property is not expressed in words, we must seek it in his acts and conduct, in the way in which he has dealt with the property or has allowed others to deal with it. It is in this way that acts of "mingling", "blending" and "throwing into the common stock" have assumed so much importance in cases of this sort as indications of the owner's intention. But it is the intention which we must seek in every case, the acts and conduct being no more than evidence of the intention. The fact that the manager of a joint family, who has his own separate property, keeps money which is the income of the joint family property and money which is the income of his separate property in the same box or the same money bag and cannot say of any coin to which income it belongs, indicates nothing if he keeps separate accounts

(1) (1876) 3 I.A., 259.

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of the two incomes. Nor would paying both incomes as received into the same account in a Bank by itself alter the position so long as he maintained, separate accounts of them. But, if no separate accounts of receipts and expenditure under the two heads were maintained, or if the general expenditure for the support of the whole joint family were provided from the box or money bag or Bank account on a scale which exhausted the whole of both incomes or much exceeded the income from the joint family property for a considerable time, an inference or intention to surrender the separate right to the joint family might properly be drawn in many cases. We cannot, however, appreciate the significance of an act until we know the circumstances in which it is done. Similar acts in different circumstances may have very different significance. If the case is one of a sonless man, who has ancestral property in which for the time being he alone is interested, either because he is the last surviving member of his joint family or because, like the plaintiff in this case, the ancestral property has come to him on partition, and he has also self-acquired property, there may be much greater difficulty in ascertaining his intention in regard to his self-acquired property. If he puts the receipts from both classes of his property into one pocket and spends them indiscriminately on his own needs—even if he keeps no accounts at all, can we safely infer that he intends to give up his separate right in his self-acquired property? To give up that right might affect him very seriously if afterwards he begot or adopted a son. But for the moment the indiscriminate use of the two incomes and the inability to say how much of one or of the other remains is of no consequence to him. In such circumstances the mixing up of the two incomes, the indiscriminate use of

them and the failure to maintain accounts provide no safe basis for any inference of an intention to give up the separate right in the self-acquired property. Now let us apply the same principles to the building of a house with self-acquired funds on ancestral land. If a member of a joint family with his own separate funds builds a house on joint family land and lives in it with the other members of the family as the family house, we may often infer that his intention is to waive any right to the house as his separate property. But, if on part of the joint-family land he builds with his separate funds a house in which he lives with his wife, or wife and children alone, can we draw the same inference? Mr. Varadachariyar contends that the mere building of the house on joint family land is such a physical mingling of it with the land that the characteristics of the land must attach to it. But the owning of a house by one man and of the land on which it stands by another is a matter of such ordinary occurrence that we cannot ignore it when trying to ascertain the intention of the builder in such a case. In *Vithoba Bava* v. *Hariba Bava*(1), the principle that a member of a joint family building a house with his own funds on joint family land may retain the house as his separate property was recognized and was the basis of the decision. No case to the contrary has been quoted before us. The fact that a house is built by one member of a joint family on joint family land cannot therefore be regarded as sufficient by itself to show that he intended to waive his right to the house as his separate property if he built it with his separate funds. It is still more difficult to infer such an intention when the house is built with his separate funds on his ancestral land by a man who

(1) (1869) 6 Bom. H.C.R., 54 (A.C.J.).

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has at the time no co-parcener. In the absence of other evidence we should have to go out of our way to read into his action an intention to waive his separate property in the house for the benefit of a son whom he might beget or adopt at some future date. In the present case it was not until many years after he built the house in question that the plaintiff adopted defendant 2. It is pointed out that, after the adoption, defendant 2 lived in the house with the plaintiff. But that indicates nothing as to the plaintiff's intention in regard to the house. If the house had been built not only with the plaintiff's separate funds but also on land which was his separate property, it would still have been natural for defendant 2 to live in the house with the plaintiff after the adoption. There appears to be no evidence that before the adoption or after the adoption or at the time of the adoption the plaintiff ever did anything to indicate an intention to waive his right to the house as his separate property.

I agree therefore that the house is the plaintiff's separate property and is not liable to attachment in execution of defendant 1's decree against defendant 2 and that a declaration should be made accordingly in respect of the house but not of its site. Defendant 2's interest in the site is liable to attachment and can be brought to sale in execution, if necessary. If it is bought at the execution sale by any one but the plaintiff, the purchaser will be able to sue for partition and the plaintiff will then be able to buy the interest attached and sold, if he wishes to do so, at a valuation under the Partition Act.

I agree with the order proposed by my learned brother as to costs.

K.R