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There was thus no bar of *res judicata* against the defendants respondents and it was open to them to take the pleas which they took. These pleas have been decided on the merits and have been rightly decided. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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April, 8.

SRI THAKURJI (DEFENDANT) *v.* NANDA AHIR (PLAINTIFF) *

Hindu law—Mitakshara, Chapter 1, *sections* 27, 28 *and* 29—*Joint ancestral property—Gift of portion by one member for pious purposes—Circumstances in which such gift is valid.*

The second and third of the circumstances stated in paragraph 28 of Chapter 1 of the Mitakshara as justifying a transfer of joint ancestral property by one member of the family are not governed by the preceding words "in a time of distress"; but there are three separate and distinct exceptions. Thus the gift of a portion of the joint ancestral property made by one member of the family for pious purposes is valid, though not made in a time of distress.

The term "pious purposes" as used in paragraph 28 does not necessarily mean indispensable duties, such as the obsequies of the father, etc., mentioned in paragraph 29.

Gopal Chand Pande v. *Babu Kunwar Singh* (1) and *Raghunath Prasad* v. *Govind Prasad* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent. The facts of the case appear from the judgment under appeal, which was as follows:—

"THE appellant in this second appeal is Sri Thakurji, through Parmeshwar Das. The suit was instituted by one Nanda Ahir and the relief claimed by him was that a decree might be given him for possession of 15 gandas and 4½ dants share together with *sir* lands etc., by removal of the unlawful possession of the defendant, first party, and cancelment of a waqfnama so called, dated the 1st of November, 1911. In the lower appellate court's judgment the facts are given that on the 1st of April, 1901, Sonai Ahir, father of the plaintiff, executed a deed of gift of 1½ pies out of 15 gandas and 4½ dants in favour of the defendant no. 1. The allegation was that this property was joint property of the family; that Sonai aforesaid had no right to give it in gift; that the defendant had taken possession of the entire 15 gandas and 4½ dants; the property was the self-acquired property of Sonai. The finding of the lower appellate court is that he agrees with the Munsif that it was satisfactorily proved that Sonai acquired the property in question from the income of the joint

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* Appeal No. 18 of 1920, under section 10 of the Letters Patent.

(1) (1843) 5 S. D. A., L. P., 24. (2) (1885) I. L. R., 8 All., 76.

ancestral property and that at the time he acquired it, he, Nanda and his other sons were joint with him, and that Sonai had no right to give the property away by gift. The lower appellate court decreed the plaintiff's claim for recovery of possession of 1½ pies only and declared the deed of gift in respect of it invalid. On behalf of the appellant it is contended that the gift being only of a small portion of the donor's property was valid under the Hindu law and in support of this contention reference is made to a passage in the *Mitakshara*, being *slokas* 28 and 29 of the *Mitakshara*, Chapter 1, section 1, in part 2 of the Law of Inheritance. Reference is also made to the ca of *Gopal Chand Panda* v. *Babu Kunwar Singh* (1) and *Raghunath Prasad* v. *Gobind Prasad* (2). In this last named case the learned Judges say:—"An examination of the authorities is sufficient to show that a father is competent to deal with ancestral property, not only for the especial exigencies mentioned by the Judge, but also to make pious and reverential gifts to Brahmans as Brahmutra, Krishnarpana, also gifts from affection towards Vishnu and other divinities." Looking into the original text in the passage quoted, this seems to be an extension of the word there used. Paragraph 27 begins by saying that it is settled that ownership in the father's and grandfather's estate is by birth, and paragraph 28 is cited as an exception to the above but one of the limitation attached to this exception is that the alienation must be during season of distress (apat kale) for the sake of the family and especially for pious purposes. I do not think we can eliminate the words "during a season of distress" from the rest. Following the ordinary rules of interpretation they qualify the following words; and in the present case, it has not been established that the transfer in dispute was made "during a season of distress." It is suggested that the mention made in the plaint in paragraph 2, namely, that "the plaintiff was sentenced to transportation for life in a murder case and after sixteen years he was released and came here in *Jeth* last" covers the provision "during a season of distress." I have been referred to no evidence which shows that the transfer was made "during a season of distress." I do think it safe to take this exception and to qualify it in any away. Then besides that, we have the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), which lays down broadly that joint family property cannot be the subject of gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. For the passage from the *Mitakshara* see page 442.

For these reasons I dismiss this appeal with costs."

The defendant appealed.

Pandit *Uma Shankar Bajpai* and Munshi *Janaki Pershad*, for the appellant.

Babu *Saila Nath Mukerji*, for the respondent.

MEARS, C.J., and BANERJI, J.:—The father of the plaintiff to the suit out of which this appeal has arisen made a gift of a portion of the family property on the 1st of January, 1911, to

(1) (1843) 5 S. D. A., L. P., 24. (2) (1885) I. L. R., 8 All., 76.

(3) (1917) I. L. R., 39 All., 497.

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a deity for the purpose of a temple. Subsequently a relinquishment was obtained from the manager of the temple, but the relinquishment was cancelled at the instance of the manager upon the institution of the suit. On the 18th of September, 1915, one of the sons of the grantor brought a suit to have the gift set aside, but his suit was dismissed. The present plaintiff, who states that he was imprisoned in jail at the time, brought the present suit for a declaration that his father was incompetent to make a gift of a portion of the family property in favour of the idol.

The suit was decreed by the courts below, and on second appeal to this Court the decrees of those courts were affirmed by a learned Judge. He based his judgment mainly upon the text of the Mitakshara contained in paragraph 27 of Chapter I. He was of opinion that the words "during a season of distress" in that paragraph governed the remainder of the cases which would justify a gift or mortgage or sale and that as it was not proved in the present instance that the gift to the idol was made during a season of distress, it was invalid and not binding on the plaintiff.

Paragraph 27 provides that in the case of joint ancestral property a gift, mortgage or sale by one of the members of the family without the consent of the other members is invalid; and paragraph 28 provides an exception to the rule. That paragraph runs as follows: "Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and specially for pious purposes." As we have said above the learned Judge of this Court was of opinion that the words "during a season of distress" also governed the expressions "for the sale of the family and specially for pious purposes." We do not feel ourselves justified in following the view of the learned Judge. In our opinion the three circumstances which are mentioned in paragraph 28 are exceptions to the general rule laid down in paragraph 27 and must be deemed to be disjunctive clauses. The circumstances which would justify transfers are, as stated in that paragraph (1) a season of distress, (2) for the sake of the family and (3) specially for pious purposes. Each one of these

clauses seems to us to be an exception to the rule, independently of the other clauses. This appears to have been the view which has been adopted ever since the year 1843. In *Gopal Chand Pande* v. *Babu Kunwar Singh* (1) it was held that a gift of a small portion of joint family property for pious and religious purposes was a valid gift binding on all the members of the family. That case was decided upon the opinion of the Pandit who was consulted in the matter. No reference was made in that opinion or in the judgment of the Court to the words "during a season of distress" as being the governing clause controlling the clause authorizing a gift for religious purposes. This case was followed in this Court in the case of *Raghunath Prasad* v. *Gobind Prasad* (2). In Trevelyan's Hindu Law, page 284, the same view was adopted and the rule as laid down in the case decided by the Sadr Dewani Adawlat was stated to be the rule on the subject. In West and Bühler's Hindu Law, at page 203, the same rule was mentioned and this was also the conclusion of Mr. Ghose as stated in his work on Hindu Law, Vol. I, p. 476. We think that there is no sufficient justification for departing from the view which has prevailed on the subject ever since the year 1843.

On behalf of the respondent it was contended that having regard to the terms of paragraph 29 the expression "pious purposes" in paragraph 28 must be held to be equivalent to "indispensable duties" such as the obsequies of the father or the like as mentioned in paragraph 29. We do not agree with this contention. We think that paragraph 29 was the author's commentary on what the rule was stated to be in the preceding paragraphs, specially in paragraph 28. We do not think that the last portion of paragraph 29 was intended to be a limitation of pious purposes as mentioned in paragraph 28. We are unable to agree with the decision of the learned Judge of this Court.

We accordingly allow the appeal, set aside the decrees of this Court and of the courts below and dismiss the suit with costs in all courts.

Appeal decreed.

(1) (1843) 5 S. D. A., L. P., 24. (2) (1885) I. L. R., 8 All., 76.