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the preliminary objection must succeed. The view which we take of the matter is the view taken by Sir NORMAN MACLEOD in I. L. R., 47 Bom., 721. We accordingly dismiss this application with costs.

Application dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Kt., Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

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MUSAMMAT BRIJ KUNWAR AND OTHERS (DEFENDANTS-APPELLANTS) *v.* RAI BAHADUR PANDIT SANKATA PRASAD AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Hindu Law—Ancestral nature of property, presumption of—Onus of proof of certain property being ancestral—Will—Father bequeathing self-acquired property in favour of a son—Nature of property taken by son under the will—Self-acquired and ancestral property.

There is no presumption in Hindu Law about any property being ancestral.

Where, therefore, the sons and grandsons of a Hindu father contest a suit brought by the mortgagee to enforce a mortgage by the father the onus lies on them to prove that the property mortgaged was ancestral. *Nanabhai Ganpat Rao Dhairyavan* v. *Achratbai* (1), relied on.

The nature of an estate taken by a son on a bequest of his self-acquired property by the father is a question of intention, turning on the construction of the will. Where, therefore the terms of the will of a Hindu father leave no room for doubt about his intention that the legatee was to be the owner of the property without any coparcener it should be considered that the property in the hands of the legatee was to be his exclusive property and was not to partake of the incidents of ancestral property. *Rameshar* v. *Musammat Rukmin* (2), *Jagmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (3), *Parsotam Rao Tantia* v. *Janki Bai* (4), *Nagalingam Pillai* v. *Ramachandra Tevari* (5), and *Lal Ram Singh* v. *The Deputy Commissioner of Partabgarh* (6), referred to.

*First Civil Appeal No. 74 of 1928, against the decree of Pandit Gulab Singh Joshi, Subordinate Judge of Kheri, dated the 24th of February, 1928, decreeing the plaintiffs' case.

(1) (1886) I.L.R., 12 Bom., 122.
(2) (1911) 14 O.C., 244.
(3) (1886) I.L.R., 10 Bom., 528.
(4) (1907) I.L.R., 29 All., 354.
(5) (1901) I.L.R., 24 Mad., 429.
(6) (1923) L.R., 50 I.A., 265.

Messrs. *Ishuri Prasad, Haider Husain* and *K. N. Tandon*, for the appellants.

Messrs. *A. P. Sen* and *Mohan Lal*, for the respondents.

STUART, C. J. and SRIVASTAVA, J. :—This is a first appeal against the decision of the Subordinate Judge of Kheri. It arises out of a suit brought by the plaintiff Rai Bahadur Pandit Sankata Prasad Bajpai on foot of a mortgage deed and four deeds of further charge executed in his favour by defendant No. 1 Thakur Gobardhan Singh. These deeds of further charge are dated the 15th of June, 1914, the 13th of June, 1921, the 11th of July, 1921 and the 22nd of August, 1921. In the array of defendants were included not only the mortgagor Gobardhan Singh but also his wife Musammat Brij Kunwar who was defendant No. 2, his son Balbhaddar Singh who was defendant No. 3 and his grandsons Potan Singh and Ganesh Bakhsh Singh, minors, who were defendants Nos. 4 and 5 to this suit.

The plaintiff claimed a decree for sale for Rs. 1,17,959-6-9 on the basis of all the aforementioned deeds. Various defences were raised on behalf of the mortgagor's son Balbhaddar Singh, including the defence so common to suits of this nature, namely, that the consideration for the mortgage and the deeds of further charge was tainted with immorality. All these pleas have been decided against the defendants and the claim has been decreed in full by the learned Subordinate Judge. The defendants Nos. 2 to 4 have preferred this appeal.

The learned counsel for the appellant has impugned the finding of the learned Subordinate Judge as regards certain items forming the consideration of the original mortgage deed and of the subsequent deeds of further charge. His argument is that the items disputed by him have not been proved to have been advanced for any

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legal necessity or to constitute antecedent debts so as to make those items binding on the son or the grandsons of the mortgagor. The items disputed by him are items No. 5 of exhibit 1 and the whole of the consideration of the four deeds of further charge, namely, exhibits 2, 3, 4 and 5. He has accepted the findings of the learned Subordinate Judge in respect of all the items of exhibit 1 other than item No. 5 just mentioned. But it seems to us unnecessary to enter into the validity or otherwise of the disputed items of consideration because of the view which we take of one of the points arising for determination which seems to us to go to the root of the whole case. It is this. It is not denied that the defendants cannot question the validity of the consideration of the mortgage deed or the deeds of further charge unless they can show that the mortgaged property is ancestral. The question about the nature of the property, whether it was ancestral or self-acquired, constituted one of the pleas raised by the defendants in defence and formed the subject matter of issue No. 5 which was framed by the learned Subordinate Judge in the following terms :—

"Is the property mortgaged in exhibits 1 to 5 ancestral"?

This issue casts the onus on the defendants to prove the property to be ancestral. There can be no doubt that there is no presumption in Hindu law about any property being ancestral. If any authority were needed for this proposition reference may be made to the case of *Nanabhai Ganpatrav Bhairyavan* v. *Achratbai* (1). In this case dealing with the question whether a particular property was ancestral or not, Mr. Justice FARRAN remarked as follows :—

> "If, in order that the plaintiffs should succeed in their suit it be necessary that the property left by Pandurang Mankoji should be held to have been his ancestral property,

(1) (1886) I.L.R., 12 Bom., 122.

> it lies on the plaintiffs to prove, in some way or other, that it was ancestral in his hands. There is no presumption in Hindu law upon the "point which they can invoke in their favour."

In the present case it is necessary for the defendants, in order to entitle them to question the consideration of the mortgage made by their father, to prove that the property was ancestral. The learned Subordinate Judge was therefore right in throwing the onus of proving issue No. 5 on the defendants. His finding on the issue is that only two out of the five items of property which formed the subject of mortgage are ancestral. These properties are village Gadiana Mohal Gumani Singh and Makarampur parganna Bhur. The learned Subordinate Judge seems to have assumed that the aforesaid property in the hands of Gumani Singh was ancestral and having made that assumption he has gone on to hold that Gumani Singh having made a will of the aforesaid property in favour of his adopted son, defendant No. 1, the property in the hands of the latter must also be considered to be ancestral property. We find ourselves unable to accept this view of the learned Subordinate Judge. The learned counsel for the defendants appellants has not been able to refer us to any evidence showing that the said property was ancestral in the hands of Gumani Singh. All that we know about it is, as stated by Gumani Singh in his will, exhibit C8 (page 1 of the record) that he had got this property under a decree of court passed in his favour. It may be conceded that this statement is as much consistent with the property being ancestral as with its being his self-acquired property. But we have also the fact that Gumani Singh undertook to make a testamentary disposition in respect of this property. He could only make such a testamentary disposition if this property was his self-acquired property. Thus the fact of Gumani Singh having made a will in respect of it raises the

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presumption about the property being his self-acquired property. In any case in the absence of any evidence to prove that the property was the ancestral property of Gumani Singh, and there being no presumption in favour of its being ancestral, we must hold that it was the self acquired property of Gumani Singh.

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This leads us to the next question as to the nature of the property in the hands of Gobardhan Singh. It has been found by the learned Subordinate Judge and the finding is amply supported by the documentary evidence on the record, that Gumani Singh made a will of the property in favour of his adopted son Gobardhan Singh and that Gobardhan Singh after the death of his adoptive father got mutation effected in his favour on the basis of the said will. Here we may point out that the translation of exhibit C9 printed at page 5 of the record is not correct. The correct translation should be "by testamentary disposition" instead of "by right of inheritance" as put down in the translation. The question whether such property in the hands of the son who gets it under the will of his father is to be treated as ancestral or as self-acquired property, is by no means free from difficulty. The decisions of the various High Courts in this country have not been consistent on this point. It is not necessary for us to enter into a detailed discussion of the entire case law bearing on the point because in the view which we take of the matter we do not consider it necessary for the purposes of this appeal to commit ourselves definitely to any of the conflicting views. The matter has been discussed at considerable length in the decision of a Bench of the late Court of the Judicial Commissioner of Oudh reported in *Rameshar* v. *Musammat Rukmin* (1). It will appear that the view taken by the Bombay High Court in *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (2) and by the

(1) (1911) 14 O.C., 244. (2) (1886) I.L.R., 10 Bom., 528.

Allahabad High Court in *Parsotam Rao Tantia* v. *Janki Bai* (1), which was accepted by the Bench of the late Court of the Judicial Commissioner of Oudh is "that in a case where self-acquired property is bequeathed to sons it should be presumed, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, that each son takes an interest which passes to his heirs at his death." In other words the view is that in such cases the property should be presumed to be the self-acquired property of the sons. On the other hand, in the case of *Nagalingam Pillai* v. *Ramachandra Tevar* (2), the Madras High Court has held that the nature of the estate taken by a son on a bequest of his self-acquired property by his father was a question of intention, turning on the construction of the will. This question was also raised before their Lordships of the Judicial Committee in *Lal Ram Singh* v. *The Deputy Commissioner of Partabgarh* (3), but their Lordships did not consider it necessary to make any pronouncement on the point. We are of opinion that even if we do not go the length of the view taken by the late Court of the Judicial Commissioner of Oudh and by the Bombay and Allahabad High Courts, and if we confine ourselves to the more limited view taken by the Madras High Court, even then the terms of the will executed by Gumani Singh leave no room for doubt about his intention on the point. He says that the legatee will be the owner of the property without any co-parcener and that no one except him shall have any right in the property. We are, therefore, of opinion that on the terms of the document before us the intention of Gumani Singh clearly was that the property in the hands of Gobardhan Singh should be his exclusive property and should not partake of the incidents of ancestral property. For these reasons

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(1) (1907) I.L.R., 29 All., 354. (2) (1901) I.L.R., 24 Mad., 429.
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we are of opinion that the two properties which the learned Subordinate Judge holds to be ancestral properties have not been proved to be so. They must be considered to be the self-acquired property of Gobardhan Singh, mortgagor.

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The learned counsel for the appellants does not dispute the correctness of the findings of the learned Subordinate Judge in respect of the three other properties being the self-acquired property of Gobardhan Singh. The result therefore is that the entire mortgaged property must be held to be the self-acquired property of the mortgagor. It follows that the defendants have no right to question the validity of any part of the consideration of the mortgage deed and the deeds of further charge executed by their father. The appeal must therefore fail on this ground and it is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice A. G. P. Pullan.

1929 *September*, 3.

SADIQ ALI (PLAINTIFF-APPELLANT) *v.* MUSAMMAT AMIRAN (DEFENDANT-RESPONDENT).*

Muhammadan Law—Marz-ul-maut—*Gift during* marz-ul-maut *by husband to his wife in satisfaction of dower debt, validity of.*

When a gift is made during *marz-ul-maut* by a husband to his wife in satisfaction of his legal obligation to pay the dower debt it cannot be treated as ambulatory or testamentary for the simple reason that had the husband not discharged his legal obligation by means of the gift his estate in the hands of heirs would be liable to satisfy the same obligation. If, therefore, the nature of that gift is such that it cannot be treated for the purposes of the distribution of the assets on inheritance as a bequest it follows that it is a gift not subject

*Second Civil Appeal No. 59 of 1929, against the decree of Babu Gokul Prasad, Subordinate Judge of Sitapur, dated the 7th of November, 1928, confirming the decree of P. Kaul, Munsif Sitapur, dated the 23rd of May, 1928.