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the District Judge, turned upon the question of the consequences of a widow leaving the family house, and not upon the effect of incontinence upon her maintenance. The observations, in that case, of her Majesty's Privy Council as to loss of maintenance in consequence of unchastity, we think, referred to maintenance as a *dives*, not to a starving maintenance, as a bare maintenance has been sometimes denominated. We reverse the decree of the District Judge and restore that of the Subordinate Judge, but direct the parties respectively to bear their own costs of the suit and both appeals.

Note.—For the law as administered in the Bengal school on the subject of forfeiture of rights by an unchaste widow, see the Full Bench case of *Kery Kolitany* v. *Moneeram Kolita* (13 Beng. L. R. 1).

[APPELLATE CIVIL JURISDICTION.]

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August 2.

LAKSHMAN DADA NAIK (DEFENDANT AND APPELLANT) *v.* RAMCHANDRA DADA NAIK (PLAINTIFF AND RESPONDENT).*

RAMCHANDRA DADA NAIK (PLAINTIFF AND APPELLANT) *v.* LAKSHMAN DADA NAIK (DEFENDANT AND RESPONDENT).*

Hindu Law—Power of a Hindu to make a will—Unequal distribution of ancestral moveable property—Partition—Evidence of value—Outstandings—Interest.

A Hindu governed by the Mitakshara law, who has two sons undivided from him, cannot, whether his act be regarded as a gift or a partition, bequeath the whole, or almost the whole, of the ancestral moveable property to one son to the exclusion of the other.

Ramchandra Dada Naik v. *Dada Mahadev Naik*, (1 Bom. H. C. Rep., Appx. lxxvi.,) distinguished and explained.

A plaintiff entitled on partition to half the property in the hands of his brother is bound to bring into hotchpot any ancestral property, or property acquired from ancestral funds which may be in his own hands, but is not liable to account for money received by him from his father while living in commensality with him and his brother, the circumstances of such receipt not being of a kind to impute fraud.

* Cross Regular Appeals Nos. 39 and 45 of 1875.

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Members of an undivided Hindu family making partition are entitled, as a rule, not to an account of past transactions, but to a division of the family property actually existing at the date of partition.

The statement in a will as to the value of the testator's property is no evidence thereof.

The acceptance by one brother of a certain sum of money in satisfaction of his own share in 1868, though it might be evidence of the value of the ancestral property in that year, affords no indication of the value of that property in 1876.

In a partition suit, the Court ought not to order an immediate money payment by the defendant to the plaintiff of his share in the outstanding debts due to the family estate, as if such outstanding debts had been recovered and the money were in the hands of the defendant.

As a member of an undivided Hindu family is not bound to effect a partition by paying a certain sum of money to his co-parcener or co-parceners, the Court, in a partition suit, ought not to award interest on money decreed to be paid by the defendant to the plaintiff.

THESE were cross regular appeals from the decision of Dayaram Mayaram, 1st Class Subordinate Judge at Belgaum. Dada Naik, a Hindu, died on 13th July 1872, leaving him surviving two sons, the present litigants. The property whereof Dada Naik died possessed was ancestral, and consisted both of moveables and immoveables. In 1868 another son, Keshav Naik, had received the sum of Rs. 66,005 in full satisfaction of his share and interest in the moveable family property, but there had never been any partition as between the present litigants and their father in his life-time, though, on account of family quarrels, the plaintiff had never resided with his father and brother since 1858. By his will, dated 13th July 1872, Dada Naik estimated the moveable property in his possession to be worth Rs. 1,32,824-3-9; and stating that the plaintiff had already received more than his share, bequeathed to the defendant the whole of his property, moveable and immoveable, with the exception of one house and a sum of Rs. 500, which he left to the plaintiff.

In October 1872 the plaintiff brought the present suit against his brother, impeaching the validity of their father's will, and claiming a partition of the whole of the family property, both moveable and immoveable. The Subordinate Judge decreed partition, and laid down the principles upon which it was to be made. Against his decision both parties appealed.

The appeals were argued before MELVILL and KEMBALL, JJ.

Marriott, Advocate-General (Acting), and *Telang*, with whom was *Shántárám Nárâyen*, appeared for the defendant in support of the will.

Farran and *Vishnu Ghanasham*, for the plaintiff, *contra*.

The arguments and authorities cited are set forth at length in the following judgment of the Court, delivered by

MELVILL, J.:—In this suit the parties are brothers, and the plaintiff sues for a partition of the family property.

This is not the first litigation of the kind between these parties. At the beginning of the year 1861 the plaintiff filed a bill in the late Supreme Court at Bombay against his father Dada Naik and his brother, the present defendant, to obtain an immediate partition of the family estate. That case is reported at 1 Bom. H. C. Rep., Appx. lxxvi. The defendants demurred to the bill, and the demurrer was allowed by Sausse, C.J., and Arnould, J., on the grounds that the right of a son to a compulsory partition, if it exists at all against the father, does not extend to moveable property, and because the only immoveable property, of which a partition was claimed, appeared upon the face of the bill not to be within the jurisdiction of the Court. The Court considered that, as between a father and his sons, in the distribution of paternal or other ancestral estate, the father takes the moveable property absolutely, or subject only to certain conditions, none of which had been broken upon the facts appearing on the record.

On the 30th October 1871 Dada Naik made a will (Exhibit 16). In this document he stated that his eldest son Ramchandra (the present plaintiff) had misconducted himself, and had also received more than his share of the property; and he, therefore, left the whole of his property (subject to certain trusts) to his undivided son Lakshman (the present defendant), with the exception only of the family house at Shāhāpur, in which the plaintiff was living, and the sum of Rs. 500, which he bequeathed to the plaintiff.

On the 13th July 1872 Dada Naik died, and three months afterwards the plaintiff brought his suit.

Two preliminary objections have been taken to the maintenance of this action: the first, that it is barred by the law of limita-

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tion; the second, that the former judgment between the parties operates as an estoppel. It is contended that the Supreme Court decided that the father took the ancestral moveable property absolutely, and that it necessarily follows from that decision that the father had the power of disposing of such property according to his pleasure. But we think that all that the Supreme Court was called upon to decide, and all that it intended to decide, was that a son cannot, during his father's lifetime, compel a partition of ancestral moveable property. To that extent only the judgment would operate as a bar, and it cannot so operate in respect of any matter to be inferred by argument from the judgment. On the other hand, the judgment does operate, in the plaintiff's favour, as a bar to the plea of limitation. The plaintiff has all along been in possession of the family house at Sháhápur, and the only other immoveable property sued for is a house at Belgaum, which is stated not to have been built till 1864, and which would not, therefore, be classed with ancestral immoveable property. The suit, therefore, is virtually in respect of ancestral moveable property only; and as to such property, the Supreme Court held that the plaintiff had no cause of action during his father's lifetime. As between the present parties, therefore, it has been judicially decided that the plaintiff's cause of action did not arise at an earlier date than that of Dada Naik's death, which took place only three months before this suit was brought.

It has also been faintly contended that an actual partition is to be inferred from the admitted fact that the plaintiff lived separate from his family for fourteen years before the present suit, and from the alleged fact that he received certain payments out of the family estate. But it is quite clear that no such partition ever took place. The plaintiff lived separately after 1858, because he had quarrelled with his father; but in 1861 he sued his father for his share, and he has brought his action again, as soon as his father's death left him at liberty to do so. There is no ground whatever for supposing that a settlement of the plaintiff's share was ever made with him, or that he ever renounced his rights.

The main question which we have to determine is the validity or invalidity of Dada Naik's will. The *factum* of the will has been

admitted. On the other hand the learned Advocate General has admitted that all the property in dispute must be regarded as ancestral property; and he has further admitted that, on this side of India, a father cannot make an unequal distribution among his sons of such family property as consists of immoveables. The question, therefore, is narrowed to this: can a Hindu, who has two sons undivided from him, bequeath the whole, or almost the whole, of the family moveables to one son, to the exclusion of the other?

The present suit has arisen in the Southern Maratha Country; and there the first place, as an authority, is assigned to the Mitakshara, and a subordinate, though still an important one, to the Mayukha.[1] In *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*[2] the Judicial Committee say: "Decided cases, too numerous to be now questioned, have determined that the testamentary power exists" (among Hindus), "and may be exercised, at least within the limits which the law prescribes to alienation by gift *inter vivos*. Accordingly, it has been settled that even in those parts of India which are governed by the stricter law of the Mitakshara, a Hindu without male descendants may dispose, by will, of his separate and self-acquired property, whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property, if moveable, subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." Their Lordships then refer to, but do not decide, the question whether a father can by will make an unequal distribution amongst his sons of immoveable property, whether acquired or ancestral. That case does not touch the question of ancestral moveable property; nor have we been referred to any case in favour of the father's right to make an unequal distribution of such property, except one, *Sudanund* v. *Bonomalee*.[3] In that case a Bench of the Calcutta High Court said: "By the Mitakshara law applicable to the case, the son has a vested right of inheritance in the ancestral immoveable property; and as the question was raised before us, we must declare that

(1) See *Krishnaji* v. *Pandurang*, 12 Bom. H. C. Rep. 65.

(2) 12 Moore Ind. App. 1; S. C. 9 Calc. W. R. 15 P. C.

(3) 1 Marsh 317, see page 320.

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the ancestral property is only that actually inherited from ancestors, and not that which has been acquired or recovered, even though it may have been acquired from the income of the ancestral property; for the income is the property of the tenant for life, to do as he likes with it. On the other hand the father has it in his power to dispose as he likes of all acquired and all personal property." No authority is given for this view of the Mitakshara law; and in a subsequent case between the same parties the first proposition contained in the above extract was most strongly dissented from by another Bench of the Calcutta Court.(1) The case cannot, therefore, be treated as of much authority on the question before us, and we may discuss that question as if it stood clear of judicial decisions. The passages in the Mitakshara bearing upon the question are very fully and carefully discussed by Sir Barnes Peacock in delivering the judgment of the Full Court at Calcutta in *Raja Ram Tewary* v. *Luchman Pershad*(2)—a judgment which, it may be observed, proceeds upon a different view of the power of a son, under the Mitakshara, to compel a partition, from that expressed by the late Supreme Court at Bombay in the case already referred to: see also *Laljeet Singh* v. *Rajcoomar Singh*.(3) The author of the Mitakshara, after stating the arguments of his adversaries in paras. 18 to 22 of Chap. I., Section I., proceeds to answer these arguments in paras. 23 to 26; and then in para. 27 he sums up his own conclusions as follows:—"Therefore it is a settled point, that property in the paternal or ancestral estate is by birth, [although] the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth." And again in para. 9 of Section V. of the same chapter he says: "So, likewise, the grand-son has a right of prohibition, if his unseparated father is making a donation, or a sale, of effects inherited from the grand-father; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependent." And the reason is stated in the next

(1) See *Sudanund* v. *Soorjoo Moonee*, 11 Calc. W. R. 436 Civ. Rul.
(2) 8 Calc. W. R. 15 Civ. Rul. (3) 12 Beng. L. R. 373.

para. "Consequently the difference is this: although he has a right by birth in his father's and in his grand-father's property; still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property: but, since both have indiscriminately a right in the grand-father's estate, the son has a power of interdiction [if the father be dissipating the property]."

Such are the provisions of the Mitakshara, which are similarly stated by Sir Thomas Strange.(1) "Even of *moveables*, if *descended*, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty and purposes warranted by texts of law; while the disposal of the *land*, whencesoever derived, must be in general subject to their control; thus in effect leaving him unqualified dominion only over *personalty acquired*." The Mayukha (Chap. IV., Sec. I., para. 5) limits the power of the father even more strictly—"As for this text: 'The father is master of all gems, pearls, and corals; but neither the father nor the grand-father is so of the whole immoveable estate,' it also means the father's independence only in the wearing and other [use] of ear-rings, rings, [&c.], but not as far as gift or other alienation."

The above are the passages of the Mitakshara and Mayukha bearing upon the subject of alienation of ancestral moveable property, and it appears to us that their effect is to prohibit such a gift as that made by Dada Naik to the defendant. We think it impossible to regard such a gift as "a gift through affection," "prescribed by text of law." The gifts which such expression contemplates are probably gifts made by an affectionate husband to his wife (Mitakshara I. i. 20), the

(1) 1 Str. H. L. 19.

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gift of affectionate kindred (Daya-Krama-Sangraha II. ii. 26), gifts affectionately bestowed on a separated son, who has become divided before his brother's birth (Mitakshara I. vi. 13 to 15). It would be impossible to hold a gift of the great bulk of the family property to one son, to the exclusion of the other, to be a gift prescribed by text of law: for the texts which we next quote distinctly prohibit such an unequal distribution. The author of the Mitakshara, (Chap. I., Section II., para. 1,) after quoting the text of Yajnavalkya, "When the father makes a partition, let him separate his sons [from himself] at his pleasure, and either [dismiss] the eldest with the best share, or [if he choose] all may be equal sharers," goes on to say (para. 6)—"This unequal distribution supposes property by himself acquired. But, if the wealth descended to him from his father, an unequal partition at his pleasure is not proper: for equal ownership will be declared." And again in para. 14—"When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law; then that division, made by the father, is completely made and cannot be afterwards set aside: as is declared by Manu and the rest. Else it fails, though made by the father." The rule is stated by Sir Thomas Strange[1] to be that, as to such parts of the estate as have been inherited by the father, whether real or personal, land or moveables, the division must be strictly equal; and this rule, he adds, is alike binding according to the doctrine of every school.

From the above authorities we come to the conclusion that it was not within the power of Dada Naik, (whether his act be regarded in the light of a gift, or of a partition), to bequeath the whole, or almost the whole, of the ancestral moveable property to one son, and virtually to disinherit the other. The will must, therefore, be set aside, as wholly inoperative.

It follows that the plaintiff is entitled to a partition. How that partition is to be made is, under the circumstances of this case, a difficult problem: and it cannot be said that it has been satisfactorily solved by the Subordinate Judge. The plaintiff is entitled to one-half of the property in the defendant's hands, but he

(1) 1 Str. H. L. 123.

is bound to bring into hotchpot any ancestral property; or property acquired from ancestral funds, which may be in his own possession. We will deal with the latter point first. It is admitted that the plaintiff is in possession of the family house at Shâhâpur, valued at Rs. 5,000, and that he carries on some business as a money-lender. There is no evidence that this business is carried on by means of self-acquired funds, and the legal presumption is to the contrary. The defendant further seeks to charge the plaintiff with certain sums received during his father's lifetime. The sum of Rs. 30,000 is entered in Dada Naik's books as paid to the plaintiff between the years 1854 and 1856. The plaintiff denies that he ever received this money; and there is no evidence of the payment, except the entries in the accounts, which alone are not sufficient to charge the plaintiff with liability (Section 34 Indian Evidence Act). Nor, even if the money was really paid, would the plaintiff be liable to account for it: for the payment was made to the plaintiff while he was living in commensality with his father and brother; and even supposing that the father and brother did not take equivalent sums from the common chest, yet "where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud"[1]—none of which latter circumstances are shown or alleged in the present case. Moreover, if the plaintiff were called on to account for this Rs. 30,000, the defendant would have to account not only for all that he received while the family was living in commensality, but for every thing which he has expended since 1858, during which time he has been supported out of the family property, while the plaintiff has received nothing. Some evidence has been imported into the case, in regard to a sum of Rs. 45,000 said to have been paid by Dada Naik to the plaintiff in 1859. The circumstances connected with this payment seem to have been these: Dada Naik had lodged a complaint of robbery against the plaintiff and two other persons before Major Jameson, Cantonment Ma-

(1) 1 Str. H.L. 200.

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gistrate at Belgaum. The plaintiff and the two other persons were consequently arrested, but shortly after released: and they then brought actions against Major Jameson in the Supreme Court at Bombay. These actions were compromised by the payment of Rs. 45,000: but whether Dada Naik supplied the money, or what portion of it was received by the plaintiff, is not clearly shown. Nor is it, in our opinion, at all material. The money was certainly not paid to the plaintiff, as part of his share in the family property, but apparently as compensation for an injury inflicted upon him by his father. Moreover, we think that members of an undivided Hindu family, when making a partition, are entitled, as a rule, (and there is nothing in the present case to make it an exception to the rule) not to an account of past transactions, but to a division of the family property actually existing at the date of partition.—See *S. M. Ranganmani* v. *Kasinath*.[1]

The plaintiff, then, is entitled, upon bringing into hotchpot the family property in his own possession, to obtain a half share of that property, and of all property actually in possession of the defendant. But unfortunately neither party is in a position to prove what the other has. The Subordinate Judge has made no reference to the plaintiff's property, and he has estimated the value of the defendant's property in a very unsatisfactory manner. In Dada Naik's will the moveable property is stated to be worth Rs. 1,32,824-3-9; and as it appeared that in 1868 Keshav Naik, another son of Dada Naik, accepted the sum of Rs. 66,005 as his one-third share of the property, the Subordinate Judge thought that it was not likely that Dada Naik left more than was stated in the will; and he accordingly accepted that statement as correct, and awarded to the plaintiff one-half of the sum so stated in the will, as the value of his share of the moveable property. To this he added Rs. 5,000, as the difference in value between the two houses, and awarded to the plaintiff altogether Rs. 71,412, or moveable property of that value, and further directed that the sum so awarded should bear interest from the date of suit to the date of payment. To this award several objections have been taken by the defendant, viz., that the statement in the will

(1) 3 Beng. L. R. 1, O. C. J.

is not evidence; that if Keshav Naik's acceptance of a certain sum in 1868 be evidence of the value of the property in that year, it affords no indication of the value of the property now; that the assets of the banking business, which forms the most important part of the property, consist in a great measure of outstanding debts; that the Subordinate Judge, in ordering an immediate money payment by the defendant to the plaintiff, treated such debts as if they had been recovered, and the money were in the defendant's hands; and, finally, that, as the defendant is not, and never was, bound to effect a partition by paying to the plaintiff a certain sum of money, the award of interest cannot be sustained. We think that all these objections are good and valid objections, and that we must endeavour to put the partition on some other basis than that adopted by the Subordinate Judge. The only immoveable property consists of two houses, one of which has been for years occupied by the plaintiff, the other by defendant. The house at Shāhāpur must be assigned to the plaintiff, and that at Belgaum to the defendant; and as the defendant does not dispute the plaintiff's valuation of the house at Belgaum at Rs. 14,000, and neither party disputes the Subordinate Judge's valuation of the Shāhāpur house at Rs. 5,000, the defendant must pay to the plaintiff, on account of the difference of value, the sum of Rs. 4,500. Each party must be required to give in an inventory of all furniture, jewels, and other moveables in his possession; and these, (with the exception of such moderate amount of clothes and jewels as are usually worn by the members of the family,) must be equally divided, either in specie, or by a valuation and money adjustment. It will, of course, be competent to either party to prove the existence of any moveables not entered in the inventories; and, if necessary, a Commissioner can be appointed, with power to enter the houses of both the parties, and make an inventory and valuation of the property therein contained. Finally, we have to consider the extensive trade and banking business carried on by the defendant, and that carried on on a smaller scale by the plaintiff. If there were any hope that the parties would be able and willing to carry on business harmoniously, and with mutual confidence, the most satisfactory way of making the partition would be to declare the parties to be

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henceforth, not members of an undivided Hindu family, but partners in trade; and to direct that the plaintiff's business at Sháhápur and the defendant's business at Belgaum and Bombay should be united into one common firm, and carried on by both parties on the footing of an ordinary partnership. It would probably be most convenient that the existing system of management should not be disturbed; that the plaintiff should continue to manage the Sháhápur business, and the defendant that at Belgaum and Bombay, the profits being divided from time to time in equal proportions. That, as it appears to us, would be the most convenient mode of partition; but it would manifestly be useless for this Court to constitute such a partnership, unless the parties agreed to enter into such a relation with one another, because either party, who might be dissatisfied with the arrangement, might at once come into Court, and claim a dissolution of the partnership, and the settlement of the differences between the parties would then be no further advanced than at the present moment. If the parties will not accept such an arrangement as this, and if the defendant will not do what would be still more satisfactory, viz., come to a private settlement with the plaintiff and pay him the ascertained value of his share, (in the same manner as the claims of Keshav Naik and other members of the family were settled in former years,) then the only alternative is to order an account between the parties, and a division upon the footing of such account. It appears that the defendant's account books have been considerably damaged by white ants while in the custody of the lower Court; and the loss of these books may, as he says, render it more difficult for him to recover some of his outstanding debts. But he has been carrying on his business for some time without these books; and he must certainly be in a position to show what are the assets and liabilities of his business, as they exist at the present moment. The decree, therefore, which we shall make is the following:—This Court reverses the decree of the Subordinate Judge, and declares that the plaintiff and defendant are entitled each to a separate half share in all the property in the possession of either of them, and directs that partition be made in the manner hereinafter mentioned, that is to say, that of the two houses in the plaint mentioned, the house at Sháhápur be assigned to the

plaintiff, and the house at Belgaum to the defendant, and that the plaintiff do receive, in respect of the difference in value between the two houses, the sum of Rs. 4,500: and in respect of the furniture, jewels, and other specific moveables this Court directs that the Court below shall proceed to inquire and determine what property there is of this description in the possession of either of the said parties, and to divide the same in the manner which is usual in the partition of moveable property; and in respect to the trade and banking business carried on by the plaintiff at Shâhâpur, and by the defendant at Belgaum and Bombay, this Court orders and directs that each of the said parties shall forthwith produce and bring into the said lower Court all accounts, books, books of account, bonds, mortgages, agreements, papers, and other documents whatsoever in his possession, custody, or control, or in the possession of any other person or persons in trust for him, relating to such trade and business, in order to enable the said lower Court to ascertain and determine what is the amount of moneys in the hands of either party, and what is the amount of the debts due to and by either party on account of such trade and business; and thereupon that the said lower Court do direct that all moneys in the hands of either party be paid into Court, and do make payment therefrom of all debts due by either party on account of his said trade or business, and do appoint a receiver or manager, under Section 92 of the Civil Procedure Code, to recover or sue for outstandings due to either party and to pay the same into Court, and do from time to time divide the moneys so paid into Court between the said parties in equal shares. And this Court directs that the costs of this suit and appeal be paid out of the estate, but authorizes the said lower Court to direct that either of the said parties, who may vexatiously or improperly delay or obstruct the execution of this decree, shall pay the costs occasioned by any such vexatious or improper delay or obstruction.
