APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

HANMANTAPA, A MINOR (ORIGINAL PLAINTIFF), APPELLANT, *v.* JIVUBAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1900. *March* 21.

Minor—Guardian—Ex-parte decree against minor—Minor's right to sue to set aside ex-parte decree—Proof of negligence or fraud on the part of the guardian—Practice—Genuine gift by father-in-law to his widowed daughter-in-law—Gift by way of affection of a small share of moveable property acquired by the donor while living in union with his sons and grandson—Gift valid—Hindu law.

It is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside the previous decision can be claimed by a minor or his administrator.

The plaintiff, a minor represented by an administrator, sued to recover possession of two houses. With respect to one of the houses there had been previous litigation. The plaintiff was the defendant, a minor represented by his guardian, and one of the present defendants was the plaintiff in that litigation, and an *ex-parte* decree was passed against the plaintiff.

Held, that the decision in the previous litigation barred the present claim with respect to the house which was the subject of that litigation, no negligence being proved on the part of the plaintiff's guardian therein.

Where there is a genuine gift by a father-in-law to his widowed daughter-in-law by way of affection, out of a small share of moveable property most of which was acquired by the donor while living in union with his sons and grandson, the gift cannot be impeached as being opposed to the principles of Hindu law.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, varying the decree of Ráo Sáheb Sheshgeri R. K., Second Class Subordinate Judge of Hubli.

The plaintiff, a minor represented by his administrator, sued to recover possession of two houses and some gold ornaments, alleging that he was the undivided grandson and heir of his deceased grandfather, Yellappa, who died possessed of moveable and immoveable property; that the plaintiff's administrator was in possession of all the property left by Yellappa except the property in suit; that the defendants were in wrongful possession of the said property and refused to part with it on the strength

* Second Appeal, No. 537 of 1899.

1900.

HANMANTAPA v. JIVUBAI.

of a will alleged to have been executed by Yellappa in favour of defendants Nos. 1 and 2; that Yellappa had no authority to dispose of the property by will, as it was ancestral and undivided, and that he professed to dispose of the property under the will as his self-acquired property and granted it to the defendants as a gift *inter vivos* at the instigation of his widowed daughter-in-law (plaintiff's paternal aunt) Yamnava and her daughter defendant No. 1, with the intention of defrauding the plaintiff. Defendant No. 2 was the husband of defendant No. 1, and defendant No. 3 was joined because he was in actual possession.

Defendant No. 1 answered (*inter alia*) that Yellappa had no ancestral property; that one of the houses in suit was exclusively owned by him and he transferred it with possession to the defendant under a deed dated the 31st March, 1893; that the minor plaintiff having subsequently dispossessed the defendant, she filed a suit, No. 127 of 1894, against him represented by the Názir of the Court as his next friend, and got an *ex-parte* decree in respect thereof; that an application, No. 25 of 1895, was made to set aside the *ex-parte* decree, but it proved unsuccessful, therefore the present suit was *res judicata*; that the ornaments and the other house in suit belonged to Yellappa, who granted them to defendant's mother Yamnava by a deed dated the 31st March, 1893, and that Yamnava subsequently transferred them to the defendant on the 13th September, 1893.

Defendants Nos. 2 and 3 supported some of the allegations of defendant No. 1, and added that they were sued needlessly.

The Subordinate Judge found that the suit as regards the house about which there was prior litigation was not *res judicata*; that the property in suit was the joint ancestral property as between the plaintiff and his grandfather Yellappa; and that the gift of the property by Yellappa to Yamnava and defendant No. 1 was not valid as against the plaintiff. He, therefore, allowed the claim.

On appeal by the defendants, the Judge held that the claim with respect to one of the houses was *res judicata* and that the houses were the ancestral property of Yellappa, but not the ornaments. He, therefore, varied the decree by allowing the plaint-

iff's claim with respect only to one of the houses which was not the subject of the former litigation. The rest of the claim was dismissed.

The plaintiff preferred a second appeal.

Branson with *Narayan G. Chandavarkar* for the appellant (plaintiff) :—The Judge was wrong in holding that the *ex-parte* decree in the former suit operated as *res judicata*. That suit was not defended, and the Court had no opportunity to consider the question of title to the house comprised in that suit. The first Court found that the Názir, who represented the minor plaintiff as his next friend in that suit, was guilty of negligence in not defending the suit, and, therefore, it held that the decision in that suit was not *res judicata*. The Judge in appeal found that negligence on the part of the Názir was not proved. We contend that the very fact that the Názir did not defend the suit, proves negligence on his part. Whether the Názir was guilty of negligence or not, is, no doubt, a question of fact, but his conduct has prejudiced the minor plaintiff and, therefore, that decree must be set aside—*Lalla Sheo Churn* v. *Ramnandan*[1] ; *Cursandas* v. *Ladkavahu*[2]. Further, when the present administrator made an application to set aside the *ex-parte* decree, he was ordered to file a fresh suit for that purpose. We, therefore, filed the present suit. Consequently the Judge ought to have very carefully considered whether the Názir was negligent in the performance of his duty as the next friend of the minor plaintiff.

The next question relates to the burden of proof with respect to the nature of the property. The Judge finds that the houses were ancestral property in the hands of Yellappa, and, therefore, he had no right to dispose of them. He allowed our claim with respect to one of the houses, and the claim of the other house was rejected on the ground of *res judicata*. Notwithstanding that the Judge held that the houses were ancestral property, he placed the burden of proof with respect to the ornaments on us and disallowed our claim to them on the ground that we had not proved that they were ancestral property. The ornaments are worth a considerable sum, namely, Rs. 2,000. If the houses were ancestral property,

(1) (1894) 22 Cal., 8. (2) (1895) 19 Bom., 571.

1900.

HANMANTAPA v. JIVUBAI.

then the natural inference would be that the ornaments of such a considerable value are also ancestral property and the burden of proof would be on the plaintiff to show that they were Yellappa's self-acquisition. The view which the Judge has taken with respect to the ornaments is clearly wrong.

Bhandarkar (with *Shivram V. Bhandarkar*) for the respondents (defendants):—The Judge has found that negligence on the part of the Názir was not proved. It was for the plaintiff to show that the Názir was negligent in not defending the former suit The burden of proof lay on him and he has failed to discharge it. It appears from Exhibit 97, the *ex-parte* decree, that the Názir had no instructions to defend that suit. This circumstance clearly shows that the Názir's conduct cannot be impeached and the Judge has arrived at a correct finding which is a finding of fact. Even the cases relied on, show that an *ex-parte* decree passed against a minor cannot be impeached unless fraud or negligence is proved on the part of the next friend or administrator. We, therefore, submit that the former decree operates as a bar of *res judicata* to the present suit. It was argued that the present suit was filed for the purpose of setting aside the *ex-parte* decree. But in the present plaint nothing is said about the fraud or gross negligence of the Názir. Unless there is a specific allegation of fraud or gross negligence, and unless that allegation is clearly proved, a previous decree cannot be set aside. See Hukum Chand on *Res Judicata*, p. 164.

The Judge has, no doubt, found that the houses were ancestral property, but that finding cannot lead irresistibly to the conclusion that the ornaments, which are moveables, were ancestral property. The Judge has given reasons for placing the burden of proof with respect to the ornaments on the plaintiff.

Yamnava was Yellappa's widowed daughter in-law and defendant No. 1 was her daughter; therefore, the gift by Yellappa to Yamnava can be supported as a gift on account of natural love and affection. A father governed by the Mitákshara is competent to make such gift of moveable property though it is ancestral.

RANADE, J.:—The minor appellant-plaintiff in this case brought the original suit to set aside two deeds of gift passed by his grand-

father Yellappa, one in favour of his daughter-in-law Yamnava, and the other in favour of his grand-daughter, respondent No. 1, on the ground that Yellappa could not make valid gifts of joint ancestral property. The gift to Yamnava consisted of a house worth Rs. 500 and certain ornaments worth Rs. 2,000, and the gift to the respondent No. 1 was of a house worth Rs. 300. Yamnava made a second gift of the property given to her by Yellappa to respondent No. 1, her daughter, who is thus in possession of the whole of the property. The Court of first instance held that the property was joint ancestral, and that, therefore, Yellappa could not make a valid gift of the same. In appeal, the District Judge held that, as regards the house given to respondent No. 1, the appellant-plaintiff's claim was *res judicata* by a previous litigation between the parties, and that as regards the ornaments, they were not proved to be ancestral and were presumably self-acquired property of which Yellappa could make a valid disposition. The other house was held to be ancestral, and the gift in regard to it was set aside, and the claim as regards the other house and ornaments was disallowed. In second appeal the principal points raised are whether the claim for the smaller house is *res judicata*, and whether the ornaments were the self-acquired property of Yellappa.

The undisputed or proved facts in the case are that Yellappa died possessed of moveable and immoveable property worth about Rs. 23,000. He had two sons who died before him, and in 1887 he made a will giving the whole of his property to his grandson, the appellant-plaintiff, who was then, and is still, a minor. Later on, Yellappa changed his mind, and in April, 1890, he executed two deeds of gift, one in favour of his widowed daughter-in-law Yamnava and the other in favour of her daughter, respondent No. 1. Yamnava transferred in 1893 to the same respondent the property given to her. Respondent No. 1 was apparently dispossessed of the smaller house given to her, and in 1894 she brought a suit against the minor plaintiff-appellant represented by his guardian the Názir, and obtained an *ex-parte* decree. In 1895 the Názir as guardian applied to set aside the *ex-parte* decree, but the application was disallowed, and thereupon the present suit was instituted in 1896 by the certificated

1900.

PAYMANTAPA v. JIVUBAI.

administrator of the minor to set aside both the alienations made by Yellappa.

As regards the alienation of the smaller house, the defence was that plaintiff's claim was *res judicata*. In the first Court this contention was disallowed on the ground that the Názir had been guilty of wilful negligence in the prosecution of the claim, and that, therefore, the minor plaintiff-appellant could bring a suit to establish his right. The District Court in appeal held that the Názir was not guilty of any negligence, and that, therefore, the present suit was *res judicata* in regard to this house. The Názir was only appointed by the Court after notice had been issued to the present administrator of the minor's estate, and he failed to take any action. It appears that the Názir's attempt to set aside the *ex-parte* decree failed, because he received no instructions from those who were interested in the proper management of the minor's estate. It cannot, therefore, be maintained that the present suit was not barred by the former litigation. There is really no conflict between the decision of this Court in *Cursandas* v. *Ladkavahu*[1] and the ruling in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[2], such as was noticed in the judgment of the first Court. It is only where fraud and negligence is proved on the part of the guardian of the minor that the right to bring a suit to set aside the previous decision can be claimed by the minor or his administrator. In the Calcutta case gross negligence was held proved, and that has always been held to be a good ground, like fraud or collusion, to extend the protection of the Court in the interest of the minor. The Bombay ruling assimilates negligence of this sort with fraud. As no such negligence has been proved in the present case, the District Judge rightly held that the decision in the former proceedings barred the present claim.

The more important point relates to the validity of the gift of the ornaments. The Court of first instance held that the ornaments were part of the ancestral estate in which Yellappa and the appellant had common ownership, and that, therefore, Yellappa could not make a valid gift of the same. The District Court

(1) (1895) 19 Bom., 571. (2) (1894) 22 Cal., 8.

held that the burden of proof lay on the appellant, and as he failed to discharge it, it decided that the ornaments were presumably the self-acquired property of Yellappa. It is now contended before us that the burden was wrongly placed on the appellant and that the presumption was that the property was joint and ancestral. It appears, however, from the judgment of the first Court itself that Yellappa's father, Keshav, was comparatively in poor circumstances. He kept a grocer's shop, and was stated to be in possession of an estate worth about Rs. 1,000 in 1825. In 1841-42 he is shown to have owned two houses for which he paid Rs. 24 a year as house-tax, and his means had not much improved when he died in 1850. Yellappa, on the other hand, admittedly prospered in his business. He owned seven houses for which he paid taxes. He also paid license tax, and the will made by him shows that he was worth about Rs. 23,000. His circumstances were, therefore, in every way superior to those of Keshavappa. The presumption, therefore, that the gold ornaments were acquired by Yellappa was properly drawn by the District Court in the absence of any evidence to the contrary.

The further question still remains whether, as Yellappa and his two sons worked and lived together, the property acquired by Yellappa was one in which the appellant-plaintiff and Yellappa had joint interest to such an extent as to debar Yellappa from making a valid gift of the same without his grandson's consent. It appears from the will that these ornaments had been given by Yellappa to Yamnava, the widowed wife of his other son, and these ornaments were to remain with Yamnava till her death, having been given to her for use. When Yellappa changed his mind later on, he made a gift of them to Yamnava. The real question, therefore, is whether Yellappa could not make a gift of these ornaments to his daughter-in-law out of his own acquisitions even though the appellant-plaintiff was joint owner with Yellappa of the property. The power of the father to dispose of moveables acquired by him in a state of union with his sons has always been admitted to be much larger than what he has over immoveable property. The Mitákshara in express words recognises this distinction, and gives the father power

1900.

HANMANTAPA v. JIVUBAI.

over moveables for indispensable acts of duty, and for purposes prescribed by law, such as gifts through affection, support of family, release from distress, and so forth. Apart from these special causes, the power of the father over joint moveables has been regarded as being subject to the same restraint as the immoveables. The question is not free from difficulty, and Mr. Mayne in section 310 discusses the views held on the point by the different High Courts; and finally arrives at the conclusion that though the father has a larger power of dealing with joint ancestral moveable property, he can only do so for certain special purposes specified by the Mitákshara. This view of the law is supported by the decision of the Privy Council in *Lakshman Dada Naik* v. *Ramchandra*[1], where the Privy Council set aside the father's will as being valid neither as a gift, nor as a partition, when it gave the whole of the moveable property to one son to the exclusion of the other. The gift in the present case made by Yellappa of the ornaments is, however, not open to the objection which proved fatal in *Lakshman Dada's* case, as in the present case there is no exclusion of one son from the whole property in preference to the widow of another. It must be treated as a case falling within the exception where the power of the father to make gifts of affection has always been upheld. The ornaments had been given to Yamnava for her use, even in the will which gave the whole property to the appellant-plaintiff, and when Yellappa changed his mind, all that he did was, he gave the property in the ornaments to Yamnava. The decision in *Lakshman Dada* v. *Ramchandra*[2], therefore, does not affect the gift in the present case. As regards his own acquisitions of moveable property, the decision in *Baboo Beer Pertab* v. *Maharajah Rajender Pertab*[3] shows that a man may dispose of self-acquired property, if moveable, with the qualification that he cannot disinherit any of his sons altogether. The case of *Bhujangarav Ghorpade* v. *Malojirav*[4] was a case of such disinherision, and, therefore, does not apply. See also the ruling in *Akoba Dada* v. *Sakharam*[5]. These cases do not really affect the father's power of

(1) (1880) L. R., 7 I. A., 181; I. L. R., 5 Bom., 48.
(2) (1880) L. R., 7 I. A., 181.
(3) (1868) 12 M. I. A., 1.
(4) (1868) 5 B. H. C. R., 161.
(5) (1885) 9 Bom., 429.

making a gift for special purposes. In *Baba* v. *Timma*[1], Chief Justice Turner has discussed the question of the father's power to alienate sale-acquired moveable estate and his share in ancestral moveable and immoveable property, and he lays down, as the effect of the Mitákshara texts taken together, that though the son is recognised as co-owner with the father, both in the ancestral and self-acquired property, the father has power to dispose of, at his pleasure, self-acquired moveables, and, with consent of the sons, self-acquired immoveables. He has also power to dispose of ancestral moveables for specified purposes inculcated by the texts, and of all property for indispensable acts of duty. The case of *Rayakkal* v. *Subbanna*[2], where a father's conveyance by way of gift to his wife and daughter was set aside at the instance of his son, related to the alienation of ancestral immoveable property, and, therefore, has no bearing on the present case. In *Raghunath* v. *Gobind* [3] an alienation by a father without the son's consent of joint ancestral property by way of a provision for a family idol was upheld against the son, and the decision rests on the Mitákshara texts noted above, permitting gifts of affection and pious and charitable gifts. In that case the property alienated was worth Rs. 693 out of an entire estate worth Rs. 4,000 In the present case the gift of affection represents less than a sum of Rs. 2,000 out of an estate worth about Rs. 23,000, and the gift was made to a widowed daughter-in-law. It is, therefore, a genuine gift by way of affection, and such a gift of a small share of moveable property, most of which was acquired by the donor while in union with his sons and grandson, cannot be impeached as being opposed to the principles of Hindu law. We, therefore, dismiss the appeal and confirm the decree of the lower Court with costs.

Decree confirmed.

(1) (1883) 7 Mad., 357. (2) (1892) 16 Mad., 84.

(3) (1885) 8 All., 76.