visions of section 13 places the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption arises that the mortgagee is, apart from the provisions of the Dekkhan Agriculturists' Relief Act, not entitled to retain possession after the date of the institution of the suit. It appears to us that this is a case in which we ought to apply the principle laid down by Sir Charles Sargent in *Janoji* v. *Janoji*[1], in which he says:—

"Remembering that the Act encroaches on existing legal rights, it should, on general principle, not be construed to extend beyond the particular object which the Legislature had in view in passing the Act, and which in the preamble is said in express terms to be to relieve the agriculturist in the Deccan from indebtedness. That object is effected when the agriculturist is enabled to discharge his debt and recover his land on far easier terms than those which he has contracted for."

We, therefore, vary the decree of lower appellate Court by deleting the provisions with regard to the payment of mesne profits. The appellant has partly succeeded and partly failed; therefore, each party must bear his own costs in this Court and in the lower appellate Court.

Decree varied.

J. G. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

PARVATIBAI BHRATAR SHANKAR PANDHARINATH BAGAT (ORIGINAL DEFENDANT), APPELLANT, *v.* BHAGWANT VISHWANATH PATHAK (ORIGINAL PLAINTIFF), RESPONDENT.*

1915. *June* 22.

* Second Appeal No. 111 of 1914.

[1] (1882) 7 Bom. 185 at pp. 187-188.

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Hindu Law—Ancestral moveable property—Will—Bequest—Bequest by Co-parcener.

One Pandharinath Ramchandra a Hindu testator made a will by which he directed that Rs. 2,001 should be paid to each of his three daughters out of the ancestral moveable property. He died leaving a son surviving him. In a suit by one of the daughters to recover the amount of the legacy from the estate of the testator,

Held, that the legacies were directed to be paid by the testator out of property which he had no power to dispose of by will.

Vitla Butten v. *Yamenamma*[1] followed. *Hanmantapa* v. *Jivubai*[2] and *Bachoo* v. *Mankorebai*[3] distinguished.

SECOND Appeal against the decision of C. Fawcett, District Judge of Poona, confirming the decree passed by V. N. Navaratna, Subordinate Judge of Junnar.

The facts of the case were as follows:—One Pandharinath Ramchandra (defendant's father-in-law) made a will dated the 18th September 1887 by which he appointed four persons as administrators of his estate during the minority of his only son Shankar and directed Rs. 6,001 to be paid to his sister and Rs. 2,001 to each of his three daughters and he further mentioned that the amount directed to be paid to the daughters, should be credited to their respective names in the accounts and they should be paid interest every year at 3 per cent. and that on their attaining majority the administrators should pay the said amount for justifiable purposes. The said Pandharinath died on 18th January 1888 and the persons mentioned in the will were appointed guardians of the estate of the minor Shankar. Later on Shankar died a minor and the defendant succeeded to his estate. Bakubai, one of the daughters of the testator, then made an application to the District Court for a direction to the guardians of the defendant's property to pay her the amount directed to be given to her by the will. The guardians opposed the application. The Court thereupon rejected the application and referred

(1) (1874) 8 Mad. H. C. R. 6. (2) (1900) 24 Bom. 547.
(3) (1904) 29 Bom. 51: (1907) 31 Bom. 373.

the applicant to a regular suit. Bakubai, however, having died the present plaintiff as her heir brought the suit to recover the amount of the legacy.

The defendant contended that the deceased Pandharinath had no power to make a will; that the will ceased to have any effect on the death of defendant's husband and the defendant succeeded to the property in her own right; that the will was void and inoperative.

The Subordinate Judge was of opinion that a Hindu father could devise by will property which he would have alienated by way of gift *inter vivos*, and held that there was a valid disposition by way of legacy in favour of the testator's daughter to which the plaintiff could succeed. His reasons were as follows:—

"A Hindu co-parcener cannot dispose of his share in the undivided family estate by simple voluntary gift or by devise without the consent of the other co-parceners. An exception to this rule is that a father has power to alienate a *reasonable amount* of ancestral moveables as a gift through affection or as pious and reverential gifts (*vide* Phadnis on Hindu Law, page 183). A gift of a few ornaments by the father in favour of his daughter-in-law is valid (I. L. R. 17 Bom. 282). In a family consisting of an uncle and nephew, the uncle made a gift of Rs. 20,000 to his daughter out of the estate worth 10 to 15 lacs and it was held that the gift was binding on the nephew (I. L. R. 29 Bom. 51) * * * *. It has been repeatedly held by several High Courts and also by the Privy Council, that the testamentary power may be exercised within the limits which the law prescribes to alienations by gift *inter vivos*, that is to say, the power to make a gift *inter vivos* and the power to devise by will are co-extensive and whatever property can be dealt with as a gift *inter vivos* can be disposed of by will (2 Sutherland 114 at page 123), I. L. R. 22 Mad. 383; 14 Bom. L. R., 749; Mayne on Hindu Law, 7th edition, page 553."

The District Judge in appeal confirmed the decision of the Subordinate Judge. He observed that though there was no doubt that Pandharinath had no power to dispose by gift or devise of his general interest in the co-parcenery property, under Mitakshara Law, a father

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can make a gift, within reasonable limits, of a portion of the moveable co-parcenery property for pious purposes or as a gift of affection.

The defendant preferred a second appeal.

Dhurandhar with *K. H. Kelkar* for the appellant :— The judgments of both the lower Courts are based on the proposition that according to Hindu Law the power of gifts and that of testamentary disposition are co-extensive. A father in a joint family can make a gift of ancestral moveables for certain purposes, therefore, he can also make a bequest of them for those purposes. The proposition, however, is not true in its generality. It has reference to self-acquisitions and not to joint family property. A Hindu co-parcener cannot make a bequest of the joint family property because at his death the right by survivorship is in conflict with the right by bequest, and being prior title, takes precedence: see *Lakshman Dada Naik* v. *Ramchandra Dada Naik*[1] [Counsel was stopped].

Dewan Bahadur G. S. Rao for the respondent :— A Hindu father has an independent power of disposal over ancestral moveables for certain specific purposes. Mita. Chap. I, section 1, pl. 27. He can, therefore, make a bequest of them for those purposes.

[SCOTT, C. J. :—Is there any case in which it was held that a bequest of co-parcenery property could be made ?]

There is no such case. But Wilkinson J. in *Rathnam* v. *Sivasubramania*[2] seems to suggest that a Hindu though unseparated can make a bequest of the joint family property for purposes warranted by special texts.

(1) (1880) L. R. 7 I. A. 181 at p. 193. (2) (1892) 16 Mad. 353.

[SCOTT, C. J.—But Muttusami Ayyer J. in that case says that the contention is not tenable inasmuch as a Hindu father has no testamentary power at all either to give legacies or make gifts out of joint property.]

SCOTT, C. J. :—The first question which arises in this case is whether there has been a valid disposition by way of legacy in favour of certain female relations of the testator Pandharinath, for if that point is decided in favour of the appellant, it will dispose of the whole case. The learned Judges both in the Subordinate Court and in the District Court have taken as the fundamental proposition upon which the case must be decided, that whatever property is so completely under the control of the testator that he may give it away in specie during his lifetime, he may also devise by will. That is the form in which the proposition is adopted by the Subordinate Judge. In the District Court the proposition is stated as follows: "A Hindu who is of sound mind, and not a minor, can by gift dispose of all property in which he has an absolute interest and can, by will, dispose of all property which he may give away in his lifetime;" and it is said that because the author of the Mitakshara states that "it is a settled point, that although property in the paternal or ancestral estate is by birth, the father has 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," the testator here had power by way of affection to make legacies in favour of his female relations out of what was admittedly ancestral property. There is, so far as we are aware, no decided case in which it has been held that the power of a Hindu father stated in pl. 27, Chap. 1, section 1 of the Mitakshara, above referred to, enables him for the purposes therein mentioned to dispose of ancestral pro-

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perty, even though not immoveable, by will. On the other hand, it has been decided by the Madras High Court, one of the Judges being Mr. Justice Muttusami Ayyar, that a legacy cannot be treated as an executory gift made for religious uses: see *Rathnam* v. *Sivasubramania*,[1] and that was based upon an earlier decision in *Vitla Butten* v. *Yamenamma*[2], where it was held that a member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death the right by survivorship is in conflict with the right by bequest, and the title by survivorship being the prior title, takes precedence to the exclusion of that by bequest. This point was considered by the Privy Council in *Lakshman Dada Naik* v. *Ramchandra Dada Naik*[3], where it was said: "It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime... and the learned counsel for the appellant have insisted that it follows as a necessary consequence (from the power of alienation by gift *inter vivos*) that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindu Law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will." Reference is then made to the case of *Vitla Butten* v. *Yemenamma*[4], above referred to, the reason of that decision being stated to be that "the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon

(1) (1892) 16 Mad. 353. (2) (1874) 8 Mad. H C. R. 6.
(3) (1880) L. R. 7 I. A. 181 at p. 193. (4) (1874) 8 Mad. H. C. R. 6.

which the will can operate." Their Lordships conclude the discussion of the question in these terms: "The question, therefore, is not so much whether an admitted principle of Hindu Law shall be carried out to its apprently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision."

It is admitted by the learned pleader for the respondent that none of the cases referred to by the learned Judge as instances of gifts falling within the power stated in pl. 27, Chap. 1, section 1 of the Mitakshara are cases of testamentary disposition. In *Hanmantapa* v. *Jivubai*[1], which was referred to by the same learned pleader, the disposition was by gift *inter vivos*, and the decision in *Bachoo* v. *Mankorebai*[2], affirmed in appeal by the Privy Council[3], was a case in which the gift had been made before the death of the testator. We are, therefore, of opinion that the decision of the lower appellate Court cannot be supported. The legacies were directed to be paid by the testator out of property which he had no power to dispose of by will. We, therefore, reverse the decree of the lower appellate Court and dismiss the suit. We think that under the circumstances the parties should bear their own costs.

Decree reversed.

J. G. R.

(1) (1900) 24 Bom. 547.

(2)(1904) 29 Bom. 51. (3) (1907) 31 Bom. 373.