1868. *February* 14. *R. A. No.* 61 *of* 1867.

The cross Appeal, No. 73 of 1867, in which the proper stamp has not been paid, and the appellants have abandoned all claim to proceed, should be dismissed.

ORIGINAL JURISDICTION. (*a*)

Original Suit No. 394 *of* 1867.

RÁYADUR NALLATAMBI CHETTI.....*Plaintiff.*

RÁYADUR MUKUNDA CHETTI.....*Defendant.*

In a suit brought by a son against his father to compel a division of moveable and immoveable property inherited by the latter from his paternal cousin.—

Held that, as regards the jewels of which plaintiff required an account, the plaintiff had no right of complaint although his father, the defendant, had made an unjust and partial distribution of them.

Held also, that the suit to enforce a division of the immoveable property could not be maintained inasmuch as neither the plaintiff nor the defendant acquired any right to such property by birth.

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THIS was a suit by the plaintiff, the son of the 1st defendant, to compel a division of family property stated to be of the value of more than Rupees 70,000, and which consisted for the most part of houses situated in Madras. Two issues were settled, 1st; whether the property of which the 1st defendant was in possession was self-acquired or ancestral ; 2nd, whether the suit was barred by the law of limitation.

The *Advocate General* for the plaintiff.

O'Sullivan for the defendant.

The case for the plaintiff was that the property in dispute came to the 1st defendant by inheritance from one Chinni Chetty, the first cousin of the 1st defendant's father.

The case for the defendant was that the property, part of which was acquired by the joint exertions of Chinni Chetti and the 1st defendant, was transferred by gift to the 1st defendant by Chinni Chetti in his life-time.

Evidence having been offered on both sides, judgment was this day delivered by

BITTLESTON, J:—His Lordship held that as to all the houses in Madras, except one, Chinni Chetti transferred his interest to the 1st defendant, and that the property

(*a*) Present : Bittleston, J.

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having been in this way acquired by the 1st defendant the plaintiff had no right to compel a partition of it.

With reference to the moveable property alleged to have been inherited by the 1st defendant from Chinni Chetti and one of the houses in the possession of the 1st defendant, the judgment proceeded as follows:—

What other property Chinni left appears very doubtful upon the evidence. None of the witnesses profess to know anything about it excepting the plaintiff and 1st defendant.

The plaintiff says, generally, he left property worth 70,000 Rupees, but he can give no particulars, except as to the houses of which he produces the certificates and except as to jewels which he says were worth 14,000 Rupees.

The 1st defendant says he knows nothing of any jewels: he received none, and if there were any, his son-in-law took possession of them and placed them on the female members of the family. This in substance is what the plaintiff complains of for he says that jewels were given away to the daughters of the 1st defendant, and that his wife never received more than one, though he was continually protesting against this unfair treatment. The 1st defendant's statement, I confess, did appear to me unsatisfactory as to his possession of jewels ; but if even it be assumed that Chinni left jewels which descended to Mukunda as his heir, it does not follow that the plaintiff has any right to complain of his father having made an unjust and partial distribution of them. On the contrary, the author of the Mitákshará commenting on the text "the father is master of the gems, pearls and corals, &c," declares expressly that " when the grand-father dies his effects become the common property of the father and sons ; but it appears from this text along that the gems, pearls and other, moveables belong exclusively to the father, while the immoveable estate remains common." Mitákharà, c. 1, sec. 1, cl. 21, and in cl. 24 the opinion is given "that the father has power under the same text to give away such effects though acquired by his father. "

It seems to me, therefore, upon the grounds already stated, that there is no property of the 1st defendant of

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which the plaintiff can compel partition, unless it be the one house for which there is the certificate No. 1674, and as regards that property it therefore becomes necessary to consider whether this case falls within the ruling of this Court in *Nagalinga Mudali* v. *Subbiramaniya Mudali*, 1 M. H. C. Reps. 77.

The head note of that case is in these words. "A grandson may by Hindu law, irrespective of all circumstances, maintain a suit against his grand-father for compulsory division of ancestral family property," but the property of which the partition was claimed in that suit was property which had descended to the plaintiff's grand-father from his father, and which had been increased by the grand-father himself. The case was therefore held to be within the term of that passage of the Mitákshará on which the decision was rested, viz., "thus while the mother is capable of bearing more sons and the father retains his worldly affections and does not desire partition, a distribution of the grand-father's estate does nevertheless take place by the will of the son," ch. 1, sec. 5, para. 8.

It is to be observed that it is "the grand-father's estate" which is here spoken of; and the same or like words are used throughout this Section 5, which is entitled "equal rights of father and son in property ancestral." This property in which the father and son are declared to have equal rights is the grand-father's estate, to which both father and son indiscriminately acquire a right by birth, and it seems to me that the passage above cited does not warrant the application of the rule to any other property, even though it might be not improperly described in a wide sense as ancestral property, such as property derived from a remote collateral ancestor. The ground on which the distinction between the property acquired by the father and property inherited from the grand-father rests is distinctly stated in para 10. "Consequently the difference is this: although he have 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*

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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)."

This doctrine of course finds no place in the Dáya Bhága—because the acquisition of any right of property by birth is distinctly denied in that school (c. 1, para. 14), but the discussion of the subject in that treatise shows that the right of sons to claim partition in their father's life-time is dependent on the doctrine of acquisition of property by birth. Thus (para. 18) "Devala too, expressly denies the right of sons in their father's wealth. When the father is deceased, let the sons divide the father's wealth : for sons have not ownership while the father is alive and free from defect," and para. 19 : " Besides if sons had property in their father's wealth, partition would be demandable even against his consent : and there is no proof that property is vested by birth alone : nor is birth stated in the law as means of acquisition."

It is this difference of doctrine between the two schools of Hindu Law, as to the vesting of property by birth, which has led to the different rules established in each respecting the right of the sons to compel partition of the paternal estate inherited from the grand-father ; and the reason of this difference is strong to show that the rule laid down in the Mitákshará must be limited to property in which the right by birth exists.

In Mr. Colebrooke's Translation of Jagannátha's Digest, Book 5, C. 2, sec. 103, at the end of the author's commentary on a text of Katyáyana respecting the right of a father to receive two shares out of property acquired by his son, there is a passage which tends to confirm the view I have above expressed. The author proposes the question " in partition made by a father how shall property inherited by him from his maternal grand-father who left no daughter, or nearer heir, be distributed ? Shall he take two shares, or the like, as if it were property inherited from the paternal grand-father ; or may he reserve a considerable part of it, as if it had been acquired by himself ?" He then states (according to his usual habit) the opinions on different sides of the question : " To this question (he says) some reply that 'his own acquired wealth' in the text of Vishnu

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signifies that which was gained by his own act ; but what is received from the maternal grand-father being gained without any exertion on the part of the father, is not acquired by his act ; he shall therefore receive two shares or the like, as suggested by the general rule." Now the text of Vishnu referred to is to be found at sec. 25 of Bk. 5, ch. 1 of the Digest, and is in these words : " if a father make a partition between himself and his sons, he may give or reserve at his pleasure any part of his own acquired wealth ; but over landed property left by a paternal grand-father the father and the sons have equal dominion;" and the argument founded on that text by those who take the view above expressed on the question propounded by Jagannátha is thus stated by him :—

" The term ' property left by the paternal grand-father' must be explained property inherited in right of affinity : whether it be received from the paternal great grand-father or from the maternal grand-father and so forth, the father and son have equal dominion over it. Nor should it be argued, that property regularly descending from ancestors is alone intended by the term " estate left by the paternal grand-father," and that any other property whether left by a material grand-father, or received in a present, or the like, is regulated by the law which allows the reserve of the greatest part and so forth. There is no argument to prove that an estate devolving from the maternal grand-father and the rest is not considered as regularly descending from ancestors : and legislators have not distinguished property devolving eventually on collaterals or on descendants in the female line.

" That reply is not satisfactory ; for when the heritage of one who leaves no kinsman devolves on a fellow student, or on a learned priest, the father and son would have equal dominion. In the case where the son of a daughter's son does not succeed to property eventually devolving on distant heirs, by failure of the direct descent in the male line, surely that son has no dominion if his father be dead ; but if his father be living he is not even noticed. The very same exposition is proper in respect of the heritage devolving from the father of the paternal great grand-father on the grandson of his grandson ; for that has not regularly des-

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cended from ancestors. But the heritage of the paternal great grand-father, successively devolving on his son and the rest until it reach the great-grandson, has regularly descended ; in that case the rule of equal dominion vested in father and son must be argued : however, when a great grandson, whose father and grand-father are both dead, succeeds to the estate of his paternal great grand-father, he and his son have equal dominion. There is no objection to explain " property left by the paternal grand-father," an estate inherited in right of birth whereby the ancestor attains a region of bliss ; for texts show, that a man reaches heaven by the birth of a son, of a son's son, and of the son of that grandson." (CIV and XI.)

This commentary cannot perhaps be regarded as of very high authority, but it shows at all events that a Hindu Lawyer of some repute has put the same construction on the words " landed property left by a paternal grandfather" in the text of Vishnu as I have put on the words " the grand-father's estate" in the Mitákshará.

This construction limits the rule laid down in the decision of this Court above referred to to property which passes by what Jagannàtha terms " regular descent," and that does not extend beyond the great grandson.

In the present case the relationship between Chinni and the 1st defendant was collateral only ; the 1st defendant being the son of Chinni's cousin ; and certainly neither the 1st defendant nor the plaintiff acquired by birth any right in Chinni's property. That property during his life he might have disposed of as he pleased, and only upon his death without any such disposition could the defendant Mukunda have acquired any title to it.

In the case of property so acquired I am of opinion that the son cannot claim partition from the father during his life-time and against his will ; and as the plaintiff's case is wholly based upon the assumption that his father's property was derived from Chinni, this objection goes to the root of the case. But for the reasons above given, I do not think that in this case,as to the bulk of the property, it really did come to the 1st defendant by inheritance from Chinni.

The suit must be dismissed with costs.

Suit dismissed.