CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION.

OF THE

HIGH COURT OF BOMBAY.

Special Appeal No. 366 of 1868.

Bai Manchha	...	*Appellant.*	1869
Narotamdas Kashidas *et al.*		*Respondents.*	Jan 13.

Hindu Law—Joint family—Self-acquired property—Onus probandi—*Gains by science, when impartible.*

In the case of an undivided Hindu family the burden of showing that property in the hands of one of the members of the family is self-acquired and impartible lies upon the person who alleges it to be so.

Gains of science acquired at the family expense, and whilst the acquirer is receiving a family maintenance, are liable to partition, and upon the death of the acquirer from part of the family property, and do not pass to his widow.

This was a Special Appeal from the decision of C. G. Kemball, District Judge of Surat, in Appeal suit No. 19 of 1868 reversing the decree of Bholanath Sarabhai, the Principal Sadr Amin of Surat, and remanding the case for retrial.

Gordanbhai Shivdas carried on business at Surat and died about thirty-seven years ago. He left three sons—Kashidas, Dulabhai, and Jamnadas. The business of the firm of Gordanbhai was continued, being carried on by one of the brothers for the benefit of the whole family; but a separate account was opened in the books for each of the brothers who from time to time drew out money for their own purposes. The brothers lived together in the family house.

In addition to the business of the firm of Gordanbhai, each of the brothers carried on a distinct business of his own, of which they each kept private accounts.

Jamnadas, about 20 years before his death, went to Bombay to pass the *vakil's* examination, and was admitted as a

1869

Bai Manchha v. Narotamdas Kashidas. *et al.*

pleader, and on his return to Surat he practised as a pleader and with success. The accounts of his earnings were kept in a private book distinct from that of the family firm. He also lent money on promissory notes and bonds which he took in his own name, upon some of which he sued and obtained decrees in his own name. He also purchased some immoveable property which was conveyed to himself, but it was not proved whence the money lent, and that with which the immoveable property had been purchased, was acquired.

Of the three brothers, Kashidas died in 1860, leaving male issue; Dulabhai died in 1867, also leaving male issue; and Jamnadas died in 1866, leaving no male issue, but leaving a widow surviving him.

This suit was instituted by the heirs of Kashidas and Dulabhai against the widow of Jamnadas to recover from her certain ornaments and other moveable property (of the value of Rs. 53,537-13-8), and to establish their proprietary right over certain immoveable property, all belonging as they alleged to the firm of Gordanbhai Shivdas.

Bai Manchha's defence was that the property in dispute did not belong to the firm of Gordanbhai, nor had her deceased husband purchased it with the money belonging to the firm; that her husband and his brothers traded in their own names respectively, and acquired property separately, and had therefore no claim to each other's property; that her husband practised as a pleader, and also sued to lend money at interest, and acquired the property out of his own private earnso that it belonged to her after his decease; and that the ornaments formed her *stridhan* to which the plaintiffs had no right whatever.

The Principal Sadr Amin rejected the claim of the plaintiffs.

The following is the judgment of the District Judge.

"It appears that one Gordanbhai, the ancestor of the parties, died in Samvat 1888 (A.D. 1832) leaving three sons Kashidas, Dulabhai and Jamnadas. All three of these brothers are dead, Kashidas dying in 1916 (A.D. 1860), Dula-

bhai in 1923 (A.D. 1867), and Jamnadas 1922(A.D. 1866); and this action is brought by the sons of Kashidas and Dulabhai against the widow of Jamnadas, to recover from her certain moveable property and to establish their proprietary right over some immoveable property. Putting aside the matter of *stridhan* for the present, the dispute resolves itself into two questions :—First, whether the family was joint; and, secondly, if so, whether the property claimed was not partible by reason of its having been acquired by Manchha's husband independently of his co-heirs. And here I must express my suprise at the singular finding of the lower Court to the effect that it was not proved that the family was unseparate, if I may use such a word. The whole evidence goes to show as clearly as possible that the family was, up to the time of Jamnadas's death, joint in the common acceptation of the term, and the defendant, without attempting to traverse the point, based her right to the property in dispute on the ground that it was self-acquired by her husband, and therefore, not liable to the claims of his co-heirs, he having been by profession a *vakil*, and also, having been engaged in money lending quite independent of his family. But assuming that the lower Court was right in framing an issue on the subject of the family being joint or separate, I am of opinion that the Court was bound to presume, on the answer put in by the defendant, that the family was joint until the contrary was proved; so that the Court's finding that it was not proved that the family was *avibhakta*, shows that it did not rightly understand on whom the *onus probandi* rested.

"I now come to the real gist of the dispute, namely, whether the property in question was liable to partition amongst the co-heirs of Jamnadas or was inherited by Manchha as heir to her husband: and this involves two questions: first, whether the property was self-acquired, and, if so, secondly, whether self-acquired property of an undivided Hindu on his death without male issue devolves on his surviving coparceners or on his widow. With respect to the first question, I think that, admitting the existence of a joint family property, about which there is really no dispute, the

1869

Bai Mnachha v. Narotamdas Kashidas. *et al.*

onus of proving the self-acquisition pleaded rests on the defendant, the presumption in such a case being that all the acquired property belongs to the family. The argument resorted to by the respondent before me is that, though the family was joint as to the ancestral estate, still each brother traded separately on his own private account: but the question is, has it been proved by Manchha, who alleges her husband's separate rights, that the property was entirely acquired from separate resources without aid from the ancestral estate. I hold that it has not. She says her husband was a money-lender and a *vakil*, the profits derived from the profession being, it is presumed, classed under the head of 'gains of science,' but she has not thought it worth her while to show how her husband started in business as a money-lender, and whence he derived means of subsistence while he was acquired the knowledge requisite for a competent pleader; and, in the absence of such information, the evidence that the brothers all lived together (Manchhabai still lives in the common house), and took out money from the common stock as they required it, affords, I think, ample presumption that the means by which the gains were acquired by the different members of the family were derived from the common ancestral property, and that the acquisition were for the general good of the family. The Principal Sadr Amin appeared to consider that the burden was on the plaintiffs of showing that Jamnadas was not sole owner of the decrees passed in his own name, and that the fact of Jamnadas having taken money from time to time out of the firm did not affect the separate character of the earnings which he derived from those means, but the fact of Jamnadas carrying on business in his own name raised no presumption of separate acquisition (*vide* "Calcutta High Court Reports," Vol. I. p. 37 and p. 308); and I cannot agree with the lower Court in thinking that the fact of Jamnadas having derived assistance from the joint funds did not affect his exclusive right to the gains accruing thereon. I feel it unnecessary to go into the intricate question of 'gains of science' which was ably argued before me by Mr. Nanabhai. I am of opinion that the defendant has failed to show

that any portion of the property which she claims as heir to her husband was acquired by him from separate resources. I then come to consider the question of *stridhan*, as this comes to be a material point in the case ; and I find that the lower Court has passed it over with but slight notice. I determine on returning the case to the Principal Sadar Amin to take such evidence as may be offered as to what property is really the *stridhan* of Manchha, and to pass his finding thereon. *The decree is reversed, and the case returned under sec. 356 of the Code of Civil Procedure. Cost to be apportioned hereafter.*"

The appeal was argued on the 25th of November 1868, before COUCH, C. J., and NEWTON, J.

White (with him *Shantaram Narayan*) for the appellant — Though the general rule is, that he who alleges self-acquisition must prove it, yet the circumstances of this case are such as to shift the *onus probandi* to the plaintiffs. Jamnadas had the means of acquiring property, and what he possessed he always treated, and dealt with, as his own. This was acquiesced in by the other members of the family. He cited *Dhunookdharee Lall* v. *Gunput Lall* (*a*) *Shek Golam Sing* ; *Bissro Pershad Mytee* v. *Kane Dayee.*

(*c*) *Chalakondra Chalakonda* (*d*) ; Strange H. L. Vo. I p. 214, Vol. II. pp. 372, 373 ; Grady on "Hindu Law" p. 405 ; Steel on "Castes," p. 212.

Pigot (with him *Nanabhai Haridas*) for the respondents, commented on the evidence and cases cited for the appellant, and referred to *Gane Bhine* v. *Kane Bhive* (*e*) ; Mitac. on "Inheritance," ch. I. sec. 4, para. 8.

Cur. adv. vult.

Jan. 19, 1869. COUCH, C. J. :—In this case the Judge has properly laid down the points for consideration, and held that the family was joint until the contrary was proved. The law as regards the *onus probandi* in such cases was considered by H. M.'s Privy Council so far back as 1831 in the case of *Luximon Row Sadasew* v. *Mullar Row Bajee* (*f*), where their Lordships observed—"it appears, from the

(*a*) 10 Calc. W. Rep. Civ. R. 122. (*b*) Ibid. 198.
(*c*) 5 Calc. W. Rep. Civ. R. 83. (*d*) 2 Mad. H. C. Rep. 56.
(*e*) 4 Bom. H. C. Rep. A. C. J. 169. (*f*) 2 Knap. P. C. C. 60.

1869

Bai Manchha v. Narotamdas Kashidas. *et al.*

cases that have been cited in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof of them lies upon the party who would seek to bring himself within them"—and this view of the law was acted upon by their Lordships so late as 1865 in the case of *Prankishen* v. *Mothooramohun*, (*g*) where it was ruled that the presumption of Hindu law was that property, not shown to be separate, is joint, and the *onus probandi* lay on the party claiming it as separately acquired. If there are any *dicta* in the Calcutta cases opposed to this, we can only say that we differ from them and follow the higher authority. We, therefore, hold that the ruling of the Judge in regard to the *onus probandi* is correct, and the same has been decided in various cases in this Court.

The question as to what gains should be considered self-acquired property has been very fully considered by the Madras High Court (*h*), and the result is that "gains of science, imparted at the family expense and acquired while receiving a family maintenance are not impartiable property." (*i*)

In this case the learned Judge (HOLLOWAY J.) observed "we are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science, which have been taught at the expense of the family funds, are not impartible. To render them so, the science or learning must have been imparted by persons not members of the learner's family" (*j*). We concur in this judgment, and we cannot give any weight to what is said upon it in a recently published Text Book (*k*). We have to ascertain what the law is, and not what it ought to be; and having ascertained it, we must apply it. Nor, having regard to the usage, of native society, do we think it is bad law. There may be hard cases, and the remedy for such is in the hands of the parties themselves—viz., to divide. We must confirm the decree of the Judge with costs.

NEWTON, J.—Concurred.

Decree confirmed.

(*g*) 10 Moo. Ind. App. 403. (*h*) 2 Mad. H. C. Rep. 56.
(*i*) Ibid. 76. (*j*) Ibid. 77. (*k*) Grady on Hindu law p. 405.