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respondent was appointed Receiver must be regarded as incorporated into the decree in substitution of that part of it by which Mr. Gamble was originally appointed.

We are of opinion, therefore, that this order is appelable under either Code of Civil Procedure, the question between appellant and the respondent being a question between parties to the suit relating to the execution of the decree.

Attorneys for the appellant.—Messrs. *Craigie, Lynch* and *Owen.*

Attorneys for the respondent.—Messrs. *Tobin* and *Roughton.*

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PRESENT:

Sir J. W. Colvile, Sir B. Peacock, Sir. M. E. Smith, and Sir R. P. Collier.

[*On appeal from the High Court, Bombay.*]

LAKSHMAN DADA NAIK (*Original Defendant*), *Appellant v.* RAMCHANDRA DADA NAIK (*Original Plaintiff*), *Respondent.*

[6th, 7th and 11th May, 1880.]

Hindu Law—Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitaton Act XIV of 1859—*s.* 1, *cl.* 13—Res judicata—*Act VIII of* 1859, *s.* 2.

A Hindu of the Southern Maratha Country, having two sons undivided from him, died in 1871 leaving a will disposing of ancestral estate substantially in favour of his second son excluding the elder who claimed his share in this [49] suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveable, the claim failed because they were situated beyond the jurisdiction of the Court.

Held, first that the suit was not barred under Act VIII of 1859, s. 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death.

Secondly: that the suit was not barred under the Limitation Act XIV of 1859, s. 1, cl. 13. As to the immoveables; setting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables in the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, s. 14. As to the moveables; assuming that they could, on the question of limitation, be treated as distinct from the moveable, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the movables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous.

So far, also, as the father's interest was concerned, the succession only opened on his death.

Thirdly; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share.

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Held that under the Mitakshara law, as received in Bombay, the father could not dispose of his one-third share by will.

The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharer's consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of the other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will were held to be sound and sufficient to support that decision.

[R., 6 A.L.J. 263 (299, 301); 15 Bom. L.R. 266 (274) = 19 Ind. Cas. 558; 5 Ind. Cas. 752 = 6 N.L.R. 46; 8 Ind. Cas. 512(516) = 21 M.L.J. 21 (28) = 9 M.L.T. 3; 19 M. L.J. 62 = 5 M.L.T. 140 = 4 Ind. Cas. 1104.]

APPEAL from a decree of the High Court of Bombay (2nd August 1876) confirming, as to the questions raised in these [50] proceedings, a decree of the Subordinate Judge of Belgaum (8th January 1875).

This suit was brought by the respondent in October 1872, against the appellant, who was his brother, both being sons of Dada Naik, a Hindu resident in the Southern Maratha Country, with whom, until his death in July 1872, the brothers were an undivided family. A third son, Keshev Dada Naik, had become separate from them in 1868, having received his share of the ancestral estate. This consisted mainly of a banking business carried on by the family at Belgaum and in Bombay; and also partly of houses at Belgaum and at Shahapur in the territories of the Sangli State.

This claim was made on the ground that, although the above property had been derived from ancestral money, the second son, Lakshman Dada Naik, had, under his father's will, virtually obtained the whole of it to the exclusion of the elder son, the plaintiff.

The questions which arose on this appeal were—

First.—Whether this suit, in consequence of a prior suit having been decided in 1861, was not barred under s. 2, Act VIII of 1859, the Code of Civil Procedure, as *res judicata*. *Secondly.*—Whether it was not barred under Act XIV of 1859, s. 1, cl. 13, by limitation; the plaintiff, as was alleged, not having sued within twelve years from the date of the death of the person from whom the joint property descended, or from the date of the last payment to him out of the joint estate.

The prior suit referred to was instituted in the Supreme Court in March 1861, by Ramchandra Dada Naik, against his father and his two brothers, for a declaration of his right in, and for partition of, the joint estate. A demurrer, on the part of the father, was allowed, and the suit was dismissed, with costs, in August 1861: see *Ramchandra Dada Naik* v. *Dada Mahadev Naik and others*(1). The ground of the decision in that case was that a son could not, during his father's lifetime, compel a partition of ancestral moveables; and that the immoveables were, if partible, beyond the jurisdiction of the Court.

[51] The following particulars relate to the will:—

On the 8th December 1864, Dada Naik executed what purported to be an absolute deed of gift of all his property to his two sons, Lakshman Dada Naik and Keshav Dada Naik, subject to certain provisions for the maintenance, marriage and family ceremonies of the younger members of

(1) 1 B. H. C. R. App. lxxvi.

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the family. The document recited that Ramchandra, this respondent, had been misconducting himself towards his father for years and that he had already received more than his share in money, ornaments and clothes. It directed that a sum of Rs. 500 should be given to him after Dada Naik's death.

On the 16th November 1868, a deed of release was executed by Keshav Dada Naik to his father and to his brother Lakshman, by which he accepted the sum of Rs. 45,000 in full satisfaction of his claims upon the family property.

On the 30th October 1871, Dada Naik made the will which caused the present litigation. In it he referred to the deed of gift of 1864, which, he said, he had afterwards revoked, and also to the partition in favour of Keshav Dada Naik. He stated that Ramchandra had received from him property to the value of Rs. 40,000, exclusive of Rs. 45,000 paid by the testator to compromise certain actions, arising out of the family disputes, against the Cantonment Magistrate of Belgaum.

With the exception of a legacy of Rs. 500, and a house at Shahapur in Sangli territory, said to be worth Rs. 5,000, which were given to Ramchandra, the whole of the testator's property (which he stated to be of the value of Rs. 1,52,824), was given to the appellant, Lakshman Dada Naik, subject to certain provisions for marriages, family ceremonies, and charities.

In July, 1872, Dada Naik died, and in October of the same year the respondent commenced this suit, claiming one-half of the house at Belgaum, one-half of the gold and silver ornaments of the family, and one-half of the capital stock of outstandings of the two banking establishments at Belgaum and in Bombay. In this suit the Subordinate Judge of Belgaum, who found that the plaintiff had not received his full share as elder son, made a [52] decree in his favour, awarding to the plaintiff such a sum as would, with the house already in his possession, make up his share to one-half the amount of the valuation of the ancestral family property given in the will.

Against this decree both parties appealed to the High Court: the defendant on the ground that the plaintiff was entitled to nothing, the plaintiff on the ground that he was entitled to more than had been decreed. The High Court affirmed all the findings upon which the decrees of the lower Court had been based, but reversed the decree itself, being of opinion that instead of awarding a fixed sum of money, it should have made a general decree for a partition and an account.

The judgment of the High Court, reported in *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (1), contains a review of the authorities on the subject of the alienation of ancestral property by one of several co-sharers, and concludes thus: "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 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."

Leith, Q. C., and *R. V. Doyne*, for the appellant.

Cowie, Q. C., and *J. D. Mayne*, for the respondent.

(1) 1 B. 561.

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For the appellant it was argued, in reference to s. 2, Act VIII of 1859, that the result of the decision of 1861 might be construed to be that the father was entitled to the moveable estate absolutely; and if that was the decision, the cause of action as to the moveable estate, which was the bulk of the claim, had been "heard and determined." As to Act XIV of 1859, s. 1, cl. 13, it was contended that a state of things had been shown to exist to which the rule declared in *Jwala Buksh* v. *Dharum Singh* (1) was applicable, *viz.*, that the possession of one member of the joint family could not be taken to be that of another, where that other had been plainly excluded. For fourteen [53] years before this suit, during which period the plaintiff had been practically separate, no payment on account of his share in the banking business had been made to him and he had resided apart, though one of the family houses was relinquished to him. Reference was made to the observations on the difficulty of applying this section in the case of an undivided family in the judgment in *Govindan Pillai* v. *Chidambara Pillai* (2).

If the suit was not barred, effect might be given to the will as a disposition of the father's share. The right to make such a disposition by will as had been made followed, as a logical consequence, upon the state of the law regarding alienations by way of gift on the part of co-sharers in joint family estate. It followed from the decisions under the Mitakshara; amongst others, from that of the Madras High Court, to the effect that a son "has as co-parcener a present proprietary interest in the ancestral property to the extent of his proper share, but beyond that he has vested in him, no legal interest whatever, whilst his father is alive:" *J. Rayacharlu* v. *J. V. Venkataramaniah* (3); also were cited *Virasvami Gramini* v. *Ayyasami Gramini* (4), *Palanivelappa Kaundan* v. *Mannaru Naikan* (5), *Narottam Jagjivan* v. *Narandas Harikisandas.* (6) In the latter case, the proposition, in support whereof the Bombay Court had cited *Vallinayagam Pillai* v. *Pachche* (7) was stated, *viz.*, that in Madras the testamentary power had been held to be co-extensive with the right of alienation *inter vivos.* This had not been admitted to be so in *O. Goroova Butten* v. *C. Narainsawmy* (8), but it followed as a necessary step after what had been decided.

For the respondent it was contended that the decision of 1861, not relating to rights identical with those now in dispute, could not bar this suit. Nor had limitation run against the plaintiff who had continued to be a member of the joint family, and in whose favour the time occupied in the former proceedings should be allowed. On the question of his continuance in the joint family was cited *Runjeet Singh* v. *Kooer Gujraj Singh* (9).

[54] On the question whether effect could be given to the will as a devise of the father's one-third share were cited *Vitla Butten* v. *Yamenamma* (10), special reference being made to the words in the judgment," at the moment of death the right of survivorship, is in conflict with the right by devise; then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise;" also *O. Goroova Butten* v. *C. Narainsawmy Butten* (8).

(1) 10 M.I.A. 511. (2) 3 M. H. C. R. 99. (3) 4 M. H. C. R. 60.
(4) 1 M. H. C. R. 471. (5) 2 M. H. C. R. 416. (6) 3 B. H. C. R. A.J. 6.
(7) 1 M. H. C. R. 326. (8) 8 M. H. C. R. 13. (9) 1 I. A. 9.
(10) 8 M.H.C.R. 6.

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Reference was made to the opinion of Mr. Colebrooke (1) on the case of *Ramasawmy* v. *Sosha Chella* (2), and to the distinction in the degrees of restriction maintained by the Courts of Bengal, Madras and Bombay, respectively, upon alienation by a co-parcener. To show that the Madras Court, and *a fortiori* the Bombay Court, maintained principles, according to which there must necessarily exist a distinction between the right to devise, and the permitted alienations *inter vivos* were cited *Tarachand* v. *Reebram*, (3) *Gangabai* v. *Ramanna* (4), *Vasudev Bhat* v. *Vyankatesh Sambhav* (5), *Udaram Sitaram* v. *Ramu Panduji* (6), *Vankatapathy* v. *Lutchmee* (7).

Reference was made on both sides to Mitakshara, c. 1, ss. 1, 3, 6; Strange Hindu Law, 194, 202; *Sonatun Bysakh* v. *Srimati Jagatsoonderi Dossee* (8); *Baboo Beer Pertab Sahee* v. *Maharaja Rajendar Pertab* (9), *Deendyal Lal* v. *Jugdeep Narain Singh* (10); *Suraj Bunsi Kooer* v. *Sheo Proshad Singh* (11).

JUDGMENT.

Sir J. W. COLVILE delivered their Lordships' judgment:—

The appellant in this case is the second, and the respondent, the eldest, son of one Dada Mahadev Naik, who died on the 13th July 1872. Dada Mahadev Naik was a son of Mahadev Narayan Naik, who died in 1847, leaving another and eldest son called [55] Hurba, and seven grandsons, four of whom were sons of predeceased sons, and three, namely, the respondent, the appellant and a younger son, Keshav, were the sons of Dada Naik. All these persons, after the death of Narayan Naik, constituted a joint and undivided Hindu family, of which Dada Naik, his eldest brother Hurba being dumb and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements, the other members of the larger family became separate from Dada Naik and his three sons, who, in the year 1857, were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at Shahapur in the Southern Maratha Country, and of an ancestral business which was carried on partly there and partly in a koti at Bombay, which appears to have been managed by gomashtas. About the year 1858, great dissensions arose between the respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that, in 1858, the father and his two younger sons left the family house, the respondent remaining there; and afterwards they, in the year 1864, built for themselves, with the family funds, another house at Belgaum.

Between the two last dates, and in March 1861, the respondent instituted a suit in the late Supreme Court of Bombay against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th August 1861, his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

(1) Appendix to 2 Strange Hindu Law 344; see also Note b. 1 M. H.C.R., at p. 474.
(2) 2 Strange (N.C. ed. 1827) p. 74. (3) 3 M.H.C.R. 50.
(4) 3 B.H.C.R. A.C.J. 66. (5) 10 B.H.C.R. 139. (6) 11 B.H.C.R. 76.
(7) 6 Mad. Jurist 215. (8) 8 M. I. A. 66. (9) 12 M. I. A. 138.
(10) 4 I. A. 247=3 C. 198. (11) 6 I. A. 88=5 C. 148.

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In 1868, Keshv Naik, the youngest son, formally separated himself from the joint family, taking Rs. 45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th November of that year, is on the record, and it may be observed that it treats the old family house at Shahapur as still part of the joint family estate.

[56] The father afterwards made a will, dated the 30th October 1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the respondent, as having received already more than his share of the estate, gave him only the house at Shahapur and Rs. 500, and gave all the rest of the property to his second son, the appellant. He died, as has been before stated, in July 1872.

In the following October, the respondent brought this suit against his brother, the appellant. By it he claims to be entitled to one-half of the joint business and estate as it stood at the death of his father. Various defences were set up by the appellant, and the issues, as finally settled, were the following:—

"1. Whether the suit is barred by s. 2, Act VIII of 1859," that is, whether the decision of the Supreme Court on the demurrer amounted to *res judicata*. "2. Whether the suit is barred by cl. 13, s. 1, Act XIV of 1859," that is, whether it was barred by limitation under that statute. "3. Whether the property in suit is deceased Dada Naik's ancestral or self-acquired property. 4. If the former, whether plaintiff has taken or received so much out of it as could be considered more than what he was entitled to for his share? 5. If the latter, whether the deceased Dada Naik made the original of Exhibit No. 16, and to what sum is the plaintiff entitled under it? 6. Whether the property left by the deceased Dada Naik is correctly estimated? 7. Whether the plaintiff is restricted in getting his share on any other ground, as alleged by defendant?"

It was admitted at the bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th, and 7th of these issues cannot now be questioned. It must, therefore, be taken that the property in question was ancestral; that the respondent, the plaintiff, has not received his full share of it; that the *factum* of the will has been established: and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the plaintiff's claim. Again, as to the will, it is now conceded that under the Mitakshara law, as received in Bombay, by which this family is governed, a father cannot, by will, make an unequal distribution of ancestral property, whether moveable or immoveable [57] between his sons. It has, however, been contended that, inasmuch as under the Mitakshara law a father and his sons are during his life joint co-parceners in family estate, and that as it has now been decided by the Courts in the south and west of India that one co-parcener may, by act *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of his contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be divided between the brothers to two-thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of Bombay in 1861 was that, the respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of moveable,

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though it might be ancestral property; and that the Supreme Court had no power to make a partition of the immoveable property which was beyond the limit of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th clause of s. 1 of Act XIV of 1859, which is as follows:—

"To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property, and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, the period of 12 years from the death of the persons from whom the property alleged to be joint is said to have descended or on whose estate the maintenance is alleged to be a charge or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

[58] In considering the application of this enactment to the present suit, we may leave out all that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property." The section gives two periods from which the twelve years may be calculated; one is "the death of the persons from whom the property alleged to be joint is said to have descended," and the other is "the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate."

It is contended that, in this case, which is governed by the Mitakshara law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the Statute of Limitation, but the grandfather, on whose death the father and his sons all became co-parceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended, but for the present purpose it may be assumed that the property descended from the grand-father as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice Holloway and Mr. Justice Collet in *Govindan Pillai* v. *Chidambara Pillai andothers* (1) as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the Mitakshara law though such difficulty would not exist in the case of a like family governed by the law of Lower Bengal. They are not prepared, however, to affirm that in this particular case the father may not be held to be "the person from whom the property alleged to be joint is said to have descended" within the meaning of the Act. The claim is two-fold. It is to establish the right of the plaintiff as a co-parcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to [59] which he became entitled on the father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned,

(1) 3 M. H. C. R. 99.

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the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of disposition over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument with the learned counsel for the respondent have founded on the possession by the respondent since 1858 of the family house at Shahapur. How do the facts on this part of the case stand ? The respondent was, unquestionably, a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has, ever since 1858, been in possession of the house at Shahapur, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the appellant was a party, and also by the father when he made his will, as continuing to be joint family property. The contention of the appellant and of his father seems to be embodied in the 4th issue in the suit, *viz.*, that the respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a co-parcener as he would have done upon a formal partition. This issue has, however, been found by both Courts in favour of the respondent, who must, therefore, be taken to be entitled to his full rights as a co-parcener, except so far as he may be barred from asserting them by the Statute of Limitation. Now, so far as the immoveable property of the family is concerned, there seems to be no ground **[60]** for the application of the statute. Not only has the respondent all along been in the enjoyment of part of that property, *viz.*, the house at Shahapur, but, under the 14th section of the Act, he is entitled to exclude from the computation of the period of limitation the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immoveable property, proceeded on the ground of want of jurisdiction over it. There is, therefore, no bar in this case to a suit for the partition of the immoveable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Mr. Justice Holloway in the case above referred to, is necessary to lay the ground for the application of the statute at all. It is argued, however, on the part of the appellant that the claim is substantially claim to share in the ancestral business and other moveable property, and that the right to do so has been barred by reason of the respondent having received no payment thereout since 1858. Their Lordships will assume that the claim as to the moveable may thus be treated as distinct from that as to the immoveable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the appellant is in this case estopped by the proceedings of the Supreme Court of Bombay from setting up the statute as a bar to the respondent's claim. They treat the order of the 30th of August 1861, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the respondent was not entitled to sue in his

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father's lifetime for a partition of the moveable property, and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the Statute of Limitation because it was erroneous in point of law, and the respondent ought to have appealed from it. There seems, to their Lordships, to be no warrant in law for such a contention. For the above reasons, they are of opinion that the plea of limitation cannot be maintained.

[61] The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this appeal, and they have not the advantage of having the judgment of either Indian Court upon it. 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. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay which have been recognised by this Committee as establishing that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The Madras High Court has gone further and ruled that an alienation by gift, or other voluntary conveyance *inter vivos* will also be valid against the non-assentient co-parceners. And assuming this latter proposition to be law, the learned counsel for the appellant have insisted that it follows as a necessary consequence 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.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay, notably *Basudeb Bhat* v. *Venkatesh Sanbhav*(1) and *Udaram Sitaram* v. *Ranu Panduji and another* (2), have ruled that a co-parcener cannot, without the consent of his co-sharers, either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of the testamentary power over the undivided share fails.

Again, the High Court of Madras, though admitting that a coparcener can effectually alienate his share by gift, has ruled that [62] he cannot dispose of it by will (see the case reported, 8 Madras H. C. Rep., p. 6). Its reasons for making the distinction between a gift and a devise are, 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 which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (3), and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground

(1) 10 B.H.C.R. 139. (2) 11 B.H.C.R. 76. (3) 6 I.A. 88=5 C. 148.

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PRIVY COUNCIL.

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that the proceedings had then gone so far in the lifetime of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned counsel for the appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1), above referred to, they observed: "There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently 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 [63] that decision. The appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The costs of the appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.

Solicitors for the appellant.—Messrs. *Ashurst, Morris Crisp & Co.*

Solicitors for the respondent.—Messrs. *Ramsdem* and *Austin.*

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5 B. 63=5 Ind. Jur. 425.

APPELLATE CRIMINAL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

EMPRESS *v.* BALA PATEL. [7th April, 1880.]

Confession—Evidence—Indian Evidence Act I of 1872, *s.* 30—*Joint trial—Dacoity—Receiving stolen property—Indian Penal Code, ss.* 395 *and* 412.

A and *B* were committed for trial; the former for dacoity under s. 395 of the Indian Penal Code, and the latter under s. 412 for receiving stolen property knowing it to be such. *A* made two confessions, and in both he stated he had handed over to *B* some pieces of gold and silver stolen at the dacoity. When *B* was

(1) 6 I.A. 88=5 C. 148.