

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 Bansi 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. *Ramsden and Austin.*

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.

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5 B. 48
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7 I.A. 181=
4 Sar. P.C.J.
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arrested a gold ring and a silver wristlet were found in his possession. At the trial *A* pleaded guilty and *B* claimed to be tried. A goldsmith deposed that he had made the ring and wristlet found with *B* out of pieces of gold and silver given to him for the purpose by *B*. On this evidence and on the confessions made by *A* the Session Judge convicted *B*. On appeal to the High Court.

Held that *A* and *B* not having been tried jointly for the same offence, the confession of *A* was inadmissible as evidence against *B*. There was therefore no evidence of the identity of the goods stolen at the dacoity with those found in *B*'s possession, and the case against him failed. Conviction quashed.

[R., 6 Bom.L.R. 517 (518).]

THE accused Bala Patel and one Bayaji were committed for trial by C.W. Richardson, Magistrate, First Class, at Satara, before the [64] Session Court. Bayaji was charged with dacoity under s.395, and the accused Bala Patel with receiving property knowing it to be stolen at the dacoity, under s. 412 of the Indian Penal Code. Bayaji had made two confessions, one before a third Class Magistrate immediately after his arrest, and the other, before the committing Magistrate at the preliminary investigation. In both of them, he stated, among other things, that at the request of the leader of the dacoits, he handed over some pieces of gold and silver stolen at the dacoity to Bala Patel. But in his first confession to the Third Class Magistrate, he had stated that they had been tied up in a piece of cloth and that he had not opened the bundle to see its contents. In the Session Court, Bayaji pleaded guilty and he was convicted and sentenced to transportation for ten years. Bala claimed to be tried and the Session Judge proceeded with his trial. When Bala was arrested, a gold ring and a silver wristlet were found in his possession, which were alleged to have been made of the pieces of gold and silver he had received from Bayaji. The Session Judge, on the confession of Bayaji to the committing Magistrate and on the evidence of a goldsmith who stated that he had made the ring and wristlet from pieces of gold and silver given to him for the purpose by Bala, convicted him of the offence charged and sentenced him to suffer rigorous imprisonment for three years and to pay a fine of Rs. 200.

Bala appealed to the High Court against the conviction and sentence.

Macpherson (with him *G. B. Kirloskar*), for the accused.—The only evidence in this case is the confession of Bayaji. But Bayaji and the present appellant were charged with different offences. Bayaji's confession, therefore, is inadmissible against the appellant under Act I of 1872, s. 30. The section itself is very clear, and is made still more so by the ruling of this Court in *Reg v. Amrita Govinda* (1). The learned counsel also referred to *Reg v. Kalu Patel* (2), the *Queen v. Jaffer Alli and others* (3):

Nanabhai Haridas, Government pleader, appeared for the Crown.

JUDGMENT.

WESTROPP, C.J.—The sole evidence of the identity of the goods stolen at the dacoity with those found in the possession of the [65] accused Bala is the confession to the committing Magistrate by the accused Bayaji, who has pleaded guilty to the charge of dacoity—a charge different from that made against Bala; *viz.*, receiving property knowing it to be stolen. That evidence, therefore, was inadmissible against Bala as he and Bayaji were not "being tried jointly for the same offence." Indian

(1) 10 B. H. C. R. 497 (499).

(2) 11 B. H. C. R. 146.

(3) 19 W. R. C. R. 57 (64).

Evidence Act, s. 30; *Reg. v. Amrita Govinda* (1). The evidence being legally inadmissible, the case against Bala fails. But even if that evidence had been legally admissible, it would have been extremely dangerous to have acted upon it, inasmuch as Bayaji had, in his previous confession to the Third Class Magistrate, stated that the goods which he gave to Bala were "wrapped in a piece of cloth" which bundle he (Bayaji) did not open to see which it contained.

The Court quashes the conviction and sentence, and directs the prisoner to be discharged, and the fine, if paid, to be returned.

Conviction and sentence reversed.

5 B. 65 = 5 Ind. Jur. 426.

APPELLATE CIVIL.

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

SORABJI FARDUNJI (*Original Defendant*) v. DULABHBHAI HARGOVANDAS AND OTHERS (*Original Plaintiffs*), Respondent.*
[7th June, 1880.]

Partnership—Jurisdiction of District Court to wind up under s. 265 of Indian Contract Act—The Indian Contract Act, IX of 1872, ss. 354 and 265—The Bombay Civil Courts Act No XIV of 1869—Power of District Judge to refer to Assistant Judge a case falling under s. 265 of Contract Act.

A previous dissolution of partnership is necessary, in order to give jurisdiction to the District Court under s. 265 of the Indian Contract Act.

Accordingly, where a suit was instituted in the District Court of Ahmedabad, by some members of a partnership (which, however, was not dissolved at the date of the suit) for the winding up of the business of a ginning factory and for distributing among the shareholders any surplus that might remain, after providing for the payment of its debts, under s. 265 of Act IX of 1872, and the Assistant Judge, to whom it was referred for trial by the District Judge, directed the dissolution of the partnership and the winding up of its business, the High Court, on appeal, reversed the decree of the Assistant Judge and returned the plaint to the plaintiffs for its presentation to the proper Court.

[66] *Quare*.—Whether the District Judge had power, under the Bombay Civil Courts' Act XIV of 1869 to refer to the Assistant Judge a case falling under s. 265 of the Act IX of 1872.

[R., 6 B. 143 (144) ; 10 O.C. 669 (674).]

THIS was an appeal from the decision of A. L. P. Larken, Assistant Judge at Ahmedabad.

The plaintiffs, Dulabhbhai and others, brought this suit against Sorabji Fardunji, under s. 265 of the Indian Contract Act. The plaintiffs alleged in the plaint that on the 7th October 1877, they, the defendant, and one Kavasji Ratanji (who subsequently joined the suit as a plaintiff) opened a ginning factory in partnership and appointed the defendant as manager for conducting its business, under a deed dated the 17th of the same month; that the defendant mismanaged the business and acted fraudulently and contrary to the condition stipulated in the deed; that he did not furnish the shareholders with a statement of the accounts of the factory, and that his mismanagement caused loss to the concern.

* Appeal No. 7 of 1880.

(1) 10 B.H.C.R. 497.

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