

of it. The Subordinate Judge dismissed the suit, holding that the Plaintiffs had no right of ownership in the land, but that they were only mortgagees. In appeal, the Assistant Judge reversed that decree, and allowed the plaintiff's claim, principally on the ground that the defendants failed to prove the plaintiffs to be mortgagees of the land, as alleged by them. In special appeal (which was preferred by the defendants), it was contended on their behalf that the Assistant Judge had wrongly placed the burden of proof on them.

The following is the judgment of the High Court (Sargent, C.J., and Melvill, J.):

Per Curiam.—We think that there is ground for the appellants' objection that the Assistant Judge has placed the *onus probandi* on the wrong party. The plaintiff in such cases is bound to prove his title affirmatively (see 2 Mad. H. C. Rep. 171). But the Assistant Judge seems to have made the declaratory decree asked for, not on the ground that the plaintiffs have proved that they are owners, but because the defendants have failed to prove that the plaintiffs are mortgagees. We, therefore, reverse the Assistant Judge's decree, and remand the case, in order that the Court below may find whether the plaintiffs have proved their title, and may pass a new decree, awarding costs (16th July, 1872).

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APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

LAKSHMAN MAYARAM (ORIGINAL PLAINTIFF), APPELLANT, v. JAM-NABAI, WIDOW OF DAYARAM MAYARAM (ORIGINAL DEFENDANT), RESPONDENT.*

February 7.

Hindu law—Gains of science—Self-acquired property—Partition.

The acquisition of a distinct property by a member of an undivided Hindu family without the aid of joint funds is his self-acquired property, and is not subject to partition; but the improvement or augmentation of the family property by the exertions of one of the members is subject to division.

Hindu law texts regarding gains of science establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance; but that it is otherwise when the science has been imparted at the expense of persons who are not members of the acquirer's family.

When the Hindu texts speak of the gains of science, they intend the special training for a particular profession which is the immediate source of the gains, and not the general elementary education which is the stepping stone to the acquisition of all science. Consequently, the property acquired by a Subordinate Judge who had received elementary education at the family expense, but a knowledge of law and judicial practice without such aid, is impartible.

The ruling of the Privy Council in *Luximon Rao Sudasew v. Mullar Rao Bajec* (1) interpreted to mean no more than the law as now settled, viz., that when there is

* Regular Appeal, No. 9 of 1881.

(1) 2 Knapp, 60.

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ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate.

Case of *Bai Mancha v. Narotamdas* (1) distinguished.

Dictum of Mitter, J, in *Dhunookdharee v. Gunpat Lall* (2)—that the Hindu law nowhere sanctions the contention that the acquisition of a member of a Hindu family who has received education from the joint estate is liable to partition—commented on as not strictly correct.

THIS was an appeal from the decision of A. M. Cantem, Subordinate Judge (First Class) at Belgaum.

The facts of the cases and the authorities cited fully appear from the judgment of the High Court.

Ghanasham Nilkanth Nadkarni for the appellant.

The following texts were cited by him :—

Manu by Grady, ch. ix, secs. 204, 205, 206, 207 and 208, pp. 214 and 215 ; Mitakshara, ch. i, secs. 1, 6, 15, 29, 30 and 31 ; Stoke's Hindu Law Books, pp. 384, 385, 387 and 390 ; Daya Bhag by Jimut Vahan, ch. vi, sec. 1, paras. 3, 4, 5, 6, 15 and 18 ; Stoke's Hindu law Books, pp. 266, 267, 268 and 269 ; Daya Bhag, by Jimut Vahan, ch. vi, sec. 2, para. 1 ; Stoke's Hindu Law Books, p. 280 ; Daya Krama Sangraha by Shri Krishna Tarkalankara, ch. iv, sec. 1, paras. 3, 4, 7 and 8 ; Stoke's Hindu Law Books, pp. 501 and 502 ; Jaganath's Digest by Colebrooke in two vols. (3rd ed.), Vol. 2, pp. 444 *et seq.* ; Vivad Chintamani by Vachaspati Mishra, translated by Prossono Coomar Tagore, pp. 249 to 253 ; Vyavahar Mayukha by Nilkantha, ch. iv, sec. vi, paras. 1 to 10 ; Stoke's Hindu Law Books, pp. 73, 74 and 75 ; Smriti Chandrika by Devanna Bhat, translated by T. Krishna Sawmy Iyer, ch. vii, paras. 2, 4, 5, 6, 7, 8, 9 and 29, pp. 77 to 85.

K. T. Telang, with him *G. R. Kirloskar*, appeared for the respondent.

The following judgment of the Court was delivered by

MELVILL, J.—There is little or no dispute as to the following facts, though there may be some doubt as to the accuracy of the earlier dates.

The plaintiff's father, Mayaram, came to Dharwar about fifty years ago. He is said to have been at first a jamadar of peons

in the Collector's office. He was then appointed deputy jailor on Rs. 20 or Rs. 30, and subsequently jailor on Rs. 50 a month. He lost this situation about the year 1843, but was shortly afterwards appointed kotval of Belgaum, in which post he received a salary, at first of Rs. 15, and afterwards of Rs. 30 a month. In 1846 he retired on a small pension of about Rs. 11 a month. Whether he had any other means, does not clearly appear; but he acquired some land and two or three small houses at Dharwar, as well as two houses at Belgaum,—one of which, however, he sold, and the other he mortgaged during his lifetime. He had two wives, by one of whom he had a son, Dayaram, the husband of the respondent in this case; and by the other, two sons, viz., Lokanath, and the appellant Lakshman. Dayaram's mother died while he was still young. Mayaram's family was with him in Belgaum, but appears to have returned to Dharwar at some time before the year 1855. In 1849, Mayaram took his eldest son, Dayaram, to Bombay, and introduced him to Mr. LeGeyt, who was then a Judge of the Sadar Adalat. Dayaram seems to have found some employment in a barrister's office, and is also said to have supported himself by writing petitions; but after a while he obtained an appointment in the Sadar Adalat, and in 1856 he was made Munsif at Ron, in the Belgaum District. From this time down to his death on the 1st May, 1875, Dayaram was Munsif and Subordinate Judge at Belgaum and other places in the Southern Maratha Country, and for six years before his death was First Class Subordinate Judge at Belgaum on a salary of Rs. 500 a month. Shortly after his death, the elder of his two wives, Bhagirthibai *alias* Krishnabai, adopted Bhowaniram, son of Mayaram's second son, Lokanath, and she was appointed by the District Court administratrix of the minor's estate, although the minor remained in his natural father's house. Bhagirthi died on the 4th August, 1876, and the minor's estate was then placed under the administration of the nazir, while the boy remained in Lokanath's charge. Lokanath died on the 10th January, 1877, and on the 11th May, 1879, the minor, Bhowaniram, also died. The appellant Lakshman then applied to the District Court to be put in possession of the estate in the nazir's hands; but the Court considered that Dayaram's

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surviving widow, Jamnabai, had a preferable title, and the estate was ordered to be delivered over to her. Thereupon the appellant, Lakshman, brought the present suit in which he claims two houses in Belgaum, a house and two fields at Inchal in the Belgaum District, and moveable property valued at Rs. 9,693-1-3. The moveable property consists almost entirely of Government promissory notes, and other securities and money deposited in a bank.

The appellant bases his claim upon three grounds, namely, first, that he and Lokanath formed with Dayaram, (and, of course, with Bhowaniram after Dayaram's death), an undivided family, and that, as the only surviving male member of that family, he is now entitled to the whole estate ; second, that any property which Dayaram may have acquired, has the character of joint property, because it was acquired by means of ancestral property, or was so blended by Dayaram with ancestral property in his hands that it cannot be distinguished from such ancestral property ; and, third, that, even if this were not the case, Dayaram's acquisitions had been obtained by means of an education which had been imparted at the family expense, and, as such, were subject to partition.

The burden of proving either that the family was divided, or that, the family remaining undivided, the property in dispute was Dayaram's separate estate, lies upon the respondent. We proceed to consider whether she has discharged herself from this burden in respect to one or both of the propositions just stated. We may say at once that the oral evidence on both sides appears to us of little value. There is hardly a point on which the witnesses on the one side are not contradicted by those on the other ; and many of the statements made on both sides are too improbable to receive ready credence. We feel bound to draw our conclusions chiefly from the conduct of the parties, and from certain letters (exhibits 57 to 72) written by Dayaram to his father, his step-mother, and his brother Lokanath, between the years 1849 and 1861.

The learned counsel for the respondent has very fairly admitted that the evidence falls somewhat short of what is necessary to establish a partition between Dayaram and his brothers. The

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statements made by some of the witnesses for the respondent—that Dayaram left Dharwar and came to Belgaum, because he could not endure the misconduct of his step-mother, and that, while at school at Belgaum, Dayaram lived and messed separately from his father,—are quite unworthy of credit. The correspondence, to which we have referred, shows clearly enough that Dayaram was on excellent terms with his father Mayaram down to the death of the latter in 1858, and that, after Mayaram's death, the relations between Dayaram and his step mother were of a very friendly nature. The letters leave no doubt in our minds that Dayaram was united with his father down to the latter's death, and that there was no partition between Dayaram and his brothers, at all events down to 1861. Indeed, down to that date, or nearly so, the brothers were minors, and, therefore, not capable of consenting to a partition. Whether between 1861 and 1875, the date of Dayaram's death, there was anything in the nature of a partition between the three brothers, is rather more doubtful. There is certainly no direct evidence of anything of the kind having taken place; and it might be expected that a man of Dayaram's position and legal knowledge would have taken good care that there should be direct evidence of such a transaction, if it had taken place. On the other hand, it is certainly very strange that the correspondence between Dayaram and his brothers should have ceased so abruptly in 1861. The only explanation which the appellant's pleader can offer on this point, is that, after Dayaram went to Belgaum, it was no longer necessary for him to write to his brothers, because Belgaum and Dharwar are in such close proximity to one another. But the distance is nearly 50 miles; and, besides, Dayaram was not continuously Munsif or Subordinate Judge at Belgaum from 1861 to 1875. The explanation, therefore, which is offered is not satisfactory; and in the absence of satisfactory explanation, the sudden break in the correspondence certainly suggests a suspicion that some change must have occurred in the relations between Dayaram and his brothers after the latter attained to man's estate. There is no doubt that the property at Dharwar was, with Dayaram's consent, entered in Lokanath's name, and that Lokanath lived there and looked after it. The oral evidence, that Dayaram took part in the management of it, is weak

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in the extreme ; and there is no documentary evidence that he in any way interfered with his brother Lokanath's management after the latter came of age. It is, moreover, stated by the witnesses on both sides—and there appears to be no doubt of the fact—that, about 1868, Lokanath sold his father Mayaram's house in Belgaum, and that the conveyance was executed in Lokanath's name ; and this although Dayaram was at the time Munsif of Belgaum, and might, therefore, have been expected to join in the sale, if he had retained any interest in the ancestral property. The explanation offered by one of the plaintiff's witnesses (No. 45), viz., that Dayaram did not wish to appear in the transaction, because he was a public servant, and, as such, forbidden to hold immoveable property in the place where he was employed, is, on the face of it, absurd. The prohibition in question, if it then existed, could not have suggested to Dayaram's mind that there was any impropriety in selling his father's house ; and the supposition that he had any scruples of the nature is contradicted by the circumstance that he bought other houses, or, at all events, continued to hold other houses, while he was Munsif and Subordinate Judge of Belgaum. These considerations certainly create a suspicion that there must have been something like a partition between Dayaram and his brothers, or, at all events, a tacit understanding between them that Dayaram should abandon his claim to Mayaram's property, and that his brothers should rest satisfied with the exclusive enjoyment of that property, and such further assistance as Dayaram might see fit to afford to them. As we shall presently see, it is difficult to explain the conduct of Lokanath and the plaintiff after Dayaram's death, except on the supposition that some such understanding existed, or, at all events, that Dayaram's brothers recognized the justice of such a division of the estate. As, however, the respondent's counsel does not insist that there was any partition, and prefers to rest the defence on the ground of self-acquisition, we will go on to consider whether the respondent has proved that the property in suit was acquired by Dayaram in such a manner as to exempt it from the ordinary rule of partition among the members of a united Hindu family.

The case mainly relied upon by the appellant, as bearing upon that division of this question which relates to the existence

of a *nucleus* of ancestral property, is the case of *Luximon Rao Sudasew v. Mullar Rao Bajee*⁽¹⁾. That was a suit brought by the nephew of Sudasew Punt Bhow, the Prime Minister of the Peshwa, to recover from the Bhow's adopted son a share in the very large property left by the Bhow at his death. The grounds on which the claim was founded, were that there had been no division of the ancestral property between the Bhow and his brothers, and that by the Hindu law, until a division of a joint property or inheritance is effected between the members of a family, the acquired fortune of each member falls into and belongs to the common stock, and is divisible accordingly. The defence was that the property did not belong to the common stock, and ought not to be divided, because the Bhow had acquired it by means of his own skill and capacity, without any assistance from the family property. The dispute had been referred to arbitrators, who, after taking the opinions of the different members of the Panchait and also of the shastris employed in the judicial establishments of the Deccan, made an award in the plaintiff's favour. An appeal was made from this award to the Governor in Council in Bombay (the Governor being Mr. Mountstuart Elphinstone), who made a decision in conformity with the award. The case went in appeal before the Privy Council, and in 1831 judgment was delivered by the Lord Chancellor. The judgment is brief, and the material portion of it is as follows. After discussing the question of the *onus* of proof, Lord Brougham said: "Now it appears here very doubtful, and indeed (although we may suspect it) there is no proof in the cause that shows how this property was acquired; but it is perfectly clear, as it appears to their Lordships, that there was some, although not a large, family property in which the Bhow shared, and which was never abandoned by him while he was enjoying his more splendid fortunes in the Darbar at Poona; and it appears, too, from the correspondence that he left his brother in some sort of charge of this property, and always appeared to take an interest in it, and to receive reports respecting the management of it, though his agent complains of not having received any orders from him * * * * * * * *. It cannot, therefore, be said that there was no property,

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though it was very small ; nor can it be said that he gave it up, for he maintained a more immediate connection with it than would be supposed natural to a man placed in a much higher situation than the rest of his family, and separated from it by local circumstances. Upon the whole, viewing this as a question of Hindu law, (upon which it is impossible to speak with any great confidence,) and the question appearing to their Lordships to have been decided upon proper grounds, throwing the proof upon the right party, and that proof not having been given, it is their opinion that the decree appealed against must be affirmed."

It is contended, and certainly not without some show of reason, that the circumstances of the case just cited are on all fours with those of the present suit. Here, as there, we have a small amount of ancestral property, to which it is not shown that Dayaram ever formally abandoned his claim, though there is, as we have said, strong reason to suspect that he did so. Here, as there, we have a brother left in charge, while Dayaram was enjoying his more splendid fortunes elsewhere ; and we have a correspondence showing that, at all events down to 1861, Dayaram took an interest in, and received reports regarding the management of the ancestral property. But, after a very careful and respectful consideration of the observations of the Privy Council in the case cited, we do not think that it gives any very strong support to the plaintiff's case. It is impossible not to perceive that Lord Brougham's judgment gives forth an uncertain sound. The Hindu law had not at that time been studied with that attention which has since been devoted to it ; and Lord Brougham found it impossible to speak with any great confidence upon a question of Hindu law which has since been settled as clearly as such questions can be settled. If full effect be given to the words of the judgment which we have quoted, it would come to this, that so long as there is any ancestral property, however small, and so long as any member of the family shares in such property, and has not abandoned it, all acquisitions of such member are subject to partition. That would be equivalent to saying that no member of a united family, who shares in an ancestral property, can acquire any separate property. Their Lordships cannot have meant this ; for, if they had, they would not have troubled themselves to

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consider whether the defendant had proved that the property in dispute had been acquired by the Bhaw. The judgment is probably not very well reported ; but, taking it as a whole, we have no doubt that what their Lordships intended was this : that, when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. This proposition, so stated, is, no doubt, strictly in accordance with the law as now settled. In *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*⁽¹⁾ the Judicial Committee say : " It is allowed that this was a family who lived in commensality, eating together, and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of, was joint property until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case with regard to any part of the property. Now, what has been relied upon with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it ; but all that is perfectly consistent with the notion of its having been joint property ; and, even if it had been joint property, it still would have been treated exactly in the same manner. We have heard from the highest authority, from the authority of Sir Edward East and Sir Edward Ryan, whose most valuable assistance we have in this case, (and it gives me a confidence that I should not otherwise have felt) that the criterion in these cases in India is to consider from what source the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid ; therefore, I think, that, so far on this point of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property."

We may also refer to a case decided by the Supreme Court at

(1) 3 Moore's Ind. App., 229.

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Calcutta in 1843, which has been much relied on by the appellant, as showing that, when the earnings of one member of a family have been blended with the family property, the whole must be considered as joint estate. That is the case of *Guruchurn Doss v. Golukmoney Dossee*(1). The bill showed that Ram Mohan Doss, whose property was the subject of dispute, died, leaving two sons, Ramkistno Doss and Doorgapersaud Doss. Ramkistno Doss was blind, and consequently Doorgapersaud was manager of the joint property, and in consequence of his brother's blindness treated the whole property as his own, and made his will on that supposition. In the trial of the cause it became material to determine whether Doorgapersaud Doss had any separate estate and property at the time of his death; and on that issue the Court found the following special verdict:—"That there was ancestral property which descended from Rammohan, the father of Doorgapersaud, at the death of the said Rammohan. That Doorgapersaud, by his own industry as clerk in several offices and by mercantile dealings, greatly increased the property, and died possessed of the said family property and of such addition thereto. That there is no evidence of any origin of the property of which he so died possessed, except such ancestral property and such his industry. That he lived and died in the same house with the other members of the family as a member of an undivided Hindu family." To the state of facts so found the Court had to apply the law. Peel, C.J., observed: "If the fact had been that the earnings of Doorgapersaud, which were in their own nature his separate property, had not been blended with the ancestral property and its augmentations, proof of that fact would have entitled the plaintiff to a verdict on the trial of the issue." * * * * * "Upon an attentive perusal of the words of the finding, they appear to me to exclude the existence of any acquisition unblended with the joint fund, to show that the property was at the death of Durgapersaud the same fund, but augmented by the two distinct sources and origins of increase specified in the verdict." * * * * * "The unity of the fund being established, whether the additions thereto be termed an increment, or augmentation, or improve-

(1) 1 Fulton 165.

ment, and whether they be derived in the one mode or the other of the modes of increase above referred to, the division must according to the authorities, be made by an equal partition." Grant, J., said : "Durgapersaud's industry was employed in two ways : first, as a clerk ; second, in mercantile dealings with the common stock, *i. e.*, 'the improving and augmenting the common stock (or patrimony descended) through commerce,' in the very words of the Mitakshara. The only part of the accumulated wealth he died possessed of, which could have accrued by any other than the dealing with the ancestral property, was such savings as might have been made from his salary as a clerk. But if his salary was mixed up with the proceeds of the inheritance, it must be taken as blended with them for the common benefit of the family, as such admixture has in all cases been taken. As, on the one hand, an inconsiderable benefit derived to the acquirer from inherited property shall not convert into an *improvement* of that property what is, in fact, a new *acquisition by separate industry*, so, on the other hand, an inconsiderable contribution by separate industry to the general stock, or to the maintenance of the family, should not convert what is substantially the *improvement and augmentation of the inheritance* into a *new acquisition by separate industry*." The whole of the judgments in this case will well repay a careful study ; but it is unnecessary for us to quote further from them. The distinction drawn by the Court was between the acquisition of a distinct property without the aid of the joint funds, and the mere improvement or augmentation of the family property by the exertions of one of the members. In the one case it was held that the acquired property would be impartible ; in the other, that the accretions to the original estate would be subject to division.

In the present case, then, the question which we have now to decide is, whether the respondent has proved that the purchased money of the estate in dispute came from Dayaram's separate funds, or whether, on the contrary, there is any sufficient ground for holding it to be a mere augmentation of the common stock.

Now the property left by Mayaram was undoubtedly of very small value. There was a house at Belgaum, but it was heavily mortgaged, and, as we have already said, it was ultimately sold

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by Lokanath, and it is not proved that Dayaram received any of the purchase money. The land at Dharwar is said to have yielded about Rs. 200 *per annum*, and some small sum may perhaps have been obtained from the houses at the same place. It is alleged by the appellant that these rents were received by Dayaram. The evidence on this point is very weak. Witness No. 42 says that he held the land for seven or eight years, that he gave it up ten years ago, and that during the term of his tenancy he paid rent to Dayaram. He has, however, no receipts, and it is remarkable that no tenant should be forthcoming who can say that he has paid rent to Dayaram within the last ten years. There are some witnesses who state vaguely that Dayaram used to come to Dharwar during the Court vacations, and receive the rents; but it is impossible to hold that there is any satisfactory proof that, at all events subsequently to 1861, Dayaram received anything from the Dharwar property. Assuming, however, that he did receive the rents, it is quite certain that none of the money remained in his pocket. It is in evidence that the marriage expenses of Lokanath and the appellant were defrayed by Dayaram; and it is also admitted by the appellant's pleader that the amount uniformly allowed by Dayaram for the maintenance of his brother and step mother at Dharwar exceeded the amount which appears to have been realized from the rents of the property. Witness No. 43 says that Dayaram sent from Rs. 10 to Rs. 30 monthly, and witness No. 27 states that from 1863 to 1875 Dayaram sent regularly every month from Re. 1 to Rs. 15, and occasionally from Rs. 50 to Rs. 100. The appellant's pleader puts the amount at Rs. 30 *per mensem* on an average. The correspondence also shows that sums were from time to time paid by Dayaram on account of repairs to the Dharwar property. It follows conclusively that from this source Dayaram could not have derived any part of the purchase-money of the property in dispute. On the other hand, his salary appears to have been amply sufficient to have furnished the funds for the purchase. We are told that in 1863 he bought land at Inchal worth Rs. 500. In 1864 he bought a house at Belgaum worth Rs. 3,000. In 1866 he bought a house at Inchal worth Rs. 1,000. In 1872 he purchased another house at Belgaum

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worth Rs. 1,000. These are the valuations now put upon the property by the appellant, though they were stated at a less amount in his plaint, and the estimate is alleged by the respondent to be in excess of the true value. We have no means of saying what Dayaram actually gave for the houses and land; but, supposing the amounts to have been as stated above, it is impossible to say that Dayaram's income was not sufficient to provide funds for the purchase, not only of the immoveable property, but also of the promissory notes and other securities left by him at his death. We do not know what his salary was when he was in the Sadar Adalat; but after the year 1856, when he became a munsif, he could never have received less than Rs. 100 a month. Several civil lists have been produced by the appellant's pleader in Court which show, as we are told, that, at all events from 1866, Dayaram drew Rs. 200 a month, in 1869 Rs. 400, and from that time till his death in 1875 Rs. 500 a month. His letters show that he was very careful, if not penurious, in money matters; and there can be little doubt that he saved a very large portion of his salary.

An attempt has been made by the appellant to show, by direct evidence, that Dayaram received a considerable amount of family property after Mayaram's death. The story is that Mayaram, just before his death, locked up in a box jewels of the value of Rs. 2,000, and Rs. 4,000 in cash, and gave the box to the witness Venkatsing for delivery to Dayaram. About three months after Mayaram's death, Dayaram went to Dharwar, and received the box from Venkatsing. The Subordinate Judge has held the evidence produced in support of this story to be entirely false; and we see no sufficient reason to dissent from his conclusion. The witness Lakshmansing stated in Court on a former occasion that the box was delivered by Venkatsing to a peon sent by Dayaram; while in his present deposition he says that he saw it delivered by Venkatsing to Dayaram himself. This witness, therefore, can hardly be regarded as reliable; and no other member of the "panch", in whose presence the delivery of the box is alleged to have taken place, has been called to support the story. But the most serious objection to the story is the apparent impossibility that Mayaram at his death could

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have been possessed of Rs. 2,000 in ornaments and Rs. 4,000 in cash. Mayaram never received a very large salary. He retired in 1846 on a pension of only Rs. 11 a month. Subsequently to that date, he had no means of raising money except by mortgaging his house—for the purpose, we are told, of paying the expense of taking Dayaram to Bombay. If, then, Mayaram had no money, and was obliged to run into debt in 1849, how are we to suppose that between that date and 1858 he was able to accumulate Rs. 4,000 out of his pension and the very small rents of his Dharwar property.

But, after all, the best proof that the property in dispute was the acquisition of Dayaram is furnished by the conduct of the members of the family.

They had the best means of knowing the fact, and the appellant and Lokanath had the best reason for disputing it, if it was not a fact. But it is quite clear that, during Dayaram's life, they never dreamed of setting up a claim to any of the property in his hands, nor does it appear that Dayaram ever rendered to his brothers any account of his savings or his investments. It is true that he sent them money; but the amount was quite insignificant in comparison with what they were entitled to, if Dayaram's salary was liable to partition. And, in sending the money, it is apparent that Dayaram did not do so, because he recognized any right on the part of his brothers to demand it. To take a single example, we find in the last letter to Lokanath (exhibit 72) the following passage: "You and Lakshman should take pains, and continue to earn so much, at least, as is required for your expenses. You are no longer quite young. If you should want any assistance, you may occasionally ask for it. But if you sit idle, and continue to trouble me frequently, I will not listen to it". We have already mentioned that, after Dayaram's death, his widow, Bhagirthibai, entered upon the administration of the whole of Dayaram's estate on behalf of the adopted son. There appears to have been no opposition on the part of Dayaram's brothers. Bhagirthibai administered the estate till her death without any remonstrance or complaint, although the District Judge says (exhibit 9) that she was an imprudent manager and wasted the estate. Neither Lokanath nor the plaintiff

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objected to the administration of the nazir after Bhagirthibai's death, and we find Lokanath speaking of the allowance made to his mother by Dayaram and Bhagirthibai as if it had been an act of bounty on their part. When Lokanath died, the appellant made an application (exhibit 54) to the Court, in which he certainly stated that he, Lokanath, and Dayaram, had been a united family, and that there had been no partition of the ancestral and self-acquired property; but even then he made no claim on his own account, but simply asked that a different arrangement might be made for the maintenance of the minor. The proceedings throughout show that, just as Dayaram's administrators never thought of taking charge of the Dharwar property, so neither Lokanath nor the appellant ever dreamed of setting up any claim to the property in dispute until after Bhowaniram's death. It is suggested that Lokanath may have forborne to do so, because Bhowaniram was his natural son. This is not likely; but, at any rate, there is no explanation of the appellant's long acquiescence in the continuance of a state of affairs so inconsistent with the rights which he now alleges. Since 1865 he has been employed in the police;—not so lucrative a profession, we may suppose, as to render him indifferent to the acquisition of Rs. 3,000 in ready money, which, if his present contention be true, he has been in a position to claim at any moment since Dayaram's death in 1875. The only possible inference from his conduct appears to us to be that until Bhowaniram's death he always regarded the property in dispute as the acquisition of Dayaram, and, consequently, as the exclusive property of Dayaram and, after Dayaram's death, of his adopted son; and the fact that he so regarded it and acquiesced in its being dealt with accordingly, affords the strongest proof that the property was so acquired.

For these reasons we are of opinion that the respondent has proved that the property was acquired by Dayaram solely by means of his own exertions, and not by the aid of the ancestral estate.

It remains to consider the argument that, even on the assumption that Dayaram acquired the property out of the salary earned by him as Munsif and Subordinate Judge, yet the property is none the less subject to partition, inasmuch as Dayaram's education was imparted to him at the family expense.

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The evidence as to Dayaram's education is very conflicting, and none of it appears very reliable. For the appellant it is alleged that he was educated in Marathi, Kanarese, and English, by a private tutor, whom Mayaram retained on a salary of Rs. 4 *per mensem*. If this be so, the education so cheaply obtained is not likely to have been very extensive. The respondent's case is that Dayaram was educated in the Mission School at Belgaum, which is probably the case. But, by way of improving the story, the witnesses add that Dayaram was supported by a charitable allowance from the missionaries. As Mayaram held a respectable and fairly well-paid appointment in Belgaum, this is unlikely; but it is likely enough that Dayaram received a free education in the Mission School, in which case it could not be maintained that he received his education at the family expense merely because he was maintained at the family expense, while he was receiving his education. We will, however, for the sake or argument, assume that Mayaram did pay something for such education as Dayaram received before he went to Bombay. When we proceed to consider what this education amounted to, we see no reason to believe that it consisted of anything more than the ordinary elementary education—reading, writing, and arithmetic—which is likely to have been imparted at a Mission School in Belgaum thirty or forty years ago. The question to be decided is, whether the circumstance, that Dayaram acquired such an ordinary education, while a boy, at the family expense, rendered him incapable of calling his salary his own, when he rose by his learning and merits to the position of a judge.

We do not think it necessary to enter upon a disquisition regarding the numerous texts of Hindu law which have been cited to us by the learned pleader for the appellant. Those texts, or most of them, have been set out and discussed in the case of *Chalakonda Alasani v. Chalakonda Ratnachalam* (1), which has long been a leading authority on the subject. That was a case in which the adoptive mother of a dancing girl claimed her property, on the ground that it had been acquired by skill imparted at the mother's expense. The High Court of Madras, overruling a very elaborate judgment of the Civil Judge, decided that, if those

(1) 2 Mad. H. C. Rep. 56.

gains were to be considered as the gains of science, they were joint property of the acquirer and her mother. The authority of this case was recognized in general terms by Couch, C.J., in *Bai Mancha v. Narotamdas* (1), in which the question was whether the earnings of a vakil were partible. It is to be observed, however, that the vakil united the business of money-lender with that of pleader, and that there was joint property of which he had the use: so that perhaps this case can hardly be regarded as of any great authority on the point. On the other hand, in *Dhunookdharee Lall v. Ganpat* (2), Mitter, J., said: "The plaintiff's case in the Court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu law, and I see nothing in justice to recommend it." This last case was, in a measure, approved and some doubt thrown on the authority of the Madras and Bombay cases by the Judicial Committee in *Pauliem v. Pauliem* (3) in which the following passage occurs:—"This being their Lordships' view, it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant—which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives *any education whatever* from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property—is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited, go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of Sutherland's Weekly Reporter—*Dhunookdharee Lall v. Ganpat* (4), in which a judgment was given by Mr. Justice Jackson and Mr. Justice Mitter, both very high authorities—lays down the law bearing upon this

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(1) 6 Bom. H. C. Rep. 1.

(3) I.L.R., I Mad. 252; 4 Ind. App. 109.

(2) 10 Calc. W. Rep. 122.

(4) 10 Calc. W. Rep. 122.

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subject by no means so broadly as it is laid down in the two cases which have been quoted as decided in Madras ; the first being to the effect that a woman adopting a dancing girl, and supplying her with *some* means of carrying on her profession, was entitled to share in her gains (*Chalakovda Alasani v. Chalakovda Ratnachalam*⁽¹⁾) ; and the second to the effect that the gains of a vakil who has received no *special education* for his profession are to be shared in by the joint family of which he was a member (*Durvasala Gangadhurudu v. Durvasala Narosamma* ⁽²⁾); decisions which have been to a certain extent also acted upon in Bombay (*Bai Mancha v. Naratomdas* ⁽³⁾). It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the Courts of Bengal is not more correct than what appears to be the doctrine of the Courts of Madras.”

It certainly appears to us that the dictum of Mitter, J., that the proposition which we are considering “ is no where sanctioned by Hindu law”, is not strictly accurate. The texts which have been cited to us do, in our opinion, establish it as a rule of Hindu law that the ordinary gains of science are divisible, when such science has been imparted at the family expense, and acquired while receiving a family maintenance, but that it is otherwise when the science has been imparted at the expense of persons who are not members of the student’s family. But the question still remains, whether the term “science”, as used in the texts, is, in modern days, to be construed as meaning a mere general education, and not rather a special training for a particular profession. The words which we have italicised in the judgment of the Judicial Committee in *Pauliem v. Pauliem*, as well as an observation of one of their Lordships, in the course of the argument, that the Madras case of the dancing girl was a case of a special training, and not necessarily applicable to a case of general training, may seem to indicate that, if the question comes again before their Lordships, it will be considered chiefly with regard to the nature and extent of the education imparted at the family expense. Mr. Mayne, in his valuable work on Hindu law, discusses

(1) 2 Mad. H. C. Rep., 56.

(2) 7 Mad. H. C. Rep., 47.

(3) 6 Bom H. C. Rep., 1, A.C.J.

this question with his usual ability. "It is difficult", he says (S. 256), "to see why a person who has made gains by science, after having been educated or maintained at the family expense, should be in a worse position than any other person who has been so educated or maintained, and who has afterwards made self-acquisitions. Jimuta Vahana lays it down that, where it is attempted to reduce a separate acquisition into common property on the ground that it was obtained with the aid of common property, it must be shown that the joint stock was used for the express purpose of gain. 'It becomes not common merely because property may have been used for food or other necessaries, since that is similar to the sucking of the mother's breast.' This seems to be good sense. If a member of a joint Hindu family were sent to England, at the joint expense, to be educated for the Bar or the Civil Service, it seems fair enough that his extra gains should fall into the common stock, as a recompense for the extra outlay incurred. It might be assumed that, when the outlay was incurred, the reimbursement was contemplated. But it is different where all start on exactly the same level, with nothing but the ordinary maintenance and education which is common to persons of that class of life."

We think that we shall be doing no violence to the Hindu texts, but shall be only adapting them to the condition of modern Hindu society, if we hold that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the necessary stepping stone to the acquisition of all science. Adopting this principle, and applying it to the present case, we find, as we have said, that there is no reason to suppose that Dayaram acquired at Dharwar and Belgaum anything more than a rudimentary education. We see no reason to doubt that the knowledge of law and judicial practice which qualified him for the post of a judge was acquired by him in a lawyer's office in Bombay and in the Sadar Adalat. Assuming that the burden of proving that this knowledge was acquired without any aid from the family estate lies upon the respondent, (though the observations of the Privy Council in *Luximon Rao Sudasew v.*

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Mullar Rao Bajee⁽¹⁾ tend to the opposite conclusion,) we find sufficient in the evidence, and especially in the earlier letters written by Dayaram from Bombay, to show that Dayaram was not receiving pecuniary aid from his father, but on the contrary was supplying his father with such money as he could spare.

We are, therefore, of opinion that the appellant's case fails on all the grounds on which it has been rested; and we, accordingly, affirm the decree of the Subordinate Judge with costs.

Decree affirmed.

2 Knapp, 60.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

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September 13.

NAWAB MIR KAMALUDIN HUSENKHAN (ORIGINAL PLAINTIFF),
APPELLANT, v. PARTAP MOTA (ORIGINAL DEFENDANT), RESPONDENT.*

The Summary Settlement (Bombay) Act VII of 1863, Secs. 2, 6, 9—Jaghirdar—Inamdar—Suit for contribution—The Indian Contract Act IX of 1872, Secs. 69 and 70.

The plaintiff was the *jaghirdar* of a village in which the defendant held certain land as *inamdar* on the annual payment of a certain quit-rent. The plaintiff's *jaghir* was, in point of time, subsequent to the defendant's *inam*. Ever since the time of the *jaghir*, the ancestors of the defendant (and, after them, the defendant himself) paid the quit-rent to the ancestors of the plaintiff, and, after them, to the plaintiff himself. In 1869 the summary settlement was introduced into the village under Bombay Act VII of 1863. Under section 9 of that Act, a notice was served upon the plaintiff by the Collector in respect of the village, and he accepted the settlement provided in sections 2 and 6 of the Act. Government, accordingly, granted the village to him at the summary settlement of two annas in the rupee of the full assessment. No notice was served upon the defendant under the Act, nor did the plaintiff inform the defendant of the notice which the plaintiff had received in respect of the village. The certificate issued by the Collector to the plaintiff, previously to the grant of the *sanad* regarding the settlement, contained the following passage:—"Before the villages (Vesu and Sanya) were granted in *jaghir*, lands were held by *petu-inamdars* over which the *jaghirdar* has no right. They are entered in the *sanad* only for the purpose of receiving the settlement and paying it over to the Sarkar." In 1877 the plaintiff sued the defendant for the amount of three years' summary settlement which he (plaintiff) had paid to Government on account of the defendant's land.

* Second Appeal, No. 150 of 1880.