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to leave it to the owner or occupier to adopt such measures as he pleases to carry out the demand of the Commissioner. It is not open to the Commissioner to prescribe his own measures and deprive the owner or occupier of his option. If this were not so, the Commissioner might order expensive painting, or papering, or other costly alterations beyond the means of the person concerned, and beyond the intentions of the Legislature. We hold, therefore, that it was not competent to the Commissioner to require ridge ventilation in the notice; and as the notice was thus framed, no offence was committed by failing to do what it did not call on the owner to do. We accordingly reverse the order of the Presidency Magistrate, and direct the fine paid by the accused to be refunded to him.

Sentence reversed, and fine ordered to be refunded.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1883 *February* 10, 16, 17, 19, 20, 22.

MOOLJI LILLA AND DHURMA LILLA, PLAINTIFFS, *v.* GOKULDA'S VULLA, RANCHORDA'S DÁRSI AND DAYA'L DÁRSI, DEFENDANTS.*

Hindu law—Joint family—Joint property—Presumption that family is joint—Separation—Onus of proof—Nature of evidence required to prove separation.

The presumption of Hindu law is that every family is joint, and that all property possessed by the family is joint. A member of an undivided family may, however, acquire separate property, but the burden of proof lies upon him to prove the independent character of the acquisition. The essence of his exclusive title is that the separate property was acquired by his sole agency without employing what is common to the family.

If the property is separate the presumption operates no longer, and each member is separate owner of what he possesses. Even in the case of a separate family blood relationship within certain degrees imposes a moral duty, though not a legal duty, towards dependent relatives. The support on a liberal scale of poor relatives and even payment of their marriage expenses are not in themselves without other evidence proof of a joint family.

SUIT for partition. The plaint alleged that one Bhimji Parpia died intestate many years ago, leaving three sons, *viz.*, Dársi

*Suit No. 182 of 1881.

Bhimji, Vulla Bhimji and Lilla Bhimji, who after their father's death took possession of his property and lived together as a joint and undivided Hindu family. The three brothers also jointly carried on business under the style of Dársi Bhimji, and acquired considerable wealth. The plaintiffs in the present suit were the sons of Lilla Bhimji; the first defendant was the son of Vulla Bhimji, and the second and third defendants were the sons of Dársi Bhimji. The plaintiffs further alleged that they and the defendants after the death of their respective fathers continued to live as a joint family, and jointly carried on the firm of Dársi Bhimji up to the month of April, 1880. A dispute having arisen, the plaintiffs demanded a partition of the family property, which the defendants refused.

In their written statement the defendants denied that Bhimji Parpia had left any moveable property save a house at Cutch worth Rs. 100, or that after his death his sons traded jointly in partnership. They alleged that Vulla originally entered the firm of Cursondás Nensey, and after Vulla's death, in the Samvat year 1900, his place in the firm was taken by Dársi Bhimji, whose name was given to the firm in the Samvat year 1912. In 1912 Dársi Bhimji admitted Vulla's son, the first defendant Gokuldás Vulla, into the firm, and three years afterwards Dársi died, leaving him surviving his two sons, defendants 2 and 3, who with the defendant No. 1 (Gokuldás) had ever since carried on the business of the firm. The defendants denied that the plaintiffs were ever joint with the defendants, or that they ever had any interest in the firm of Dársi Bhimji, and they alleged that the property mentioned in the plaint was property acquired by the defendants, or by their respective fathers, and that the plaintiffs had no interest therein.

Latham and *Inverarity* for the plaintiffs.

Lang and *Jardine* for the defendants.

Counsel for the plaintiffs contended that the *onus* of proof was upon the defendants, and that they should begin. The Court held that the *onus* of proof was upon the defendants, and required them to begin. The following authorities were cited in the course of the case:—Mayne's Hindu Law, sec. 261; *Tarruck*

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Chunder Podder v. *Jodeshur Chunder*(1); *Mussámat Okeetha* v. *Baboo Miheen Lall*(2); *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*(3); *Dhurm Dás Panday* v. *Mussámat Shama Soondri Debiah*(4); *Bái Mancha* v. *Narotamdás Káshidás*(5).

March 6. SCOTT, J.—Three brothers—Vulla, Dársi and Lilla—came to Bombay from Cutch fifty years ago. The sons of Lilla now sue the sons of Vulla and Dársi for partition of a business which was carried on, as the plaintiffs contend, by all the brothers jointly as a joint family concern. The defendants reply that the business was started by Vulla, that no family property was used in its creation, and that it was always carried on as a separate concern, with which Lilla had no connection.

No doubt the presumption of Hindu law is that every family is joint, and that all property possessed by the family is joint. A member of an undivided family may, however, acquire separate property. But the burden of proof lies upon him to prove the independent character of the acquisition. The essence of his exclusive title is that the separate property was acquired by his sole agency without employing what is common to the family. *Rampershad Tewarry* v. *Sheochurn Doss*(6) is an authority on this point. There D., one of five brothers constituting an undivided Hindu family, acquired personal property with which, with the aid of his brothers, he established a banking business. The burden of proof was thrown upon D., and he failed to prove separateness, whilst it was proved on the other side that he associated his brothers as partners, and that for many years they carried on business together, though in different places. It was, therefore, held that the business was a jointly acquired family property. But it appears clearly from the judgment that, if D. had shown that he had acquired and retained the property separately, or, in other words, if he had offered the evidence proved in the present case that he did not receive any property from his father to serve as a nucleus for his trading operations, and did not associate his brothers with himself as partners, he would

(1) 11 Beng. L. R., 193 at p. 198.
(2) 11 Moo. Ind. Ap., 369.
(3) 9 Moo. Ind. Ap., 66.
(4) 3 Moo. Ind. Ap., 229.
(5) 6 Bom. H. C. Rep., A. C. J., 1.
(6) 10 Moo. Ind. Ap., 490.

have been entitled to hold the property as separate estate in spite of the fact of the joint and undivided family.

The most recent decisions on this subject are *Pauliem* v. *Pauliem*[1] and *Lakshuman Mayárám* v. *Jamnábái*[2]. Both these cases, by the arguments as well as by the result of the judgments, are precedents for the decision of the present question, and are also important as showing a leaning and a progress to the side of separateness. The gradual decay of the joint family system is one of the inevitable results of the modern conditions of life. Thus in the first of these two cases the Privy Council questions (p. 118) the correctness of the ruling of the Madras High Court to the effect that if a member of a Joint Hindu family receives any education whatever from the joint funds he becomes incapable of acquiring by his own skill and industry any separate property, and in the second case the Bombay High Court decided *(inter alia)* that although the "gains of science" are partible, that rule cannot be held to cover the gains of a professional man whose education for his profession was provided for out of separate funds, although the joint funds supplied his general elementary education. See also *Bannoo* v. *Kashee Ram*[3], a decision of the Privy Council, which says that the burthen of proof may be shifted from him who alleges separateness to him who alleges joint property, as in the case where the members of the family are living separately and their grandfather had effected a division, although the plaintiff contended that the division had not separated him and the brother whose property he claimed.

The rule laid down in the latest cases only develops, but does not in any way depart from that enunciated in the earliest authorities. The Mitákshara says :—"Whatever is acquired by the co-parcener himself without detriment to the father's estate does not appertain to the co-heirs[4]. Manu says: "What a brother has acquired by his labour without using the patrimony, he need not give up to the co-heirs"[5].

If the family is separate, then the presumption as regards the property being joint operates no longer, and each member is

(1) I. L. R., 1 Mad. 252; L. R. 4 Ind. Ap. 109. (3) I. L. R. 3 Cal. 315.
(2) I. L. R., 6 Bom., 225. (4) Miták., ch. i, sec. 4, r. 1.
(5) Manu, ch. 9, r. 204.

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separate owner of what he possesses. This rule is too clear to require authorities in its support. But, even in the case of a separate family, blood relationship within certain degrees imposes a moral duty, though not a legal duty, towards indigent relatives. The support, on a liberal scale, of poor relations, and even the payment of the expenses of their marriage ceremonies, as in the present case, are not in themselves, without other evidence, proof of a joint family. The blood tie would be sufficient explanation of such acts, even in a separate family (see Colebrook's Dig., Vol. 3, p. 99; West and Bühler, p. 230, 3rd ed.). "Maintenance by a man, of his dependants," says, Sir T. Strange [1], "is with the Hindus a primary duty . . . . nor of his duty in this respect are his children the only objects, co-extensive as it is with his family as consisting of other relations and connections." (See also Manu, ch. xi, secs. 9-10).

I will now apply this law to the present case. As regards the question whether the three brothers were joint or separate, there was a good deal of conflicting evidence. For the purposes of this case I will suppose the family to have been undivided, which is the view the most favourable to the plaintiffs' contention.

I do not think any ancestral property existed, save a possible share in a small house at Cutch which has never been sold. No evidence was produced of any other property. The mode of life of the brothers when they started in Bombay negatives the idea. They came penniless to the city. If there was no ancestral property, save a house which was not sold, none could have been used in the foundation of the business. That none was used, was also proved by the firm's books at the date of Vulla's entering the concern. The business, therefore, was not founded on a nucleus of joint property.

The second question—was the business carried on as a separate property?—is a more difficult one to answer. Five witnesses for the defendants swore that the brothers, who admittedly came to Bombay at different times, at first and for a good many years lived separately and had different employment. One of the witnesses for the plaintiffs somewhat unexpectedly confirmed this statement. But two other witnesses for the plaintiffs swore

[1] Str. H. L., Vol. 1, p. 67.

that the three lived together, worked together, and jointly conducted the business. The first of these witnesses, however, had not opportunity of seeing what the brothers did, and the second admitted that he would lose a considerable sum of money if the plaintiffs did not win this suit. I prefer to believe the defendants' story.

I am not, however, obliged to decide on the oral testimony. I have in the business books a more trustworthy source of information.

These books show that Vulla joined a drug business in 1836, becoming a partner of one Nansi Thákorsi; that it was for some years carried on by Vulla and Nansi, with Nansi Thákorsi as the partnership name. There were annual divisions of profit between the two partners. Nansi Thákorsi was the capitalist; Vulla only brought his skill and industry. For seven years there is no mention of either of the other brothers. But in 1843 Vulla went on a pilgrimage and left the business in charge of his brother Dársi. Vulla died on the pilgrimage, and Dársi took his place. The books now show that Dársi was a partner, sharing the profits just as Vulla did previously. But there is no proof whatever that Lilla was admitted as a partner or that he had any share in the business. It appears, however, that, at some time during Dársi's conduct of the business, Lilla came to live with him, and up to the date, which was fixed variously as 1844 and 1859 when Lilla went mad, he did petty office work. But that Dársi was clearly sole partner with Thákorsi, is proved by the books. So the business continued till 1859, when Vulla's son was old enough to come into the business. But he did not take the share he would have been entitled to had the business been joint. He only took a four-anna share, whilst Dársi had a twelve-anna share, the senior partner Thakorsi having retired. There were yearly divisions of profit up to 1879, when Darsi died, and his two sons succeeded to his share. Lilla also had died in 1877, leaving two sons, the present plaintiffs.

The eldest son, the first plaintiff, proved that he did work for the firm. But the work was of an inferior and menial kind, and there is no mention of either him or his brother in the books as

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a partner. A considerable contract was shown to have been made and entered into in his name, and one or two small sums were advanced to him, whilst a series of entries show that some small transactions were carried on for two years in the name of his brother. But these transactions were of very trifling importance compared to the whole business of the firm, and certainly do not suffice to prove partnership in the presence of the fact that their names were not entered as partners in the books and they did not participate in the profits. As further proof of the joint business, it was shown that Lilla and his sons were fed and housed by Dársi, and that the business was charged with large marriage expenses in their favour. This is the plaintiffs' only strong point, but I do not think it is a proof of a joint concern, sufficient to set aside the very stong evidence afforded by the books. If the family is joint, it is the duty of the rich brothers to pay the marriage expenses of the family (see Colebrook's Dig., Vol. III, p. 99). Even if the family is separate, the generosity of Dársi does not invest his nephews with any legal right to share his separate estate. He only fulfilled a duty towards his poor relations such as is enjoined by his moral law.

My judgment is for the defendants, and the suit is dismissed with costs.

Judgment for defendants.

Attorneys for plaintiffs.—Messrs. *Macfarlane and Edgelow.*

Attorneys for the defendants.—Messrs. *Jefferson, Bhaishankar and Jinsha.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1875
December 21.

VENKATESH NA'RÁYAN PA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNA'JI ARJUN (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lessor and lessee—Kabulâyat—Suit for rent—Notice of surrender—Surrender of land by tenant.

The plaintiff was a mortgagee of certain land, and sued the defendant for the rent thereof for the three years 1871, 1872 and 1873. He alleged that in 1866 the defendant had passed to him a *kabulâyat* for one year; that the defendant did

* Special Appeal, No. 299 of 1875.