1886
JUNE 12.
ORIGINAL CIVIL.
12 B. 110 = 12 Ind. Jur. 349.

urged upon me as a reason for its exercise. If it were established to my satisfaction that there had been delay on the part of the plaintiff, and that the defendants' or even Sonabai's interests had suffered therefrom, I should gladly exercise it, but I cannot say that there has been any undue delay. The defendants do not appear to have kept the plaintiff informed as to their negotiations for Sonabai's marriage, and it was apparently not until after his conversation with Babaji Cashinath that the plaintiff knew that the marriage between Sonabai and her cousin was about to take place. That was on the 11th May. Before that the plaintiff had not led the defendants to believe that he would consent to any marriage they might agree upon, nor do I think that the defendants could reasonably have drawn that conclusion from the plaintiff's not following up his letter of the 2nd December by active proceedings in Court. Lastly, it is not made out to [122] my satisfaction that there is any well-grounded reason to fear that, if Sonabai be not married during the present marriage season, she may be condemned to a life of perpetual celibacy.

The affidavits of Anand Gangadhar Joshi, Pandurang Bhaskar Joshi, and Vishnu Mahadev Thosar on the subject are extremely guarded, and are sufficiently met by the affidavit of the plaintiff and of others not replied to. I make the rule absolute until the hearing. The costs will be costs in the cause.

Rule absolute.

Attorneys for the plaintiff: Messrs *Balkrishna and Dikshit.*
Attorneys for the defendants: Messrs *Winter and Burder.*

---

12 B. 122.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

NANABHAI GANPATRAV DHAIRYAVAN AND ANOTHER, (*Plaintiffs*) *v.* ACHRATBAI AND OTHERS (*Defendants*).* [22nd July, 1886.]

Hindu Law—Ancestral property—Burden of proof where property alleged to be ancestral—Property derived by a son from his mother where it originally formed part of his father's estate.

Where a Hindu by will leaves property to another which is afterwards alleged to be ancestral by members of the testator's family, the burden of proving it to be ancestral rests on the plaintiffs. There is no presumption of Hindu law as to its character.

Pandurang Mankoji, a Hindu, died in 1831, having by his will bequeathed all his estate to his wife Parvati and his three minor sons, Vithoba, Govind, and Ganpatrav, and directed as follows:—"In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property and divide the whole among such sons, or the survivors of them. Subsequently to the testator's death his widow Parvati managed his estate, and probate of his will was granted to her alone in January, 1832. In 1836 she bought the V. property for Rs. 2,801. There was no evidence to show out of what funds this property was bought, but the deed of sale stated that it was assigned to "Parvati, widow and administratrix of the late Pandurang Mankoji, her heirs, executors, administrators, and assigns." In 1845 the eldest son Vithoba separated from the family, and gave a release to his mother Parvati. In 1854 she purchased the P. property for Rs. 8,452, the

* Suit No. 138 of 1884.

1886
JULY 22.

ORIGINAL CIVIL.

12 B 122.

conveyance being to [123] "Parvati, her heirs, executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of Pandurang Mankoji deceased." In the same year, *viz.*, 1854, the second son Govind separated, and gave Parvati a release. The third son Ganpatrav (the third defendant) continued to live with his mother Parvati until 1871, in which year she died intestate. Ganpatrav then entered into possession of all the property which she had or managed in her lifetime, including the V. and P. properties. In 1879 he mortgaged these properties to the first two defendants for Rs. 12,500. His sons (the plaintiffs) now alleged those properties to be ancestral, and complained that he and the mortgagees were acting in collusion; that he had charged the properties unnecessarily; and that he and the mortgagees were about to sell them at an undervalue for the purpose of defeating their (the plaintiffs') rights. They, therefore, filed this suit, and prayed (*inter alia*) that the claims of the mortgagees, after being ascertained, might be paid off. The defendants denied that the properties in question were ancestral property in the hands of Ganpatrav (the third defendant) or that the plaintiffs, as his sons, had any interest therein.

Held, that the interest which the third defendant Ganpatrav derived from his mother Parvati in the mortgaged premises was ancestral property in respect of which the plaintiffs had no present right of interference.

The Court ordered that on payment of the mortgage-debt the properties should be reconveyed to the third defendant, and, in the event of their being sold, that the whole of the surplus proceeds should be paid to him.

The original property was to be regarded, as in 1831, the self-acquired property of Pandurang Mankoji, and as having passed under his will. In the absence of any evidence with regard to it, there was no presumption as to its character; and the plaintiffs, who alleged it to be ancestral, were bound to prove that fact.

On Pandurang Mankoji's death, his sons, Vithoba, Govind, and Ganpat (third defendant) took whatever they became entitled to, under their father's will, as their self-acquired property, but in co-parcenery according to Hindu law, and not as joint tenants according to English law. As to Parvati, she took, under the will, an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they might claim their shares. On the sons claiming their shares, one share would be left with Parvati, and that share, subject to her incapacity as a Hindu widow to deal with immoveable property given her by her husband, would then become hers absolutely.

Vithoba and Govind having separated, Parvati and Ganpatrav (third defendant), continued to treat themselves as a joint family, and when Parvati died in 1871, her share in the joint property lapsed for the benefit of Ganpatrav. That share, whether he took it by inheritance or by survivorship, having originally formed part of his father's estate, became ancestral in his hands.

[F., 13 B. 534 (545); 22 A.W.N. 20; R., 29 A. 244 (P. C.); 13 B. 61 (64); 17 C.L.J. 38=17 C.W.N. 280=18 Ind. Cas. 625; 13 C.P.L.R. 115;]

THE plaintiffs were the sons of the third defendant, Ganpatrav Pandurang, who had mortgaged certain properties to the first and second defendants. The plaintiffs in this suit sought to restrain [124] the first and second defendants, (the mortgagees), from selling or completing the sale of these properties; and prayed that the said defendants might be ordered to render a true account of the mortgage executed to them by the third defendant.

The two properties in question were situated, the one at Vithalvadi, and the other at Parel, in Bombay; and they were mortgaged by the third defendant to the first and second defendants on the 2nd June, 1879, for the sum of Rs. 12,500, with interest thereon at the rate of 12 *per cent.* per annum. The plaintiffs alleged that the two properties were ancestral, and were worth Rs. 45,000; and that their father Ganpatrav, (the third defendant), was, at the time of the mortgage, in need only of a sum of about Rs. 6,000, in order to satisfy a decree which had been passed against him; and they submitted that their father had no right, under the Hindu law, to charge the properties with a larger sum

1886
JULY 22.
ORIGINAL CIVIL.
12 B. 122.

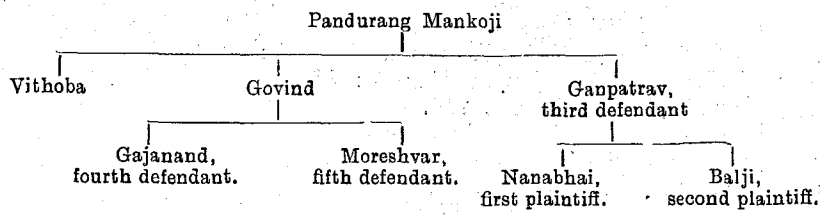
than was necessary. They further complained that since the date of the said mortgage their father, (the third defendant), had improperly and unnecessarily obtained further loans from the first two defendants, with whom he was acting in collusion, and had charged these further loans on the said two properties, so that the amount now due to the first two defendants amounted nearly to Rs. 22,000; and that this was done for the purpose of defeating the plaintiffs' future rights in their ancestral property.

The plaintiffs further alleged that the first two defendants had been advertising the sale of the two properties, and, in collusion with the third defendant, had attempted to effect a collusive sale at an undervalue; that the Vithalvadi property, which was worth Rs. 30,000, had actually been sold for Rs. 17,500, and had been bought in by the first and second defendants in the name of another person.

The plaintiffs, therefore, prayed that the defendants might be restrained from selling or completing the sale of either property until the hearing of this suit; that the sale of the Vithalvadi property might be declared null and void, and that the said property might be sold by the Court, and the claim of the first and second defendants, after being ascertained, might be paid off.

[125] The fourth and fifth defendants were first cousins of the plaintiffs, being sons of Govind Pandurang, a deceased brother of Ganpatrav Pandurang, the third defendant. Govind had in his lifetime claimed to be interested in the mortgaged properties, and the plaintiffs, therefore, made his sons parties to this suit, and as against them prayed for a declaration that they had no interest in the properties in question.

As above stated, the plaintiffs alleged that the mortgaged properties were ancestral properties. The following is a genealogical table of the plaintiffs' family:—



Pandurang Mankoji, the grandfather of the plaintiffs and the father of the third defendant, died in 1831, possessed of considerable moveable and immoveable property; but whether this property was ancestral or self-acquired in his hands, there was no evidence to show. He was divided from his brothers, of whom he had three. At his death he left three sons, *viz.*, Vithoba, Govind, and the third defendant Ganpatrav; and by his will, dated the 18th August, 1831, he appointed two of his brothers and his wife Parvati his executors, and bequeathed his property as follows:—

"I give and bequeath unto my beloved wife and three minor sons, Vithoba, Govind, and Ganpatrav, all my estate and property whatever, besides the pension which might be allowed them from Warden's Official Fund, to which I have been a subscriber for twenty-eight years. In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to entitle them to claim their respective shares of

1886
JULY 22

ORIGINAL CIVIL.

12 B. 122.

whatever may be left after marrying, &c., then I direct my surviving executors will secure my property, and divide the whole among such sons or the survivors of them."

[126] Subsequently to her husband's death, Parvati managed the estate. Probate of his will was granted to her alone on the 4th June, 1832. On the 9th January, 1836, she bought the Vithalvadi property for Rs. 2,801. The deed of sale stated that this property was conveyed to "Parvati, widow and administratrix of the late Pandurang Mankoji, her heirs, executors, administrators, and assigns :" but there was no evidence to show out of what funds this property was bought.

In 1845 the eldest son Vithoba separated from the family, and gave a release to Parvati, his mother.

In 1854 Parvati purchased the Parel property for Rs. 8,452, the conveyance being to "Parvati, her heirs, executors, administrators, and assigns." In this deed, also, she was described as "the widow and administratrix of Pandurang Mankoji, deceased."

In the same year, 1854, the second son Govind separated and gave Parvati a release. In 1871 Parvati died intestate ; and Ganpatrav, (the third defendant), who had until then continued to reside with her, entered into possession of all the property which she had or managed in her lifetime, including the two properties in question in this suit.

Prior to her death, *viz.*, in 1862, Parvati had mortgaged, by way of equitable mortgage, both these properties to one Pestonji Dinsha, whose assignee, Adarji Dadabhai, brought a suit upon the mortgage, and in August, 1877, obtained a decree (1). In order to pay off this decree, Ganpatrav mortgaged the two properties in question to the first two defendants for Rs. 12,500 on the 2nd June, 1879, as stated in the plaint.

Macpherson and *B. Tyabji*, for the plaintiffs.

Starling and *Telang*, for defendants Nos. 1 and 2.

Lang and *Vicaji*, for defendant No. 3.

Defendants Nos. 4 and 5 appeared in person.

For the plaintiffs it was contended that the mortgaged property was ancestral—Mayne on Hindu Law, pp. 248, 249 ; *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2) ; *Nund Coomar Lall* v. *Razeeoodeen* (3) ; West and Buhler, p. 714.

[127] For the defendants it was contended that Pandurang Mankoji having made a will, the presumption was that his property was self-acquired ; and that, after his death, Parvati and Ganpatrav held it jointly. Counsel referred to Mayne's Hindu Law, s. 250 ; West and Buhler, p. 331, note (E).

JUDGMENT.

5th August, 1886. FARRAN, J.—By an indenture of mortgage bearing date the 2nd June, 1879, the third defendant Ganpatrav Pandurang mortgaged two properties—one at Vithalvadi and the other at Parel—to the first and second defendants, to secure repayment of the sum of Rs. 12,500, with interest thereon at the rate of 12 *per cent. per annum.* The first and second defendants, Achratbai and Narrandas Nathubai, made some abortive attempt to sell the mortgaged properties, and ultimately bought them in the name of Purshotam Narottam, the sixth defendant.

The plaintiffs, Nanabhai Ganpatrav and Balji Ganpatrav, the sons of the third defendant Ganpatrav Pandurang, have filed the present

(1) See 3 B. 312. (2) 9 I. A. 123 (142, 143). (3) 10 B.L.R. 183 (192).

1886
JULY 22.

ORIGINAL CIVIL.

12 B. 122.

suit, praying, in effect, that it may be declared that the mortgaged premises are ancestral in the hands of their father Ganpatrav Pandurang, and that the plaintiffs are equally interested with him therein; and further, (alleging that Ganpatrav Pandurang is colluding with the mortgagees, and that the properties are in danger of being sold at an undervalue), that the mortgaged premises may be sold under the direction of the Court, and that the first and second defendants, the mortgagees, may be paid what is justly due to them, and that the balance may be dealt with, having regard to the rights of the plaintiffs and of the third defendant *inter se*.

The defendants Nos. 4 and 5, Gajanand Govind and Moreshvar Govind, are minors. They are added as defendants to the suit, because their father Govind Pandurang in his lifetime claimed to be interested in the mortgaged premises; and the plaintiffs seek a declaration that his minor sons are not interested therein. As to the latter portion of the relief sought by the plaint, I consider that it cannot be given in this suit, and the defendants Gajanand and Moreshvar will be dismissed therefrom without prejudice to their rights (if any) against the property in the possession of the third defendant and of the plaintiffs.

[128] Save as to the misjoinder of the minor defendants, no objection is taken to the frame of the suit; and it has been agreed between the parties that, whatever may be the rights of the plaintiffs and of the third defendant *inter se*, the mortgaged properties, in the event of their not being redeemed, shall be sold by the Court, and the amount justly due to the mortgagees paid thereout; the balance being dealt with according to the rights of the plaintiffs and of the third defendant respectively therein.

The only issues, accordingly, which need be dealt with in the suit are the second, fourth, and fifth, which are—

(2) Whether the property comprised in the said mortgage is or was ancestral property in the hands of the third defendant.

(4) What sum is due at foot of the said mortgage.

(5) Whether the plaintiffs are entitled to any and what relief in this suit. No evidence has as yet been given on the fourth issue. It has been reserved until after the decision on the second.

The only facts proved relating to the second issue are these. Pandurang Mankoji, the father of the defendant Ganpatrav, was divided from his brothers, Camba, Venkoba, and Bhaskar Mankoji. Of these, Bhaskar when he died left no property. Camba, who was an orderly in the Chief Engineer's office on pay of Rs. 20 or Rs. 25 *per* month, left one small house. Venkoba died possessed of property of some value.

Pandurang Mankoji died in or about the Christian year 1831, possessed of two oarts and a piece of vacant land in Bombay, besides moveable property of considerable value. He left a will, bearing date the 18th of August, 1831, whereby he appointed his brothers Venkoba and Camba and his wife Parvati his executors and executrix respectively; and devised and bequeathed his property in the following words:—

"I give and bequeath unto my beloved wife and three minor sons, Vithoba, Govind, and Ganpatrav, all my estate and property whatever, besides the pension, which might be allowed them from Warden's Official Fund, to which I have been a subscriber for twenty-eight years. In the event of my wife's demise previous to my sons attaining their full age of twenty-one years, to **[129]** entitle them to claim their respective shares of whatever may be left after marrying, &c., then I direct my surviving executors will secure my property, and divide the whole among

1886
JULY 22.
ORIGINAL
CIVIL.
12 B. 122.

such sons or the survivors of them." He also made provision for his daughters. Parvati and her three sons survived the testator, and probate of his will was granted to Parvati alone on the 4th June 1832 (Ex. A).

Beyond what may be inferred from the above statement of facts, there is nothing to show whether the property, of which Pándurang Mankoji died possessed, was ancestral or self-acquired in his hands. Parvati and her sons for some years lived together as members of a joint Hindu family. On the 9th of January, 1836, in consideration of the sum of Rs. 2,801, one Ananta Raghoba conveyed, by deed of that date, the Vithalvadi property to Parvati, "widow and administratrix of the late Pandurang Mankoji, her heirs, executors, administrators, and assigns." There is no evidence to show from what source the consideration money for that property was paid (Ex. No. 1).

In 1845 Vithoba Pandurang, having at that time received his share of his father's estate in cash or moveable property, separated from his mother and brothers, and executed a release. The fact of such separation is proved by the proceedings and decree in suit No. 9 of 1874, in which Vithoba Pandurang was the plaintiff and Govind and Ganpatrav Pandurang were the defendants (Exs. B, C, D and E). The release was not produced in that suit, and is not now forthcoming. It was in favour of Parvati (see Ex. G.)

On the 24th August, 1854, Ramchandra and Lakshman Dajiba bargained and sold to Parvati, "her heirs, executors, administrators and assigns," the Parel property above referred to, and certain other properties with which this suit is not concerned (Ex. No. 2). The consideration for the purchase was the sum of Rs. 8,452 paid in different sums by Parvati to her vendors. Parvati, in the portion of the deed in which the parties to it are described, is mentioned as being "the widow and administratrix of Pandurang Mankoji, deceased."

[130] In 1854—the exact date is not in evidence—Govind Pandurang received his share in his father's estate, and separated from his mother and brother Ganpatrav, and passed a release to Parvati. This appears from an affidavit made by him in the suit No. 9 of 1874, put in as Ex. C, and his written statement in suit No. 392 of 1874 (Ex. G). Down to the date of his separation, Govind and his mother and brother Ganpatrav had lived together as members of a joint Hindu family, and when he separated, Ganpatrav and his mother continued to do so. The release which Govind executed is not in evidence.

In 1862, Parvati gave an equitable mortgage over the Vithalvadi and parel properties to one Pestonji Dinsha. She died in 1871, intestate. Down to the time of her death she seems to have managed the joint property, or at least it was managed in her name. The defendant Ganpatrav says that after he began to earn his livelihood as a clerk in the Telegraph Department he paid his earnings, Rs. 100 *per mensem*, to Parvati. When she died, Ganpatrav continued in possession of all the property she had possessed or managed in her lifetime.

On the 15th August, 1874, Adarji Dadabhai, as assignee of the equitable mortgage created by Parvati in 1862, filed a suit, (No. 392 of 1874), against Vithoba, Govind, and Ganpatrav Pandurang for the purpose of establishing the mortgage, and praying for a sale of the property. He succeeded in establishing his claim to the extent of Rs. 6,000 for principal and interest (1). Costs of suit were also awarded to him (Exs. H and I).

(1) See 3 B. 312.

1886
JULY 22
ORIGINAL
CIVIL.
12 B. 122.

It was for the purpose of satisfying the decree of the appellate Court in suit No. 392 of 1874 (*inter alia*) that the defendant Ganpatrav Pandurang executed the mortgage of the 2nd June, 1879, (Ex. J), in favour of the first and second defendants which I have mentioned.

As the mortgaged premises were purchased by Parvati as executrix of Pandurang's estate and during her management of it, they must, in accordance with the ordinary presumption, be treated as forming a portion of that estate, and treated as if they had been purchased by Pandurang himself, notwithstanding the [131] limitation to the heirs, executors, administrators, and assigns of Parvatibai.

The first question which arises is, whether the property, which came into the possession of Parvati upon the death of Pandurang Mankoji, is to be treated, for the purpose of this suit, as having been the ancestral, or the self-acquired property of the latter. Actual proof upon this point there is none. If, in order that the plaintiffs should succeed in their suit it be necessary that the property left by Pandurang Mankoji should be held to have been his ancestral property, it lies upon the plaintiffs to prove, in some way or other, that it was ancestral in his hands. There is no presumption in Hindu law upon the point which they can invoke in their favour. There is no presumption one way or the other. It is just as likely that Pandurang Mankoji acquired the property which he died possessed of, as that Mankoji or Mankoji's father acquired it. There are faint indications, on the other hand, that the property was self-acquired by Pandurang, arising from the facts, that one of his brothers, Bhaskar, left no property at all, and that Pandurang made a will of his property, which was recognized as a valid will, and acted upon, as such by all his sons, which he could not have done effectually had his property not been self-acquired. These indications have, however, little, if any, probative force. The plaintiffs none the less have to make out their case upon this, as upon every other point; and, if they fail to do so, and this point is essential to their success, their suit must fail. I adopt to a considerable extent the views expressed in Mayne's Hindu Law, s. 263. The mortgaged property must, therefore, be treated in this suit as the self-acquired property of Pandurang Mankoji, and as having passed under his will, since the plaintiffs have failed to prove the contrary.

The above proposition being established, it was not contended, by counsel for the plaintiffs, that the decision of the appellate Court lately given in the case of *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhai*(1) would not be applicable to the present case. From that decision it follows, I think necessarily, that Vithoba, Govind, and Ganpatrav Pandurang took whatever they [132] became entitled to under their father's will, as their self-acquired property, but in co-parcenery according to Hindu law, and not as joint tenants according to English law. It is more difficult to determine what interest Parvati took in the property. It is open to argument, upon the authorities, that she took not more than an interest to endure during her life—*Mahomed Shumsool* v. *Shewukram* (2).

The more correct construction, however, I hold to be that the will gave Parvati an equal interest with her sons in the testator's estate, liable to be defeated in the event of her death before the sons attained the age of twenty-one years, when they were to be entitled to claim their shares. On the sons claiming their shares, one share would be left with Parvati,

(1) 10 B. 528. (2) 2 I. A. 7.

1886
JULY 22.

ORIGINAL CIVIL.

12 B. 122.

and that share, subject to her incapacity, as a Hindu widow, to deal with immoveable property given her by her husband, would then become hers absolutely.

She did not, however, at that period remove her share from the common stock, nor did she ever attempt to separate her interest in the property from that of her sons. She managed for them, and was treated as the head of the family. It would perhaps be incorrect to speak of her as co-parcener with her sons, as their father would have been had he lived; but yet the family after his death acted exactly as if Pandurang had survived in Parvati. If Parvati had died before the separation of Vithoba, I cannot but think that her interest would have been treated as having lapsed for the benefit of the co-parceners, just in the same way as if one of the brothers, had died childless. Vithoba took his share, and separated. The joint family continued upon the same basis. So, too, when Govind divided, Parvati and Ganpatrav continued to treat themselves as constituting a joint family. When Parvati died in 1871, her share in the joint property lapsed, I think, for the benefit of Ganpatrav. It does not seem, however, material to determine whether Ganpatrav took Parvati's share by survivorship or inheritance, as, if that share is ancestral in his hands in the event of his taking it by inheritance, it seems to me that it must be equally so in the event of his **[133]** taking it by survivorship. In the case of the father this is clearly so. A father and son possessed of no ancestral estate by their joint exertions acquire some property. The son's share in that property is self-acquired in his hands—*Chaturbhooj* v. *Dharamsi* (1). The father dies, and his self-acquired share devolves on his son by survivorship. It cannot be but that the son takes that accretion to his share as ancestral. If just before his death the father had separated, and the son upon the father's death had taken his share, such share would be ancestral in the hands of the son. *A fortiori* must it be ancestral if the father dies joint with his son. Mr. Mayne discusses this question as between brothers at s. 250 of his work practically the converse of this case.

The question, therefore, must be considered whether property which a son derives from his mother is ancestral in his hands when such property originally formed part of the father's estate. In the case of *Nund. Coomar Lall* v. *Razeeooddeen* (2), the Court adopted the following passage in West and Buhler, p. 323 (2nd ed.), as correctly expressing the law as to ancestral property :—"On the other hand, property inherited by a father from females, brothers, or collaterals, or directly from a great-great grand-father, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the *apratibandhadaya*, or 'unobstructed inheritance.'" The case before the Court related to property inherited, not from a mother, but from a collateral relation. In *Muttayan Chetti* v. *Sangili Vira* (3) the question arose as to the nature of a father's interest in a *zamindari* which, having been inherited by his mother from her father, devolved upon her death upon him. The Court came to the conclusion that property inherited through the mother is ancestral, and not self-acquired' In the beginning of the judgment they say (at p. 375): "It" (such property) "may not be ancestral in the sense in which property inherited by the father from the paternal grandfather is liable to partition under the Mitakshara Law at the instance of the son, but it is not self-acquired property, on that ground, for

(1) 9 B. 445 (446). (2) 10 B.L.R. 183. (3) 3 M. 371.

1886
JULY 22.

ORIGINAL CIVIL.

12 B. 122.

purposes other than [134] those of partition." In that case it was sought after the death of the *zamindar* to establish a charge given by him over the *zamindari* as against the defendant, his son, and the right of the *zamindar* to alien the *zamindari* beyond his own lifetime was the point which the Court had to decide. The Court decided against the right. The case went on appeal to the Privy Council, and was reversed on the ground that the debt, to secure which the charge was created, was not illegal or immoral, and that the decision in *Girdharee Lall's Case* (1) applied to it. As to the nature of the property, their Lordships said: "It was contended, on behalf of the plaintiff, first, that the *zamindari* having descended to the defendant's father from his maternal grandfather, was his self-acquired property, or, at any rate, that he was not, as regards his son, under the same restrictions as to the alienation or hypothecation of the property as he would have been if it had descended to him from his father or paternal grandfather; secondly, that the whole *zamindari* or at least the interest which the defendant took therein by heritage, was liable as assets by descent in the hands of the defendant, as the heir of his father, for the payment of his father's debts. Their Lordships are of opinion that the appellant is entitled to succeed upon the second ground, and they, therefore, think it unnecessary to express any opinion upon the first. Indeed, as the case has been argued before them on one side only, and the same question may hereafter be raised in some other case, they consider it right to abstain from expressing any opinion upon it, except that they concur with the High Court in holding that the property was not the self-acquired property of the defendant's father—*Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2)."

Observing upon that case Mr. Mayne, after citing 3 Dig., 61, West and Buhler, p. 323, approved in *Nund Coomar Lall* v. *Razeeooddeen* (3), says (see Mayne's Hindu law, (3rd ed.) p. 240, *note*): "The High Court of Madras has held that property which descended to a man from his maternal grandfather was ancestral property, which he could not alienate to the detriment [135] of his son. None of the above authorities were referred to; the decision was reversed by the Privy Council on another point. When the case arises again, it will be material to remember that property only becomes joint property by reason of being ancestral property when the ancestor, from whom it was derived, was a paternal ancestor. See Mit. i. I, secs. 3, 5, 21, 24, 27, 33; *i* 5 secs. 2, 3, 5, 9—11." Messrs. West and Buhler's comment on the case is as follows:—"In a recent case the Privy Council have said that a *zamindari* inherited through a mother was not self-acquired property, but they expressed no opinion whether it was subject to the same restrictions on alienation or hypothecation as if it had descended to the *zamindar* from his father or grandfather. It may be concluded, therefore, that the more extensive construction of '*pitrarjit*' or 'ancestral' will prevail, though probably without the consequence of giving to the son equal power with the father over such ancestral property, which is not in the stricter sense 'patrimonial' by "agnatic descent'"—West and Buhler's Hindu Law, pp. 714 and 715 (3rd ed.). The learned authors of the work do not, however, adopt the distinction of the Madras Court as set out in the passage I have last cited from their judgment, which they regard as fanciful, and conclude their comment thus: 'The rules for partition of inherited property point to male lineal inheritance, leaving property owned in any other right to be distributed as self-acquired, or according to the special rules applicable on account of the

(1) 1 I. A. 321. (2) 9 I.A. 128 (143). (3) 10 B.L.R. 183 (192).

1886
JULY 22.

ORIGINAL CIVIL.

12 B. 122.

character of the property as sacred or secular, or as affected or not with the support of public duties,' " p. 715.

I think I shall be acting most in accordance with the principles of Hindu law and with the weight of authority in holding that, in the present case, the interest which the defendant Ganpatrav Pandurang derived from his mother Parvati in the properties in question is ancestral property in respect of which the plaintiffs have no present right of interference; and I shall, therefore, decree that the whole of the surplus proceeds of the mortgaged premises (if any), in the event of their being sold, be paid to the defendant Ganpatrav Paudurang. In his hands they will remain of the same character as were the mortgaged premises themselves. **[136]** The agreement between the parties relieves me from the necessity of determining whether the plaintiffs have such an interest in the property as would technically have entitled them to maintain a properly constituted suit for their redemption.

The minutes of the decree will be as follows :—

Dismiss the suit as against the defendants Ganpatrav Govind and Moreshvar Govind, without costs. Order that, upon payment by the defendant Ganpatrav Pandurang or the plaintiffs of the amount of the moneys which shall be found to be due to the first and second defendants at foot of their mortgage of the 2nd of June, 1879, with interest as therein provided, and their taxed costs of this suit within six months from the time when such amount shall be ascertained, the first and second defendants do reconvey the mortgaged premises to the defendant Ganpatrav Pandurang; but, in the event of such payment being made in whole or in part by the plaintiffs, subject to a charge in their favour for the amount which they shall so have paid.

In default of such payment within the time given, let the mortgaged premises be sold. And out of the net proceeds of such sale let the first and second defendants be paid the aforesaid amount with interest and costs, and let the balance (if any) after paying thereout, firstly, the taxed costs of the defendant Ganpatrav Pandurang and, secondly, of the plaintiffs, be paid to the defendant Ganpatrav Pandurang. No other order as to costs.

Attorneys for the plaintiffs :—Messrs. *Balkrishna and Dikshit.*

Attorneys for the defendants :—Mr. *Mansukhlal M. Munshi*; Messrs. *Tyabji and Dayabhai*, and Messrs. *Nanu and Hormasji.*

---

12 B. 137 = 12 Ind. Jur. 311.

[137] ORIGINAL CIVIL.

Before Mr. Justice Farran.

DE SOUZA AND ANOTHER (*Plaintiffs*) *v.* VAZ AND ANOTHER (*Defendants*).* [21st July, 1887.]

Will—Construction—Vesting—Period of distribution—Gift of dividends.

S., a Portuguese inhabitant of Bombay, by his will dated 19th March, 1866, devised all his estate, real and personal, to his executors in trust, to realise the same, and invest the proceeds thereof in the public funds, and directd as follows :—

" (1) The dividends arising therefrom shall be applied, at the discretion of my executors, towards the maintenance and education of my children until each of

* Suit No. 114 of 1887.