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[271] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Birdwood.

DAMODARDAS MANEKLAL AND OTHERS (*Original Defendants*
Nos. 1—4), *Appellants* v. UTTAMRAM MANEKLAL AND OTHERS
(*Original Plaintiff and Defendants* Nos. 5 and 6), *Respondents*.*

[8th February, 1892.]

Hindu law—Partition—Manager—Liability of manager to account on occasion of partition—Right of members who were minors at time of management to an account from manager—Manager also guardian of minors—Nature of account to be rendered by a manager on partition—Family idol and property appertaining thereto goes on partition to senior member of family—Right of mother to a share of estate on partition.

A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his *ipsa dixit* as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objections the other members of the family can take to it, must depend on the conduct of the manager and the other members of the family, the nature of the property, and the circumstances of the family, and cannot be stated in definite terms. Members who were minors during the management cannot be taken to have consented to the management, and are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests; the presumption, however, being that, in the absence of evidence, the property for partition is such as it exists at the time of the suit for partition.

A brother sued his three brothers for partition of their father's estate, which consisted of moveables and immoveables and a banking business. As senior member of the family he also claimed the *rajseva* (family idol) and the property appertaining to it. The mother (Kashi) of the first three defendants and Manchba, the widow of a deceased brother of the plaintiff, and Nandkore, his aunt, the widow of his father's brother, were also defendants to the suit. The three brothers (defendants Nos. 1, 2 and 3) alleged that their father, Maneklal, had died in 1864 at which time they were minors; that the plaintiff had managed the estate ever since and had, in 1865, obtained a certificate of guardianship and administration to their estate under Act XX of 1864; that the plaintiff's management had been fraudulent, improper and wasteful and prejudicial to their interests as minors, and they contended that they were entitled to an account from him of the property at the date of their father's death and of the proceeds, income and profits from that date to the date of suit. They contended that as the plaintiff had been appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. The lower Court held that the family being united, the Minors Act did not apply, [272] and that the fact that the plaintiff had obtained a certificate of guardianship did not enlarge his liability to account, and that, on the authorities, the manager of a Hindu family was not bound to account for past transactions, nor for mesne profits, unless in cases of fraud or gross extravagance, and that the state of the family property as it existed at the time of partition was to be the basis of the distribution.

On appeal to the High Court,

Held that the defendants were entitled to an account from the plaintiff, and that it was open to them to raise objections with regard to the plaintiff's management.

Held, also, as to the nature of the account which the plaintiff should render of past transactions, that having regard to the circumstances of the family and the nature of the family property, the plaintiff, in producing the books of the firm

* Appeal No. 48 of 1890.

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since the father's death, which contained an account of all transactions relating to the firm's property and of the moveable and immoveable property, had done all that he could be expected to do, whether as the family manager or as certified administrator of the defendants' interests in the family property.

Held, also, that the circumstance that the plaintiff had obtained a certificate of administration of the estate of the minors, and sold their interests in certain houses, without the consent of the Court, could not give them a counter claim against the plaintiff unless they proved that they had been prejudiced by the sale. As to ornaments purchased since the death of the father, it was directed that they should be brought into hotchpot by all the parties in making the partition. As to remissions of tenants' rent and compromises of suits, although a considerable loss was shown to have resulted from them, it was held that the defendants had failed to show that they were improper or uncalled for, and there was no evidence to make the plaintiff himself liable for them, or to forbid their being transferred to the general account. The losses in trade also were properly debited to the general business of the firm, and the plaintiff was not personally liable for them.

Held, also, that the plaintiff was entitled to take the *rajseva* (family idol) and keep it with the property appertaining thereto as the family idol and the property thereof, with liberty to such members of the family as are or shall become *marjadas* to have access to it for the purpose of worship.

Held, also, that Kashi, the mother of the first three defendants (step-mother of the plaintiff), was entitled on this partition to a one-fifth share in the estate.

[R., 19 B. 532 (536, 537); 20 B. 659 (666); 29 B. 51=6 Bom. L.R. 263 (275); 20 C.L.J. 183.]

THIS was a first appeal from the decision of Khan Bahadur B. E. Modi, Subordinate Judge of Surat.

Suit for partition filed in 1886.

The plaintiff was the son of one Maneklal, who died in July, 1864. Maneklal left six sons, *viz.*, the plaintiff, and Chhaganlal, and Dayabhai by his first wife, and Damodardas Vizbhukandas, and Parshotamdas (defendants Nos. 1, 2 and 3) [273] by his second wife (defendant No. 4). At the time of Maneklal's death the first three defendants were minors and the family was then living as a united family. Dayabhai separated in May, 1868, and died in 1872, and Chhaganlal died in May, 1881. His widow, Manchba, was the fifth defendant in this suit.

The plaintiff claimed a fourth share of the family property, which included immoveable and moveable and also a banking business carried on in the name of Govindram Gosai. As the senior member of the family he also claimed the property appertaining to the *rajseva* (the family idol).

The defendants did not object to a partition, but they alleged that after their father's death in 1864 the plaintiff and Chhaganlal and Dayabhai took possession of the family property, and had the management of it, and they contended that no division should be made until an account had been rendered of the property at Maneklal's death and of the dealings with it and of the profits accrued since that time up to the date of suit. They further charged that the plaintiff, who had obtained a certificate of guardianship and administration of the estate on 17th March, 1865, had been guilty of waste and of fraudulent and improper management, the details of which they set forth in their written statement.

The Subordinate Judge framed twenty-four issues. He found (*inter alia*) that the plaintiff had not been guilty of fraud or negligence in managing the estate, and that he was not bound to account for past transactions, and that the estate should be divided into four equal shares among the plaintiff and defendants, and he prescribed the mode in which the account should be taken. He awarded separate maintenance, at the rate of Rs. 100 a month, to each of the three widows—*Krishna alias*

Kashi, Manchha, and Nandkore—and he held that the plaintiff was entitled to the *rajseva* and the property appertaining thereto.

Defendants Nos. 1, 2 and 3 appealed.

Shantaram Narayan, Government Pleader, (with *Shivram Vithal Bhandarkar*), for the appellants.—The plaintiff, having [274] undertaken the position of an administrator, is bound to give an account of past transactions—*Konerrav v. Gurrav* (1).

[SARGENT, C. J.—Must you not bring a separate suit under the Minors Act?]

Though this is not a suit under the Minors Act (XX of 1864), still as the plaintiff was the manager of the family concern, consisting of trade and other moveable and immoveable property, he is liable to render a strict account. The plaintiff was appointed administrator under the Minors Act, and therefore on this ground also he is liable to account as a trustee. He could not alienate property without sanction of the Court.

The plaintiff having taken upon himself the active management of the family affairs has rendered himself liable to give a strict account of his management—*Abhayachandra Roy v. Pyarimohan* (2); *Jugmohandas v. Sir Mangaldas Nathubhoy* (3).

Further, we contend that Krishna *alias* Kashi, the mother of the defendants Nos. 1, 2 and 3, is entitled to a separate share. The Subordinate Judge misunderstood her claim. She claimed a separate share in the property, and not merely maintenance—*Damoodur Misser v. Senabuttu Misrain* (4); *Lakshman v. Satyabhamabai* (5). Not only a mother, but a stepmother is also entitled to a share. The term “mother” includes a “step-mother”—*Mitakshara*, Ch. I, s. 7, pl. 1; *Viramitrodaya*, p. 80. This view is also confirmed by the *Vyavahar Mayukha*, Ch. IV, s. 4, pl. 18 and 19. The following authorities were referred to:—*West and Buhler*, pp. 360, 820, 824; *Steele on Castes and Custom*, pp. 48, 49 and 56; *Second Appeal No. 346 of 1889*, decided on the 12th June 1890; *Mahabeer Persad v. Ramyad Singh* (6); *Pursid Narain Singh v. Honooman Sahay* (7); *Sunder Bahu v. Manohur Lal* (8); *Sumrun Thakoor v. Chunder Mun Misser* (9); *Kishori Mohun Ghose v. Moni Mohun Ghose* (10); *Lakshman Ramchandra v. Satyabhamabai* (5); *Bilaso v. Dina Nath* (11).

[275] We have no objection to the plaintiff retaining the *rajseva* (family idol) during his lifetime, but he cannot alienate it. It should be kept apart from his share in the family property.

Rao Saheb *Vasudev Jagannath Kirtikar*, for respondent No. 1 (plaintiff *Uttamram Maneklal*).—The family being undivided, we dealt with the property in our capacity as manager, and cannot be called upon to render an account. We deny that our conduct has been fraudulent, or that we have mismanaged the property. The appellants are entitled to a division of the property as it exists at the time of partition, and they cannot ask for an account—*Konerrav v. Gurrav* (1). The fact that we obtained a certificate of administration under the Minors Act (XX of 1864) cannot enlarge our liability to account as manager.

So far as the Bombay Presidency is concerned, the right of a mother to share with her sons on partition is nowhere recognized. There is no decision which shows that she is entitled to a share. She is only entitled to maintenance. Even if according to the texts she is entitled to a share, her right has become obsolete, and in Bombay no mother claims a share:

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| (1) 5 B. 589 (595). | (2) 5 B. L.R. 347. | (3) 10 B. 528. | (4) 8 C. 537. |
| (5) 2 B. 494. | (6) 12 B.L.R. 90. | (7) 5 C. 845. | (8) 10 C.L.R.79. |
| (9) 8 C. 17. | (10) 12 C. 165. | (11) 3 A. 88. | |

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see Mandlik's vernacular edition of the Vyavahar Mayukha. If a mother's right to a share is not now recognized, much less can that of a step-mother. Even so far back as 1820 a mother was held to be entitled to maintenance in dispute between sons for partition—*Muncha v. Brijbookun* (1). The word "mother" does not include a step-mother—*Bai Daya v. Natha Govindlal* (2). There can be no objection to maintain a step-mother; but her maintenance would be a charge upon the property which would go to her sons, and not step-sons—*Kedar Nath v. Hemangini Dassi* (3). This leads to the inference that, even supposing that a mother is entitled to a share, she should share equally with her sons only, and not the step-sons. As the plaintiff is the senior member of the family, he is entitled to the *rajseva*. He gives up his claim to the property appertaining to it.

Dhandu Moroba Sanzgiri, for respondent No. 3 (Bai Nandkore).

JUDGMENT.

[276] SARGENT, C. J.—One Maneklal Govindram died in 1920, on 23rd July 1864, leaving three sons, the plaintiff, Chhaganlal, and Dayabhai, by his first wife, and three sons, Damodardas, Vizbhukandas, and Parshotamdas, who are the three first defendants, and were minors at the time of his death, by his second wife, the defendant No. 4. The family were living in union at the time of his death, and continued so until Dayabhai separated on 5th May 1868. Dayabhai died in 1872 (*Samvat* 1928) and Chhaganlal in *Samvat* 1937, on the 14th May 1881. The first defendant, Damodardas, after attaining his majority also separated from the family on 4th September 1869, after executing a release (*fargati*). However, on 9th September 1872, he filed a suit to have it set aside, which suit was dismissed by the Court of first instance, but on appeal was granted by the High Court on the 25th September 1878, with a declaration that Damodardas and the defendants in that suit continued to be members of a united Hindu family.

The plaintiff by the present suit, brought in 1886, seeks for a division of the family estate and to have possession of his share after making provision for the maintenance of the defendants Nos. 4 and 5, widows of Maneklal and Chhaganlal. Defendants Nos. 1, 2 and 3 by their written statement allege that after their father's death the plaintiff with Chhaganlal and Dayabhai took possession and had the management of the family estate, which included moveable and immoveable property and also a banking business carried on in the name of Govindram Gosai, and they contend that no division can take place until an account has been rendered of the family property at the time of their father's death, and also of what the same may have produced, either by sale or annual income, or by the profits of the said business from the time of their father's death until the date of suit. They also charge that the plaintiff, who obtained a certificate of guardianship and administration of their estate on 17th March 1865, committed unauthorized acts prejudicial to their interests as minors, and also since they attained majority has committed acts with the fraudulent object of injuring them, the nature of which they set out in detail in their written statement. Nandkore, widow of Pranjivandas Govindram, uncle of the parties, was subsequently on 2nd April 1889 made a party as the sixth defendant.

(1) Cases decided by the Sadar Divani Adalat, Bombay, 1820—1840, p. 1.
(2) 9 B. 279. (3) 13 C. 336.

[277] The Court below has framed twenty-four issues, of which the 19th and 23rd raise the questions as to the liability of the plaintiff to account and the extent and nature of that liability whether as guardian or as manager of the family estate. It was contended by the defendants Nos. 1, 2 and 3 that, as the plaintiff was appointed administrator of their estate under Act XX of 1864, he was liable to account to them as a trustee, and was bound to show that all sales, purchases and other transactions entered into by him were necessary and for their benefit. [The Court below held, on the authority of *Shivji v. Datu* (1), that as the family was united, and the Minors Act had no application to the minors, the circumstance of the plaintiff having obtained a certificate of administration under the Minors Act did not enlarge his liability to account as manager of the family, as to which it held that the authorities showed that the manager is not bound to account for past transactions, unless in case of fraud or gross extravagance, nor to account for mesne profits, and that the state of the family property as it exists at the time of the partition is alone to be the basis of the distribution; that the manager must lay an account of the property as it exists at the time of partition, and, unless the other members can show, at least by a few instances or otherwise, that there has been fraud or gross misconduct or gross extravagance or gross disproportion as to the expenses of the different members, past transactions cannot be re-opened.] The lower Court held that the defendants had failed in proving fraud or misappropriation or gross extravagance, and that the plaintiff was, therefore, "not bound to explain past transactions or to account for mesne profits;" but at the same time "that he must submit an account of the transactions themselves, so far as he could, and, if possible, from the death of his father in 1864," as to which the Court held that he had discharged his obligation by producing all the account books, including day books, ledgers, *samadaskhats* and *nunds* from *Samvat* 1920 (A. D. 1864) to *Samvat* 1942 (A. D. 1886). In answer to this account defendants presented 14 statements, I. N. to J. A. based on the account books themselves, and which were used by the Subordinate Judge in connexion [278] with the various objections set out in detail in paragraph 19 of the written statement.

Owing to the peculiar constitution of an undivided Hindu family, which renders it difficult to define with precision the legal position which the manager of the family holds relatively to the other members, the nature and extent of his responsibility have, as might be expected, given rise to much difference of opinion. In *Ranganmani v. Kashinath* (2), Mr. Justice Markby laid it down broadly that a member of the family who takes upon himself the active management of the family affairs does not thereby render himself liable to render to the rest of the family an account of his management. However, a Full Bench of the Calcutta High Court, in which Mr. Justice Mitter took part, declined to adopt Mr. Justice Markby's view of the manager's position, and held that the manager was bound, in equity and good conscience, to account for his management, and would be liable to a suit if he did not do so. This decision, however, leaves the question still open as to the nature of the account which the manager must render, and which Mr. Justice Mitter admitted would be different from that of a managing member of an ordinary partnership. In Bombay, West, J., after remarking that, in the absence of fraud and gross misconduct, the object of such an account is simply to determine

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(1) 12 B. H. C. R. 281.

(2) 3 B. L. R. (O. C. J.) 1.

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the nature and value of the property, says in *Meghasham v. Vithalrao* (1) : "The manager is not a trustee required, as in ordinary case of trustee, to keep accounts of his own expenditure, or of that of the ordinary members, or of supplies taken out of the common stock. The remedy for his misconduct is his deposition or partition, in which an adequate account can in general be taken." Mr. Justice West is here speaking of the manager's liability to a suit for an account, and we do not understand him as meaning that the manager is exempt from any liability to account on the occasion of a partition of a family estate between the members. In *Konerrav v. Gurrav* (2), Melvill, J., lays it down as the ordinary rule that a Hindu co-parcener seeking a partition cannot demand [279] an account; but he is there speaking of a partition between members who have been in possession of different portions of the property, and he considered that there was nothing in the extent of the property in the possession of either of the parties to take the case out of the ordinary rule, and he remarks that, where one member of the family has been entirely excluded from the enjoyment of the property, there might be good grounds for ordering an account. Mr. Justice Melvill is not considering the case of a member who has had the exclusive management of the family property in his hands, and we think it would be difficult to hold that there is anything in the custom of a Hindu family which can justify the manager in refusing to render any account whatever of his management on the occasion of a partition and requiring the other members to accept his *ipse dixit* as to the property subject to partition. What that account should be, so as to discharge him from his liability to account as manager, and what objections the other members can take to it must, we apprehend, depend on the conduct of the manager and the other members, the nature of the property and the circumstances of the family, and cannot be satisfactorily stated in definite terms. However, it has never been said that members who were minors during the management cannot ask for an account, and as they cannot be taken to have consented to the management, they are entitled, when they attain their majority, to hold the manager liable, not only for acts amounting to fraud, but also where the management has been grossly negligent and prejudicial to their interests; the presumption, however, being, as West, J., points out, that in the absence of evidence the property for partition is such as it exists at the time of the suit for partition. In the present case, as the plaintiff of his own accord applied for and obtained a certificate of administration of the appellants' estate under the Minors Act, there is all the more reason for holding him accountable for acts of mismanagement and extravagance, if proved against him.

It was said, however, that the defendants have been guilty of laches in not sooner impeaching the plaintiff's management, and should not be allowed to do so now; but the second and third defendants were, by virtue of s. 3 of the Indian Majority Act (IX of 1875), not of age until they attained twenty-one, which would not [280] have been, as Mr. Vasudev admitted more than a year and three years respectively before the present suit for partition was brought by the plaintiff, with whom they had lived and been on good terms up to that time. We must, therefore, in answer to the 22nd issue raised by the Subordinate Judge, hold in the affirmative

(1) S. A. 148 of 1871, 14th Sept. 1871.

(2) 5 B. 589.

that it is open to the defendants to raise objections with reference to the plaintiff's management.

As to the nature of the account which plaintiff should render of past transactions, we agree with the Subordinate Judge that, having regard to the circumstances of this family and the nature of the family property, the plaintiff in producing the books of the firm since Maneklal's death, which contain an account of all transactions relative to the firm's property and as well of the business as the moveable property and also the immoveable property with provisional rent, has done all that he could be expected to do, whether as the family manager or as certificated administrator of the defendants' interests in the family property. The defendants indeed complain that no books are forthcoming before Maneklal's death, and suggest that they have been kept back, but this objection, it is to be remarked, was not taken when the plaintiff produced his books at the trial, nor after the defendants had had an opportunity of examining them, and is now taken on appeal for the first time. The plaintiff was not examined in the Court below, but the *gumasta* of the firm (witness No. 460) says that the books were burnt in the fire which admittedly took place in Bulsar. The same account was also given in the *fargati* suit, as appears from the defendant Damodar's deposition in this case, and should, we think, be accepted in default of any rebutting evidence. The sale of some old books stated in entries (Exs. 402 and 410) to have taken place in 1874 and 1882, might have been explained if the *gumasta* had been asked about it.

It is not in dispute that the plaintiff Uttamram and Chhaganlal carried on separate money transactions, and Damodar's affidavit and the notice to produce books show that Damodar considered that they had been doing so before Maneklal's death. The plaintiff's own case is that his separate business was carried on by means of his own and his wife's money. [231] He made a statement to that effect in the *farkhat* Suit No. 2251 of 1872, naming at the same time the persons with whom he had those transactions, and has repeated it in answer to defendants' interrogatories in this case. The Subordinate Judge in the *farkhat* suit found that the plaintiff Damodar had failed to prove that the private transactions of Uttamram and Chhaganlal had been carried on with the moneys of the family. This is important, as Damodar had been quarrelling with Uttamram for several years before the partition in 1869, and although only eighteen or nineteen at that time, must have been in a position to ascertain the truth. It is not contended that the firm's books, in which Uttamram and Chhaganlal had separate *khata*s, afford any support to the defendants' case. The defendants' suggestion would appear to be that moneys were taken by Uttamram and Chhaganlal when Maneklal was suffering from paralysis two or three years before his death or after his death, but it rests upon no evidence whatever to support it.

Upon the whole, we agree with the Subordinate Judge that, having regard to the long period (commencing probably even before Maneklal's death) during which these separate transactions have been openly going on side by side with the firm's transactions, it was incumbent on the defendants to give some evidence that the family funds were used in them, as they allege, and none is forthcoming. The Subordinate Judge has, therefore, in our opinion, decided the issue raised by the 10th item of the 19th paragraph of the written statement and the 12th issue correctly in holding that the cash balances and outstandings relating to the dealings carried on by the plaintiff in his and his brother Chhaganlal's names are

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not liable to be included in the partition. There is, however, a sum of Rs. 2,500 debited to the defendant Damodar in the firm's books for 1924, which the judgment in the *farkhat* suit held not to have been paid to Damodar. The plaintiff must, therefore, account for that sum, but without interest.

Passing to the consideration of the specific charges of mismanagement set out in the 19th paragraph of the defendants' written statement, we think that the Subordinate Judge has correctly disposed of the first three. The circumstance that the plaintiff [282] had obtained a certificate of administration of the interests of the minors and sold their interests in the houses without the consent of the Court, could not, in any view of the Minors Act and quite independently of the remarks of the Court in *Shivji v. Datu* (1), give the defendants' any counter claim against the plaintiff in this suit without proving that they had been prejudiced by the sale. Here Chhaganlal and Dayabhai may be presumed to have consented to the sales of the houses and shops, and there is no evidence to show that they were not sold with a due regard to the interests of all the members of the family. The same remark applies to the purchases of the houses between *Samvat* 1920 and *Samvat* 1940 for Rs. 5,088 and the plot of ground purchased in *Samvat* 1922 for Rs. 16,200 and afterwards built on.

The 4th item relates to the purchase of ornaments. It was suggested that there were family ornaments in existence at the time of Maneklal's death, and it was urged that this might be inferred from what plaintiff admitted in the *fargati* suit, *viz.*, that he, Dayabhai, and Chhaganlal had about Rs. 2,000 each of ornaments at the time of Damodar's separation, and the entries of ornaments made since Maneklal's death. This, however, would only show that the sons by the first wife had had ornaments given to them for their own use during their father's life, and presumably by him; in the absence of evidence to show the contrary, such gifts, if not of an unreasonable amount, might be validly made by the father even out of ancestral moveable property—*Mitakshara*, ch. I, s. 1, para. 27. The decision of *Lakshman v. Ramchandra* (2), referred to by the defendants, does not militate against this view. The family was a wealthy one, and the father might well have given his eldest son, the plaintiff, and his wives ornaments of the value of Rs. 1,300, even assuming that the gift of ornaments of such an amount can be fairly inferred from the evidence, which, however, is far from being the case. However, as to ornaments purchased since the death of Maneklal, we think that they must be brought into hotchpot by all the parties in making the partition of the family property. It was said indeed [283] for the defendants that there was no sufficient proof that they had received the ornaments stated in the accounts to have been purchased for them. The *gumasta* said they had been given to their mother. Kashi, however, was not called by either party, and there would be no presumption, as the Subordinate Judge thinks, that the minors received them. On the whole, we think it would be more satisfactory that the question whether the defendants or any or either of them have or has received the ornaments so stated in the accounts to have been received by them or him should be distinctly considered by the Court in executing the decree as regards bringing the ornaments into hotchpot. The plaintiff should also bring into hotchpot the ornaments,

(1) 12 B.H.C.R. 281.

(2) 1 B. 561.

or their value, mentioned in Ex. I N as being of the value of 83 rupees, 35 rupees and 14 rupees respectively, but not stated to have been made for any member of the family in particular, and of which the plaintiff is unable to give any satisfactory account.

As to the remissions of tenants and compromises of suits, although they show a loss to the family firm of a considerable sum between 1920 and 1942, the defendants have failed to give any proof that they were improper or uncalled for. The circumstance that Damodar was not made a party to the suits, may have afforded the defendants an opportunity of taking a technical objection, but cannot by itself and without any other evidence afford sufficient reason for concluding that they were compromised without adequate cause, or contrary to the interests of the family. As to the remissions to debtors, the Court below has considered they were satisfactorily explained by plaintiff, and that to Rajaram Ganda was, we think, the only one seriously disputed before us. Rajaram owed Rs. 1,024 to the firm, which was compromised at Rs. 551. The defendants say that Rs. 150 was advanced to Rajaram on the same day and is included in the Rs. 551, and that Rajaram's debt to plaintiff was compromised at Rs. 150 with the Rs. 150 purporting to be advanced to Rajaram. The plaintiff by his vakil says that Rajaram paid no money, but gave a transfer on Pestonji Bomanji and paid the plaintiff his debt when compromised in the same way—and the *samadaskat* of 1925 was referred to to establish this. Mr. Shivram could not deny that [284] it so appeared by the *samadaskat*, and upon this evidence, which the defendants have not been able to rebut in any way, we think the explanation must be accepted. As to cl. 14, which relates to the items of Rs. 375, Rs. 740, and Rs. 1,000 (mentioned in T 2) debited to Chhaganlal, the first sum was, as the books show, taken by Chhaganlal himself and afterwards debited to his daughter Harkor's marriage deposit account. The Rs. 740 were written off for expenses incurred by Chhaganlal on his visit to Bombay, and the Rs. 1,000 were given by him to a widowed daughter on his deathbed. The entries must, we think, in the state of the evidence, be presumed to be correct. Chhaganlal himself, as the evidence shows, took part with plaintiff in the affairs of the family and wrote in the books. In any case, there is no evidence to make plaintiff personally liable for them, or to forbid their being transferred to the general account.

As to the losses sustained in trade, amounting to Rs. 8,935-1-3, mentioned in statement T. S, the defendants say that such trade was not part of the firm's legitimate business, and that plaintiff should be held liable for them. The ledger, however, of 1920 shows that business in molasses, grain, &c., was carried on in Maneklal's lifetime, and the conclusion is therefore that it was part of the firm's business. As to the transactions themselves, plaintiff's vakil says that no contract books were kept, and that the particulars of the business are to be found either in the firm's books or those of the parties with whom they traded, and the plaintiff was not questioned about them in the interrogatories. No case has therefore been made out for holding plaintiff personally liable for the losses, and they were properly debited to the general business account of the firm.

As to the expenses of litigation, to which items 17 and 18 of cl. 19 of the written statement taken in connexion with the defendants' statements relate, we cannot agree with the Subordinate Judge that the expenses incurred by plaintiff in the *fargati* suit should be made a charge on the estate. The plaintiff and Chhaganlal were declared by the judgment

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of the High Court to have taken advantage of Damodar's youth, and to have given him less than his fair share of the family property, [285] and the *farkhat* executed by Damodar was set aside. No part, therefore, of the expenses incurred by the plaintiff, whether directly or by paying Damodar's costs (if any), can be properly thrown on the estate to the prejudice of the defendants. As to expenses incurred by plaintiff in the suits against debtors and tenants, it was urged that such as were caused by plaintiff's not making Damodar a party to the suits should not be charged on the estate. It was urged for plaintiff that he might have thought in good faith that as manager he could sue in his own name, and that it was not necessary to make Damodar a party, but this could not be so after Damodar objected to being represented by him. We think, therefore, that the expenses caused as above stated must also be excluded from the expenses of litigation to be charged on the family estate.

With regard to the expenses incurred by the plaintiff in the proceedings which Damodar instituted to set aside the certificate and for an account, as that litigation was exclusively between plaintiff and Damodar, in which the other defendants were in no way concerned, they ought not to be charged on the estate. The same remark applies to the Rs. 3,994-8-0 referred to in sub-cl. 18 of cl. 19 of the written statement, being the expenses incurred by Damodar in the *farghati* suit exclusive of what Damodar has recovered as costs from plaintiff, as the other defendants are in no way responsible for the plaintiff's misconduct in the partition which was set aside. As to item 13 of cl. 19 of the written statement, the plaintiff admits he must account in partition for the Rs. 15,000 drawn out by him on 1st October, 1885, a few months before the institution of the suit, and also for the Rs. 5,048 drawn out on the 13th January, 1886. In making up the partition account, Damodar must bring in the houses which he received in 1869 when he separated from the family, and also account for the rents received by him for the same, excepting the house in which he lived. Damodar, on the other hand, must be credited with the several annual sums, mentioned in the statement I Z on account of maintenance and such sums as he may have expended in repairs or rebuilding of the houses or any of them, in taking account as shown in I Z to which he was entitled after he was restored to family.

[286] It remains to consider the objections taken to the maintenance awarded to Mancha, widow of Chhaganlal, Krishna *alias* Kashi, widow of Maneklal and mother of the first three defendants, and Nandkore, widow of Maneklal's brother Pranjivandas. It has not been seriously contested before us that maintenance is forbidden by the custom of the caste, as stated in the written statement of Damodar. The lower Court awarded Rs. 100 per annum and a residence to the three widows. The first three appellants object to maintenance being awarded to Manchha and Nandkore, because they say Manchha is provided for by Chhaganlal's separate business, which is managed by plaintiff, and Nandkore did not ask for any. This was not the objection as regards Manchha taken in the Court below, and there is no evidence to support it. It was there only said that she should bring in the joint family property she possessed, but the lower Court found, and no attempt has been made to dispute the correctness of the Court's finding, that she had no property of any sort except perhaps a few hundred rupees and ornaments which are unproductive property. As to Nandkore, she was made a party, and it was admitted by Damodar, and this is not disputed by the other defendants, that she was entitled to maintenance if the other widows were. No reason has

been shown for interference with the award of the Court as regards their maintenance, which is almost nominal in amount.

As regards Krishna *alias* Kashi, the mother of the first three defendants, she contends that she is entitled to a one-fifth share of the family property, and not merely to maintenance. This objection raises a question which has never been the subject of express judicial decision in this Presidency, although it is referred to by Mr. Justice West in his elaborate judgment in *Lakshman v. Satyabhamabai* (1). However, in *Damoodur Misser v. Senabuttu Misrain* (2), it was decided in a partition suit (Mr. Justice Mitter delivering the judgment of the Court) where a deceased father had left sons by different wives, that each wife, that is, both mother and step-mother, according to the leading authorities of the Mitakshara school, shared equally with all the [287] sons. The conclusion is based, in the main, on the Mitakshara, ch. I, s. 7, v. 1, where it is said that, "heirs dividing after the death of the father let the mother also take an equal share." This leaves it in doubt whether the term "mother" includes step-mother, but the Court adopted the opinion of the author of the *Viramitrodaya* at p. 80 that it was intended by the author of the Mitakshara to include it from the circumstance that the passage is introduced by the remarks "It has been ordained that the wives are entitled to share equally with the sons in partition during the lifetime of the father," which shows that the division is the same whether the partition is effected before or after the death of the father. This view is also confirmed by the language of the *Mayukha*, ch. IV, s. 4, vs. 18 and 19.

It was urged indeed by Mr. Vasudev for the respondent that Kashi should only share equally with her own sons, but that would be clearly contrary to the rule laid down in the Mitakshara on a division during the father's lifetime. It was said, however, that the right of a mother to share with the sons on partition was obsolete. Mr. Mayne says it is so in Southern India, but there is no sufficient reason for thinking that it is so here. It may be that no instance of its being recognized is to be found in the reports; but this is scarcely a matter for surprise, as, when partition takes place between brothers, the widows still living are generally only the widows of deceased brothers. However, the questions and answers in West and Buhler, pp. 360, 820, 824, conclusively show that the mother is still considered to be entitled to a share in this Presidency, and not to a mere setting apart of a maintenance. They, as well as the remarks of the learned authors, are inconsistent with the opinion which is expressed by Rao Saheb Manqlik in his work that the claim of a mother to a share is obsolete.

On the whole, we think that no case has been made out for treating the mother's claim as obsolete. The conclusion arrived at by the Calcutta High Court on the question as to the right of a step-mother to share equally with all the sons, although not entirely free from doubt on the several Hindu texts and authorities, appears to us to be in accordance with the opinion of the author [288] of the Mitakshara, the principal authority in this Presidency, and should be adopted. Krishna will therefore be entitled to a one-fifth share in the estate, but subject to the liability to contribute with the other co-sharers towards the maintenance of Manchha and Nandkore; as we cannot hold that she has waived her right to share in the family estate because she did not claim it when Dayabhai separated from the family in 1868, or Damodar asked for his

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(2) 8 C. 537 (539).

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share in 1869. There is no evidence to show that she took any part in those transactions, which were apparently managed exclusively by the plaintiff, the eldest son, with the tacit consent of Chhaganlal.

It remains to consider the question as to the custody of the *rajseva*. We think that question has been rightly decided by the Subordinate Judge. We think that the findings on issue 8 should be varied by declaring that the plaintiff Uttamram is entitled to take the *rajseva* and keep it, with the property appertaining thereto, as the family idol and the property thereof, which, we agree with the Subordinate Judge, is rightly stated in the inventory attached to the plaint, with liberty to such members of the family as are or shall become *marjadas* to have access to the same for the purposes of worshipping them.

This disposes of all the questions raised by the appeal except as to the costs of the suit, which the Court below has thrown on the estate. As the Court below has found, and we think correctly, that the defendants have failed in establishing any fraudulent or dishonest conduct on the part of the plaintiff in the management of the estate, the rule in ordinary partition suits, that the costs of the suit should be borne by the estate, was properly followed. The decree must therefore be varied in accordance with the remarks made in this judgment and also as to the costs of Bai Krishna, Bai Manchha, and Bai Nandkore, each of which must be calculated on the claims as allowed by this judgment, but subject thereto the decree is confirmed; and we think that parties should pay their own costs of this appeal, except costs of Bai Krishna, which should be paid by the plaintiff.

Decree varied.

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[289] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

KALIAN MOTI (*Original Plaintiff*), Appellant *v.* PATHUBHAI
FALJUBHAI (*Original Defendant*), Respondent.* [10th March, 1892.]

Talukdars Act (Bombay Act VI of 1888), s. 31, cl. 2—Construction—Retrospective operation—Alienation of estate—Sanction.

A decree upon a mortgage bond passed against part of a *talukdar's* estate on the 15th August, 1887, was transferred under s. 320 of the Civil Procedure Code (Act XIV of 1882) to the Collector for execution. The property was sold on the 5th August, 1889, but the Collector refused to confirm the sale, as the sanction of the Governor in Council under cl. 2, s. 31 of the Talukdars' Act (Bombay Act VI of 1888), which came into force on the 25th March, 1889, had not been obtained.

Held, that the section was not retrospective in its operation, and that the sale should be confirmed, although no sanction had been obtained. When the Act passed, the plaintiff had already acquired a vested right by the decree to have the property sold, and the presumption was that the Legislature did not intend to interfere with that vested right. That presumption was not rebutted by any intention to interfere appearing in the Act itself.

[F., 1 Bom.L.R. 849; R., 19 B. 80 (82); 22 B. 884 (887, 888, 889); 1 Bom.L.R. 154 (155); 11 Ind. Cas. 912 (913)=7 N.L.R. 125.]

THIS was a second appeal from an order passed by E. M. H. Fulton, District Judge of Ahmedabad, in execution of a decree.

* Second Appeal No. 586 of 1891.