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FULL
BENCH.18 B. 175
(F.B.).

There was no appearance for the parties.

The reference was decided by a Full Bench consisting of SARGENT, C.J., and CANDY and FULTON, JJ.

JUDGMENT.

We think that the first question, put by the Subordinate Judge, should be answered by saying that mortgages, noted in the proclamation of sale as claims upon the property sold, should not necessarily be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civil Procedure Code, to be charges on the property and the Court has seen [177] fit to sell it subject to them, but that they should be entered in the certificate, and computed as part of the purchase-money, if they have been thus admitted or established, or if they have been declared, under s. 282 of the Civil Procedure Code, and the sale has been held subject to them.

As regards the second question, we consider that claims admitted by the parties, or established by decree of a Court, should be entered in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under s. 287 only, and have not been made the subject of an order under s. 282 of the Civil Procedure Code.

Order accordingly.

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APPELLATE CIVIL.

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

PARVATI AND ANOTHER, MINORS (*Original Plaintiffs*), Appellants v.
GANPATRAO BALAL AND OTHERS (*Original Defendants*),
*Respondents.** [27th February, 1893.]

*Hindu law—Joint family—Manager—Gift by manager of part of family property—
Illegitimate daughters—Maintenance—Gift—Alienation of family property—
“Dasiputra” (son of a slave).*

Ramchandra, the manager of an undivided Hindu family, gave certain shares in a spinning and weaving company, which had been purchased out of family funds, to Ganesh for and on behalf of the plaintiffs, who were Ramchandra's illegitimate daughters. After the death of Ramchandra and Ganesh, Ramchandra's illegitimate daughters sued the surviving members of the family for a declaration that the shares belonged to them, and that they had a right to have them transferred to their names in the company's books.

Held, without deciding whether illegitimate daughters are entitled to simple maintenance from the family property, in any case, Ramchandra, as manager, could not alienate the shares for that purpose, as there were no emergent circumstances requiring it.

[F., 4 Bom.L.R. 893 (890); R., 24 B. 563 (579); 29 B. 51 (54); 32 B. 562 (566)=10 Bom.L.R. 736.]

APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

The plaintiffs were the minor illegitimate daughters of one Ramchandra Ganesh, deceased. They sued the defendants, who were the

* Appeal No. 67 of 1890.

legitimate sons of Ramchandra, for a declaration that [178] certain shares in the Morarji Goculdas Spinning and Weaving Company belonged to them, and that they had a right to have these shares transferred to their names in the books of the company.

They alleged that the deceased Ramchandra in 1876 had given these shares to one Ganesh Bapuji for and on their behalf; that he had intended to transfer them into the name of one Ganesh Bapuji Marathe, who passed an agreement to the plaintiffs that he held the shares for them and on their behalf, and that the company declined to transfer the shares to the plaintiffs' names owing to the defendants' opposition. They prayed, therefore, for the above declaration and for an injunction restraining the defendants from interfering with the plaintiffs' rights and from drawing the dividend on the said shares.

The defendants Balvant, Sadashiv and Hari, sons and representatives of the deceased Ramchandra Ganesh, pleaded (*inter alia*) that the suit was time-barred, that Ramchandra was not competent to alienate the shares, which had been purchased out of the family funds, and that the gift being incomplete was invalid.

At the hearing it was proved that the family was joint, and that the shares had been purchased out of the family funds. Ganesh Bapuji had died in 1880. The Subordinate Judge disallowed the claim, holding that the gift to the plaintiffs was not proved, and that the donor Ramchandra had no authority to make the gift. In his judgment he said:—

"The facts which have been proved beyond all doubt are these:— That the defendants' family was joint; that the shares in dispute were purchased with the ancestral funds belonging to the joint family by Ramchandra; that the said Ramchandra attempted to make a gift of these shares to Ganesh Bapuji; that he wrote to the secretaries and treasurers of the Morarji Goculdas Spinning and Weaving Company to transfer these shares to Ganesh Bapuji's name, which they refused to do owing to the defendants' objections; that Ganesh Bapuji brought a suit claiming those two shares as *his*; that the costs of that suit were defrayed by Chimma, the plaintiffs' guardian; that [179] Chimma herself claimed the shares from the company as hers. These facts undoubtedly disprove the assertion that the shares were given in gift to the minor plaintiffs as alleged by them. It is for them to prove their assertion that these shares were given to them as alleged, and that the gift was completed by the necessary formalities. These the plaintiffs have clearly failed to prove. Were it otherwise, the shares were purchased with joint ancestral funds by Ramchandra. Hence he cannot make a gift of those shares as against his co-owners, who not only did not give their consent, but actually repudiated the transaction.

* * * * *

The plaintiffs appealed.

Inverarity (with *Balaji Abaji Bhagavat*), for the appellants (plaintiffs).

—The management of the family property was in the hands of Ramchandra, who purchased the shares in dispute in his own name in or about November, 1875. In the year 1876 he was ill and desired to go on a pilgrimage to Benares, where his father Ganpatrao was then living. The plaintiffs' mother Chimma had been Ramchandra's mistress for several years, and prior to his going to Benares he desired to make provision for the plaintiffs who are his illegitimate daughters. He had a separate account in the family books, and he debited to himself the price of five shares and credited it in the accounts of the family. In fact, he bought five shares from the

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family estate. Out of them he gave two to Ganesh Bapuji orally upon a secret trust in favour of his daughters (the plaintiffs). In the year 1878, Ganesh passed an agreement in favour of the plaintiffs with respect to the shares. The Subordinate Judge has held that agreement to be proved; The question as to the gift has arisen in other judicial proceedings. The story as to the gift, therefore, is not a new one. The only question to be determined, then, is whether the gift was complete or not. The fact of the gift is not disputed. The contention is either that Ramchandra had no power to make the gift, or that the gift was incomplete. The lower Court wrongly held that there was no gift. The shares were given for the maintenance of the plaintiffs. The illegitimate children of a person belonging to the twice-born [180] class are entitled to maintenance; and the assignment in favour of the plaintiffs being complete, they are entitled to take the benefit of that assignment.

The delivery, by Ramchandra, of the share certificates to Ganesh and the execution of the transfers with the oral direction to Ganesh to hold the shares for the benefit of the minor plaintiffs show that there was a perfectly created trust valid in law. It could not be rendered incomplete by the fact that the name of Ganesh was not entered in the shareholders' register. Ramchandra having done everything in his power to get Ganesh's name registered, the trust was complete—Lewin on Trusts, p. 66. The legal estate was divested from the settlor, and that was sufficient. When the owner creates a trust for the benefit of a third person by appointing a trustee, it is not necessary that the legal interest of the owner should be entirely divested from him if the trustee can acquire that legal estate without any further act on the part of the owner. When there is nothing further to be done by the donor, the gift is complete—*In re Richards*; *Shenstone v. Brock* (1). It is not necessary for the purpose of passing the interest in the shares that the transfer should be registered—Buckley on Companies (6th ed.), p. 93; *Roots v. Williamson* (2); *The Societe General de Paris and G. Colladon v. Jenet Walker* (3).

Assuming that the legal estate did not pass to Ganesh, still under the circumstances the plaintiffs might have compelled the company to transfer the shares to their names under the articles of association. That being so, they could have asserted their right against Ramchandra even if he had been alive.

The rules as to a gift under Hindu law are not applicable to this transaction. We contend that the transaction is not a gift, but a mere transfer effected for the purpose of a legal object, namely, the maintenance of the minor plaintiffs, who, though illegitimate, are entitled to maintenance under Hindu law.

Jardine (with *Mahadeo Chimnaji Apte*), for the respondents (defendants).—The shares were purchased by Ramchandra with [181] ancestral funds; they were, therefore, family property. At the time of the alleged transfer, Ramchandra, although the manager of the undivided family, had only a limited interest in the family estate which he could not give away even to the extent of his own share—*Ramanna v. Venkata* (4); *Ponnusami v. Thatha* (5); *Vasudev v. Venkatesh* (6); *Gangubai v. Ramanna* (7) *Lakshman Dada Naik v. Ramchandra Dada Naik* (8). Even assuming that there was legal or moral obligation for

(1) 36 Ch. D. 541.

(2) 38 Ch. D. 485.

(3) 11 Ap. Ca. 20.

(4) 11 M. 246.

(5) 9 M. 273.

(6) 10 B. H. C. R. 139.

(7) 3 B.H.C.R.A.C.J. 66.

(8) 7 I. A. 181.

the gift, still the above authorities show that the gift was bad. But we contend that there was neither any legal nor moral obligation to support the plaintiffs, being illegitimate daughters. The Hindu texts lay down that it is only a *dasi-putra* (son of a slave) that is entitled to inherit—*Rahi v. Govind* (1). Illegitimate sons may be entitled to maintenance, but illegitimate daughters are not. The word in all the texts being *dasi-putra* (son of a slave), it excludes a daughter. No doubt in the reported cases the words used are "illegitimate children," but none of the texts uses the word "children," the word throughout being *putra* (a son)—*Vyavahar Mayukha*, Ch. IV, s. 14, pl. 29-32; *Daya Bhaga*, Ch. IX, pl. 28; *Mitakshara*, Ch. I, s. 12; *Kirpal Narain v. Sukurmoni* (2). Even if the transaction in dispute be considered to be a gift, it is invalid according to Hindu law. The gift was not complete. It was argued that the transfer might have been compelled, but the thing to be considered is what was actually done. There was no transfer made, and Ganesh acquiesced in the objection raised by the company to the transfer. Ramchandra might have intended to make a gift which was not completed before his death. Such a gift is invalid—*Hirbai v. Jan Mahomed* (3).²

Inverarity, in reply:—In support of our contention that illegitimate daughters are entitled to maintenance, we rely upon *Salu v. Hari* (4); *Inderun Valungypooly Taver v. Ramasawmy Pandia* (5); *Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi* [182] *Nilamani Patta Maha Devi Garu* (6); West and Bühler, pp. 263, 432. No doubt the word "son" occurs in the texts, but we contend that the word "son" should be held to include "daughter," as the word "brother" has been held to include "sister."

JUDGMENT.

SARGENT, C.J.—The plaintiffs in this suit, who are the illegitimate children of one Ramchandra Ganesh, ask for a declaration that certain shares in the Morarji Gokuldas Spinning and Weaving Company, which had been purchased by their father, belonged to them, on the ground that they had been given by him to one Ganesh Bapuji for and on their behalf. The Court below found that the gift to plaintiffs was not proved; that the shares were purchased with ancestral funds by Ramchandra, and that he could not make a gift of them without the consent of the defendants, who are his legitimate children; that the gift, if at all, was to Ganesh and not to the plaintiffs, and that the gift, in any case, was incomplete, and accordingly dismissed the suit.

The appellants (the plaintiffs) have not attempted to argue that the Court was not correct in its finding as to the family having been joint and the shares having been bought with ancestral funds. The first question, therefore, in this case is whether Ramchandra could give the shares to the plaintiffs, or rather to Ganesh in their behalf, supposing the gift to be one which the Court would otherwise give effect to.

Ramchandra, it is admitted, was acting as manager of the family whilst his father Ganpatrao Balal was at Benares, and it has been argued that the support of Ramchandra's illegitimate children by Chima was a legal obligation on the entire family, and that a gift by Ramchandra as manager for that purpose could not be impugned, but that, at any rate, it was good as an alienation of his own share for that purpose. There is, doubtless, express authority for holding that an illegitimate son of one of

(1) 1 B. 97.

(2) 19 C. 91.

(3) 7 B. 229.

(4) P. J. (1877), p. 34.

(5) 13 M.L.A. 141 (159).

(6) 13 M.L.A. 497.

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the family is entitled amongst the regenerate classes to maintenance. See *Chuoturya Kun Murdun Syn v. Sahub Purkulad* (1) and *Muttusawmy v. Vencataswara* (2), and indeed in the case of *Rahi v. Govind* (3), Westropp, C. J., states it to be the result of the authorities that [183] amongst the three regenerated classes illegitimate "children" are entitled to maintenance. It is to be remarked, however, that the real question in that case was as to the meaning of 'dasi' in the text relating to the rights of illegitimate children, and that the authorities on which Westropp, C. J., relies in support of that statement, and which are mentioned in the note at p. 102, only deal with the case of a *dasi-putra*, i. e., illegitimate son. In the *Mitakshara*, Ch. I, s. 12, cl. 3, Yajnavalkya is cited as saying that "the son begotten on a female slave does not obtain a share even by the father's choice, but if he be docile he receives a simple maintenance" and the same passage is referred to by the author of the *Mayukha* at Ch. IV, s. 4, and it is on these authorities that Sir T. Strange in his *Hindu Law*, Vol. I, p. 70, states the right of illegitimate "progeny" to maintenance. Unless, therefore, the expression "*dasi-putra*" can be held to include "daughter," there is no authority for a daughter having a claim to maintenance. It was said that a "son" is to be construed as including a daughter, as "brethren" was interpreted as including "sisters" by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak v. Lakshmibai* (4), which was decided upon the authority of the *Mayukha*. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, is, we think, that they were not contemplated as having the same right.

But in any view of that question it is clear that the plaintiffs' claim to the shares is not sustainable. Even if the daughters were entitled to simple maintenance out of the family property it cannot be contended that it was within the power of Ramchandra, even as the *de facto* manager, to alienate the shares for that purpose, as there were no emergent circumstances requiring it. The case of *Gangubai v. Ramanna* (5) shows this could not be done even in the case of a legitimate daughter.

[184] Lastly, as to the suggestion that the gift might be supported as an alienation of Ramchandra's interest in the family property, even if it could be regarded as an "alienation for value" so as to satisfy the decision in *Vasudev v. Venkatesh* (6), it would be sufficient to say that such was not the plaintiffs' case. But independently of that objection it is plain, on the authorities, that a suit would not lie against the other members of the family to have the shares declared to belong to plaintiffs and transferred into their names.

For these reasons, and without discussing the question whether there was such a possession by Ganesh as to create a valid gift by Hindu law, or whether the evidence suffices to establish that the gift was to Ganesh as a trustee for the benefit of the plaintiffs, we must hold that the plaint was properly dismissed, and confirm the decree with costs.

Decree confirmed.

(1) 7 M.I.A. 18.
(3) 1 B. 97 (102).
(5) 3 B.H.C.R.A. C.J. 66.

(2) 12 M.I.A. 203.
(4) 1 B.H.C.R. 117 (123).
(6) 10 B.H.C.R. 139 (160).