ORIGINAL CIVIL.

Before Mr. Justice Beaman.

KARSONDAS DHARAMSEY, PLAINTIFF, *v.* GANGABAI AND OTHERS, DEFENDANTS.* *1908 January 23.*

Hindu Law—Ancestral property—Doctrine of nucleus—Difference between joint property, joint-family property and joint ancestral-family property.

The three notions—(1) joint property, (2) joint-family property and (3) joint ancestral family property are distinguishable. In all three things there is a common subject—property; but it is qualified in three different ways. The joint property of the English law, is property held by any two or more persons jointly, and its characteristic is survivorship. Analogies drawn from it to joint-family property are false or likely to be false for several reasons. The essential qualification of the second class, is not jointness only, but a good deal more. Two complete strangers may be joint tenants, according to English law: but in no conceivable circumstances could they constitute a joint Hindu family, or, in that capacity hold property. In the third case, property is qualified in a two-fold manner: it must have been joint family property and it must be ancestral.

There must have been a nucleus of joint family property before ancestral joint-family property can come into existence, because the word ancestral connotes descent and therefore pre-existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property it is *not* true that there cannot be joint-family property without a pre-existing nucleus, for that would be identifying joint family property, with ancestral joint family property.

Where there is ancestral joint-family property, every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind. This is equally true of joint-family property.

Where it is known or admitted that some at least of the property of a joint-family has come down to them the presumption is that the whole property is ancestral, and any member alleging that it is not, will have to prove his self-acquisition.

Where property is admitted or proved to be joint-family property, it is subject to exactly the same legal incidents in every respect as property which is admitted or proved to be ancestral joint-family property. Further, this class of property in India differs radically in origin and essential characteristics from the joint property of the English law.

* Suit No. 541 of 1904.

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The fundamental principles of the Hindu joint-family is the tie of Sapindaship. Without that it is impossible to form a joint-Hindu family. With it as long as a family is living together it is almost impossible not to form a joint Hindu family.

There is nothing either in practice or theory which excludes the possibility of members of the same family starting a family fortune holding it as members of a joint-family, and thereby clothing it with all the legal qualities and incidents of joint-family property, chief among which is that every member born into the family after the property has acquired that character, and before it has been divested by partition obtains by birth an interest in it.

IN this case the plaintiff prayed for a declaration that he was solely entitled to all the family properties moveable and immoveable, including the share of one Mulji Jaitha in the firm of Mulji Jaitha and Company. The plaintiff's case was that in the year 1824 Mulji Jaitha, the great-grandfather of the plaintiff began to trade in Bombay under the name and style of Mulji Jaitha and Company, and soon after his son Soonderdas joined him in the business. Mulji Jaitha and Soonderdas Mulji acquired considerable properties, moveable and immoveable, by their joint exertions and enjoyed the same as members of a joint Hindu family.

By an Indenture dated 17th October 1872 Mulji Jaitha and Soonderdas Mulji settled certain of their properties upon certain trusts for the benefit mainly of Dharamsey, the son of Soonderdas Mulji and such other sons as might thereafter be born to Soonderdas. Soonderdas died on 13th January 1875, leaving him surviving his father Mulji Jaitha and two sons, Dharamsey and Gordhandas.

Soonderdas made a will dated 1st December 1874 probate of which was obtained on 21st May 1875 by two of the executors who state in their application that the deceased had no power to dispose by will of any of the properties which by the will he purported to bequeath. After the death of Soonderdas, Mulji Jaitha and his grandsons, Dharamsey and Gordhandas, continued joint in food, worship, and estate as members of a joint Hindu family, and Dharamsey on attaining majority took a share in the management of the firm of Mulji Jaitha and Company and of all other properties belonging to the joint family.

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Mulji Jaitha died on 14th August 1889, leaving him surviving his two grandsons, Dharamsey and Gordhandas, and one great-grandson the plaintiff, being the son of Dharamsey. He also left a will, dated 30th October 1888. By this will the testator bequeathed all the family properties to his grandsons Dharamsey and Gordhandas in equal shares. As at the date of his death Mulji Jaitha formed a joint Hindu family with his two grandsons, and his great-grandson, the plaintiff, he had no power to make any valid disposition of any part of the joint family property.

After the death of Mulji, Dharamsey and Grodhandas and the plaintiff continued members of a joint Hindu family and after the attaining of majority by Gordhandas, Dharamsey and Gordhandas jointly managed all the joint family properties, including the share of Mulji Jaitha in the firm of Mulji Jaitha and Company.

Dharamsey died on 28th February 1899, leaving him surviving his son the plaintiff, his brother Gordhandas and Callianji, the son of Gordhandas, who died in April 1899. Dharamsey previously to his death had duly executed a will dated 7th February 1899. As Dharamsey at the time of his death formed a joint Hindu family with Gordhandas and the plaintiff he had no power to validly dispose of any of the joint family properties.

After the death of Dharamsey, Gordhandas managed till his death all the joint family properties, including the share of Mulji Jaitha in the firm of Mulji Jaitha and Company. Such management was, as manager, and on behalf of the joint family consisting of the said Gordhandas and the plaintiff. In the year 1899 Gordhandas filed a suit being Suit No. 573 of 1899 against the executor of the will of Dharamsey, the surviving trustees of the Indenture of the 17th October 1879, the sole surviving executor of the will of Soonderdas Mulji, and the plaintiff for a declaration among other things that the Indenture of Trust was inoperative and that Dharamsey did not by virtue of the Indenture become solely entitled to the properties, the subject matter of the Indenture. The plaintiff further contended that in so far as the findings in that suit were against any of the plaintiff's

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present contentions, he was not bound by them especially as he was not properly represented in the said suit as his guardians *ad litem* were two of the executors of the will of Dharamsey.

The Court held that the Indenture of Trust was never given effect to and that no trusts had been created thereby and further directed that the decree in the said suit was not to be sealed until Gordhandas obtained letters of administration to the estate of Mulji Jaitha.

Gordhandas died on the 10th October 1902 without issue, leaving him surviving his widow Gangabai and the plaintiff his nephew; he also left a will whereby he appointed defendants 1—4 and one Naranji Thackersey Mulji, executrix and executors respectively.

The plaintiff also contended that, Gordhandas being a member of a joint Hindu family had no right to make any valid disposition of or give any directions about the joint family properties, and the plaintiff was solely entitled in the events that had happened to these properties, and was in no way bound by any of the acts of the executors of Dharamsey, who, as such executors, could not, and did not, properly represent him.

The defendants in their written statement denied that any property whether acquired by Mulji Jaitha or by him and the said Soonderdas jointly was enjoyed by them as members of a joint Hindu family. They denied that at the date of the will of Soonderdas he formed a joint Hindu family with his father and sons or that there was any joint property of such family, that after the death of Soonderdas, Mulji Jaitha and his grandsons, Dharamsey and Gordhandas, continued or were joint in food and worship and estate as members of a Hindu family. They contended that Dharamsey and Gordhandas were brought up and maintained by Mulji Jaitha as dependent members of his family, but without their having acquired by birth or otherwise any interest in the properties of Mulji Jaitha or those (if any) acquired jointly by him and Soonderdas.

They further contended that Mulji Jaitha was the sole and absolute owner of all the properties dealt with by his will, that he had full powers to dispose of the same, and they denied that

Mulji Jaitha at the date of his death formed a joint Hindu family with his two grandsons and his great grandson the plaintiff, or that after the death of Mulji, Dharamsey, Gordhandas and the plaintiff continued or were members of a joint Hindu family or that any joint family properties were managed by Dharamsey and Gordhandas and said that Dharamsey and Gordhandas held and enjoyed the residue of Mulji's estate as their own respective absolute properties as tenants in common, and were as such admitted in due course as partners in the firm of Mulji Jaitha and Company; that Dharamsey at the time of his death did not form a joint Hindu family with Gordhandas and had full powers to dispose of all the properties which had come to him under the will of Mulji Jaitha, that after the death of Dharamsey, Gordhandas only managed the immoveable properties which had come to him and Dharamsey under the will of Mulji Jaitha in the common interests of himself and the estate of Dharamsey until the same could be partitioned.

They further alleged that on the death of Dharamsey the firm of Mulji Jaitha and Company was dissolved and the share of Dharamsey therein ceased. As to the suit filed by Gordhandas in 1899 they alleged that the plaintiff having been a party to that suit was bound by the decision and findings therein and that he could not maintain the present suit; that he was properly represented in that suit.

They denied that Gordhandas was a member of a joint Hindu family, that any of the dispositions or directions made by or contained in his will were invalid or that the plaintiff had any rights to or interest in the properties so dealt with by him; the plaintiff was bound by all the acts done on his behalf by the executors of Dharamsey and that a valid partition of all the properties including the firm of Mulji Jaitha and Company was effected during the life-time of Gordhandas between him and the executors of Dharamsey.

The following issues were raised and tried as preliminary issues:—

(1) Whether assuming that the allegations of facts mentioned in the plaint are correct, did the plaintiff acquire by birth any interest in the properties mentioned in the plaint?

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(2) Whether, if the plaintiff, on the facts mentioned in this plaint, did not acquire by birth any interest in the properties mentiond in the plaint, the plaint discloses any cause of action ?

(3) Whether having regard to the determination, decisions and findings in Suit No. 573 of 1899 and the orders of the Appeal Court and the Privy Council made therein, this Court can try this suit ?

(4) Whether, having regard to the proceedings in Suit No. 573 of 1899 and to the events which have happended, the plaintiff can be allowed to assert that he, by birth, acquired any interest in the properties in the plaint ?

(5) Whether the plaintiff was not properly represented in Suit No. 573 of 1899 as alleged in paragraph 11 of the plaint ?

(6) Whether, having regard to the proceedings in Suit No. 573 of 1899 and the orders made in the Appeal Court and Privy Council, the plaintiff can now be allowed to allege that he was not properly represented in the said suit ?

Strangman (with *Setalvad* and *Weldon*) for the plaintiff.

Inverarity, *Scott* (Advocate-General), *Raikes* and *Lowndes* for defendants 1—4 ; *Bhandarkar* for defendants 5, 6, 7 ; *Vaidya* for defendant 8 ; *Lang* for defendant 9.

Inverarity :—They do not allege any nucleus of ancestral property, they allege that a Hindu father and son jointly acquired property. Mulji Jaitha sprang from nothing and made a considerable fortune. The genesis of the fortune is the trading which was begun by Mulji. Soonderdas was not born till 1839. There is no allegation that trade began with ancestral funds.

The question is whether the grandson of a father and son carrying on business jointly acquired any interest in the property of his father and grandfather. If Mulji and Soonderdas had traded separately what interest could the son have taken in the property of either ? Does it make any difference that they trade together. See Mayne, p. 348 (7th edition), and *Chatturbhooj Meghji* v. *Dharamsi Naranji*[1] ; Dharamsey and Gordhandas took as tenants in common. See suit of 1899. It would not have paid Karsondas to raise his present contention and Gordhandas would have accepted it. It would have got him rather more than he gets at present. On issue 5 the onus of proving that he was not properly represented in the former suit lies on the plaintiff. He was living with his step-

(1) (1884) 9 Bom. 438.

mother and paternal grandmother ; it was not his interest then to set up the case he now makes in his plaint.

The Court then found in so many words that the plaintiff Gordhandas and Dharamsey were entitled in equal shares. Karsondas applied for leave to appeal on the ground that he was not property represented. The appeal Court would not grant leave and plaintiff applied to the Privy Council ; the matter is now *res judicata.* See judgment.

See issues 21, 22, 25 in suit No. 573 of 1899. If anything was uncovered by those issues still it was decided because the whole question in the suit was whether Mulji had not power to dispose of the whole property by will. Mulji got all his cash from the firm ; the legacies left by Mulji have been paid. The point they now raise ought to have been taken if true in the other case. *Gregory* v. *Molesworth*[1] ; *Soorjomonee Dayee* v. *Suddanund Mohapatter*[2] .

Strangman :—We must assume the facts stated in the plaint to be correct. They say no nucleus of ancestral property is alleged, therefore on authority of Mayne, p 348 (7th edition), and the passage in Birdwood's decision in *Chatturbhooj Meghji* v. *Dharamsi Naranji*[3] the case fails. The property of Soondardas survived to Mulji. See paras. 1—4 of plaint. The allegations are that they were joint in food, worship and estate, that is, were co-parceners, not joint tenants. If co-parceners the property they had was property they treated as ancestral property.

Joint tananoy is unkhown to the Hindu law. *Jogeswar Narain Deo* v. *Ram Chund Dutt*[4] .

BEAMAN, J. :—[You are confusing joint-property and joint ancestral property.]

Strangman :—The property was thrown into the common stock and thereby became of the nature of ancestral property. The question is whether our plaint does not make Mulji and Soondardas co-parceners. If that is so all the results follow and each of Soonderdas' sons take an interest by birth.

(1) (1747) 3 Atk. 626.
(2) (1873) Suppl. Vol. I. A., p. 212.
(3) (1884) 9 Bom. 438.
(4) (1896) L. R. 23 I. A. 37.

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My first answer is that the plaint does not put forward joint tenancy; it puts forward co-parcenary with all the results following from it.

My next answer is that a Mayne and Birdwood, J., are wrong, they are introducing an absolutely new conception into Hindu law. Defendant's argument is only sound in English law; it seems curious that property acquired by a father alone stands on a different footing to property acquired by father and son. Hindu law is different; the father might say to the son when he joined him, I won't give you any interest in the property; but Mulji did not do this, he threw it all into the common stock: and each descendant took an interest. Joint tenancy is not applicable to Hindu law. Property must either be ancestral or self-acquired. By throwing it into the common stock they treated it as ancestral property. The only joint property known to Hindu law is ancestral property; directly a father says "I am going to throw this into common stock with my son", he treats it as ancestral: *Sudarsanam Maistri* v. *Narasimhulu Maistri*(1).

We go further and say that Mulji, Dharamsey and Gordhandas were joint in food, worship and estate.

As to *res judicata*:—The settlement only mentioned Dharamsey. Gordhandas claimed he was entitled under it. He claimed all the trust properties, also the properties mentioned in clause (6) of his will, and made his will accordingly. Gordhandas filed the suit No. 573 of 1899 and inadvertently mentioned the other properties. The executors who were the guardians took up the wrong attitude. They accentuated all the differences between Karsondas and Gordhandas. Karsondas was not properly advised. Section 13 of the Civil Procedure Code refers to matters decided in a suit, and therefore it cannot refer to the decision of Jenkins, C. J., and the privy Council which was not in a suit. See *Dinkar Ballal Chakradev* v. *Hari Shridhar Apte*(2).

As to issue 3 we contend that the suit of 1899 was confined to the consideration of the properties in the trust deed and at

(1) (1901) 25 Mad. 149 at p. 155 (2) (1889) 14 Bom. 206.

Byculla and Karachi. The statements in the judgment are very conflicting. We contend you must go by the decree and issues. Our whole case now is inconsistent with the case put forward for Karsondas before RUSSELL, J. (1) The allegations in the plaint amount to an allegation of co-parcenary; (2) the joint tenancy suggested by the defendants is unknown to Hindu law; (3) the allegation is that Mulji, Dharamsey and Gordhandas were joint in estate. We could show on this that after the death of Soonderdas, Mulji had thrown the property into the common stock between himself and the sons of Soonderdas.

Inverarity in reply:—There is no statement in the plaint that father and son threw any property into common stock or that they ever agreed or acted as if treating property as ancestral Consequently there is no allegation bringing the case within the Madras case cited. We do not give evidence as to the conduct of these two persons as there is no allegation made in the plaint.

According to the plaint there is no common stock into which property could have been thrown. There is no allegation that property was acquired by Mulji Jaitha and thrown by him into the common stock.

The proposition that Hindus cannot hold property jointly has also been decided by the Privy Council or otherwise. The result is the same if you hold them to be tenants in common. There is no case deciding that Hindus cannot be co-owners. See William on real property for the meaning of co-parcenery. Two Hindu sons on the intestacy of their father would be co-parceners. Mulji and Soonderdas were both entitled to dispose of their property.

As to *res judicata*, the former suit dealt with all the properties now in dispute. The order as to the minor's representation though made on an application was made in Suit No. 573 of 1899.

BEAMAN, J.:—The plaintiff sues as a member of a joint undivided Hindu family, alleging that his great-grandfather Mulji Jaitha, with his son Soonderdas Mulji founded the family fortunes, acquiring great wealth, and that they were joint in

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food, worship and estate ; that on the birth of Soonderdas' eldest son, Dharamsey, the joint family consisted of Mulji Jaiha, Soonderdas Mulji and Dharamsey Soonderdas ; that the various settlements and devises made by Mulji Jaitha, Soonderdas Mulji and subsequently by Dharamsey Soonderdas and Gordhandas Soonderdas were all invalid and beyond their competence, as purporting to dispose of joint family property, in the first instance, and afterwards of joint ancestral family property. That on the birth of Gordhandas, he too acquired by birth a right in the joint family property, and after him his son, since deceased, and the plaintiff who is the son of Daramsey Soonderdas.

The defendants, representing generally, the estate of Gordhandas, demur, that the plaintiff on his own showing acquired no interest by birth, in the family property or to so much of it as had come into the hands of Gordhandas, and had formed the subject of his will ; that this being so, the plaint discloses no cause of action, and should be dismissed. Futher, the defendants plead that by reason of the suit brought by Gordhandas against this plaintiff in the year 1899, the contentions raised in that suit, the decision thereon and the decree, the present suit is *res judicata*. And to the plaintiff's averment that he was not properly represented in that suit, the result of which is not therefore *res judicata*, against him, the defendants reply that that, too, is *res judicata* by reason of the application for leave to appeal, grounded on the same averment, which was heard, first in this Appeal Court, and again before their Lordships of the Privy Council and rejected. This Appeal Court and the Privy Council held that the plaintiff had been properly represented in the previous suit.

The demurrer rests on this ground. The plaintiff does not allege that when Mulji Jaitha started business he had any ancestral property. It is admitted that he built up his business by his personal exertions, and that it was at a much later stage that he associated his son Soonderdas with him in the business. While therefore the defendants appear to admit, and it was so found in the former suit, that Mulji Jaitha and Soonderdas Mulji were joint in all respects, joint in food worship and estate,

that means no more than that thay were joint tenants, and that on the death of Soonderdas before his father, the latter took the whole estate by survivorship, as his own self-acquired property, over which he had full powers of disposition. The basis of this argument is what I may call the doctrine of nucleus, a doctrine which I cannot help thinking has involved the simple theory of the Hindu law, applicable, to the joint-family estate, in a great deal of confusion. Briefly it amounts to, or is used as amounting to this, that where there has been no nucleus of joint family property, that special estate does not come into being until there has been at least one unimpaired descent. Or in other words to throw it into a concrete from, if a father and son, or two brothers, start upon nothing, and make a fortune, which they use in common to the end of their lives, children being born to them in the meantime, that fortune has the character, rather, of what in England would be called joint estate, than of what in this country would be called joint-family property. The important consequence is that in the former case, the children would take no interest by birth, while in the latter case they would.

The demurrer was admirably argued by Mr. Strangman for the plaintiff: it was supported strenuously by the leading advocate at this bar Mr. Inverarity, and after attentively listening to all that could be said on either side, and giving full weight to the rival contentions, and examining much at least of the voluminous case law on the subject, I think I might help a little to simplify it by stating as shortly as I can the reasons on which I rest my conclusion.

If we want to get a clear and sound understanding of this vexed question the best way, is to look direct, in the first instance, at the fundamental principle, underlying it; not, I think, to approach it, through the medium of innumerable cases, but taking, the terms, which in those cases, are overloaded with definitions and distinctions, and trying to find out which are and which are not appropriate, rejecting after this separation, the latter, and getting as well as we can at the real sense

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of the former. This needs on difficult reflective analysis. We must disentangle the English and the Hindu notions which, owing to a likeness of names, have spread quite a little network of fallacies, and bad argument over the subject. And when the names are separated, it becomes comparatively easy to look clearly at the underlying concepts, and keep them, again, apart. We have joint property, denoting a very special legal idea in England, and we have joint family property denoting a very special legal idea in India. Arguing from the one to the other, because they have the term "joint" in common has I believe given rise to whatever difficulty, Indian Courts may have experienced in dealing with this class of case.

While the English joint estate is wholly unknown to Hindu Law, it is still more emphatically true that Hindu joint-family estate is wholly unknown to English law. But observe how loosely the terms are used, and to what further confusions such use may give rise, in such a proposition, for example, as that in a Privy Council case, that joint property is unknown to the Hindu law except between co-parceners in a joint undivided Hindu family. First, as though it were known, in that form; in other words as though the "co-parcenary" of an undivided Hindu family holding property, were identical in its legal incidents with, either co-parcenary in England, or joint tenancy there; second, as suggesting that a property holding joint Hindu family could only be constituted in this country in the same way as a co-parcenary in England. For want of terms ready to their hands English lawyers and Judges not unnaturally apply, those English terms with which they are familiar, and the connotations of which appear on the surface best to fit the case. Thus in this country "co-parcenary" is almost uniformly used as synonymous with joint family; and, in this case, that loose and misleading use of the technical term of the English law has afforded Counsel an argument, amounting in effect to this, that, as in England the state of co-parcenary depends upon devise, so there can be no Hindu co-parcenary or joint family property, which has not come by its character in the same way. It cannot be seriously contended that the Courts of this country do not use co-parcenary, and joint-family, as vir-

tually interchangeable terms; and I think it is as impossible to deny that in doing so it has never been thought to impress the notion with the condition precedent of special divise. It is still more inaccurate, in my opinion, to say that the English concept of joint tenancy is represented in this country only in the form of the joint family property There is an absolutely contradictory principle at the root of the legal notions, and altogether different incidents distinguish them.

There are, then, three things to be examined, described as (1) Joint property; (2) Joint-family property; (3) Joint ancestral-family property. In all three things there is a common subject, property: but it is qualified in three different ways. The joint property of the English law, is property held by any two or more persons jointly, and its characteristic is survivorship. Analogies drawn form it to joint-family property are false, or likely to be false, for several reasons. One clearly is that they neglect the additional qualifying term "family." I would make what at first may appear an almost absurdly simple suggestion to clear away a very great deal of the confusion in which discussions of this kind seem to get inevitably obscured. If we insist upon joining the words joint and family, by a hyphen, we shall be helped to realize on each occasion that the essential qualification of this kind of property in India, is not jointness only, but a good deal more. Two complete strangers may be joint tenants, according to English law, but in no conceivable circumstances could they constitute a joint Hindu family, or in that capacity hold property. Although I am well aware that there is authority against me, I have always thought and I still think with all proper submission to the learned Judges who have held otherwise, that the simple expedient I have suggested, with all that is necessarily implied in it, would have averted a great deal of exceedingly for fetched reasoning and unsustainable analogy in dealing with Hindu estates.

In the third case, property is qualified in a twofold manner: it must have been joint family property, and it must be "ancestral." It is here for the first time that we come in touch with the nucleus doctrine, the extension of which beyond its proper sphere, is a fertile source of bad argument. It is obvious that there

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must have been a nucleus of joint family property before ancestral joint-family property can come into existence. Because the word ancestral connotes descent and therefore of course pre-existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint-family property, it is not true that there cannot be joint-family property without a pre-existing nucleus. For that would be identifying *joint-family property, with ancestral joint family property*. The distinctions arising under the case law between the two classes of property, thus designated are well enough known, though it would be hard to find any strictly logical justification for them. Where there is ancestral joint family property, every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or diposition of any kind. And this, in my opinion, with respect to any judicial decisions to the contrary is equally true of joint-family property. The contrary *opinion is easily traceable to another origin*, and is not, when rightly understood, a contrary opinion at all. But there is a difference, though rather verbal then real, and that is that whereas in the case of joint ancestral property, members of the family acquire a right to their shares by birth *ex necessitate et vi termini*, in the case of merely joint-family property, the Courts have shown a very strong tendency to refuse to draw even a presumption in favour of this peculiar incident. But that again is a logical, verbal, not a real difference, for it goes beyond the *proposition that the property is joint-family property* at all, and demands that the person so alleging shall prove it to be so. In the same way of course were there a *bonâ fide* dispute whether property was ancestral joint-family property or not, that too would have to be proved. The difference, such as it is, must be sought between first, the character, next, the strength of the presumptions which the Courts are prepared to draw. Where it is known or admitted that *some at least of the property of a* joint family has come down to them the presumption is that the whole property is ancestral, and any member alleging that it is not, will have to prove his self-acquisition. But where it is admitted that when the joint-family commenced there was no property, there is not the same unanimity of opinion. There is

plenty of authority for the proposition that mere "commensality" as it is called gives rise to no presumption that the property held under that condition, is joint family property. There is likewise plenty of authority for the proposition that it does. My present point, however, is to strip away all this superfluous conflict, and lay bare the identity between the two classes of property, called joint-family, and ancestral joint-family property. Bating all presumptions, I state as my opinion, without much fear of serious contradiction that where property is admitted or proved to have been joint-family property, it is subject to exactly the same legal incidents in every respect, as property which is admitted or proved to be ancestral joint-family property. Further that this class of property in India differs radically in origin and essential characteristics from the joint-property of the English law.

The fundamental principle of the Hindu joint-family is the tie of sapindaship. Without that it is impossible to form a joint-Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence. The object of the early Hindu lawyears in clothing this family relation with special legal sanctions and far-reaching consequences, was quite clearly to preserve the continuity of the family and seems to harmonize completely with so much else that is peculiarly characteristic of the Hindu law, and sentiment, similarly exemplified in caste restrictions, and indicative of the deep interpenetration of law by roligion. The first care of the Hindu law-giver was to perpetuate religious observances, to perpetuate therefore the family, as a permanent unit, of which each succeeding generation was under sacred obligations to perfor n religious obsequies for the benefit of ancestors. Obviously connected with this is the need of worldly provision, and hence the legal attributes of joint-family property. There can be no alienation or delegation of spiritual duties. If the father could deprive his sons of the whole family property, he might render them incapable of duly discharging his appointed obsequies; so that where a father and sons held property together, the sons, along with religious

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duties, acquired civil rights and in the same manner their sons and sons and sons, to the uttermost limit of the sapinda tie. That is the theory of the joint Hindu family, and I have no doubt that until English lawyers took it in hand, introducing English notions often on an imperfect acquaintance with the Hindu system, that it was almost uniformly and consistently worked. I do not deny that there were probably always exceptions in favour of special self-acquisitions, but these were exceptions, and the general rule was that where father and sons had lived in "commensality" with property applied to the common uses, whether that property had or had not in the first instance been acquired by the father, it received the impress of joint family property and fell under the law regulating its descent. This shows how entirely misleading it is to use technical English terms such as joint estate, into which no notion of family enters at all, and co-parcenary, in this domain of the Hindu law. Mr. Strangman acutely pointed out one radical difference, that whereas in the joint estate of English law, the inevitable consequence was the termination of the estate with the lives of the joint tenants, the joint-family estate was created specially to be enduring and permanent. As I began by saying, the two conceptions not only do not coincide but are radically opposed to each other in every essential point. The accidental incident of survivorship common to them both is their single point of resemblance, and that again is referable to a wholly different theoretical basis.

I return now to the demurrer itself. When it is remembered that not only does the plaint allege (and this must be assumed to be correct here) but that Gordhandas in suit No. 573 of 1899 alleged that Mulji and Soonderdas at any rate were joint in food, worship and estate, there is really an end of the matter. If that were so in fact, then they were a joint-family, and their property was joint-family property subject to all the incidents of such property in the eye of the Hindu law. For those words are highly technical words in the Hindu law, as administered in this country, being in short the formula for fully describing and connoting all the contents of the Hindu jural conception of joint-family property. Observe, the family is not only joint in food and worship, it is also joint in estate, and being ex hypothesi, a

family related by the tie of sapindaship, there can be no other joint estate between its members than the joint-family estate. Attempts have been made, feebly made I cannot help thinking, to arrive at this conclusion, by such a proposition as that where there has been no nucleus of joint-family property, the property of a joint-family, must be held to be joint-family property or not, according as the intention of the members to make it so, or to keep it separate, is proved. But surely this is only another way of saying that the person alleging that it was joint-family property must (in the present state of the law) show that the family was joint in food, worship, and estate; in other words that the members had shown their intention to constitute a joint-family, and to hold all their property as joint-family property. For the purposes of this argument that must be conceded Let me guard myself against being supposed to think that in the circumstances of this family which have been fully narrated in a previous judgment, and about which there is no dispute, it need have necessarily followed that what Mulji Jetha made in trade by his own exertions became joint-family property between himself and his son Soonderdas. Indeed I think that had the matter come to the proof and had there been no admissions, such facts as are undisputed clearly point to Mulji Jetha, and Soonderdas too for that matter, having intended not to make this joint-family property. But then I do not suppose that they would have been prepared to say that they were, as Russell, J., finds, joint in all respects, or as Gordhandas admitted joint in food worship and estate.

It is true that the plaintiff admits that Mulji Jetha had no property, that he made his own fortune, and that he afterwards associated his son Soonderdas with him. But that allegation does not put the plaintiff out of Court as the learned counsel for the defendants evidently thought that it did. For the plaint goes on to say that Mulji Jetha and his son Soonderdas first, and then, along with Dharamsey Soonderdas the son of Soonderdas constituted a joint-family. What seems to be overlooked by the defendants is that the mere inclusion in the joint-family of the son of Soonderdas virtually disposes of the demurrer. For if not only the father and the son joined their energies and earnings

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together, in the manner of members of a joint-family, but the grandson, by birth became likewise a member of that joint-family and took an interest in the property by birth, it follows that there was a joint-family owning joint-family property. The nature of a demurrer involves, for the sake of that limited argument, the correctness of all the allegations in the plaint. And if the allegations in this plaint are true, namely that there was first a joint-family consisting of Mulji Jetha and his son Soonderdas and that afterwards the joint-family was enlarged so as to take in the sons of Soonderdas and their sons, and at the same time it is alleged that none of the members of this family had any right to dispose of the joint-family property by settlement or devise, etc., why, then it seems to me that there is on the face of these allegations a very good cause of action? I have no doubt whatever in holding that the demurrer fails and must be overruled. The sole ground on which it rests is that Mulji Jetha and Soonderdas made their own money, or rather that Mulji Jetha made it all; and what is implied in this plea is that in such circumstances there cannot be joint-family property. I have, I hope, shown conclusively that that proposition is untenable. There is nothing either in practice or theory which excludes the possibility of members of the same family, starting a family fortune, holding it as members of a joint-family, and thereby clothing it with all the legal qualities, and incidents of joint-family property, chief among which is that every member born into the family after the property has acquired that character, and before it has been divested of it by partition, obtains by birth an interest in it. Whether in any particular case that has or has not been done would depend upon evidence and would not fall within the scope of a demurrer.

The second point argued as a preliminary issue, namely whether the present suit is not *res judicata* by the decision and decree in suit No. 573 of 1899, evidently proves fatal to the plaintiff. Briefly that was a suit by Gordhandas to have the family trust settlement set aside, to have the will of Soonderdas set aside, to have the will of Mulji Jetha construed, and for the complete determination of all the rights of the parties to it, in the estate of Mulji Jetha.

The present plaintiff was then a minor, and was defendant 8 to the suit. He first contends that he was not properly represented, and therefore that what was decided in that suit does not bar him. Here again he is met by a second objection, that this contention too is *res judicata*. When he came of age he applied for leave under section 5 of the Limitation Act to appeal after the prescribed period on this very ground, namely, that he had not been properly represented That question was fully gone into before this Appeal Court and the learned Judges held that he had been properly represented, and refused to extend the period. He then went to the Privy Council, where again there was an elaborate and thoroughly exhaustive argument, in the course of which every point that could possibly be taken was taken, and the result was that their Lordships of the Privy Council held again in effect that he had been properly represented. He now seeks to raise the same question again, and to evade the bar of *res judicata*, by pointing out that the decisions of the Appeal Courts here, and the Privy Council in London, were not decisions in a suit. Whether they technically were or not, I have not the least doubt that the question is *res judicata*. If not under section 13, then upon a general principle of law. Were authority needed for such an obvious proposition, I might refer to the case of *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*[1]. It would be indecent and impertinent for an inferior Court to go again into a question which upon full argument had been twice decided by Courts superior to it, and on the last occasion by the Supreme Court. Moreover, were there anything in this technicality, the issue has been argued before me on the understanding that all the materials upon which the plaintiff asks me to decide it have already been accumulated in the records of those two hearings In other words, he asks me to take the arguments used before this Appeal Court and the Privy Council, and then to come to a different conclusion. This I should most emphatically decline to do. Holding then that the plaintiff was properly represented, I am next to consider whether the decision in suit 573 constitutes a *res judicata*.

(1) (1883) L. R. 11 I. A. 37.

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Again it is too plain to need many words that it does. Observe especially the fifth paragraph of the supplementary written statement, the prayer F in the plaint, and the final decision. It did not suit the plaintiff at that time to set up the defence he might have set up, namely, that neither Soonderdas nor Mulji Jetha had any power to dispose of the property by will or settlement, as it was joint family property. Because as that litigation stood the plaintiff might gain a great deal by supporting the family settlement and Soonderdas' will, and could apparently lose nothing by admit ing Mulji Jetha's will. I am not at all sure that he did mean to admit it. There is a note somewhere of a remark by his counsel, Sir Griffith Evans, which indicates that the plaintiff was then inclined to dispute that will, and the fifth paragraph of the supplementary written statement points the same way. But whether he disputed it or admitted it makes no difference. As I understand the judgment and the decree, the result was this that the Court held that there was no joint-family property; that there was a joint tenancy between Mulji Jetha and Soonderdas Mulji; that on the death of Soonderdas Mulji, Mulji Jetha took the whole by survivorship; that the family settlement was void, and that Soonderdas' will was also void. Finally, and this is what is most important, that Mulji Jetha's will was valid and disposed of the entire estate with all accretions, etc. That under it (not by survivorship, or as members of a joint undivided Hindu family) Gordhandas and Karsandas, the present plaintiff, took the whole estate as it stood up to that moment (except the charity property) in two equal shares. It was as I have said open to the present plaintiff to set up in that suit by way of defence, what is now his case, and that is what he not only might but ought to have done, as he is now advised. He did not do it then, and by the perfectly well-known principles of *res judicata*, he is precluded from doing it now. It is quite true, as Mr. Strangman strenuously contended, that the more prominent features of the contest were the validity of the family settlement, and Soonderdas' will; but it is not the less true that the Court was asked to say that both those instruments were invalid, and that their subject-matter consequently fell to be included within the scope of Mulji Jetha's will, and

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the Court was asked to construe that will and to determine on that basis the rights of Gordhandas and Karsandas, in all that it purported to have disposed of, that is to say the entire estate, with the exception of the charity trust, as it then stood. That is what the Court did, using the plainest language. It is not now open to the plaintiff to put forward a second claim to the whole or any part of that property on a different and inconsistent basis. I hold that the suit is barred by *res judicata*, and must be dismissed.

Costs on the plaintiff. To pay the Advocate-General attorney and client costs. Defendants to pay the costs of the demurrer when ascertained by the Taxing Master.

Attorneys for the plaintiff: *Messrs. Cragie, Lynch & Owen.*

Attorneys for the defendants: *Messrs. Mansukhlal, Jamshetji & Hiralal.*

Attorneys for defendant 2: *Messrs. Daphtary, Ferreira & Divan.*

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

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June 25

DATTO GOVIND KULKARNI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* PANDURANG VINAYAK AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption—Widow succeeding as a gotraja sapinda in a joint Hindu family to an estate not her husband's—Powers of adopt on.

A and S. were two joint Hindu brothers. S. died in 1876 leaving a widow P., and two daughters him surviving. After S.'s death, P. continued to live with A., who died in 1877. P. succeeded him as there was no issue or nearer heir to A. P. adopted defendant 1 as a son. The plaintiffs, some of whom were reversioners entitled to succeed to A. as his heirs after the termination of P.'s life estate, sued to recover possession of the property, alleging that P. was not authorized to make the adoption she did, and it was, therefore, bad.

* Second Appeal No. 562 of 1907.