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that a suit for a declaration that the plaintiff was the nearest heir of a deceased representative Vatandar was maintainable notwithstanding that it was manifest that the declaration was sought for the purpose of establishing a fact which would enable the plaintiff to have his name entered in the Vatan Register.

I, therefore, reverse the decree of the District Judge and remand the case to him for disposal on the merits.

Costs to be costs in the cause.

Decree reversed,

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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August 9.

BAJABA *alias* BAJIRAO VISHVANATH OKE (ORIGINAL PLAINTIFF), APPELLANT, *v.* TRIMBAK VISHVANATH OKE AND TWO OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch—Self-acquisition.

Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property and excluded his brother from it.

Subsequently the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property,

Held, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of Gulabdas Laldas, First Class Subordinate Judge.

* Second Appeal No. 1033 of 1908.

Suit for partition.

One Vishvanath Ramchandra Oke, father of plaintiff and defendant 1, and Hari Krishna Oke were the representatives of two different branches of Oke family. Disputes having arisen between the two branches with respect to family property, Hari Krishna's mother, during his minority, filed against Vishvanath Ramchandra a suit which ended in a compromise, dated the 27th April 1867. Under the terms of the compromise Vishvanath Ramchandra was to remain in possession of the property, the subject of the suit, for seven years and then to hand over a moiety of the property to Hari Krishna. Hari Krishna, however, on the 24th September 1873, that is, one year before the expiration of the period of seven years fixed under the compromise, conveyed his moiety to Trimbak Vishvanath, defendant 1, for a consideration of Rs. 500.

In the year 1907 the plaintiff brought the present suit against defendant 1 and his two sons as defendants 2 and 3 for partition of the family property including the moiety purchased by defendant 1 from Hari Krishna in the year 1873. The plaintiff claimed a half share in the entire family property consisting of moveables, immoveables and their profits.

Defendant 1 contended that though he and the plaintiff were brothers, the property in suit was neither ancestral nor joint, that a moiety of the lands in dispute was lost to the family and was subsequently acquired by the defendant for himself with his own money by purchase in the year 1873, that the moiety thus acquired was his self-acquisition he having paid Rs. 500 for its price from his own private earnings and funds without receiving any assistance from the family property, that the plaintiff did not enjoy the profits of the said moiety, that the defendant being plaintiff's elder brother sometimes remitted money to the plaintiff by way of assistance and that the claim for the division of the other moiety was time-barred.

The Subordinate Judge found that the purchase by the defendant of a moiety of the lands in suit was proved and the said moiety was his self-acquired property, that the plaintiff had enjoyed the profits of the lands in suit as a co-sharer during

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twelve years preceding the suit and that the claim was, therefore, in time. He therefore decreed that the plaint lands be divided into four equal parts—good and bad—and one of the parts be given in the plaintiff's possession as his portion.

The plaintiff having preferred an appeal to the District Judge, the decree was confirmed on the following grounds :—

The question is whether he (defendant) made this purchase in such a way that it became his self-acquisition or whether it continued joint property of himself, father and brother. The lower Court is of the opinion that it was self-acquired and I concur.

* * * * * * *

It seems to me as if this was an example of the rare case mentioned in the books where a co-parcener by his unaided efforts repels an assault on or recovers seized family property without assistance from the rest of the family or its property and that this repurchase does not necessarily merge in the joint estate.

There is further no sign that the defendant intended to merge these lands in joint family property, on the contrary he seems to have practically excluded the plaintiff from the rest also of the property. His wife managed the whole landed property. He made from time to time small remittances to his brother, not amounting to half the proceeds and he has latterly pretermitted these also.

I think then that this acquisition ought to be treated as separate and peculiar property of defendant.

The plaintiff preferred a second appeal.

S. R. Bakhle for the appellant (plaintiff) :—The Judge has treated the present case as an instance of a rare case mentioned in the books. Accepting that finding as binding we contend that the Judge was wrong in not applying the rule of Hindu law under which the acquirer gets a quarter share in the acquired property in addition to his own share. Setting apart a quarter share for the acquirer the rest of the property is divided equally among the co-parceners: see Mitakshara, chapter 4, section 5, paragraph 3—क्षेत्रे तुरीयांशमुद्धर्ता लभते शेषं तु सर्वेषां सममेव—"In the immoveable property the acquirer gets a fourth share and the rest is taken in equal shares by all." This rule is based on the *dictum* laid down by Shankha. See also Mayukha, chapter 4, section 7, paragraph 3.

[BATCHELOR, J.:—The rule must have been laid down at the stage of the society when all property was considered as belonging to the family and the self-acquisition by a co-parcener was looked upon with disfavour. How is that rule applicable in the present advanced stage of the society unless it is shown to be justified by equity and good conscience ?]

The texts have laid down the rule for the purpose of enforcing it. It may not be justifiable now. It is a rule laid down by Hindu law and it requires to be enforced when the Courts of facts find facts in such a way that its application becomes necessary.

The rule is discussed by West and Bühler in their Digest, page 718 (3rd Edn.). They lay stress on the words हृत (*hrit*= stolen), नष्ट (*nasht*=lost) and उद्धरेत् (*uddharet*=may recover) and say that the rule is not applicable to properties withdrawn from the family by voluntary alienation and subsequently recovered. The word हृत (*hrit*=stolen) may imply a sense of violence in withholding the property but the other two words do not imply any violence. We contend that the property alienated voluntarily is property नष्ट (*nasht*=lost) to the family and would therefore be governed by the rule. The rule was considered by the Madras High Court in *Visalatchi* v. *Annasamy*[1]. West and Bühler say that the rule was recognized by the Bombay High Court in *Malhari* v. *Bhikoji*[2], but a reference to the record of that case shows that the recovery was made with the assistance of joint family funds.

R. R. Desai for the respondents (defendants) was not called upon.

SCOTT, C. J.:—The question is whether certain land forms part of the joint family property of all the members of the Oke family who are the parties to the suit, or whether it is the separate property of the defendants.

According to the findings of the lower appellate Court the land was originally ancestral and was the subject of a suit brought on behalf of one Hari Krishna Oke against the branch of the Oke family to which the parties to this suit belong. The

(1) (1870) 5 Mad. H. C. R. 150. (2) S. A. 534 of 1869 (Unrep.).

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litigation ended in a compromise in 1867 whereby the father of the parties to the suit was to remain in possession of land claimed for seven years, and then to convey it to the other branch. The representative of the other branch on the 24th September 1873 sold his interest which was to come into his possession under the terms of the compromise in the following year to the defendant 1 by a sale-deed for the sum of Rs. 500. It is found as a fact that Rs. 500 was not part of the joint family money but was provided by the defendant 1 on his own responsibility. The learned Judge also found that the defendant 1 did not intend by the purchase to merge this land in joint family property and excluded his brother from it.

It is contended on this state of facts that the defendant 1 is not entitled to the benefit of his purchase, but that he must partition the land with the other members of his family subject to a right under Hindu law of retaining an additional quarter share for himself. In support of this contention reliance is placed upon certain texts: Mitakshara, chapter I, section 5, paragraph 3; Mayukha, chapter IV, section 7, paragraph 3. If these texts involve the conclusion contended for by the defendants the result would be anything but equitable.

We however think that the comment upon the texts which is to be found in West and Bühler's Hindu Law (3rd Edn.), page 719, must be accepted as correct. The learned authors say: "It seems probable from the wording of the texts upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words 'hrita' (*i. e.*, that which has been taken or seized) and 'nashta' (*i. e.*, that which has been lost) and 'uddharet' (*i.e.*, if he rescue or win back). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held that such property stands on the same footing as any other purchased

property of his separate estate. A contention to the contrary was abandoned in the case of *Gooroo Pershad Roy* v. *Debee Pershad Tewaree*.(1)"

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This view receives support from the Judges of the Madras High Court, who in *Visalatchi* v. *Annasamy*(2) said :—"The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply strictly to hereditary property of which the members of the family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time :—'Property unjustly detained which could not be recovered before' is the import of the ordinance of Manu, chapter IX, sl. 209."

For these reasons we confirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

G. B. R.

(1) (1866) 6 W. R. 58 (Civ. Rul.). (2) (1870) 5 Mad. H. C. R. 150 at p. 157.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

MARDANSAHEB VALAD GANSUSAHEB RATIMANI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v. RAJAKSAHEB VALAD KASHIMSAHEB AND ANOTHER (ORIGINAL DEFENDANTS NOS. 2, 4) RESPONDENTS.*

1909. *August* 10.

Mahomedan law—Acknowledgment of son—Illegitimate son—Zina—Son by adulterous intercourse cannot be legitimised.

Under Mahomedan law, a person can acknowledge a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown in the sense that no specific person is shown to have been his father. It is not permissible to acknowledge a child born of *zina* (*i. e.*, fornication, adultery or incest).

Muhammad Allahdad Khan v. *Muhammad Ismail Khan*(1), followed.

* Second Appeal No. 740 of 1908.

(1) (1888) 10 All. 289.