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Commissioner as required by section 418. Therefore the prosecution must on this ground fail.

Under section 433 of the Criminal Procedure Code it is open to us to direct by whom the costs of this reference should be paid. But having regard to all the circumstances we make no order as to costs.

SHAH, J.:—I am of the same opinion.

R. R.

APPELLATE CIVIL.

FULL BENCH.

1917, *March* 30.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Batchelor, Mr. Justice Beaman, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Marten.

ISAP AHMED MOGRARIA AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3) APPELLANTS *v.* ABHRAMJI AHMADJI MOGRARIA AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 4 AND 5), RESPONDENTS.*

Limitation Act (IX of 1908), Schedule I, Article 127—Applicability of the Article to Mahomedans—Suit to recover share in joint family property.

The following question was referred to a Full Bench :—"Whether Article 127 of the Second Schedule of Act XV of 1877 can apply to the property of a Mahomedan (or any other person not being a Hindu), and not having been proved to have adopted as a custom the Hindu law of the joint family."

Held (*Shah J.* dissenting), that it did not.

THIS was an appeal under the Letters Patent from the decision of Batchelor J., in appeal from the decision of P. J. Taleyarkhan, District Judge of Broach, amending the decree passed by the Subordinate Judge at Ankleshvar.

Suit for partition.

* Appeal No. 41 of 1913 under the Letters Patent.

The property originally belonged to one Ahmedji who was a Mahomedan and who died on the 20th February 1894. Ahmedji had two wives, (1) Hansa who died on the 18th January 1899; and (2) Fatu, who died on the 11th July 1911. By the former he had two sons and two daughters, namely, Isap and Kala (defendants Nos. 1 and 2), and Rasul (defendant No. 3) and Hava (mother of defendant No. 4). Abhramji (plaintiff) was born to him by his second wife Fatu. The property in dispute was managed by defendants Nos. 1 and 2.

On the 28th January 1912, the plantiff gave a notice demanding his share in his father's property; and on the 3rd July 1912, he filed the present suit to recover his share in the property.

The defendants resisted the suit on the ground *inter alia* that it was barred by limitation.

The lower Courts followed the decision reported in the Printed Judgments for 1888 at page 170, applied Article 127 of the Limitation Act, and decreed the claim.

The defendants appealed to the High Court.

The appeal was heard by Batchelor J. on the 27th September 1915, when his Lordship, in dismissing the appeal, delivered the following judgment:—

BATCHELOR, J.:—In this appeal it is candidly admitted by the learned pleader, Mr. Thakor, that he has no prospect of success unless he can be allowed to show that Article 127 of the Indian Limitation Act is not applicable to Mahomedan parties. Unfortunately for the learned pleader's contention there is a long series of decisions by Division Benches of this Court against that argument, and sitting as a single Judge, I am bound, it seems to me, to give effect to those decisions.

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If Mr. Thakor can carry the matter to a Division Bench on appeal and can induce a Division Bench to refer the point for reconsideration by a Full Bench, that is another matter. But all that I can do is to dismiss the appeal with costs, following the course of Division Bench decisions to which I have referred.

Cross-objections are dismissed with costs.

There was an appeal against the above decision under the Letters Patent. The Letters Patent appeal was heard by Beaman and Heaton JJ. on the 8th September 1916, when their Lordships made a reference to a Full Bench in the following terms.

BEAMAN, J. :—We refer the following question to a Full Bench :—

"Whether Article 127 of the Second Schedule of Act XV of 1877 can apply to the property of a Mahomedan (or any other person not being a Hindu) and not having been proved to have adopted as a custom the Hindu law of the joint family."

It was held by a Division Bench (Sargent C. J. and Birdwood J.) in the case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1] that it could. It does not appear from the report whether the parties were Khojas, or Cutchi Memons. We assume that they were not.

Sargent C. J., in delivering judgment, said :—

"It remains only to consider whether the claim of Gulam Hussein, as a residuary to one-ninth of the compensation awarded in respect of lots (A), (C), (E) and (G) and the claim of Najibunissa as one of the legal sharers, to one-sixth of such compensation, are barred by time. The property left by Bakar Ali became divisible, on his death, among those members of his family, who were entitled to shares, according to the Mahomedan law or were residuaries. Till it was divided, it was, we think, 'joint family property' within the meaning of Article 127 of Schedule II of the Limitation Act of 1877. A similar construction has been put on the same words, in Clause 13 of section 1 of Act XIV of 1859, by the Calcutta High Court : see *Musst.*

[1] (1885) P. J. 170 at p. 171.

Khyroonissa v. *Salehoonissa Khatoon*[1]; see also *Achina Bibee* v. *Ajeejoonissa Bibee*[2]. And it is to be noted that, while Article 127 of Schedule II of Act IX of 1871 applies to suits 'by a Hindu, excluded from joint family property, to enforce a right to share therein,' the corresponding Article of Act XV of 1877 substitutes the words 'by a person' for the words 'by a Hindu.' It is not necessary, therefore, to restrict Article 127 of the present Limitation Act to suits by Hindus. And the question for consideration in the present case is, whether, before the institution of proceedings under Act X of 1870, the claimants...had been excluded, to their own knowledge, &c...."

From the above statement it is clear that whether the parties were in fact Khojás or Cutchi Memons or not, the suit was not dealt with on that basis, as being governed by the special customary law which those Mahomedan sects at that time were generally believed to have adopted.

This decision with which we find ourselves unable to agree, was the starting point of a current of authority in this Court, the effect of which has been to extend the scope of Article 127 of the Second Schedule of the Limitation Act to the property of all Mahomedans dying intestate in this Presidency. The foundation of this wide extension of the scope of the Article is the single sentence : "Till it was divided it was, we think, joint family property within the meaning of Article 127 of Schedule II of the Limitation Act of 1877." This opinion is supported by reference to two earlier Calcutta decisions under a previous Limitation Act. An examination of those cases will show, in our opinion, that they are a very insecure basis for the liberal interpretation thus put upon Article 127. While we agree that the substitution of the words "a person" for "a Hindu" enlarges the possible application of the Article we are wholly unable to agree with what seems almost to be implied in this judgment, that the change potentially brings every "person" within reach of the Article

(1) (1866) 5 W. R. 238. (2) (1869) 11 W.R. 45.

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because the Article may now apply to the property of some persons who are not Hindus, it does not follow that it must apply to the property of every one who is a Mahomedan. And as to the sweeping generalization that property of the kind then in suit is "till it is divided, joint family property" we can discover no ground which appeals to our reason for such a conclusion. In our opinion, whatever else it may be, the one thing it cannot be is joint family property. No one has ever yet been found to contend that those entitled to share it take over each other by survivorship, which is the distinctive characteristic of joint family property. It would be hard indeed, in our opinion, to find a single important feature in common between the property left by a Mahomedan, governed by the Mahomedan Law, dying intestate, and "joint family property" in the sense of the Hindu law. And that is absolutely the only sense in which the words "joint family property" have any definite legal connotation and meaning. The legal concept of "joint family propery" is wholly unknown outside the Hindu law. It is certainly unknown to the Mahomedan law. We start then from this general proposition. Outside the Hindu law the joint family, and, therefore, joint family property, is unknown to the law. It follows that, with a single exception to be mentioned immediately, no one but a Hindu can own joint family property, and Article 127 cannot apply to any one but a Hindu. Why then was the change made, and the words "a person" substituted for the words "a Hindu"? For a very obvious reason. Two whole sects of Mahomedans in this Presidency had by a series of judicial decisions been brought under the Hindu law to this extent at any rate that they were held to have adopted so much of it by custom as included the law of the joint Hindu family, and as a corollary of course, the existence of

joint family property under certain conditions. These persons were certainly not Hindus. Yet by way of custom they were judicially held to be subject in all matters of succession and inheritance to the Hindu law. And although this may not in fact have been so, there can be no doubt but that it was the accepted opinion that they might hold property exactly as a joint Hindu family might, and doing so, that such property would be in all respects governed by the Hindu law of the joint family. These people were numerous. They were rapidly growing in wealth and importance. Innumerable cases might arise in which they would be found in possession of great estates which could only be regarded as "joint family property" in the strict sense of the Hindu law. Here was cause enough and an adequate explanation of the change. We now state the single exception to our first general proposition. Article 127 may apply to the property of a person, not being a Hindu, if it has been proved that that person has adopted as a custom and is, therefore, subject to the Hindu law of the joint family. And to no other person whatever. Such is our conclusion. It is diametrically opposed to the current of authority in this Court starting from the decision we have cited. But it has the concurrence of the Calcutta, Madras and Allahabad High Courts. The Bombay High Court stands, as far as we are aware, alone in the interpretation it has placed upon the language of Article 127. And if only for the sake of judicial uniformity we think it highly desirable that the question should now be re-opened and decided by a Full Bench. We do not advert in detail to subsequent decisions which profess to follow *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1], because in none of those to which we have been referred or of which we are aware, has any reason been given for

[1] (1885) P. J. 170.

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following the unreported decision of the Division Bench in 1885. On the other hand Batty J. sitting alone went into the subject with great elaboration in *Abdul* v. *Mahomed*[1] and came to the conclusion that Article 127 was not susceptible of so wide an extension. And in a recent judgment, Beaman J., sitting alone on the Original Side of this Court, has gone critically over the whole ground: see *Jan Mahomed* v. *Datu Jaffer*[2]. Speaking generally we may say that we concur in the reasoning and conclusion there reached, and do not think it necessary to repeat it in detail. We would incorporate it (if necessary) by reference here.

Put in the shortest way, in our opinion, the dominant words of the Article are "joint family property." That property does not exist outside the Hindu law. No one therefore not being a Hindu or having adopted by custom the Hindu law of the joint family can own it. And it is only the property of such persons that the Article can apply. In the case before us it is not contended that the parties are Hindus. They are admittedly Mahomedans governed by the Mahomedan law. It is not contended that they have adopted by custom any part of the Hindu law. In our opinion, therefore, Article 127 cannot, in any view or upon any reasoned interpretation, (apart from the authority we have brought in question), apply to them.

The reference was heard by a Full Bench consisting of Scott C. J., and Batchelor, Beaman, Heaton, Macleod, Shah and Marten JJ., on the 19th, 20th and 21st March 1917.

G. N. Thakor, for the appellant.

Coyajee with *B. F. Dastur*, for the respondents.

(1) (1903) 5 Bom. L. R. 355.

(2) (1913) 38 Bom. 449 : 15 Bom. L. R. 1044 at pp. 1097, 1110.

Thakor:—The provisions in the Limitation Acts from the earliest down to the present are as follow :—

Act XIV. of 1859 :—

"*Section 1* (*13*).—To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property ; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge ; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be."

Act IX of 1871 :—

"*Article 127*.—By a Hindu excluded from joint-family property to enforce a right to share therein—twelve years—when the plaintiff claims and is refused his share."

Act XV of 1877 :—

"*Article 127*.—By a person excluded from joint-family property to enforce a right to share therein—twelve years—when the exclusion becomes known to the plaintiff."

Act IX of 1908 :—

"*Article 127*.—By a person excluded from joint family property to enforce a right to share therein—twelve years—when the exclusion becomes known to the plaintiff."

The change of phraseology in every succeeding Act shows the intention of the Legislature to enlarge the scope of the Article ; but it never was so wide as to include all Mahomedans generally. In all its changes, the main idea is the exclusion from a joint family property, an expression which can only be predicated of Hindus or of those sects who by custom have imbibed that characteristic notion of Hindus.

Even among Hindus a Mitakshara joint family differs in some respects from Dayabhaga joint family. In the former the principle of survivorship applies ; whereas,

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under the latter, the joint family begins only on the death of the father; and even then the sons are not joint tenants in the strict sense of the term. Yet both these notions differ characteristically from a Mahomedan family where a specific and defined share is assigned to each heir.

The concept of joint family is peculiarly a Hindu one. It never applies to a Mahomedan family as such. When the Legislature uses such a special concept it must be deemed to have used it only for that community, the peculiarity of which it represents.

Further, when the Legislature amended Article 127 in 1877 by replacing the word "person" for "Hindu," it also amended Article 107 by omitting the word "Hindu", from the expression "the Hindu manager of a joint estate of an undivided family" and also altered Articles 125 and 141 by adding the word "Mahomedan" along with the word "Hindu." Now the amended Articles 125 and 141 cannot have been intended to apply to Mahomedans generally. Under the Mahomedan law, a female takes absolutely. There can be no meaning in extending the above Articles to them. Where, therefore, the Indian Limitation Act speaks of a Mahomedan female, it has reference to families which have adopted the Hindu mode of living. The same reason ought to be assigned to the changed phraseology in Article 127.

Again, if Article 127 is applied to all Mahomedans, the resulting anomaly will be obvious. Daughters and sisters, who are in no sense members of the joint family but who have specific shares assigned to them under the Mahomedan law, will be able to take advantage of the provisions of Article 127 in the case of Mahomedans; whereas, their Hindu confrerers will not have that advantage. Moreover, the benefit of the Article

will not be evenly distributed; for if half a dozen different persons claim shares in a property the Court will have to apply different Articles, viz., Articles 127 and 141.

[MARTEN J.:—If Article 127 applied to Mahomedans, they would have the benefit of two Articles, viz., Articles 123 and 127.]

The only apparent reason that induced the Legislature to change the phraseology in Article 127 in Act XV of 1877 seems to be the decision of the Bombay High Court in *Shivji Hasam* v. *Datu Mavji Khoja*[1], which decided that Khojas were governed by Hindu law in matters of succession and inheritance. A change has consequently been made in Article 127 to bring in Khojas.

As to the reported cases. The earliest case on the point is *Musst. Khyroonissa* v. *Salehoonissa Khatoon*[2] which says that clause 13, section 1, of Act XIV of 1859 applies to Mahomedan as well as Hindu families. The Mahomedan family there concerned seems to have been governed by a special custom; for in the remand order in that case, the terms used with reference to it are "joint ancestral property," "joint undivided ancestral property" and "co-parceners"—terms which cannot be used in reference to an ordinary Mahomedan family. Again, so far as the question of limitation is concerned the lower Court has not discussed the question at all; the principal question being whether the persons there concerned were trustees or *bona fide* purchasers. The case is therefore not entitled to respect. *Achina Bibee* v. *Ajeejoonissa Bibee*[3] is no decision on the question whether clause 13, section 1, applies to Mahomedans: the point is assumed there: and the point decided

(1) (1874) 12 Bom. H. C. R. 281 at p. 294.

(2) (1866) 5 W. R. 238.

(3) (1869) 11 W. R. 45.

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is whether the payments there alleged were payments within the meaning of Clause 13, section 1. A similar assumption was made in *Bai Janubbi* v. *Mithabhai Gulabbhai*[1]. The point arose directly for decision in *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[2]; but there too the decision proceeds on the assumption that the property was joint family property. The Judges say: "Till it was divided, it was, we think 'joint family property.'" It is not correct to say that as soon as a Mahomedan dies his property becomes joint family property. No reference is made to joint family or joint family property in any books on Mahomedan law. Nor can a Mahomedan family be compared to a Hindu family under the Dayabhaga law, for under the latter as soon as the father dies, his property becomes the joint family property in the hands of his heirs. In *Bavasha* v. *Masumsha*[3] the point was not argued and there was no reasoned conclusion. In *Abdul Rahim* v. *Kirparam Daji*[4] Article 127 was once more applied to Mahomedans, following *Bavasha's case*[3]; but there was no argument on the point. On the facts stated in the judgment, the case could have been decided under any other Article. The headnote does not allude to Article 127 at all; the point decided is the applicability of Articles 91, 92 and 93. The remarks about Article 127 are *obiter*. The suit would have been barred if any of the Articles 123, 127 or 144 applied. *Faki Abas* v. *Faki Nurudin*[5] does not decide anything about Article 127.

The case of *Bavasha* v. *Masumsha*[3] was expressly dissented from by a Full Bench of the Allahabad High Court in *Amme Raham* v. *Zia Ahmad*[6], which held that Article 127 of Act XV of 1877 did not apply to Mahomedans; and the Madras High Court in *Patcha* v.

(1) (1881) P. J. 150.
(2) (1885) P. J. 170.
(3) (1889) 14 Bom. 70.
(4) (1891) 16 Bom. 186.
(5) (1891) 16 Bom. 191.
(6) (1890) 13 All. 292.

Mohidin[1] disagreed with the Bombay view as expressed in *Bavasha's case*[2]; and reiterated its opinion expressly in *Kasmi* v. *Ayishamma*[3] and impliedly in *Abdul Kader* v. *Aishamma*[4]. The Calcutta High Court swerved round to the Allahabad and Madras view in *Mahomed Akram Shaha* v. *Anarbi Chowdhrani*[5].

Notwithstanding these expressions of dissent the Bombay High Court adhered to its own view in *Mir Meher Alli* v. *Mir Haidar*[6]; but the facts were peculiar. The property in dispute was *devasthana* property and so indivisible; only the income could be divided. The point was more fully dealt with by Ranade J. in *Sayadalli* v. *Aminbi*[7] where after an exhaustive review of all the cases the learned Judge held that Article 127 applied to Mahomedans who had so far adopted Hindu manners and customs as to live joint and to keep their property undivided. If the judgment is read as requiring that the custom must in all cases be alleged and proved, there is nothing to quarrel with the decision.

In 1900, the Madras High Court adhered to its own view: see *Commercial Bank of India* v. *Allavoodeen Saheb*[8].

The point came up in Bombay before Batty J. sitting alone in *Abdul* v. *Mahomed*[9] where the learned Judge felt constrained in following *Sayad Gulam Hussein's case*[10]. Six years later, a Division Bench of the Bombay High Court unhesitatingly applied Article 127 of Act XV of 1877 to Mahomedans: *Fatma Boo* v.

(1) (1891) 15 Mad. 57.
(2) (1889) 14 Bom. 70.
(3) (1891) 15 Mad. 60.
(4) (1892) 16 Mad. 61 at p. 63.
(5) (1895) 22 Cal. 954.
(6) (1896) P. J. 365.
(7) (1898) P. J. 393.
(8) (1900) 23 Mad. 583 at p. 588.
(9) (1903) 5 Bom. L. R. 355.
(10) (1885) P. J. 170.

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Ghisan Boo[1]. But in *Jan Mahomed* v. *Datu Jaffer*[2] Beaman J. went into the whole question afresh and came to the conclusion that Article 127 did not apply generally to Mahomedans.

Now looking to the string of Bombay cases, the earliest of them, viz., *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[3] rests its reasoning upon *Musst. Khyroonissa* v. *Salehoonissa Khatoon*[4] which turns on the peculiar status of the Mahomedan family there concerned and which has since been distinguished and not followed by the Calcutta High Court in *Mahomed Akram Shaha* v. *Anarbi Chowdhrani*[5]. In the two Bombay cases that followed, the point was assumed and there was neither any argument nor was there any reasoned judgment on the point. In *Mir Meher Alli* v. *Mir Haidar*[6] the property in dispute was indivisible in its nature; and the analogy of Hindu joint property was easily applied. There was indeed an attempt to examine all the authorities on the point in *Sayadalli* v. *Aminbi*[7]; but there the conclusion is guardedly expressed. When *Fatma Boo* v. *Ghisan Boo*[8] came up for decision, the point was treated as concluded by *stare decisis*.

The doctrine of *stare decisis* ought not to deter this Bench from setting the law aright, for it has very little value outside the realm of property: see *Kashiram* v. *Pandu*[9]; *Manilal Hargovandas* v. *Vanmalidas Amratlal*[10] and *Basappa* v. *Rayava*[11].

[SCOTT C. J. referred to *Tricomdas Cooverji Bhoja* v. *Sri Sri Gopinath Jiu Thakur*[12].]

(1) (1909) 11 Bom. L. R. 1083.
(2) (1913) 38 Bom. 449: 15 Bom. L. R. 1044 at p. 1097.
(3) (1885) P. J. 170.
(4) (1866) 5 W. R. 238.
(5) (1895) 22 Cal. 954.
(6) (1896) P. J. 365.
(7) (1898) P. J. 393.
(8) (1909) 11 Bom. L. R. 1083.
(9) (1902) 27 Bom. 1 at p. 12.
(10) (1905) 29 Bom. 621 at p. 627.
(11) (1904) 29 Bom. 91.
(12) (1916) 19 Bom. L. R. 450.

[MARTEN, J. referred to *Pate* v. *Pate*[1].]

The other three High Courts in India have agreed in their view that Article 127 does not apply to Mahomedans as such. The Bombay High Court will, it is submitted, bring itself into a line with them.

Coyajee.—The material words in Article 127 are "joint family property." That expression includes, we say, property which has descended from a common ancestor and which has continued undistributed. The essential elements constituting "joint family property" are: (1) there should be a community of interest in the property; and (2) such interest should belong to persons who derive their right from a common ancestor. In the words of Farran C. J. in *Bhavrao* v. *Rakhmin*[2], it is property belonging to members of what may in common speech be called a joint family.

The first Act (XIV of 1859) was very sketchy. It was in 1871, that a general Limitation Act (IX of 1871) was enacted; but it had a very brief existence. Although enacted in 1871, it did not apply to suits instituted before April 1873; and it was repealed in October 1877.

The scheme of Act IX of 1908 as of Act XV of 1877, so far as this question is concerned, is this. For obvious reasons there must be time limit for all claims to property. Now property may be owned either by individuals singly or jointly owned by groups of individuals. As for property owned by individuals singly, we have express provisions: Articles 48 and 49, for moveables; Article 144, for immoveable property. As for property jointly owned by a group of individuals, the most common class in this country is that owned by members of a family, i.e., descendants of a common

(1) [1915] A. C. 1100.

(2) (1898) 23 Bom. 137 at p. 140.

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ancestor. For this we have Article 127. Article 123 does not apply to Hindus and Mahomedans; but it applies only to those persons who are governed by the Indian Succession Act (X of 1865), e.g., Parsees, domiciled Europeans: see *Shaik Moosa* v. *Shaik Essa*[1] and *Mahomed Riasat Ali* v. *Hasin Banu*[2]; sections 187 and 190 of the Indian Succession Act.

Now Article 127 does not in terms apply to Hindus only, nor does it say it will apply to such non-Hindus only as have adopted Hindu customs. The Article, however, uses the expression "joint family property". It means joint estate of an undivided family.

[SCOTT C. J.:—The words joint family can be taken as one adjective qualifying the noun property: the alternative reading is, the word joint is an adjective referring to the compound noun family-property.]

The expression 'joint family' property means property belonging to the members of a family descended from a common ancestor and which has remained undistributed in their hands. It refers to joint property belonging to a family. The word joint is used in the sense of undivided. Does the use of this expression lead to the necessary result that Article 127 applies only to Hindus and only to such Mahomedans as are proved to have adopted Hindu customs of joint property? I submit no.

First of all, look at the changed phraseology. In the Act of 1871, the Legislature used the word "Hindu"; and in 1877 changed it to "person". It is said that this changed phraseology is due to a desire to include within the section such Mahomedans as were known to have adopted Hindu customs of joint family. Fortunately these very enactments show that where the Legislature alters an enactment on that account it knows

(1) (1884) 8 Bom. 241. (2) (1893) 21 Cal. 157 at p. 163.

how to change its phraseology, e.g., Articles 125 and 141 of the present Limitation Act. Under the Mahomedan law, a female's estate is absolute and not restricted like that of a Hindu widow. These Articles, therefore, cannot and do not apply to all Mahomedan females. In the Punjab under a well-recognised custom existing among Mahomedan land-holders, widows take a restricted estate as in the case of Hindus: Wilson's Anglo-Mahomedan Law, 3rd edition, p. 87. In Act XV of 1877 these Articles bore the same numbers and the same phraseology; but in Act IX of 1871, they were numbered as Articles 124 and 142 and differently worded. They referred in terms to "Hindus" only. When the Legislature wanted to extend their operation in 1877, they did not supplant the term "Hindu" by the term "person" (as they did in Article 127); but they associated the words "or Mahomedan" with "Hindu" wherever it occurred. Thus in one case they take out the word "Hindu" and substitute "person" for it: in another case, they add "Mahomedan" to Hindu. The first change is wider in scope than the second one. Compare also the Article 107 where also from the expression "Hindu manager," the word "Hindu" was omitted in 1877.

[MARTEN J.:—What would have been the effect if the Legislature had put "Hindu or Mahomedan" in place of "Hindu"?]

The Article would have applied to every Mahomedan. As the Legislature has used the word "person", it is necessary to consider the import of the expression "joint family property".

It is said the notion of a joint family is essentially a Hindu notion; the expression therefore must be interpreted in the Hindu sense. Let us see what is the Hindu sense of the expression? To begin with, the

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expression we have got to interpret is "joint family property" and not merely "joint family". I would only point out that the argument on the other side would have been more forcible if the expression used were "property belonging to a joint family". The expression to interpret would, in that event, be "joint family". What is the Hindu sense of the expression "joint family property"? Is it the Hindu family governed by the Mitakshara, or by the Dayabhaga? For a joint Hindu family governed by the Mitakshara presents features essentially different from those presented by one governed by the Dayabhaga. I am trying to lead to this result: If you include Dayabhaga Hindus in the Article, then you will find it difficult to exclude Mahomedans. Take the case of a Hindu joint family consisting of two brothers, A and B and the sons of A and B. The family owns property which has descended from a common ancestor C. The position under the Mitakshara is this: (1) The sons of A and the sons of B have an interest in the property by birth, i.e., every single member is the co-owner with the rest. (2) All these members take over each other by survivorship. The main features therefore are: (1) property by birth; and (2) right of survivorship. Next, take the same family as governed by the Dayabhaga: both these features are absent. (1) As between father and sons, property in the sons arises not by their birth but by the death of the father (Mayne's Hindu Law, sections 37, 248, 324; Dayabhaga, C. I., pll. 11-30). (2) As between brothers and other collaterals, there is no right of survivorship; each holds his own interest in severalty (Mayne's Hindu Law, sections 37, 265, 373; Dayabhaga, C. XI., s. 1, pl. 26). The only features that are common to the two systems are: (1) property is undivided, i.e., there is community of interest; and (2) members derive their interest from a common ancestor. The state of a

Dayabhaga joint family is a tenancy-in-common; each one has so to say a distinct share which on his death does not merge into the whole but would pass on to his own heir even to his widow. If then you include Dayabhaga Hindus in Article 127 why are Mahomedans (if they satisfy these two conditions) to be excluded?

The expression "joint family" is a loose expression in every sense of the term. There is no corresponding expression in Sanskrit texts, which use the word अविभक्त (undivided or unpartitioned). The expression is used by English writers to convey a certain idea. We say, it is not used in its technical sense in Article 127 but in common speech. Here, however, the expression we have got to construe is not "joint family" but "joint family property". There is reason to suppose that the Legislature intended "joint" to go more with "property". The expression "with property alleged to be joint" is used in Act XIV of 1859, s. 1, cl. 13 and it means no more than "joint estate of an undivided family," employed in Article 107. If the Article is narrowly construed, it may be necessary to read into the enactment the words which are not there, e.g., suit by a person governed by the Hindu law of joint family or one who has adopted as a custom such law. Even there, you will have again to make provision for a Dayabhaga family.

What can then be the reason for the Legislature making a special provision in respect of "joint family property" in the Hindu sense. The cases arising in the other High Courts, on which the other side relies, show that in all parts of India, in numerous cases Mahomedan families do not distribute their inheritance for generations and they leave the management of the property to one or other member: see *Vellai Mira Ravuttan* v. *Mira Moidin Ravuttan*[1]; Stokes' Anglo-Indian Codes, Vol. II, p. 947. Even a Hindu has to prove

[1] (1865) 2 Mad. H. C. R. 414.

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(1) the existence of a joint family property and (2) his known exclusion from it, before he can seek assistance of Article 127. If a Mahomedan satisfies these requirements, why should the assistance of Article 127 be denied to him?

In this Presidency by far the larger proportion of Mahomedans are descendants of Hindus and therefore the Bombay view is more fitted to conditions of things existing here. Moreover, the Legislature from the very start used the expression rather in a loose sense; and never intended it to be confined in its application to Hindus alone. It has also used the expression "undivided family" in section 4 of the Partition Act (IV of 1893) and section 44 of the Transfer of Property Act (IV of 1882) as applicable to Hindus and Mahomedans alike: see *Sultan Begam* v. *Debi Prasad*[1].

The expression "joint family" has, as said above, been invented by English writers on Hindu law. The subject of joint family is treated of as a separate subject first in Mayne's Hindu law. Neither in the Mitakshara nor in the Mayukha, is the subject treated of separately; though 'partition' is so treated of. None of the early writers, viz., Sir Thomas Strange (1864); Grady (1868); Cowell (Tagore Law Lectures, 1871); Bhattacharya (Tagore Law Lectures, 1865), have any separate chapter dealing with "joint family."

Let us now briefly examine the history of the enactment and what the different High Courts have held. First, Act XIV of 1859. Cases decided here show that the expression "joint family property" was applied to Mahomedans in cases in which there is apparently no suggestion of a special custom. In *Musst. Khyroonissa* v. *Salehoonissa Khatoon*[2] no special custom was pleaded; and the expression "joint ancestral property" was promiscuously applied to a Mahomedan

(1) (1908) 30 All. 324.

(2) (1866) 5 W. R. 238.

family. There is no suggestion of a special custom in *Achina Bibee* v. *Ajeejoonissa Bibee*[1]; *Chunder Monee Debia* v. *Meharjan Bibee*[2] and *Bai Janubbi* v. *Mithabhai Gulabbhai*[3]. The next Act was Act IX of 1871. It had a very brief existence from April, 1873, to October 1877. It introduced the word "Hindu". During this brief interval there were no reported cases; and there could be none because of the word "Hindu".

[SCOTT C. J. referred to *Kali Kishore Roy* v. *Dhunnunjoy Roy*[4].]

[MERTEN J. referred to *Devapa* v. *Ganpaya*.[5]]

Then came Act XV of 1877. It gave rise to a series of decisions in our High Court. The applicability of Article 127 to Mahomedans is fully discussed in *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[6]. Here, the family was a Sayed family; there was no allegation of a special custom; and no other Article was referred to. In *Bavasha* v. *Masumsha*[7], the Judges do not give any reasons but they adopt the reasoning in *Sayad Gulam's case*[6]. The principle is accepted tacitly in *Faki Abas* v. *Faki Nurudin*[8] which relies on *Bhaudin* v. *Shekh Ismai*[9]. The case of *Sayadalli* v. *Aminbi*[10] is entirely in our favour. Then there is the case of *Mulla Mahomood* v. *Khadizabibi*[11] decided by Starling J. on the 13th January 1902.

In *Abdul* v. *Mahomed*[12], Batty J. does not say that custom must be proved before the Article can be applied to Mahomedans. No reference at all is made to the Dayabhaga doctrine. He says that previous joint possession is a condition necessary to its

(1) (1869) 11 W. R. 45.
(2) (1874) 22 W. R. 185.
(3) (1881) P. J. 150.
(4) (1837) 3 Cal. 228.
(5) (1877) P. J. 194.
(6) (1885) P. J. 170.
(7) (1889) 14 Bom. 70.
(8) (1891) 16 Bom. 191.
(9) (1887) 11 Bom. 425.
(10) (1898) P. J. 393.
(11) O. C. G. Suit No. 673 of 1900 (Un. rep.)
(12) (1903) 5 Bom. L. R. 355.

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applicability—a point which has not been taken in any of the earlier Bombay cases. Those cases do not go on Article 144. The cases of *Fatma Boo* v. *Ghisan Boo*[1] and *Nyazgoolkhan* v. *Bibi Bu*[2] decided by Batchelor and Shah JJ., are recent instances of the application of Article 127 to Mahomedans. Thus for over thirty years our High Court has uniformly applied the Article to Mahomedans. The Bombay view is upheld in Tagore Law Lectures for 1882.

As for the cases of the other High Courts, I have already dealt with the early Calcutta cases. In *Mahomed Akram Shaha* v. *Anarbi Chowdhrani*[3], there is no reference to the Dayabhaga view and the judgment dwells only on the alteration in law: see *Poyran Bibi* v. *Lakhu Khan Bepari*[4].

In Allahabad, in earlier cases at any rate, the High Court applied Article 127 to Mahomedans: see *Sahib-unnissa Bibi* v. *Hafiza Bibi*[5]; *Hashmat Begam* v. *Mazhar Husain*[6]. Two years later came the Full Bench case of *Amme Raham* v. *Zia Ahmad*[7], where that Court came to a contrary conclusion. In the last mentioned case, however, the property in dispute had already passed out of the family and Article 127 could not apply in any case.

The early Madras case of *Khatija* v. *Ismail*[8] was governed by Act XV of 1877 and was a case of self-acquisition: *Patcha* v. *Mohidin*[9] and *Kasmi* v. *Ayishamma*[10] are against me; and so is *Abdul Kader* v. *Aishamma*[11]. The case of *Commercial Bank of India* v. *Allavoodeen Saheb*[12] has no application, for

(1) (1909) 11 Bom. L. R. 1083.
(2) A. O. No. 34 of 1915 (Un. rep.)
(3) (1895) 22 Cal. 954.
(4) (1901) 7 C. W. N. 155.
(5) (1887) 9 All. 213 at p. 216.
(6) (1888) 10 All. 343 at p. 346.
(7) (1890) 13 All. 282.
(8) (1889) 12 Mad. 380.
(9) (1891) 15 Mad. 57.
(10) (1891) 15 Mad. 60.
(11) (1892) 16 Mad. 61.
(12) (1900) 23 Mad. 583 at pp. 588, 589

there the allegation was that the uncle and nephew had agreed to put their earnings into a common fund—which could be regarded as joint family property.

To sum up: the expression used in Article 127 is "joint family property" and not "property of a Hindu joint family" or "of any other joint family". In section 1, Clause 13 of Act XIV of 1859, the Legislature use a suggestive expression "the property alleged to be joint". If we read the words rightly it seems the Legislature do not intend to restrict them to any technical meaning. Then, in Article 107, "joint family" and "undivided family" are used in the same sense. In other enactments also (e.g., Partition Act, section 4: Transfer of Property Act, section 44) the expression "undivided family" is used without restricting it to Hindus. Even among Hindus, the expression "joint family" does not always present the same features. A Mahomedan family, as set out in *Sayad Gulam Hussein's case*[1], does not materially differ from a Dayabhaga family. Lastly, the other view imputes to the Legislature either (1) ignorance of alleged well known facts, or (2) an impossible omission to provide for the entire Mahomedan population which may be counted not by tens of thousands but by millions. Assumptions like these will have to be made to support the other view. The Legislature have used the expression "joint family" as in common speech. This they have to do for an obvious reason. For, in the very nature of things they have got to make a few words go a long way to reach a variety of conditions. This Court, if it subverts its view now, can only legislate: see *Dalton* v. *Angus*[2].

Thakor, in reply:—If the two tests of (1) community of interest, and (2) descent from a common interest were successfully applied, the Article would apply not

(1) (1885) P. J. 170. (2) (1881) 6 App. Cas. 740 at p. 812.

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only to Hindus and Mahomedans but to other communities like Parsis and Christians. It would also apply to a joint gift made by a Christian father to his sons; and to a partnership which brought together property inherited from a common ancestor. Article 123 applies to cases governed by the Indian Succession Act; but sections 187 and 190 of the Act are quite general. Section 190 applied only when the right of a dead person is put forward as the basis of the property: see *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Unmah*[1].

The Hindus are a community with whom the institution of joint family is unique. Such an institution is not known to exist so far as the Mahomedans are concerned.

[MARTEN J.—Among Mahomedans, the estate of the father descends and what the sons take on shares is the father's property. This does not hold true of a Hindu family.]

To constitute a joint family property there must be property of a joint family: see *Obhoy Churn Ghose* v. *Gobind Chunder Dey*[2]. It is not suggested even in Bombay that the term 'property' is governed by "joint".

[MARTEN J.:—If you read "joint family property" as joint property of a joint family, that would be really in harmony with Article 107.]

Among Hindus there were texts special to each School of Hindu law; but the concept of joint family was common to both the Schools, viz., the Mitakshara and the Dayabhaga. Hindus settling in Bengal accepted what was written in books peculiar to their School. But the institution of a joint family did remain; only one of its incident, survivorship, disappeared. On

(1) (1910) 34 Mad. 511. (2) (1882) 9 Cal. 237 at pp. 240, 243.

account of this difference, Hindus of Bengal did not become Mahomedans of Gujarat.

Mahomedans have, it appears, not infrequently lived together in a family and have their affairs carried on by a manager: see *Mata Din* v. *Ahmad Ali*[1]; *Baba* v. *Shivappa*[2]; *Fakiruddin* v. *Abdul Hussein*[3]; *Shakul Kameed Alim Sahib* v. *Syed Ebrahim Sahib*[4]; *Durgozi Row* v. *Fakeer Sahib*[5]; *Nizam-ud-din Shah* v. *Anandi Prasad*[6]. But no presumption can on that account be made in their case that they form a "joint family"; *Hakim Khan* v. *Gool Khan*[7]; and accretions to property held by them do not become joint family property: *Abdool Adood* v. *Mahomed Makmil*[8].

C. A V.

SCOTT, C. J. (BATCHELOR, MACLEOD and MARTEN JJ. concurring):—The following question has been referred to a Full Bench.

Whether Article 127 of the Second Schedule of Act XV of 1877 can apply to the property of a Mahommedan (or any other person not being a Hindu), and not having been proved to have adopted as a custom the Hindu law of the joint family?

The question referred is expressed to relate to the application of Article 127 of the Second Schedule of Act XV of 1877: the reference is, however, made in a suit brought when the Limitation Act of 1908 had come into operation. Therefore we take the question as relating to Article 127 of the later Act.

The exact point for determination is whether the three words "joint family property" as occurring in

(1) (1912) 34 All. 213.
(2) (1895) 20 Bom. 199.
(3) (1910) 35 Bom. 217.
(4) (1902) 26 Mad. 373.
(5) (1906) 30 Mad. 197.
(6) (1896) 18 All. 373.
(7) (1882) 8 Cal. 826.
(8) (1884) 10 Cal. 562.

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Article 127 of the Act of 1908 mean anything but property of a joint family in the sense in which the expression 'joint family' is understood amongst Hindus.

Of the three words so arranged two constructions are possible.

Either 'joint family' must be a compound adjective qualifying 'property' or 'family property' must be a compound substantive qualified by the adjective 'joint'.

The word 'joint' may be construed in a technical legal sense or in a loose popular sense. In India 'joint' in the Article if used in a technical legal sense would attract to itself the word 'family' and form a compound adjective connoting "appertaining to a joint family" living as an undivided Mitakshara or an undivided Dayabhaga family lives. In a loose popular sense 'joint family property' might mean undivided property of a family.

The expression 'joint family property' is first to be found in the Indian Statute Book in clause 13 of section 1 of Act XIV of 1859. In Bengal (see *Musst. Khyroonissa* v. *Salehoonissa Khatoon*[1], *Achina Bibee* v. *Ajeejoonissa Bibee*[2] and *Chunder Monee Debia* v. *Meharjan Bibee*[3]) and in Bombay (see *Bai Janubbi* v. *Mithabhai Gulabbhai*[4]) effect was given to the expression in the Act of 1859 as embracing undivided property of members of Mahomedan families not shown to be joint families in the Hindu sense. That construction was only possible if 'family property' was read as a compound substantive. In the Act of 1871 the Legislature not only confined the words to an Article

(1) (1866) 5 W. R. 238.
(2) (1869) 11 W. R. 45.
(3) (1874) 22 W. R. 185.
(4) (1881) P. J. 150.

expressly dealing with Hindus alone but coupled 'joint' to 'family' by the use of a hyphen. This hyphen appears in all copies and editions of the Act to which we have had access. In the Limitation Act of 1877 the expression 'joint family property' again appears in the same connection but the Article 127 is no longer confined to Hindus but applies to any 'person' The intention to couple 'joint' with 'family' is again emphasised by a hyphen. This we have verified by reference to the first publication of the Act for general information in the Gazette of India for 21st July 1877 after it had received the Viceroy's assent and also by reference to the official copies issued from the Government Press in Calcutta in 1878. It follows, we think, that 'joint-family' in Article 127 of the Act of 1877 must be read as a compound adjective and the expression 'joint-family property' must be read as property appertaining to a joint family.

This being so, we think *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1] upon which a long series of Bombay cases is based was wrongly decided. There is good reason to believe that Sir Charles Sargent was misled by the Edition of West's Bombay Code then before him. That was the Edition of the Indian Statutes in general use by Judges of this Court in 1885. In West's Code Article 127 of the Act of 1871 is correctly printed with the hyphen but the corresponding Article of the Act of 1877 is incorrectly printed in that it omits the hyphen. The copy of the Act of 1877 then in Sir Charles Sargent's Court has the words 'joint family property' printed exactly as they were in the Act of 1859. Sir Charles Sargent's use of decisions under the Act of 1859 for the construction of the Act of 1877

[1] (1885) P. J. 170.

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is therefore quite intelligible; we do not think it would be intelligible if he had had the hyphened phrase before him.

In Article 127 of the Act of 1908 the wording is precisely the same as in the corresponding Article of the Act of 1877 but the hyphen is omitted. We have, however, for the period of thirty-one years from 1877 to 1908 the definite indication of the Legislature, as we understand it, that the words in the connection in which they appear should be used in a particular sense and we do not think the omission of the indicative hyphen after so many years should be taken as importing an intention that a changed construction should be adopted.

It only remains to consider the argument based on the working rule '*constat stare decisis*'. On the application of this rule we have two recent decisions of the Judicial Committee to guide us, namely, *Pate* v. *Pate*[1] and Privy Council case (*Tricomdas Cooverji Bhoja* v. *Sri Sri Gopinath Jiu Thakur*[2]), decided in 1916, to the effect that a long series of decisions based upon a clearly erroneous construction of an Act is not to be followed, while a long series of decisions based upon a construction not free from doubt should not be disregarded. There is no substantial reason for thinking that Mahomedan co-sharers who have not yet sued to establish their right to share in family property relying upon the previous Bombay decisions under Article 127 of the Act of 1877 will be prejudiced by the narrower construction of the Act of 1908 now adopted, for Article 144 sets up for an excluding co-sharer practically the same period for prescription in the case of immoveable property as Article 127, while cases where undistributed moveable family property has existed since the death of the last owner for more than

(1) [1915] A. C. 1100 at p. 1109. (2) (1916) 19 Bom. L. R. 450.

six years are so rare as to make the reduction of the prescriptive period of twelve years under Article 127 to six years under Article 120 a hardship which may safely be regarded as negligible.

We answer the question referred in the negative.

BEAMAN and HEATON, JJ.:—We only wish to add that certain passages in our referring judgment were written with special reference to the Mitakshara School which is predominant in this, as over the greater part of India.

Under the Dayabhaga School of Bengal, rules, differing in some important points from those of the Mitakshara, regulate the constitution of the joint-family, more particularly in its legal relations to property. But it is true that the joint Hindu family, as a definite legal entity is as well known and recognized under the Dayabhaga as under the Mitakshara School, and so generally under the Hindu, as contra-distinguished from all other great systems of law. It is equally true, that the "joint family" as a legal entity involving definite legal notions, incidents and consequences is unknown to any other great system of law prevailing in the empire. So that where property is spoken of as belonging to a joint family, it must primarily be referred to a Hindu joint family, and only secondarily to such groups of non-Hindus as can prove that they have by custom adopted the Hindu law of the joint family.

SHAH, J.:—Treating the question referred to the Full Bench as relating to the Limitation Act IX of 1908, I am of opinion that Article 127 of the First Schedule of the Act can apply to Mahomedans even though they may not be proved to have adopted as a custom the Hindu law of the joint family. I express no opinion—as it is not necessary to express any

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opinion—as to whether the Article can apply to persons other than Hindus and Mahomedans, who are not proved to have adopted as a custom the Hindu law of the joint family.

The Article in terms applies to a person excluded from joint family property to enforce a right to share therein. The answer to the question depends upon the construction to be placed upon the expression 'joint family property'.

This expression was used in the Limitation Act (XIV of 1859), section 1, Clause 13; and the decisions under that clause show that it was held to apply to Mahomedans. The corresponding Article in the Act of 1871 was in terms confined to Hindus.

In the Limitation Act of 1877 the word 'person' was substituted for the word 'Hindu'; and the Article as thus altered was held applicable to Mahomedans by Sargent C. J. and Birdwood J. in the case of *Sayad Gulam Hussein* v. *Bibi Anvarnisa*[1]. This view was followed in subsequent decisions: see *Bavasha* v. *Mdsumsha*[2]; *Sayadally* v. *Aminbi*[3] and *Boo Fatma* v. *Boo Ghisanboo*[4]. The same view has been acted upon in other unreported cases in spite of the observations of Batty J. in *Abdul* v. *Mahomed*[5] and of Beaman J. in *Jan Mahomed* v. *Datu Jaffer*[6].

After a careful consideration of the arguments on both sides, it seems to me that though there may be ground to prefer the view that the expression 'joint family property' in Article 127 is used in a technical and Hindu sense, as interpreted by the other Indian High Courts, and not in the broad and non-technical

(1) (1885) P. J. 170.
(2) (1889) 14 Bom. 70.
(3) (1898) P. J. 393.
(4) (1909) 33 Bom. 719.
(5) (1903) 5 Bom. L. R. 355.
(6) (1913) 38 Bom. 449.

sense, in which it has been interpreted by different Judges of this Court, the construction hitherto put upon it by this Court is a reasonably possible construction of the expression. At any rate I am not satisfied that it is wrong. As this point relates to a rule of limitation affecting title to property, I am of opinion that the view taken by Sargent C. J. in *Sayad Gulam Hussein's case*[1] in 1885 should be adhered to. It seems to me that any departure from this long course of decisions is likely to result in injustice and hardship.

In the Act of 1859 there was no hyphen between the words 'joint' and 'family'. In the Act of 1871 there was a hyphen between these words. In 1877 though the Article was altered as already stated the hyphen was retained. In the Act of 1908 the hyphen is omitted. This account of the use of a hyphen is interesting; but in my opinion it is not safe to base any conclusion upon it. I see no sufficient reason to assume or to infer that the learned Judges who decided *Sayad Gulam Hussein's case*[1] had not noticed the hyphen between the words 'joint' and 'family' in the Act of 1877. The hyphen was certainly brought to the notice of the Court in *Sayadalli's case*[2] in 1898, when Ranade J. observed that the use of the hyphen by itself did not justify any such restrictive interpretation. If the Article with the hyphen in the Act of 1877 could be applied—and I am not prepared to hold that the learned Judges were wrong in applying it—to Mahomedans generally in this Presidency, I see no reason why the Article without the hyphen in the Act of 1908 should be held to be inapplicable to them.

I see no insuperable difficulty in interpreting the word 'joint' as meaning 'undivided'; and if the word be understood in that sense the view taken in

(1) (1885) P. J. 170.

(2) (1898) P. J. 393.

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Sayad Gulam Hussein's case[1] and followed in subsequent cases becomes easily intelligible and acceptable.

In view of the judgment of my Lord the Chief Justice, which I have had the privilege of reading, I do not consider it necessary to state my reasons in detail for the conclusion that the expression 'joint family property' is susceptible of the construction put upon it in *Sayad Gulam Hussein's case*[1].

I sincerely regret that I am unable to agree with my Lord the Chief Justice and my other learned colleagues on this question.

Answer accordingly.

R. R.

APPELLATE CIVIL.

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

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BAI RAMAN, DAUGHTER AND HEIR OF BAI KIKI (ORIGINAL DEFENDANT, No. 10), APPELLANT *v.* JAGJIVANDAS KASHIDAS (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Vyavahara Mayukha—Succession—Non-technical Stridhana—Sons take precedence over sons' sons.

The non-technical *stridhana* of a Hindu female governed by the Vyavahara Mayukha descends to her son in priority to her son's son.

SECOND appeal from the decision of Mohanrai Dolatrai, First Class Subordinate Judge, A. P., at Broach, confirming the decree passed by C. M. Jhaveri, Second Class Subordinate Judge at Broach.

Suit to redeem a mortgage.

[1] (1885) P. J. 170.

*Second Appeal No. 847 of 1913.