Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lakshman Dada Naik v. *Ramchandra Dada Naik, from the High Court of Judicature, Bombay; delivered May 11th*, 1880.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE Appellant in this case is the second, and the Respondent the eldest, son of one Dada Mahadev Naik, who died on the 13th July 1872. Dada Mahadev Naik was a son of Mahadev Narayan Naik, who died in 1847, leaving another and eldest son called Hurba, and seven grandsons, four of whom were sons of pre-deceased sons, and three, namely the Respondent, the Appellant, and a younger son, Keshav, were the sons of Dada Naik. All these persons after the death of Narayan Naik constituted a joint and undivided Hindoo family, of which Dada Naik, his eldest brother Hurba being dumb and therefore incapacitated, became the manager. By virtue, however, of subsequent partitions and other family arrangements the other members of the larger family became separate from Dada Naik and his three sons, who, in the year 1857, were the only members of the joint and undivided family with which their Lordships have to deal.

The family property consisted of a family house at Shahapoor, in the Southern Maratha country, and of an ancestral business which was carried on partly there, and partly in a kotee at

Q 1492. 125.—6/80. Wt. 3729. E. & S.

Bombay, which appears to have been managed by Gomashtas. About the year 1858 great dissensions arose between the Respondent and his father, the former claiming a right to take a larger share of the management of the business than his father was disposed to allow him. It is unnecessary to enter into the particulars of these disputes, but the result of them was that in 1858 the father and his two younger sons left the family house, the Respondent remaining there; and afterwards they, in the year 1864, built for themselves with the family funds another house at Belgaum.

Between the two last dates, and in March 1861, the Respondent instituted a suit in the late Supreme Court of Bombay against his father and brothers, praying for a declaration of his rights in, and an immediate partition of, the ancestral property. The father demurred to the bill, and on the 13th August 1861 his demurrer was allowed. The effect of those proceedings their Lordships will afterwards consider.

In 1868 Keshav Naik, the youngest son, formally separated himself from the joint family, taking Rs. 45,000 odd as his share in the joint estate, or the balance of it. The deed of release executed by him on the 16th November of that year is at page 260 of the Record, and it may be observed that it treats the old family house at Shahapoor as still part of the joint family estate.

The father afterwards made a will dated the 30th October 1871, whereby, after giving his account of what had taken place in the family, he treated his eldest son, the Respondent, as having received already more than his share of the estate, gave him only the house at Shahapoor and Rs. 500, and gave all the rest of the property to his second son, the Appellant. He died, as has been before stated, in July 1872.

In the following October the Respondent brought this suit against his brother, the Appellant. By it he claims to be entitled to one half of the joint business and estate as it stood at the death of his father. Various defences were set up by the Appellant, and the issues as finally settled were the following :—

"1. Whether the suit is barred by section 2, Act 8 of 1859"—that is, whether the decision of the Supreme Court on the demurrer amounted to *Res judicata*. "2. Whether the suit is barred by clause 13, section 1, Act 14 of 1859"—that is, whether it was barred by limitation under that statute. "3. Whether the property in suit is deceased Dada "Naik's ancestral or self-acquired property. 4. If the "former, whether Plaintiff has taken or received so much out "of it as could be considered more than what he was entitled "to for his share? 5. If the latter, whether the deceased "Dada Naik made the original of exhibit No. 16, and to what "sum is the Plaintiff entitled under it? 6. Whether the "property left by the deceased Dada Naik is correctly "estimated? 7. Whether the Plaintiff is restricted in getting "his share on any other ground, as alleged by Defendant?"

It was admitted at the bar that the findings of the Courts as to the 3rd, 4th, 5th, 6th, and 7th of these issues cannot now be questioned. It must, therefore, be taken that the property in question was ancestral; that the Respondent, the Plaintiff, has not received his full share of it; that the *factum* of the will has been established; and that there is nothing but the will and the two pleas in bar, the first and second issues, to defeat the Plaintiff's claim. Again as to the will, it is now conceded that under the Mitaxara law, as received in Bombay, by which this family is governed, a father cannot by will make an unequal distribution of ancestral property, whether movable or immovable, between his sons. It has, however, been contended that inasmuch as under the Mitaxara law a father and his sons are during his life joint co-parceners in family estate, and that it has now been decided by the Courts in the South and West of India that one

co-parcener may, by act of *inter vivos*, make an alienation of his share which is binding on the others, it follows that he may dispose of his share by will. The result of this contention, which will be afterwards considered, is, if it is well founded, to reduce the property to be divided between the brothers to two thirds of the joint property as it stood at the death of the father. The pleas in bar go, of course, to the whole claim.

Now, as to the first of these pleas, their Lordships have already intimated that it cannot be supported. It appears to them that all that was decided by the Supreme Court of Bombay in 1861 was that the Respondent could obtain no relief on his then bill, inasmuch as he had no right to compel his father in his lifetime to make a partition of movable, though it might be ancestral, property; and that the Supreme Court had no power to make a partition of the immovable property which was beyond the limits of its territorial jurisdiction. There is nothing, in their Lordships' opinion, which amounts to an adjudication between the brothers as to their rights in the joint ancestral estate on their father's death.

The plea of limitation is founded on the 13th Clause of Section 1 of Act 14 of 1859, which is as follows :—

"To suits to enforce the right to share in any property, movable or immovable, 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 12 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 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."

In considering the application of this enactment to the present suit, we may leave out all

that relates to suits "for recovery of maintenance," and treat it as confined to a suit "to "enforce the right to share in any property "movable or immovable, on the ground that "it is joint family property." The section gives two periods from which the 12 years may be calculated; one is "the death of the persons "from whom the property alleged to be joint "is said to have descended," and the other is "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."

It is contended that in this case, which is governed by the Mitaxara law, the person on whose death the property which is alleged to be joint has descended must be taken to be, not the father, in which case, of course, there would be no ground at all for the application of the Statute of Limitation, but the grandfather, on whose death the father and his sons all became co-parceners in the property. It is possible, indeed, that on this construction it might be necessary to go back one or more generations beyond the grandfather in order to ascertain from whom the property descended, but for the present purpose it may be assumed that the property descended from the grandfather as the first acquirer of it.

Their Lordships agree with many of the observations made by Mr. Justice Holloway and Mr. Justice Collett in the case reported in the *3rd Madras High Court Reports, p.* 99, as to the difficulty of applying this part of the clause in question to a joint family consisting of a father and sons governed by the Mitaxara law, though such difficulty would not exist in the case of a like family governed by the law of Lower Bengal. They are not prepared, however, to affirm that in this particular case the father

may not be held to be "the person from whom "the property alleged to be joint is said to have "descended" within the meaning of the Act. The claim is twofold. It is to establish the right of the Plaintiff as a co-parcener not only as to his original share in the joint estate, but also as to the moiety of the father's interest to which he became entitled on the father's death by right of survivorship, and to have a partition on that basis. So far as the father's interest is concerned, the succession opened only on the father's death. Nor is it altogether clear upon the authorities how far the principle of inheritance as well as that of survivorship applies to such a succession by sons to their father. It may be observed, too, that this construction would receive some support from the arguments addressed to their Lordships upon the effect to be given to the will which proceeded upon the father's right of dispositions over his undivided share. Their Lordships, however, do not think it necessary to decide, and do not decide, the question of limitation upon this construction of the clause in question.

Again, their Lordships think there is considerable force in the argument which the learned Counsel for the Respondent have founded on the possession by the Respondent since 1858 of the family house at Shahapore. How do the facts on this part of the case stand? The Respondent was, unquestionably, a member of the joint family, with the full rights of a co-parcener, up to 1858. There is no suggestion of a formal partition between him on the one side and his father and brother on the other. He has ever since 1858 been in possession of the house at Shahapore, which has, nevertheless, been treated on the occasion of the family arrangement which resulted in the separation of the youngest son, and to which the Appellant was a party,

and also by the father when he made his will, as continuing to be joint family property. The contention of the Appellant and of his father seems to be embodied in the 4th issue in the suit, viz., that the Respondent had taken and received so much out of the joint family property as would be considered more than what he was entitled to as his share, and so must be taken to have lost his rights as a co-parcener, as he would have done upon a formal partition. This issue has, however, been found by both Courts in favour of the Respondent, who must, therefore, be taken to be entitled to his full rights as a co-parcener, except so far as he may be barred from asserting them by the Statute of Limitation. Now, so far as the immovable property of the family is concerned, there seems to be no ground for the application of the Statute. Not only has the Respondent all along been in the enjoyment of part of that property, viz., the house at Shahapore, but, under the 14th section of the Act, he is entitled to exclude from the computation of the period of limitation the time occupied in the prosecution of the suit of 1861, inasmuch as the decision of the Court, *quoad* the immovable property, proceeded on the ground of want of jurisdiction over it. There is, therefore, no bar in this case to a suit for the partition of the immovable property of the family. Nor has there been a total exclusion from the joint family estate, as a whole, if that, as suggested by Mr. Justice Holloway in the case above referred to, is necessary to lay the ground for the application of the Statute at all.

It is argued, however, on the part of the Appellant that the claim is substantially a claim to share in the ancestral business and other movable property, and that the right to do so has been barred by reason of the Respondent having received no payment there-

out since 1858. Their Lordships will assume that the claim as to the movable may thus be treated as distinct from that as to the immovable property of the family, and that no payment out of the former has been established. They are, nevertheless, of opinion that the Appellant is in this case estopped by the proceedings of the Supreme Court of Bombay from setting up the Statute as a bar to the Respondent's claim. They treat the Order of the 30th of August 1861, whether founded on a correct or an erroneous view of the law, as an adjudication, binding on the parties to that suit, that the Respondent was not entitled to sue in his father's lifetime for a partition of the movable property, and consequently could not assert his rights in that property until his father's death. It would be in the highest degree unjust to allow the Appellant, who has had for years the benefit of that judgment, to insist that it did not suspend the running of the Statute of Limitations because it was erroneous in point of law, and the Respondent ought to have appealed from it. There seems to their Lordships to be no warrant in law for such a contention. For the above reasons they are of opinion that the plea of limitation cannot be maintained.

The only remaining question of which their Lordships have to dispose has been raised for the first time at the hearing of this Appeal, and they have not the advantage of having the judgment of either Indian Court upon it. It has been ingeniously argued that partial effect ought to be given to the will by treating it as a disposition of the one third undivided share in the property to which the father was entitled in his lifetime. The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay which have been

recognised by this Committee as establishing that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-sharers.

Those cases have established that such a share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration. The Madras High Court has gone further, and ruled that an alienation by gift or other voluntary conveyance *inter vivos* will also be valid against the non-assentient co-parceners. And, assuming this latter proposition to be law, the learned Counsel for the Appellant have insisted that it follows as a necessary consequence that such a share may be disposed of by will, because the authorities which engrafted the testamentary power upon the Hindoo law have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by will.

To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay. The decisions of the High Court of Bombay, notably those reported in the 10 B. H. C. R., p. 131, and the 11 B. H. C. R., p. 76, have ruled that a co-parcener cannot without the consent of his co-sharers either give or devise his share; that the alienation of it must be for value; and if this be law, the whole argument in favour of the testamentary power over the undivided share fails.

Again, the High Court of Madras, though admitting that a co-parcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by will (see the case reported

8 Madras H. C. R., p. 6). Its reasons for making this distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him; and that, the title of his co-sharers by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheopershad Singh*, L. R. 6 I. A., p. 88, and was fully recognised by their Lordships, although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had then gone so far in the life-time of the mortgagee as to give, notwithstanding his death, a good title against his co-sharers to the execution purchasers. It follows from what has been said that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the Appellant.

Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of his co-sharers beyond the decided cases. In the case of *Suraj Bunsi Koer* above referred to they observed: "There can be little doubt that all "such alienations, whether voluntary or com- "pulsory, are inconsistent with the strict theory "of a joint and undivided family (governed by the "Mitaxara law); and the law as established in "Madras and Bombay has been one of gradual "growth, founded upon the equity which a "purchaser for value has to be allowed to stand "in his vendor's shoes, and to work out his rights "by means of a partition." The question, therefore, is not so much whether an admitted principle of Hindoo law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established

by modern jurisprudence. Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision. The Appellant has, therefore, failed also upon the question which he has raised as to the effect of the will.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this Appeal. The costs of the Appeal must follow its result.

Their Lordships wish to throw out for the consideration of the parties how desirable it is for both of them to come, either in one or other of the ways indicated by the High Court or in some other manner, to an amicable settlement of their differences upon the basis of this Decree. It is obvious that if they persist in fighting out the case to its bitter end, by taking the accounts directed by the High Court hostilely, they are likely seriously to impair, if not destroy, the ancestral business which is the chief subject of dispute.