

**isap Ahmad Mograria Vs. Abhramji Ahmadji Mograria**

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**Court :** Mumbai

**Decided On :** Mar-30-1917

**Reported in :** AIR1917Bom254; (1917)19BOMLR579; 41Ind.Cas.761

**Judge :** Basil Scott, Kt., C.J., ;Batchelor, ;Beaman, ;Heaton, ;Macleod, ;Shah and ;Marten, JJ.

**Appeal No. :** Letters Patent Appeal No. 41 of 1915

**Appellant :** isap Ahmad Mograria

**Respondent :** Abhramji Ahmadji Mograria

**Judgement :**

Basil Scott, Kt., C.J., Batchelor, Macleod and Marten, JJ.

1. 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 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 ?

2. 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.

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

4. Of the three words so arranged two constructions are possible.

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

6. 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.

7. 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 (1860) 5 W.R. 238; Achina Bibee v. Ajeejoonissa Bibee (1869) 11 W.R. 45 and Chunder Monee Debia v. Meharjan Bibee (1874) 22 W.R. 185 and in Bombay (see Bai Janubbi v. Mithabhai (1881) P.J. 150 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 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.

8. This being so, we think Sayad Gulam Hussein v. Bibi Anvarnisa (1885) P.J. 170 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 is therefore quite intelligible; we do not think it would be intelligible if he had had the hyphenated phrase before him.

9. 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.

10. It only remains to consider the argument based on the working rule 'sta decisis.' On the application of this rule we have two recent decisions of the Judicial Committee to guide us, namely, Pate v. Pate [1915] A.C. 1100 and Tricomdas Cooverji Bhoja v. Sri Sri Gopinath Jiu Thakur (1916) 19 Bom. L.R. 450, 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 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:

11. We answer the question referred in the negative.

Beaman and Heaton, JJ.

12. 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.

13. 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.

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

15. 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.'

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

17. In the Limitation Act of 1877 the word ' person' was sub-stituted for the word ' Hindu '; and the Article as thus altered was held applicable to Muhammadans by Sargent C.J. and Birdwood J. in the case of Sayad Gulam Hussein v. Bibi Anvarnisa (1885) P.J. 170. This view was followed in subsequent decisions: see Bavasha v. Masumsha I.L.R. (1889) Bom. 70; Sayadalli v. Aminbi (1898) P.J. 393; and Fatma Boo v. Ghisan Boo (1909) 11 Bom. L.R. 1083. The same view has been acted upon in other unreported cases in spite of the observations of Batty J. in Abdul v. Mahomed (1903) 5 Bom. L.R. 355 and of Beaman J. in Jan Mahomed v. Datu Jaffar : AIR1914Bom59 .

18. 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 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 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.

19. 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 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 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 Muhammadans 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.

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

21. 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.

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

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