(1942) 04 AHC CK 0015

Allahabad High Court

Case No: First Appeal No. 283 of 1934

Ganesh Prasad		APPELLANT
	Vs	
Hazari Lal and others		RESPONDENT

Date of Decision: April 24, 1942

Hon'ble Judges: Hamilton, J; Collister, J; Bajpai, J

Bench: Full Bench

Advocate: G.S. Pathak, S.N. Seth, I.K. Srivastava and Jagdish Swamp, for the Appellant; P.L. Banerji, J.C. Mukerji, B. Malik, B.N. Misra, Shah Habib and J.K. Lal for Respondents, for the Respondent

Final Decision: Dismissed

Judgement

Collister, J.
The following question of law has been referred to this Full Bench:

On the death of a Hindu leaving self-acquired property, do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara law?

2. There is a sharp conflict of opinion between the High Courts of Bombay and Madras on the one hand and the Chief Court of Oudh on the other. There is also an old case from Calcutta dating back to 1820, which I shall mention first. In Macnaghten''s Principles and precedents of Hindu Law, Vol. II, in the chapter headed "Inheritance" we have the following question put to the Law Officers in case No. XII of 1820:

A person having assigned a moiety of his self-acquired landed estate to his Separated himself from them, and with the other half continued to live in a state of union with his son by another wife. On the death of the father, are the sons entitled to an equal portion of the estate left by him?

3. The answer was in the following terms:

Under the circumstances stated the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons or through partiality for the child of a favorite wife, in either of which case each of his sons would be entitled to an equal share of the estate; otherwise on his death the son who were separated from him during his lifetime have no claim to the inheritance.

4. In Fakirappa v. Yellappa (1896) 22 Bom. 101, it was held that as between united sons and a separated grandson the succession on the grand father''s death, to the self-acquired property left by him goes in preference according to Hindu Law, to the United sons. In that case the property was apparently acquired before partition. At page 103 Ranade, J. says:

The succession of the male issue is by right of survivorship to joint estate and must be confined to sons who are united co-parceners and cannot include the Appellant who is separate from the grand father and the uncles. In the case of a joint succession the sons succeed by survivorship and sons who have separated from their father and his family are passed over in favour of sons who have remained united with him west and Buhler, p. 68.

5. At page 104 this same learned Judge observes:

The succession to a joint estate goes by survivorship to the coparceners and the separated grandsons cannot be regarded as coparceners with the grandfather at the time of his death.

6. Further on he says:

A partition once made must be presumed to be final and complete. To hold otherwise would be to open the door to a flood of litigation, for in every case a separated son can always put forth the suggestion that a portion of his father''s property was self-acquired.

7. At page 105 Jardine J. expresses the opinion that the claim of the separated grandson was

contrary to the spirit and presumptions of the Hindu Law.

8. This decision was followed in Nana Tawker v. Ramachandra Tawker (1908) 32 Mad 377 : 2 IC 519, where it was held that Under the Mitakshara law, when a father dies leaving self-acquired property an undivided son takes such property to the exclusion of a divided son, although the division took place after the acquisition of such property by the father.

9. By implication this would apply a fortiori to property acquired by the father after the separation.

10. At page 383 the learned Judge considers the interest which sons have by birth in the self-acquired property of the father--a matter which shall deal with at a later stage--and say:

One final argument requires to be noticed. It is suggested that if sons have by birth an interest in their father''s self acquisition and if at the time when a sons separates himself there are such self acquisitions in existence, then inasmuch as at partition the son cannot obtain any share of the self acquisitions, he would be entitled on the death of the father to regard them as property of which he could demand a shire in the same way as if it were ordinary coparcenaries property which, for some reason or other, had been omitted from the original partition. The answer is that while theoretically the sons have an interest by birth in their father''s self acquisitions, still, as the father can dispose of those acquisition at his pleasure they are not coparcenary property in the ordinary sense and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the coparcenary and it was only as a member of the coparcenary that he had by birth an interest in his father''s self-acquisitions. All the right that remains to him with regard to his father''s property is the right by virtue of his son ship to inherit in the absence of undivided sons.

11. Here too the learned Judges took the view that an undivided son takes his father''s separate property by survivorship and that it becomes an addition to the joint property. They say:

...the succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance and he who took by survivorship would exclude those, such as divided sons, who could only take in any case by inheritance.

12. In Viravan Chettiar, represented by Ramasami Chettiar Vs. Srinivasachariar, , a Full Bench of the High Court at Madras agreed with the decision in Nana Tawker''s case as regards the order of succession, but they held that the undivided sons take the property by inheritance and not by survivorship. At page 534 Old-field J. says that the dictum about survivorship was unnecessary to the conclusion in Nana Tewker''s case and should not in his opinion be followed and at page 507 Kumaraswami Sastri J. says:

It is difficult to see how there can be any coparcenary between the father and the sons as regards self-acquired property over which the sons have no legal claim or enforceable rights. Coparcenary and survivorship imply the existence of co-ownership and of rights of partition enforceable at law and a mere moral injunction can hardly be the foundation of a legal right.

13. This learned Judge expressed the view that the observations about succession to self-acquired property by survivorship require re-consideration Portage the Full

Bench dissented from the earlier decision on this point, but as I have already said they agreed with it as regards the order of succession.

14. While on the subject of the mode of succession, as distinguished from the order of succession, I may mention certain authorities which seen to indicate that the view taken by the Full Bench of the Madras High Court on this subject is correct. In Katama Natchiar v. The Raja of Shivagunga (1863) 9 Moo. IA 539, the Judicial Committee made it clear that ancestral property passes by survivorship and self-acquired property by inheritance. At page 611 their Lordships say:

But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails....

15. In Neelkisto Deb Burmono v. Beerchunder Thakoor (1869) 12 Moo. IA 623 at p. 541, their Lordships say.

In Katatna Natchier v. The Raja of Shivagunga (1863) 9 Moo. IA 539,...it is stated in a judgment which underwent the most careful consideration by their Lordships that there are in the Hindoo law two leading rules of inheritance that founded on the religious duty and superior efficacy of oblation and sacrifice and that of survivorship. Where the latter rule cannot apply the former must be resorted to.

16. In Rajah Ram Narain Singh v. Pertum Singh (1873) 20 WR 189, it was held that self-acquired property becomes joint family property, in the hands of the next generation. At page 191, second column, the learned Judges say:

As long as it is separate and in the condition of self-acquired property, the person who is the holder of it has no one to consult in regard to the disposal of it except himself. But the moment it passes from his hand by descent into the hands of some one in the next generation, it becomes joint family property--the property of several persons united together as a joint family with regard to it--the property of a new joint family springing from a new root. And it continues to go down by one rule of descent only.

17. In Mulla''s "Principles of Hindu, Law", 9th Edn., p. 23, Section 31(1)(a) the learned author says that two or more sons, grandsons and great-grandsons succeeding as heirs to the separate or self-acquired property of their paternal ancestor will take the property as joint tenants with a right of survivorship by which he presumably means a right of survivorship inter se.

18. In Mayne''s "Hindu law", 10th edition at page 352 there is the following observation:

The Judicial Committee in Venkayamma v. Venkatramanayamma ILR 25 Mad. 678 pointed out that, where the sons succeed to the self-acquired property of the father,

their inheritance is unobstructed and they take it by survivorship.

19. But I do not think that in the last mentioned case the Privy Council has expressed the view that the sons succeed by survivorship to the self-acquired property of their father. In that case a Hindu named Venkat Rao died, leaving a widow and a daughter. The daughter had two sons and the litigation was between the sons of the latter. The property was the self-acquired property of Venkat Rao and the question of law which their Lordships had to determine is stated in the judgment as follows:

"If he (i.e. Vankat Rao) died intestate, did his property descend on the death of his daughter to tier two sons jointly with benefit of survivorship or jointly or in common without benefit of survivorship?

20. It was held by their Lordships that a Hindu daughter succeeds to her father''s self-acquired property as a limited owner and on her death her sons succeed to it jointly with benefit of survivorship.

21. At page 687 they say:

Members of a joint family who succeed to self-acquired property take it jointly.

22. This is not the same thing as saying that they take the property by survivorship. I find some difficulty in appreciating upon what principle, under the Hindu law, the sons can take by survivorship the self-acquired property of their deceased and upon authority, that undivided sons succeed to the self-acquired property of their father by inheritance as joint tenants with a right of survivorship inter se. It is a case of joint succession by inheritance.

23. So much for the mode of succession. I will now return to the reported decisions as regards the order of succession.

24. In Chintapenta Narasimham v. Chintapenta Narsimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361, it was held that on the death of a Hindu leaving self acquired property his undivided sons succeed to the property to the exclusion of a divided son. At page 579 Waller J.--who delivered the judgment,--after mentioning Fakirappa v. Yellappa (1898)22 Bom. 101 and Mayne''s comment upon it, says:

In other words, the separate property becomes part of the joint property in the hands of the heirs and as a divided member no longer belongs to the co-parcenary and has no interest in the property, he can take no share in it.

25. The case of Shamrao Bhaurao Marathe v. Krishna rao Bhaurao Marathe AIR 1941 Nag. 297, was concerned with brothers and it was held that a separated brother and a brother living with, but apparently not joint in status with, a third brother were entitled to inherit equally the third brother''s self-acquired property. At page 300 the learned Judges say.

It must therefore follow that a son who does not fulfil the condition of being a coparcener with his father is not entitled to the father''s sell-acquired property. That accounts for the preference accorded to the undivided son.

26. Further on he observes:

It will thus appear that, while the brothers are regarded as distinct individuals, the father and son are regarded as constituting one entity which can be broken up only by a partition The natural and necessary result of the distinction is that, while the sons'' interest in his father''s self-acquired property arises by birth, that of a person in the self-acquired property of his brother arises on the death of the porosities....

27. The above observations as regards the father and sons were unnecessary for the decision of the matter in controversy and are therefore obiter; but they are nevertheless entitled to respect.

28. Since I begin this judgment, my brother Bajpai has drawn my attention to a Full Bench decision of the High Court at Rangoon in Raghubardayal v. Ramdulare (1928) 6 Rang. 367 : AIR 1928 Rang 2 (sic)6, where it was held that the decision of the High Court at Madras in Nam Tawker''s AIR 1936 Oudh 206, case was an authority for holding that under the Mitakshara law, on the death of the father leaving self acquired property an undivided son takes such property to the exclusion of a livided son.

29. The Chief Court of Oudh has taken a view which conflicts with the view expressed by the High Court of Bombay, Madras and Rangoon and with the observations which were made obiter by a learned Judge of the High Court at Nagpur. In AIR 1930 77 (Oudh) , it was held that undivided and divided sons equally inherit the self-acquired property of their father. It was held that., in the absence of any text to the contrary, self-acquired property is not subject to the rights of survivorship, but is governed by the general rules of inheritance, according to which all sons of the deceased shall succeed in equal shares, irrespective of any consideration of their being united or separate; the rule is equally good in a case where a son has separated and the father acquires the property after such separation. It is a forcibly rapeseed judgment but with respect I am inclined to think that it is somewhat weakened by the circumstance that the learned judges relied on a decision of this Court in Kunwar Bahadur v. Madho Prasad (1919) 17 ALJ 151 : AIR 1919 All. 223 (1), which appears to me to be irrelevant inasmuch as in that case there was apparently no proof of severance of sates.

30. So much for the reported decisions which bear directly on the question referred to us.

31. There can be no doubt that succession to ancestral property and inheritance of self-acquired property are on an entirely different footing. I will first consider the position of undivided coparceners. In respect to ancestral property there is

community of interest, unity of ownership and unity of possession--vide (1941) 9 ITR 695 (Privy Council) and success on is by survivor-hip among the copartners. As regards self-acquired property of the rather I have held that it goes by inheritance, but it becomes joint property in the hands of the sons with a mutual right of survivorship. In ancestral property the sons acquire an equal right by birth, in self-acquired property they also have a certain right or interest by birth, but it is very different from the right which they have in ancestral property. In Chapter I, Section 1, placitum 27 of Part II of Macnaghton and Colebrook''s Mithakshara, relating to inheritance, it is stated:

Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects, other than immovables, for indispensable acts of duty nil ''o'' proposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor....

32. Sloka CXVIII of Section IV of this same Chapter says:

Whatever else is acquired by the coparcener himself, without detriment to the father''s estate, as a present from a friend or a gift at nuptials does not appertain to the co-heirs.

33. Placita 9 and 10 of Section V of this Chapter read thus:

9. So like vise the grandson has a right of prohibition, if his unseparated father is making a donation or a sale of effects inherited from the grandfather, but he has no right of interference if the effects were acquired by the father. On the contrary he must acquiesce because he is dependant.

10. Consequently the difference is this although he has a right by birth in his father''s and in his grandfather''s property still, since he is dependant on his father in regard to the paternal estate and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father''s disposal of his own acquired property, but since both have indiscriminately a right in the grandfather''s estate, the son has a power of interdiction if the father be dissipating the property.

34. It will be seen the it there is a contradiction between placitum 27 of Section I and placita 9 and 10 of Section V. These placita were considered by this Court in Sital v. Madho (1877) 1 All. 394, where it was held that although prohibition on moral or spiritual grounds may be implied by the texts, yet where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void and therefore the gift to one son by the father of self-acquired property is not illegal. This view was approved by the Privy Council in Balwant Singh v. Rani Kishori (1898) 20 All. 267. It was there held that a father being a member of an undivided

family subject to the Mitakshara can exercise full power of disposition over his own as distinguished from ancestral property. At page 285 their Lordships say:

All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws.

In this connection they quote Sir William Macnaghten''s dictum about the vinculum juris and the vinculum fiudoris.

In Mayne''s "Hindu Law," 10th Edn. at page 352 the learned commentator says:

So too in the case of ordinary portable property acquired by a father the sons'' right by birth exists even though the other rights of a coparcener, such as the right to enforce a partition, cannot, owing to the power of control and the dominent interest of the father, co-exist. The right by birth in such property is not a mere spes successionis, but it can be renounced or surrendered so that, as has been held, a divided son loses his right of inheritance to it.

35. The learned author cites the Madras decisions which I have already mentioned.

36. The position, therefore, is that Hindu sons do not acquire by birth a legally enforceable right as regards the self-acquired immovable property of their father but they do acquire an interest in it which consists in a moral and spiritual injunction upon the father not to squander the property to their detriment.

37. On the father''s death such property devolves by inheritance. If the father and sons were undivided at the time of the former''s death, the sons will succeed to it as joint owners with benefit of survivorship. If there are no undivided sons, the divided son or sons will take it as tenants in common to the exclusion of the widow if any--vide Ramappa Naicken v. Sithammal (1879) 2 Mad 183.

38. The question which we have to decide, however, is whether the divided son his any right of inheritance where undivided sons exist at the father''s death. There is no text of the Mitakshara which directly distinguishes between the right of inheritance of an undivided and of a divided son and Learned Counsel for each party relies upon this fact. On the one side it is said that the proposition that undivided sons will have preference is so obvious that there was no necessity to state and on the other hand it is contended that in the absence of any text to the contrary divided and undivided sons must be held to have an equal right of inheritance by virtue of their relationship with their father, for it is this which determines their right to the property. In this connection we are referred to the Mitakshara, Chapter I, section placitum 3, which says:

The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons.

This section is beaded "Definition of Inheritance and Partition."

So too in the Virmitrodaya it is said:

Besides, ownership in the property of the father or other ancestor is to be held to be caused by sonship etc alone....

39. This will be found in Setlur''s "Complete Collection of Hindu Law Books on Inheritance" in his translation of the Virmitrodaya at page 437, Clause 12. There can be no doubt that the right of succession which sons have to their father''s property, whether it be ancestral property which goes by survivorship or self-aquired property which goes by inheritance is by virtue of their filial relationship, but this does not settle the question whether united sons have or have not priority of inheritance over divided sons In Sarvardhikari''s ''Hindu Law of Inheritance'', p. 775 we read:

Sons legally separated from their father have not, on his death, any claim to inherit his property with a son not separated. Thus, where a father separates from his sons, an after-bron son alone inherits the share which his father took on partition as well as any wealth acquired by the father subsequent to partition.

In Sarkar''s "Hindu Law", 7th Edn. at page 49'', it is said;

On the death of the father having self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the fattier.

In West and Buhler, 4th Edn. at page 64 we read:

Sons who have separated from their father and his family are passed over in favour of sons remained united with him or were born lifter the separation. This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it or who, having been exceptions, have since ceased to be so are treated accordingly.

Gaur''s "Hindu Code", 4th End., Section 341(2) reads:

Sons who were joint with their father at the the time of his decease inherit to the exclusion of those who were separate.

This is based on Fakirappra v. Yellappa (1896) 22 Bom. 101 and Narasimham v Narasimham (1932) 55 Mad. 557 : AIR 1932 Mad. 361.

40. In Ghose''s "Principle of Hindu law", 3rd Edn. I, p. 85, the learned comentator says:

Under the Mitakshara law the separated son is postponed to the associated son in respect of ancestral as well as of self-acquired property.

41. The decision in Nana Tawker v. Ram Chandra Tawker (1908) 32 Mad 377 : 2 IC 519, is referred to in this connection.

42. In Ramappa Naicken v. Sithammal (1879) 2 Mad. 182 which I have already mentioned in another connection their Lordships say:

Disputing the position that the right of sons is annulled by partition, Jagannatha declares, If a father, having made a partition with his sons, die after reuniting himself with any parcener whomsoever, it would follow that his property could not be inherited by the divided sons, but no other persons ought to take the succession while sous live, since none can, like them, have a present right to his property.

43. Jagannatha may have been speaking of the Dayabhaga, but it is not suggested that there is any difference as regards succession to self acquired property between the Dayabhaga and the Mitakshara schools of law. Whether the pronouncement is or is not correct quoad re-united sons is a matter for consideration, but if Jagannatha held this view as regards re-united sons, he must have held it a fortiori as regards undivided sons.

44. This brings us to a consideration of re-union, for it is contended that an analogy can be drawn from the rules of succession relating to re-united brothers and re-united sons. Chapter II, Section 9, placitum 1 of the Mitakshara, which is headed "Re-union of Kinsmen after Partition", read''s:

The author next propounds an exception to the maxim that the wife and certain other heirs succeed to the estate of one who dies leaving no male issue.

Then comes sloka CXXXVIII, which reads:

A re-united brother shall keep the share of his re-united co-heir who is deceased, or shall deliver it to a son subsequently born.

45. This of course relates only to brothers who re-unite; it does not relate to sons who have reunited with their father. But at least it shows that re-united brothers have a preferential succession to each other''s property where the deceased brother leaves no for and it seems to indicate that there is some privilege or priority in unity, at least so far as brothers are concerned.

46. In Sham Narain v. The Court of Wards (1873) 20 WR 197 at p. 200 the learned Judges say:

It is admitted that the text of the Mitakshara is not exhaustive and that the principle and not the letter is to be followed....

At page 201 they say:

We cannot suppose that the author of the Mitakshara looked upon family union with such favour that he held out special inducements to reunion after separation, while at the same time he gave no preference to the brothers who had never separated over the brothers who had dissociated themselves. The apparent difference seems to be reconciled by supposing him to treat every division of a family as a complete

separation of all its members and the continuance in union of some after division and the separation of others as a reunion in this view union and re-union, so far as concerns secession, are synonymous terms....

Further they observe:

It is evident that the material circumstances are family partnership and relation by blood. If any special effect were intended to he given to re-union as against unbroken union, one should have expected very clear rules on the subject.

47. In the case of sons, we are referred to the Virmitrodaya in which Manu''s text is quoted,

To the nearest sapinda the inheritance next belongs;

and also to Yajnavalkhya, who says,

The sons shall on the death of the parents divide the estate and debts in equal shares

--Vide page 436 of Setlur''s book. And the view is expressed that re-united and unassociated sons succeed equally to their father''s property. At page 437 we read:

...and as the sonship etc. belong to all the male issue, whether re united or not, therefore the succession to their property of all the sons and the like without distinction is proper.

48. Sarkar in his 7th Edition at page 586 says that a son, grandson and great grandson inherit as in the ordinary case of succession whether they are separated or reunited. He says:

A son who is re-united cannot claim preference to another who remains separate.

49. The learned author emphasises the great difference between an undivided member and a re-united member. He says:

....in the former case there was no severance of status, whereas in the latter there was severance, but by express agreement they reunited.

Saraswati Vilasa says:

Therefore that the ownership of re-united and not re-united sons in the paternal wealth is equal is only reasonable.

50. In AIR 1931 268 (Privy Council) , the Privy Council observed that Saraswati Vilasa, though an authority on Southern India, could be applied in the case before their Lordships to Benares in the absence of other authority. It will be seen that Saraswati Vilasa''s pronouncement is in conformity with the Viramitrodaya, which has been held to be of high authority in Benares--Vide The Collector of Madura v. Moottoo Ramalinga (1868) 12 Moo. I A 397 at p. 438 and also Gridhari Lall Roy v. The Bengal

Government (1868) 12 Moo. I A 448 at p. 466 and Girja Bai v. Sadashiv Dhundiraj AIR 1916 PC 104 : 43 Cal 1031 at p. 1046-7. Thus as regards sons the authorities would seem to indicate that reunited and divided sons are ordinarily on an equal footing.

51. But if a son is born after separation, it would appear that a re-united son acquires a preferential status, vis-a-vis the divided sons. As regards the after born son, there are clear provisions. Manu rays:

But a son born after partition shall alone take the property of his father--

52. Vide Max Muller''s "Sacred Books of the East, Vol. 25, Chapter IX, Section 216.

53. This rule is mentioned in the Mitakshara, Chapter I, Section 6, placitum 4, where it is said:

The same rule is propounded by Manu: A son born after a division shall alone take the parental wealth.

Placitum 6 says:

Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation For it is ordained All the wealth which is acquired by the father himself who has made a partition with his sons goes to the son be gotton by him after the partition those born before are declared to have no right.

54. Then comes the provision for re-united sons where there is a son born after partition.

Placitum 7 reads:

But the son born subsequently to the separation must after the death of his father, share the goods with those who re-united, themselves with the father after the partition: as directed by Manu; or he shall participate with such of the brethren as are re-united with the father.

In the Viramitrodaya it is stated:

But if some of the sons have been re-united with the father, then the after born son is not entitled to the whole of the paternal property but he shall participate with them.

Vide Setlur, p. 344.

At page 146 of the same book we find the following declaration of Saraswati Vilasa:

The son born after partition shall divide with stitch of the brothers as lived in re-united with the father after partition.

55. On the same page there is the following pronouncement:

Where a father has two or three or many sons and is divided with some and undivided with others, property acquired by him shall be divided after his death only among his undivided sons.

56. This comes under the heading "The right of the son born after partition," and so it is contended that the sons referred to are all sons born after partition. Assuming this to be for a useful analogy can nevertheless be drawn in respect to the question referred to us.

57. In Ganganatha Jha''s "Hindu Law in its Sources", Vol. II, page 347 we read:

If a son is born after partition, he shall receive the property of the" father alorie, or if any other sons had been re-united, he shall share it with them.

58. The learned author cites inter alia Manu and the Viramitrodaya.

59. There are other authorities which deal with after born sons simpliciter; that is, without by reference to re-united sons. Ganganatha Jha at page 351 of the 2nd Volume quotes the following from Brihaspati:

The self-acquired property of the father divided from his sons goes entirely to the son born after that partition Those born before have been declared to have no right over it.

60. In Ghose''s "Principles of Hindu Law," 3rd edition Vol. I, page 85 we read:

According to the Rishis, a son born after partition with the sons takes all the wealth of the father.

61. In Collydoss Doss v. Krissan Chunder Doss (1869) 11 WR 11 at p. 18, the learned Judges, after quoting Manu and the Mitakshara, say:

This shows that a son begotten after his father has been separated from his brothers alone inherits the share which his father took after partition, as well as any wealth acquired by his father himself.

62. This was a judgment by Sir Barnes Peacock C.J. and four other learned Judges.

63. In Nawal Singh v. Bhagwan Singh (1882) 4 All 427, it was held that the property acquired by a Hindu governed by the Mitakshara Law after a partition has taken place between him and his sons devolves, on his death, when he leaves a son born after partition, on such son to the exclusion of the other sons. The learned Judges cite Manu and Brihaspati and the Mitakshara Chapter I, Section VI, sloka CXXII, which is concerned with the rights of a son born after partition and founding upon this decision and upon the decision in the case of Collydoss (1869) 11 WR 11 at p. 18 Sir Dinshaw Mulla in Section 310(1) of his IX edition says:

Where the father has reserved a share to himself, a son who is begotten as well as born after partition is not entitled to have the partition reopened, but in lieu thereof

be is entitled, after the father''s death to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to the entire exclusion of the separated sons.

64. Thus it is clear that an after-born son succeeds to the father''s self acquired property to the exclusion of the separated sons. It is also clear that, if there are any re-united sons, they will share with such after born son and this will apply a fortiori to undivided sons. It would also appear that re-united brothers--and therefore a fortiori undivided brothers--have priority of succession to each other''s property where the deceased has left no son. I have some difficulty in appreciating why, if re-united sons are on an equal footing with undivided sons in the absence of an after born son, they should be given priority over the divided sons in common with a son who may be born after separation; but this difficulty which I am experiencing will not affect my conclusion.

65. Upon the authorities the legal position as regards self acquired property appears to be this:

(1) Re-united--and therefore also undivided--brothers have a preference over divided brothers in succession to each other''s self-acquired property where the deceased brother has left no son.

(2) A son born after separation inherits the father''s self acquired property to the exclusion of divided sons.

(3) Re-united sons share this preference with such after born son over divided sons; and a fortiori undivided sons will share such preference with the after born son.

66. The question remains whether, in a case where there is no after-born son, the undivided sons will exclude the divided sons.

67. I must confess that, if the author of the Viramitrodaya is right when he says that re-united and divided sons are on an equal footing (in the absence of an after-born son), I have some difficulty in appreciating the grounds upon which union and re-union are distinguishable. Nevertheless, it seems to me that, notwithstanding the absence of any express text upon the question referred to us, there is good analogy to be drawn from the propositions which I have set out and upon an anxious consideration of the ancient texts, the commentaries and the Judicial authorities I think it must be held that there is a superior right or virtue attaching to uninterrupted unity with the father, in consequence of which the divided sons are postponed to the undivided sons, who succeed to the father''s self-acquired property as coparceners with benefit of survivorship and in my opinion this is in accordance with Hindu sentiment and the spirit of Hindu Law. Moreover, it seems to me that if the opposite view were held, it might lead to anomalous and inequitable results. A divided son would only be liable for debts contracted by the father to the

extent of his own share of the self-acquired property left by the father at his death, whereas the undivided sons would be liable to pay such debts both from the self-acquired property in hearted by them and also from the ancestral property, if any, to which they have succeeded by survivorship. There is also another aspect of the matter, which is this:

68. Supposing there are three sons and one separates and is given a one-third share of the self-acquired property of the father. On the latter''s death there will be nothing to prevent such son, on the father dying intestate, from claiming a one-third share of the balance of the self-acquired property. This could of course be obviated by the father making a will, but it is or at least it has hitherto been the exception rather than the rule for a Hindu to make a testamentary disposition of his property and I am of opinion that, whatever may be said as regards the systems of law which govern other communities, the result which I have envisaged would be repugnant to Hindu law and Hindu sentiment Here again, however there is a difficulty arising out of the analogy of reunion as propounded in the Viramitrodaya.

68. The question referred to us is by no means easy of solution and there is much to be said for the opposite view, which in some respects may appear more logical, but upon the whole matter I have arrived at the conclusion that undivided sons will succeed to the self-acquired property of (he father-in preference to a divided son, whether such property was acquired before or after such separation and whether the divided son was or was not given a share in such property at the time of separation. I would, therefore, answer the question in the affirmative.

Bajpai J.

(April 15 1942)

69. A pure question of Hindu Law has been referred by a Division Bench of this Court to the Full Bench and it is formulated thus:

On the death of Hindu leaving self-acquired property do the undivided sons-succeed to such property to the exclusion of the divided son under the Mitakshara Law?

70. The Appellant contends for the proposition that the undivided and the divided sons share equally in such property while the Respondent contends that the undivided sons exclude the divided sons.

71. Mayne in his book on Hindu law and Usage, 10th Edition, at page 645, commenting on the case of Fakkirappa v. Yellappa (1896) 22 Bom. 101, says:

A grandson sued his grandfather and uncles for a petition. He obtained a decree as to all the joint property, but failed as to part which was held to he the separate property of the grandfather. On the death of the grandfather he brought a fresh suit for a share of this, contending that by descent it had become joint property. This was perfectly true but the answer to the Plaintiff was that he was no longer a

member of the coparcenary. On the grandfather''s death, his interest in the joint property passed to the remaining coparceners by survivorship. His own separate property passed to his united sons as heirs and in their hands became an addition to the joint property, in which the divided grandson had no interest.

This is merely an illustration of the rule that property, which is held separate in one generation always becomes joint in the text generation. If it is held by a father who is himself the head of a coparcenary, it passes at his death to the whole coparcenary and not to any single member of it, all of them having under the Mitakshara equal rights by birth.

72. Again at page 350 the learned autho says:

The son''s right by birth does not therefore extend to his enforcing a partition or interdicting an alienation of his father''s property. The right, however, remains a real birth right, though dormant and enables the son to succeed to the property by survivorship or as apratibandhadaya.

It was accordingly held in Nana Tawker v. Ramchandra (1908) 32 Mad 377 : 2 IC 519 that an undivided son takes his father''s separate property by survivo ship; and that an undivided son takes the self-acquired property of the father to the exclusion of the divided son. Dissenting from the first preposition a Full Bench of the Madras High Court has decided that an undivided son takes the self-acquired property of his father by inheritance and not by survivo ship, Kumara Swami Sastri J. expressing the opinion that ancestral property is co-extensive with the objects of apratibandhadaya or an unobstructed heritage. This view is opposed to the clear statements in the Mitakshara and in the other works bearing on the point which expressly refer to the son''s right in the father''s wealth as unobstructed heirtage.

The misconception was evidently due to the view based on the observation in Sartaj Kuari''s case AIR 1941 Nag. 297 relating to importable estates that there can be no right by birth where there is no right to partition. But the right by birth in the father''s property is expressly stated by all the Sanskirt authorities and the observation in Sartaj Kuari''s case (1908) 32 Mad 377 : 2 IC 519, has itself no force after the reiterated explanation of it in subsequent cases that the existence of survivorship is quite consistent with the dominant interest possessed by the holder of an impartible estate and with the absence of a right, to partition or to interdict an alienation on the part of the junior members. As AIR 1932 216 (Privy Council) , though the other rights which a co-parcener acquires by birth in impartible property no longer exist, the birth right of the senior member to take by survivorship still remains. So, too, in the case of ordinary partible property acquired by a father the sons'' right by birth exists even though the other rights of a co-parcener, such as the right to enforce a partition or to interdict an alienation cannot, owing to the power of control and the dominant interest of the father, co-exist. The right by birth in such property is not a mere spes successions but it can be renounced or surrendered so

that, as has been held a divided son loses his right of inheritance to it.

On principle, the position taken up in the Mitakshara that the sin has a right by birth in the property acquired by the father is unassailable....The error lies in overlooking the difference between the son''s right by brith and the sons'' equal ownership with his father in the grandfather''s-property under a special text. The Judicial Committee in Venkayyamma v. Venkataramanayyamma (1902) 25 Mad 678 pointed out that where the sons succeed to the self-acquired property of the father, their inheritance is unobstructed and they take it by survivorship.

73. I shall have occasion to refer to AIR 1932 216 (Privy Council) , later at some length.

74. In West and Buhler''s Hindu Law, 4th Edition, we have the following passage at page 64:

Sons who have separated from their father and his family are passed over in favour of sons who have remained united with him, or were born after the separation.

75. According to the learned authors:

This is an application of the principle that a joint and undivided succession of the descendants being taken as the general rule, those who have become exceptions to it, or who having been exceptions have since ceased to be so, are treated accordingly. Their rights of succession are, as to their mutual extent, their rights as they would be in a partition made immediately on the death of the propositus. This is brought out most clearly perhaps in the first section of the Daya Kramasangraha. It is in general rather assumed than propounded, as after providing for representation of sons by grandsons and great grandsons, the discussions proceed on the basis of the deceased owners'' having held separately, without which there would be no room for the several rules to operate, since in a partition on his death, the then joint owners with him would take the whole.

76. From the page 323 onwards the learned authors give a digest of Vyavasthas and at page 347 there is question No. 19 relating to an after born son. The question is:

A man had two sons. The father divided his property between them and reserved a portion for himself. He had afterwards a third son born to him. The father subsequently died. The question is, what portion of the property should be given to the third son?

Answer:

It appears that when the father was alive he divided his property between his sons and reserved a portion for himself. The father may have acquired some more property after the division took place. All the property which may thus have come into the possession of the father belongs to the son born after the division. The sons who separated cannot claim any portion of this property. The son born after the

division will be entitled to it and will be also liable for such debts of the father as he may have contracted since the separation of his two sons.

77. In Sarvadhkari''s Hindu Law of Inheritance, Tagore Law Lectures, Edition 1880, page 836, it is said:

Sons legally separated from their father have not on his death, any claim to inherit his property with a son not separated. Thus, where a father separates from his sons, an after born son alone inherits the share which his father took on partition, as well as any wealth acquired by the father subsequent to partition.

78. Ghose in his Principles on Hindu Law, 3rd Edition, Volume I, at page 85 says:

According to the Rishis, a son born after partition with the sons, takes all the wealth of the father. Under the Mitakshara Law the separated son is postponed to the associated son in respect of ancestral as well as of self acquired property.

79. Sir Hari Singh Gour in his Hindu Code, 4th Edition at page 928 lays down certain rules of inheritance and says that the issues of the deceased inherit thus:

(1) When there are more than one son, whether by the same or different mothers they take equal sharers;

(2) Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate.

80. Macnaghten in his Principles and Precedents of Hindu Law in the Second Volume where the precedents are mentioned, at page 16 gives case No. XII as follows:

Q. A person having assigned a moiety of hit self-acquired landed estate to his sons by one wife, separated himself from them and with the other half continued to live in a state of union with his son by another wife. On the death of the father are the sons entitled to an equal portion of the estate left by him?

Reply

Under the circumstances stated, the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, in either of which cases each of his sons would be entitled to an equal share of the estate, otherwise, on his death, the sons who were separated from him during his lifetime has no claim to the inheritance.

81. It would thus appear that the well known text book writers on Hindu Law are all in favour of the view that the undivided son has preference over the divided son.

82. A somewhat discordant note, it is said, has been struck by Golap Chandra Sarkar Shastri in his Hindu Law, 7th Edition, at page 586, where he says:

Sons, grandson and great grandson inherit as in the ordinary case of succession, whether they an separated or reunited. A son who is reunited cannot claim preference to another who remains separate. But it has been held in some places that according to the Mitakshara, a reunited son has a preferential right of inheritance to one who remains separate. The Madras High Court in a case in which the point did not arise went beyond the scope of the appeal and held that ''the rule being as above stated in the case of reunited son there can be no hesitation in applying the same rule in the case of sons who have never separated. It is needless to point out that the learned Judges have entirely lost sight of the great difference between undivided member and reunited member in the former case there was no severance of status whereas in the latter there was severance, but by express agreement they reunited. In the former case, according to their Lordships, the principle of survivorship applies whereas in the latter, altered order of succession is expressly provided for in the texts.

83. The learned author by the above passage points out the difference between undivided member and reunited member. He was obviously referring to the case of Nana Twaker v. Ramchandra (1908) 32 Mad 377 : 2 IC 519 and held the view that a preference could not be given to the reunited son, but I venture to think that his view was that a preference could be given to the unseparated son because he says that in the case of an unseparated son there is no severance of status and the principle of survivorship applies, but in the case of a reunited son there was an express agreement for reunion and accession is expressly provided for in the texts. That this is his is clear from another passage occurring at page 494 which is as follows:

But on the death of the father having self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father. It is said that after obtaining on partition his share of all the divisible property the separating son loses all the rights which he had as a member of the co-parcenary and it was only as a member of the co-parcenary that he had by birth an interest in his father''s self-acquisitions

84. The decision in Nana Tawker''s case (1908) 32 Mad 377 : 2 IC 519 seems to be approved by Sarkar.

85. The result of my study of the various text book writers is that all the authority is in favour of the view that the divided son is excluded.

86. I now come to the cases that have arisen in the various High Court of India. In Fakirappa v. Yellappa (1896) 22 Bom. 101, it was held that as between united sons and a separated grandson, the succession on the grandfather''s death of the property, both ancestral and self-acquired, left by him goes in preference, according to Hindu Law. to the united sons, Kanada J. and Jardine J. gave separate but concurring judgments and although no original texts were discussed reliance was

placed on West and Buhler''s Hindu Law.

87. In Nana Tawker v. Ramchandra Tawker (1908) 32 Mad 377 : 2 IC 519 it was held that under the law of the Mitakshara on the death of the father leaving self-acquired property an undivided son takes his property to the exclusion of a divided son, although division took place after the acquisition of such property. In this case the learned Judges referred to the Bombay case of Fakirappa v. Yellappa (1896) 22 Bom. 101 mentioned above and followed it. They discussed some of the text book writers to whom reference has already been made by me. Reference was also made to Vyarastha Chandrika, Volume II among precedents of partition at page 404 where it is stated:

In a Hindu family where a reunion has taken place amongst certain members after partition the members of the reunited family an their descendants succeed to each other to the exclusion of the members of the unassociated or not reunited branch.

88. The learned Judges further said that the reasons given by Sarkar for his opinion were not easy of acceptation and it was pointedly observed that the rule being a above stated in the case of reunited son and being based on certain texts of the Mitakshara and Vivadachintamani there could be no hesitation in applying the same rule in the case of sons who had never separated.

89. The learned Judges probably had not the benefit at Sarkir''s opinion at page 494.

90. With this wealth of authority a young lawyer (Mr. K.N. Katju as he then was, but who has now risen to great eminence in the domain of law and politics) (sic) gave expression to his view in two articles contributed to the Allahabad Law Journal of 1914 dissenting from the opinions of the Madras and Bombay Judges and thought that he was fortified in his views by the opinion of Sastri Gopal Chandra Sarkar. I have already pointed out that Sarkar was averse to giving a preference to the reunited son as the learned judges of the Madras High Court gave (I shall discuss this point at some length later) but was of the opinion that the (sic) son did have a preference over the separated son.

91. Since then there hive been other cases in Madras and Nagpur where tin view he been taken that the divided son is postponed to the undivided son.

92. In Viravan Chettiar, represented by Ramasami Chettiar Vs. Srinivasachariar, , a full Bench of that Court approved of the decision in Nana Tawker v. Ramchandra Tawker (1908) 32 Mad 377 : 2 IC 519 mentioned above so far as the rule regarding the order of succession between undivided and divided sons was concerned, but held on the question whether a succession certificate was necessary or not that it was necessary inasmuch as the self-acquired property of the father did form part of the "effects" of the father within the meaning of Section 4 of the Succession Certificate Act. The learned Judges were inclined to the view that the undivided Hindu son took the self-acquired property of his deceased father by inheritance and

not by survivorship.

93. In Narasimham v. Narasimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361 it was held that

on the death of a Hindu leaving Self-acquired property his undivided suns succeed to such property to the exclusion of a divided son.

94. The same view was taken by Niyogi J. in the case of Shamrao Bhaurao Maratahi v. Krishnarao Bhaurao Marathi AIR 1941 Nag. 297.

95. A different view was taken by Stuart and Bisheshar Nath JJ. in Badri Nath v. Hardeo (1930) 5 Luck. 649 : AIR 1939 Oudh 77, where, relying on Kamta Natchear v. The Rajah of Shivagunga (1863) 9 Moo. IA 539 their Lordships held that in the case of property acquired by a Hindu father after his separation from some of his sons, the sees who had separated from him will be entitled to share along with the sons who may be living jointly with him.

96. These were all the cases that were cited before us at the bar and which have a direct bearing on the question at issue before us. There is yet another case where the same view was taken as is contended for by the Respondent. In Raghubar Dayal v. Ram Dulare (1928) 6 Rang. 367 : AIR 1928 Rang (sic) Pratt J. at p. 371 referred to the vladras case of Nana Tawker v. Ram Chandra Tawkar (1908) 32 Mad 377 : 2 IC 519 and said that it

is an authority for holding that under the (sic) the acquisition of such property by the father.(sic) he present case the lather left a wife and son in India and Look up ins residence in Burma, where he acquired a (sic) state. The sons by one wife joined hint and remained members of a j tint family. The son by the other wile, Plaintiff never joined his father and maintained no relations with him under the circumstances the undivided son would exclude the son who had separated and ceased to be a member of the joint family.

97. And Carr J. at page 372 observed--

The Madras case of Nana Tawker v. Ramchandra Tawker (1908) 32 Mad 377 : 2 IC 519 has been quoted as authority for the proposition that, when one son is divided from his father, an undivided son takes the father''s self-acquired property to the exclusion of the divided son That proposition may be accepted....

98. I am afraid that I have not the temerity to differ from the strong current of judicial decisions and views expressed by the learned text book writers in favour of the proposition that on the death of a Hindu leaving self-acquired property the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara Law.

99. I shall now endeavour to discuss the original texts as contained in the Mitakshara and certain Privy Council decisions. The Mitakshara is a running

commentary on Yajnavalkya Smriti and it is the law of inheritance with which we are concerned It may further be made clear that the law of inheritance naturally concerns itself with self-acquired property though on occasion pissing reference may be made to joint ancestral (sic) and thus where the property has not been specifically designated it may be taken that the text deals with self-acquired property. It may be conceded that there is no definite text which speaks of the rule that the undivided son succeeds to the self-acquired property of the father in preference to the divided son but the broad principles of the Hindu law as enunciated by the ancient Rishis might be the reason for the absence of a definite text on that point. The normal state of every Hindu family is that it is joint in food, worship and estate. This was held by their Lordships of the Privy Council in Neelkisto Deb Burmong v. Beer Chunder Thakoor (1869) 12 Moo I.A. 523 at p. 41 and in the olden days a great deal of sentiment attached to keeping the family in a normal state and the disruption of the family was regarded as something objectionable. Similar feeling and sentiments prevail even in modern times. If, therefore, there is some merit in remaining joint, the principle of the succession of an undivided son in preference to the divided son might be understood and it may be only an extension of the fundamental principle that a joint and undivided succession of the descendants is the general rule.

100. It was said by their Lordships of the Privy Council as early as 1897 in Balwant Singh v. Rani Kishori (1898) 20 All. 267 that a father, being a member of an undivided family subject to the Mitakshara, (sic) exercise full power of disposition at his own dispersion over immoveables which he has himself acquired as distinguished from ancestral property. Their Lordships effected a reconciliation between certain (sic) texts of the (sic) and observed that certain rules which were based on religions and moral considerations should not be construed as laying down positive laws and as was observed by Sir W. Macnaghten in his work on Hindu Law, it by no means follows that because an act has been prohibited it should, therefore, be considered as illegal and the distinction between vinculum juris and vinculum pudoris should be kept in view and therefore, those texts of the Mitakshara which prohibit the father from disposing of his self-acquired property which also was according to the texts subject to the control of the sons and grandsons were only moral injunctions and could not be given legal sanction. It is argued from this that when the father dies intestate all the sons divided or undivided, inherit the father''s self-acquisitions over which he had in his lifetime an absolute power of disposal without interference by his sons, more particularly as it may be taken for granted that the sons have an interest even in the father''s self-acquisition by birth, though in the case of self-acquired property they have no right of interdiction which they have in the case of ancestral property.

101. In Neelkisto Deb Burmono v. Beerchunder Thakoor (1869) 12 Moo. I.A. 523n at p. 541, their Lordships said:

In Katama Natchier v. The Rajah of Shivagunga (1963) 9 MIA. 610 it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindu law two leading rules of inheritance, that founded on the religious duty and superior efficacy of oblation and sacrifice and that of survivorship Where the latter rule cannot apply, the former must be resorted to.

102. Now in the case of divided and undivided sons both are equally placed so far as religious duty and efficacy of oblation and sacrifice are concerned, but the question is whether on the principle of survivorship a preference cannot be made in favour of the undivided son. It is true that survivorship ordinarily follows co-parcenaryship, for where a co-parcener dies before partition of the co parcenary property his undivided interest in the property (sic), not by succession upon his heirs bit by survivorship upon the surviving (sic) and the essence of co-parcenary under the (sic) Law is unity of ownership. It was observed by the Privy Council in the Raja of Shivagunga''s case (1863)9 Moo. IA 539;

there is community of interest and unity of possession between all the members of the family and upon the death of any one of them the others my well take by survivoship that in which they hid during the deceased''s lifetime a common interest and a common possession.

103. The self-acquired property of the father is capable of being disposed of by him without the control of the son or the grandson during the father''s lifetime, but it becomes ancestral when it devolves at his death on his son.

In other words, the separate property of the father becomes part of the joint property in the hands of sons and as the divided son no longer belongs to the co-parcenary he has no interest in the property of the co-parcenary and can take no share in it--

See Chintapenta Narasimham v. Chintapenta Narasimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361.

104. It is said that the above proposition laid down by Walter J. is not sound because partition does not put an end to the right of inheritance and therefore the divided son must succeed to the father''s self-acquired property equally with the undivided son, but the answer to this argument is that the divided son has ceased to be a member of the co-parcenary and although co-parcenaryship in the narrower sense of community of interest and unity of possession may not exist between the father and his joint sons in respect of self-acquired property, there is still a co-parcenaryship in the wider sense of the term and the divided son not being a member of the co-parcenary can take no share in the self-acquired property of the father.

105. Varadachariar J. in a very learned judgment (if I may say so with respect) in Venkateswara Pattar (insane) and Others Vs. K. Mankayammal and Others, where he

was discussing the case of a (sic) person, refers to three principles of succession obtaining amongst three groups of heirs under the Mitakshara Law, (1) the son, (2) the widow and other heirs, (3) the re-united parcener and observes:

It is obvious that the principles of succession are different as amongst these three groups. In the list, it is by survivorship (even in respect of the father''s self-acquired property), according to the scheme of the Mitakshara. In the second it is by inheritance pure and simple. In the third group it is an anomalous rule of succession which has now been assimilated to the principle of survivorship....

106. The learned Judge observes at p. 779:

Founding himself on an observation of Lord Lindley in 25 Mad. 678 at p. 587, Mr. Sastriar contended that where there is no right to partition there can be no right to take by survivorship. It is sufficient answer to this to say that these general remarks are not without exceptions and recent decisions of the Judicial Committee as to succession by survivorship in the case of impartible zamindari furnish an instance of such exception see particularly the observations in Shibaprasad Singh v. Prayag Kumari 59 Cal. 1399 at p. 1413 and Collector of Gorakhpur v. Ram Sundar Lal, 67 M.L.J. 274 at p. 284 corresponding to 56 Alld. p. 468

At page 780 he says:

Once the conclusion is reached that a disqualified person may be ''coparcener'' enough to take by survivorship, there is no reason why we should deny the possibility of such a severance of the joint status as would put an end to the right of succession by survivorship.

107. In the case of a divided son this is exactly what has happened, namely that there has been a severance of the joint status and his right of succession by survivorship (let me emphasise here what has been said before that even in the case of self-acquired property the succession in the case of a joint son is by some sort of survivorship) is gone. I wish at this stage to refer again to the case of Shiv Prasad . At page 928 of the latter series (1932 A.L.J.) Sir Dinshaw Mulla says:

Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the ease of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in Sartaj Kuari''s case and the first Pittapur case; and so also the third as held in the second Pittapur case. To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains

and this is what was held in Baijnath''s case. To this extent the estate still retains its character of joint family property and its devolution is governed by the general Mitakshara Law applicable to such property. Though the other rights which a co-parcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband''s estate. It is a right which is capable of being renounced and surrendered.

108. It is true that their Lordships were discussing the case of an impartible estate but what I wish to emphasise is that survivorship can under circumstances exist even when there is no right of partition and no right to restrain alienations.

109. The cases of Amrit Narayan Singh v. Gaya Singh (1917) 45 Cal. 590 : AIR 1917 P.C. 95 and Ananda Mohan Roy v. Gour Mohan Mullick (1923) 50 Cal. 929 : AIR 1923 P.C. 189 where it has been held that the right of a reversioner is a mere spes successions are different because those are cases of Hindu widows and reversioners and there the right of a reversioner is undoubtedly a mere spes successions.

110. I need not here say anything much on the point that when two or more sons succeed as heirs to the self-acquired property of their father they take the property as joint tenants with rights of survivorship. This seems to be well established for their Lordships of the Privy Council in Venkayyamma Garu v. Venkataramanayyamma Bahadur Garu (1902) 25 Mad 678 quote with approval the view taken by Phear J. in Ram Narain Singh v. Pertum Singh (1873) 20 WR 189 that members of a joint family who succeed to self-acquired property take it jointly and Mulla has so laid down in his Principles of Hindu Law, 9th Edn. at page 23

111. It may be conceded that there is no definite text in the Mitakshara on the point at issue, but there are certain rules laid down about the rights of a reunited kinsman and the rights of an after born son. I shall first deal with the text dealing with the after born son. In Chapter I, Section VI, placitum 1, it is said:

When the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution.

112. Placitum 4 makes this rule very clear and it is as follows:

Thus same rule is propounded by Manu, "A son born after a division, shall alone take the personal wealth" The term parental (Pitryam) must be interpreted ''appertaining to'' both father and mother'' for it is ordained, that ''A son, born before partition, has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother.

Placitum 5 says:

The meaning of the text is this: One born previously to the distribution of the estate, has no property in the share allotted to his father and mother who arc separated....

Placitum 6 says:

Thus, whatever has been acquired by the father in the period subsequent to partition, belong entirely to the son born after separation. For it is so ordained: All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition: those, born before it, are declared to have no right.

Placitum 7 says:

But the son, born subsequently to the separation, must, after the death of his father, share the goods with those who reunited themselves with the father after the partition: as directed by Manu or he shall participate with such of the (sic), as are reunited with the father.

113. Chapter II, Section IX, deals with the reunion of Kinsmen after partition and it is important to note that almost all the placita in this chapter deal with brothers and give preference to the reunited brother or parcener and therefore it may be argued that in the absence of a specific text a reunited son cannot claim preference to another who remains separate and therefore the principles governing a reunited brother against a separate brother should not be extended by analogy to a reunited son against a separate son and this seems to be the view taken by Viramitrodaya in Setlur''s Translation at page 436 and by Galab Chandra Sarkar in his Hindu Law. 7th Edition, at page 586. I can only speculate at this attitude and one reason that suggests itself to me is that the tendency to remain joint was great, so much so, that in the case of a son it was regarded a sin to separate from the father and this primal sin could not be expiated by reunion even, whereas in the case of brothers where separation was not so very wrong a locus paenitentiae was afforded.

114. But when we have specific texts giving preference to an after born son over sons born before partition (and it must be remembered that this partition is not the partition of ancestral property but is the partition which a father effects in his lifetime qua his self acquired property) to the extent of making him the sole inheritor of his father''s wealth and when we find placitum 7 enjoining that the after born son shall participate with such of the brethern, as are reunited with the father, there is no reason why some argument by way of analogy be not based regarding the rights of divided and undivided sons in the inheritance of their father in respect to self acquired property. An filter (sic) son excludes the (sic) who had been separated before and he gets the entire wealth of the father whether acquired before partition or after partition to the exclusive of the sons who had (sic) if one of the separated sons has reunited with the father than the after born son has got to share it with this reunited son. It is not reasonable to (sic) that if a father separates two of his (sic) and remains joint with two others, then the entire wealth of the

father, that is to say the rest of the self-acquired property, will be shared by the after-born son and the sons who have remained joint with him, or can it be argued that the after born son will exclude those sons also who hive not been separated. I think I am right when I say that the joint sons and the after-born son will share (sic) in the self-acquired property of the a pier after the father''s clear to the, exclusion of the separated (sic). It would be opposed to all principles of equity and commouseuse if one were to hold that the after-bore son will get the whole property to the exclusion of the sons who have remained joint with the father at the time when the after-born son came into existence but will have to share it with the reunited sou.

115. The reunited son does not differ in principle from the son who was never separated at all, aid if it be argued that the reunited son brings certain effects of him and throws them into the common stock of the father it may in some cases happen that the effects which the reunited son brings does not augment the share of the after-born son but really reduces it, since it my well happen that the property in the(sic) of the father which would go solely to the after born son might be very much more that the effects which the reunited son brings back with himself.

116. As page 381 Mulla in his Principles of Hindu Law, 9th Edition, says:

Next suppose that A docs not separate from all the three sons, but separates from (sic) and remains joint with C and IX and is subsequently horn to A In this case on A''s death C, D (sic) will all take in equal shires the portion of the joint property allotted to A, C and D at the partition and also A''s separate property, that is to say, the separate property of A and the portion of the joint family property allotted to A, C and D at the partition will he divided equally among C, D and the after born son F.

117. The late Sir Ganganatha Jha in his book on Hindu Law in its Sources, Vol. II, collects all the texts relating to after-born sons and reunited sons. At page 347 he says:

If a son is born after partition, he shill receive the'' property of the father alone, (sic) if any other sons had been reunited he shall share it with them�(Manu 9 216; Narada, 1343)(Quoted in (sic) p. 729, Mitakshara, p. 651, Madanaparijata p. 653, Vivadaratnakara, p. 538; Vivadachintamani, p. 228. Vivadachandra, 20-1-8; (sic), p. 711; (sic), p. 340; Dayabhaga, pp. 24, 130; Viramitrodaya, pp. 590, 591; (sic) p. 104).

At page 351 the learned author says:

The ''self-acquired property of the father-divided from his sons goes entirely to the son born after that partition, those born before have been ''declared to have no right over it. In regard to property as also to debts, gifts, pledges and purchases, they have no concern (sic) each other, except in regard to (sic)(due So death and birth) and (sic) 25 19-20).(sic), p. (sic), p. (sic) Vivadaratnakara, p. (sic); Vivadachintamani, p. 22),(sic) pp. 710-711; (sic) p. 104 Viramitrodaya, p. 590, (sic)

118. The rights of the after-born son have received judicial recognition, see the case of Nawal Singh v. Bhagwan Singh (1882) 4 All. 427.

119. There is a well known book Saraswati Vilasa written by the King of Orissa a book which is of great authority in Dra-vida or Madras School, but which has also been approved by their Lordships of the Privy Council in matters arising under the Mitakshara Law, see AIR 1931 268 (Privy Council) and in this book at page 145 in Setiur''s Translation occurs paragraph 235 which runs as follow:

Where a father has two or three or many sons and (sic) divided with some and undivided with others, property acquired by him shall be divided after his death only among his undivided sons

120. Prima facie this is a direct text on point which we are discussing, but it is argued that paragraph 233 (sic) in the paragraphs which (sic) with the rights of the son born alter partition I doubt very-much if the Sanskrit text has got a heading like the one which we have in the Translation, for the heading appears in italics but even assuming that paragraph 235 means that, where a father has two or three or more after-born sons and is divided with some and undivided with others of them property acquired by him shall be divided after his death only among his undivided after-born sons. This would then be a clear text for the proposition that as amongst the after-born sons the undivided sons will exclude the divided sons. There is no such magic in the after-born sons that as amongst the n the undivided sons have preference over the divided sons and the same principle will not operate when there is a competition between the divided sons and undivided sons, pure and simple.

121. A different result was obtained by the learned Judges of the Oudh Chief Court, but with all respect I venture to suggest that they laid undue emphasis upon what was observed by their Lordships of the Privy Council in Katama Natcher''s case (1863)9 Moo. IA 539 where it was observed that

there was community of interest and unity of possession between all the members of the family

so far as the joint family property was concerned and as there was no such community of interest and unity of possession between the father and sons joint with him in the case of self-acquired property the undivided sons did not exclude the divided ones and partition did not annul the filial relation nor the right of succession incidental to such relation, But as was observed by Niyogi J. in the Nagpur case,

the self-acquired property of the father though capable of being alienated at the will of the father becomes ancestral when at his death it devolves on his son. In so far as the son is undivided or reunited or born after partition between the father and his other sons, his status vis-a-vis his father is that of a co-owner. Consequently, the self-acquired property left by the father would be in the nature of an accretion to his

interest in the joint property and when it devolves on the undivided, the reunited or the son born after partition, it does so as if it were co-parcenary property. Hence the preference accrued to the undivided son in respect of succession to the self-acquired property of the father.... The self-acquired property of the father is thus in its nature a coparcenary property vis-a-vis his (undivided) son who therefore takes it on his father''s death as a surviving co-parcener. It must, therefore, follow that a son who does not fulfil the condition of being a co-parcener with his father is not entitled to the father''s self-acquired property.

122. The learned Judges of the Oudh Chief Court were further influenced in their decision by the case of Kunwar Bahadur v. Madho Prasad (1919) 17 ALJ 151 : AIR 1919 All. 223 (1), but a careful reading of that case makes it clear that the competition in that case was between the son living with his father and a son, living away from the father and it w s hell in that case that the mere fact of separate living did not operate as a division and naturally the son living away was held equally entitled with those living with the father to succeed.

123. Waller J. in Narashimham v. Narasimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361 discussing Kunwar Bahadur''s case (1919) 17 ALJ 151 : AIR 1919 All. 223 (1):

It is a legitimate inference from emphasis laid on the fact that there hid been no partition that, had there been a partition, the decision would have been in the opposite sense.

124. From what I have said before it follows that by reason of the interest with a son gets in the father''s self-acquired property also from birth, I am prepared to extend the principle of co-parcenaryship in the case of a father and his joint sons and give to such sons the right to inherit in a manner akin very much to the right of survivorship. This is the reason for giving a preference to the joint sons over the divided sons who are not members of the co-parcenary. I think I am on equally and perhaps more solid grounds when I am prepared to give this preference (sic) the undivided son over the divided son by reason of the argument by way of analogy afforded from the cases of the after-born son and reunited son. I have given expression to such arguments in the earlier portions of my judgment.

125. In Fakirappa''s case (1896) 22 Bom. 101 Jardine J. referred to certain grievous inconveniences which would follow if the contrary view was taken and relying on the case of Katama Natchear v. The Rajah of Shivagunga (1863) 9 Moo. IA 539 held that one is entitled to consider these inconveniences and said:

It would stimulate unpleasant litigation. It would interfere with the power of the father and the sons remaining in union with him to provide for a separating son by giving him when he demands partition something more than his proper share of the ancestral property. That can be reasonably done when the self-acquired property left with the father or in the co-parcenary (sic) sufficient to make good provision for those who do not choose to separate. But such reasonable family arrangements

would be hampered if the father were at once obliged to protect himself by resorting to gift or will in order to prevent the separating son making claim on the death of the father to share in the self-acquired property. A partition would thus be complicated with the arrangements of a testamentary sort and premature.

126. I might add to the inconveniences and hardships enumerated by Jardine J. A father is possessed of self-acquired property and has four sons. One of his sons does not pull on well with the rest of the family and the father gives him a one-fourth share and separates him. Later on the fisher dies intestate. It would not be fair to give to the separated son another fourth share out of the remaining three fourths. It may be that when the son separates he gives a sort of undertaking that he would claim no further share in the inheritance at the time of the father''s death and if he is permitted to claim a share again he would be (sic) from the undertaking given before. Let it be understood here that I am not deciding the question as to whether in law he is entitled to resile from the undertaking or not, but I am only looking at the equitable aspect of the question. Again a father may separate one of his own sons after giving him a portion of his self-acquired property. Later he remains joint with his sons and on account of adversity and the growing needs of the family he is compelled to part with a great deal of the property that was reserved by him for himself and his joint sons; and when the father dies, if the separated son is allowed to take a share in the balance of the property, his own share would be considerably augmented to the detriment of the sons who had the merit of remaining joint with the father. Then again only that portion of the property which has remained with the father will be liable for debts taken by the father after partition and the property taken away by the separated son will be immune. It may also be that the father who has separated one of his sons and has remained joint with the others has had his self-acquired property greatly augmented by the time of his death owing to the exertions of his joint sons and it would obviously be inequitable that the separated son who has contributed nothing towards this augmentation should be permitted to share in the same after the father''s death.
127. I would, therefore, answer the question referred to us in the affirmative.

Hamilton J.

(April 15, 1942)

128. The question which has been referred to the Full Bench is as follows:

On the death of a Hindu leaving self-acquired property do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara Law?

129. There was at first a view that the sons had from birth an interest in the self-acquired property of the father so that he had not the power to deal with it as he liked and it was a co-percenary so that on his death the property devolved by

survivorship and not by inheritance.

130. In Balwant Singh v Rani Kishori (1898) 20 All. 267, their Lordships of the Privy Council decided that there was a conflict between Mitakshara Ch. 1 Section 1 Clause 27 and Sections IV and V and the latter prevailed with the result that the father had absolute power over his self-acquired property.

131. The first text contained moral and religious consideration but the latter contained positive laws.

132. In Katama Natchiar v. Raja of Shivagunga (1863) 9 Moo. IA 539, their Lordships of the Privy Council dealt with the second contention and stated:

But the law of partition shows that as to the self-acquired property of one member of a united family the other members of that family have neither community of interest nor unity of possession. The foundation therefore of a right to take such property by survivorship falls.

133. The effect of decisions of their Lordships of the Privy Council was considered in Vairavan Chettiar v. Srinivasachariar (1828) 22 Bom. 101, a Full Bench decision, where it was held that an undivided Hindu son acquires the self-acquired property of his father by inheritance and not survivorship.

134. The view expressed in Nana Tawkar v. Ramchandra Tawker (1908) 32 Mad 377 : 2 IC 519 that an undivided son acquired by survivorship the self-acquired property of the father in preference to the divided son was dissented from as regards the manner of devolution but the point to be decided was whether a Succession Certificate was required and not the rights of a divided and undivided son.

135. It is I think mainly if not wholly in the belief that survivorship and not inheritance applied that the Bombay and Madras High Courts decided that the undivided son excludes the divided son and modern writers accepted that view as correct with little or no independant reasoning.

136. It has still been argued that in spite of those decisions of their Lordships of the Privy Council there is some kind of delayed action coparcenary, if I can use such an expression, so that the sons can do nothing when their father is alive but the coparcenary comes into activity when the father has died find myself unable to visualize such a peculiar coparcenary and Learned Counsel has not explained what would be the incidents of it on the death of the father.

137. The sons take by inheritance and not by survivorship as in the Hindu coparcenary and so does the grandson whose father is dead and if the sons after getting the property can divide the property such division does not prove coparcenary.

138. It appears from the judgment of Kumaraswami Sastri J. in Vairavan Chettiar v. Srinivasachariar (1828) 22 Bom. 101 that Lord Macnaghten considered that the son

had a mere spes successionis and I find it difficult to see what more the son has.

139. Supposing however that the son had some kind of interest by birth I still do not see why he should lose it by partition of the ancestral property in the lifetime of the father.

140. If a son resides and eats apart from his father but does not at the same time partition the ancestral property he does not ipso facto lose his rights in that estate and if only part of the property is divided he does not lose all rights in the remainder and I suppose no one would argue that if there has been partition of the self-acquired property of the father the son who got a share would lose his rights in the ancestral estate.

141. If a son has by birth an interest in the self-acquired property of his father as he has in the ancestral property but that interest only becomes active at the death of the father why should he not exercise that right then, just as a coparcener who has only partitioned a part of the ancestral property?

142. If on the other hand the son has no legal right by birth and there is only a moral duty laid on the father to secure equal distribution of his self-acquired property among his sons either by dividing it in his lifetime or by avoiding a testamentary disposition why should not all the sons share?

143. The position then appears to me to be that the father is as regards his self-acquired property from the beginning just as separate from sons who are joint with him in ancestral property as from sons who are not and partition of ancestral property will have no bearing on his self-acquired property.

144. It may be argued here that the position is not the same if there has been partition of the self-acquired property as the divided son has got his share and if such self acquired property of the father is in existence at his death and is divided equally then the undivided son loses and it may further be argued that as with ancestral property if the divided son has got his share the undivided should take the rest.

145. As regards the second argument there is the difficulty that there is inheritance and not survivorship and an heir cannot part with his rights in view of Section 6(a) of the Transfer of Property Act even if he wishes to do so--vide Balkrishna Trimbak v. Savitribai (1878) 3 Bom 54 Amrit Narayan Singh v. Gaya Singh (1917) 45 Cal. 590 : AIR 1917 P.C. 95. Ananda Mohan Roy v. Gour Mohan Mullick (1923) 50 Cal. 929 : AIR 1923 P.C. 189 and Uma Shankar v. Ram Charan 1939 AWR (HC) 704 : ILR 1939 All 950.

146. On the other hand it does not necessarily follow that the self acquired property at the death of the father should be divided equally.

147. It may be that, if the sons should all take equally allowance should be made for what the divided son has already got.

148. Coming now to decisions of High Courts, they are Fakirappa v. Yellappa (1896) 22 Bom. 101, Nana Tawker v. Ramchandra Tawker (1908) 32 Mad 377 : 2 IC 519 and Chintapenta Narasimham v. Chintapenta Narasimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361 which give preference to the undivided son and Badri Nath v. Hardeo (1930) 5 Luck 649 : AIR 1939 Oudh 77 and (at any rate to some extent) Kunwar Bahadur v. Madho Parshad (1919) 17 ALJ 151 : AIR 1919 All. 223 (1)

149. Fakirappa v. Yellappa (1896) 22 Bom. 101. Ranade J. relied partly on Shivagunga''s (1863) 9 Moo. IA 539 case but this he appears to have misquoted, to West and Buhler and to the fact that no divided son had previously asserted such a right.

150. I think this decision has been carefully considered in Badri Nath v. Hardeo (1930) 5 Luck 649 : AIR 1939 Oudh 77 and I agree with what has been said there.

151. I would however add that in my opinion the fact that there was no previously reported case on this question loads to no inference either one way or the other.

152. As regards the judgment of Jardine, J. I agree with what was said in Bairi Nath. v. Hardeo (1930) 5 Luck 649 : AIR 1939 Oudh 77.

153. Nana Tawker v. Ram Chandra Tawker (1908) 32 Mad 377 : 2 IC 519. This decision was based on the belief that some took by survivorship.

154. Chintapenta Narasimham v. Chintapentasimham (1932) 55 Mad. 577 : AIR 1932 Mad. 361. This was based on the principle that the self-acquired property of the father becomes part of the joint property of united sons and as the divided son no longer belongs to the coparcenery he can take no share in it.

155. With all respect to the learned Judge; if the argument is what I understand it to be, it can only hold good on the presumption that there is what I have termed a delayed action coparcenary between the father and the sons and this appears to me to be negatived by their Lordships of the Privy Council at any rate as understood by Lord Macnaghten and the Madras Full Bench.

156. So much of the self acquired property of the father as does go to undivided sons may become joint family property when it has got there so that succession to one of those sons is by survivorship and in his life time he may not have absolute power of disposal but the question which has to be decided first is what goes to the sons.

157. The learned Judges referred to Kunwar Bahadur v. Madho Prasad (1919) 17 ALJ 151 : AIR 1919 All. 223 (1) but they were under a misapprehension as the family had no ancestral property at all.

158. Badri Nath v. Hardeo (1930) 5 Luck 649 : AIR 1939 Oudh 77. This case was if I may venture to say so very carefully reasoned after considering other decisions and various placita of the Mitakshara.

159. Kunwar Bahadur v. Madho Prasad (1919) 17 ALJ 151 : AIR 1919 All. 223 (1). As there was some doubt as to the force of the decision I examined the whole case.

160. The Plaintiffs alleged that they were joint with the father and the Defendants were not and they claimed property left by the father.

161. The Defendants said that the property was ancestral and therefore they had a right as co-parceners but if it was self-acquired property of the father they still were entitled as heirs and the Plaintiff were just as separated as they were.

162. The first court held that the property was self-acquired that the Defendants lived entirely separate, maintaining themselves on property which they got from the widow of their grand father''s, brother, while the Plaintiffs lived jointly with their father. It decreed the suit apparently giving preference to sons whom it considered to be joint against sons whom it considered to be separate.

163. There had been no partition but there could not have been any, for there was no ancestral property and the self-acquired property of the father could not be partitioned and there could not hive been any greater separation in the circumstances.

164. The learned Judges who decided the appeal held that if this property was ancestral then the Defendants in the absence of a partition wire still coparceners but if, as the first court had found, the property was self acquired then all the sons were equally entitled.

165. As there had been no partition this case does not decide that a partitioned son takes equally with the others but I think that it does decide that a separated son takes equally with the others.

166. Finally there is a case Shamrao Bhaurao Maratha v. Krishnarao Bhaurao Marathe AIR 1941 Nag. 297 in which it was held that a brother A, living with another B and a third C separated from him (B) were entitled to equal shares in the self-acquired property of the deceased brother.

167. A distinction was made between the case of a father and sons and the case of brothers and it was merely taken for granted, in view of the decisions referred to, that the undivided son was preferred.

168. It has then been argued that an undivided son is in the same position as a reunited son and so should be preferred. The Viramitrodaya however distinguishes between the reunited son when there is a son born after partition and the reunited son when there is not.

In Ch. IV, 12 it is stated:

If it be argued that--the reunited sons alone should inherit the estate of the father when there are both reunited and unassiciated sons, the answer is that the

argument is not tenable.

Besides, ownership in the property of the father or other ancestor is to be held to be caused by sonship etc. alone, if not attended with degradation and the like disqualification, but not also if attended with reunion, by reason of multiplicity: and as the sonship etc belong equally to all the male issue, whether reunited or not, therefore the succession to their property of all the sons and the like without distinction is proper.

Nor can it be said, that right (of the sons etc. as such) to the property of the father and the other ancestors ceases by partition.

But if a son be born after partition, then (agreeably to what is said above, also) the sons who have been previously separated would have been entitled to the father''s property, but they are debarred by the text of Brihaspati namely--Those born before partition are not entitled to the share of the parents. Whatever is acquired by a father separated from the son belongs entirely to one born after partition.

169. It seems to me that there is good reasons to distinguish between the case when there is a son born after partition and the case when there is not.

170. In Mitakshara Ch. II Section 9 placitum 2 it is stated:

Effects which had been divided and which are again mixed together arc termed reunited. He to whom such appertain is a reunited parcener.

171. The reunited son would have mixed again with his father what he hid obtained and what had been the self acquired property of the father would reacquire that status.

172. The son born after partition had he not been made to share with the reunited son would have excluded the reunited son but the partition would not be annulled by the birth of a son after it and the partitioned son would keep what he had obtained.

173. The reunited son then would have been in the worst position. If however there is no son born after partition there is no one to exclude the reunited son.

174. The tights of the son born after partition are also considered in the Sarasvati Vilas Clauses 227-248 and the rights of reunited sons are also considered and the result as far as I can see is the sans as in the Viramitrodaya.

In Clause 234 it is stated:

The son born after partition shall divide with such of the brothers as lived in reunion with the father after-partition, as Manu says Let him divide with those who were reunited with him (the father).

but at 758 if it be said that sons reunited with the father take his wealth and that sons not reunited with the father do not take his wealth, just as the son born after partition takes the wealth of the father and not other sons.

759 Not so.....

763 Therefore that the ownership of re-united and not re-united sons, in the-paternal wealth is equal is only reasonable.

175. In view of these texts I do not see how one can say that in the absence of a son born after partition the reunited son is to be preferred to the son reunited and I do not see on what principle the united son should be preferred to the reunited.

176. If there was a united son, a reunited son and a non-reunited son who had already got his share in the self-acquired property of his father why should the reunited son be the one who got nothing at all?

177. To sum up I come to the following conclusion.

178. The united son is no better than the reunited son and there is clear and ancient? authority to the effect that when there is no son born after partition the reunited and non-reunited share equally.

179. There is no coparcenary of father and sons in the self acquired property of the father and therefore no reason to prefer an undivided to a divided son but if there has been division, of the lather''s self acquired property so that the divided of son has got something it may be that at the death of the father the property has to be so divided that the sons finish up with equal shares.

180. If however, there is some kind of coparcenary then partition of ancestral property does not put an end to it.

181. My answer to the reference is that undivided sons do not exclude the divided son.

Collister, Bajpai and Hamilton JJ.

(April 15, 1942)

182. Having regard to the view taken by the majority of the judges on this Full Bench, we answer the question referred to us in the affirmative.

Collister and Bijpai JJ.

(April 22, 1942)

183. This suit of the, Plaintiff Ganesh Prasad for partition of what he alleges to be the joint family property of himself and Defendants Nos. 1 to 7 and Defendant No, 16 was dismissed by the second Subordinate Judge of Cawnpore and hence he has filed the present first appeal.

184. We now come to the question of the will, The will alleged by the Defendant is an oral will and according to what has been stated by their Lordships of the Privy Council as early as 1867 in Baboo Beeri Pertab Sahee v. Maharajah Rajender Pertab Sahee (1867) 12 Moo. IA 1 at p. 28 such a will must be proved in a very strict manner. Their Lordships say:

But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision; the words on which he relies, with every circumstance of time and place.

185. Again in AIR 1931 285 (Privy Council) their Lordships say:

The onus of establishing, an oral ''will is alwavs a very heavy one and in this connection their Lordships may refer to the ruling of this Board for the guidance of Courts in India in dealing with Oral wills in Baboo Beer Pertab Sahee v. Maharajah Rajinder Pertab Sahee (12 Moo. I.A. 1 at 28) that they must be proved with the utmost precision and with every circumstance of time and place.

186. The same view was reiterated by their Lordships of the Privy Council in the case of Mahabir Prasad v. Mustafa Husain 1937 AWR 992,

187. Bearing these observations in view we have come to the conclusion that although the witnesses produced by the Defendants in this connection may not be speaking the untruth, they do not prove the oral will set up by the Defendants. We have already referred to these witnesses in an earlier portion of our judgment. They are Krishna Behari, Chandrabhan, Bhagwan Das and in an indirect manner Manmohan Dayal and Ram Lal also support the will. It is not necessary to discuss their evidence in detail, but a perusal of their evidence leaves an impression on one''s mind that they do not prove the alleged will "with precision and with every circumstance of time and place." In respect to the will we arrive at a finding different from that at which the Court below arrived and hold that the contesting Defendant has not been able to establish the oral will of Ajodhya Prasad.

188. The Plaintiff then contends that if the oral will is not proved then the Plaintiff, although separated, is entitled to inherit the self-acquired property of Ajodhya Prasad along with the son or sons who remained joint with him. On the 10th of March, 1942 we referred to a Full Bench the following question of law:

On the death of a Hindu leaving self acquired property do the undivided sons succeed to such property to the exclusion of the divided son under the Mitakshara Law"?

189. The view of the majority of the Full Bench was that the undivided sons succeed to such property to the exclusion of the divided son and that being so, the Plaintiff is not entitled to succeed to the self acquired property of Ajodhya Prasad and it has already been held that the main items of the plaint property are the self-acquired

property of Ajodhya Prasad.

190. We have already said that the court below dismissed the Plaintiff''s suit with certain reservations. It held that the Plaintiff would be entitled to retain possession of the Mathuri Mahal house (list No. 6 of the plaint) and moveables (list No. 3 of the plaint). It also held that the house in Lathi Mohal was the exclusive property of Ram Lal, Defendant No. 14 and the family of Ajodhya Prasad had nothing to do with the same. No arguments have been advanced before us so far as this finding of the court below is concerned and we affirm the same. For the rest, in view of what we have said above this appeal is dismissed with costs.