Madras High Court
Baba vs Timma And Ors. on 5 May, 1883
Equivalent citations: (1883) ILR 7 Mad 357
Bench: C A Turner, Kt., Innes, Kindersly, M Ayyar

JUDGMENT Charles A. Turner, Kt., C.J. (Innes, Kindersly and Muttusami Ayyar, JJ.)

1. The question referred in this appeal is, whether a Hindu father, while unseparated from his son, has power to alienate to a stranger his self-acquired moveable estate, and his undivided share in the ancestral estate, moveable and immoveable.

2. It may be admitted that some passages in the Mitakshara, respecting the father's power of alienation, are apparently conflicting; nevertheless they may be reconciled, and, when reconciled, are in agreement with the dicta of other commentators to whom reference is made as of authority in Southern India.

3. To understand the subject, it is necessary to bear in mind the distinction which Hindu lawyers recognized between the ownership of, and dominion over, property, which distinction is clearly declared in relation to the question now under consideration by Devanda Bhatta in a passage to which I shall presently refer.

4. In discussing the question, whether partition is the cause of property or the ascertainment of an existing right, the author of the Mitakshara (Section V) deals first with the argument of the objector. Property is by partition; if it arose on birth, the father could not maintain a sacrificial fire, nor perform other religious acts which require wealth for their accomplishment. Nor could the prohibition be maintained which exempts from partition gains of valour and secures the property of a wife and property acquired by the father's favour. Moreover, the text of Vishnu respecting affectionate gifts shows that a father may give his wife even immoveable property. The texts, The father is master of the gems, &c, but neither the father nor grandfather is so of the whole immoveable estate," "By favour of the father, clothes and ornaments are used, but immoveable property may not be consumed even with the father's indulgence," which forbid a gift of property through favour, the objector asserts, relate to the grand-father's property, on whose death the moveables belong exclusively to the father, while the immoveable estate descends to the father and son in common. Mitakshara, Chapter I, Section I, Sections 18--22. The author replies the acquisition of ownership by birth is generally recognized in accordance with the text of Gautama. As to the text cited ' The father is master of the gems,' it would have been unnecessary to declare this, if property were not acquired by birth; the text, moreover, applies to the immoveable property of the father as well as of the grandfather, for both father and grandfather are declared not to be masters of the whole immoveable estate. This maxim, that the grandfather's own acquisition should not be given away while a grandson is living, indicates a proprietary interest by birth; as for the opinion advanced that precious stones, &c, belong to the father by reason of the text cited, it is admitted, on the authority of that text, he has power to give them away (it is explained afterwards for what purposes). As for the text of Vishnu, the immoveable property therein mentioned is the self-acquired property of the father, given with the consent of the sons : the fitness of any moveable property to be the

subject of an affectionate gift is certain. As for the suggested impediment to the performance of religious duties, the injunction to perform them authorizes the employment of property of any kind. Therefore, "it is a settled point that property in the paternal and ancestral estate is by birth [although] the father has independent power in the disposal of effects other than immoveables for indispensable acts of duty, and for purposes prescribed by texts of law * * * 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. "Mitakshara, Chapter I, Section V, Sections 23--27.

5. The author intimates that in respect of the right by birth to the estate, paternal or ancestral, he would mention a distinction under a subsequent text. He fulfils his intention in commenting on the text relating to partition among grandsons; he declares that" the grandson has a right of prohibition if his unseparated father is making a donation or 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 dependent; consequently the difference is this, although he has a right by birth in his father and grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the sons 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 of the father in dissipating the property." Mitakshara, Chapter I, Section V, Sections 9,10.

6. The effect of the several passages taken together is that, while the ownership of the son is recognized in all property, whether the self-acquired property of his father or ancestral, the father has power to dispose at his pleasure of his self-acquired moveables; and with a consent, which his son must give, of his self-acquired immoveables, he has the power to dispose of ancestral moveables for purposes inculcated by sacred texts, and of all property for indispensable acts of duty; but the son may interdict him if he applies ancestral wealth, whether moveable or immoveable, to purposes other than those sanctioned.

7. In the Smriti Chandrika, Chapter VII, Section 48, Devanga Bhatta declares that the prohibition of the partition of wealth given by a father through affection is to be disregarded in the case of immoveable property, by reason of the text of Yajnyavalkya which declares that cloths and ornaments are gained, but immoveable property is not gained by the father's favour. But at the close of his argument, Section 50, it is apparent that he confined the limitation to ancestral immoveable property.

8. As to the rights of the father and son generally in respect to the estate, he held that by birth the son became co-owner with his father not only in the ancestral but in the self-acquired wealth of the father. But though both were equally owners, the ownership of the son interfered with the father's power of alienation only in respect of ancestral estate. Some, he observes, hold that a father is not of his own authority competent to make a gift or the like of hereditary property, the grandson (of the deceased) in the case of such property possessing an equal ownership with the father. "Such a construction is acceptable." *** "It would seem," he continues, "from the above construction that in the case of the father's property, the ownership of the father and son is unequal;" and he goes on to explain "that it is not the ownership (Svamiem) but the independent power (Svatantriem), wherein

difference exists, that, in the case of grandfather's property, the Svamiem and Svatantriem are equal in the father and the son; in the case of the father's property, while he is alive and free from defect, the father alone possesses Svatantriem." Chapter VIII, Sections 20-21.

9. The Sarasvati Vilasa declares the law in a sense similar to that of the Mitakshara. "So also, in the case of a gift or a sale of a paternal grandfather's wealth by an undivided father, the right of prohibition belongs to his son, grandson and great-grandson. [Mr. Foulkes observes this word is not found in one manuscript, nor in the Mitakshara.] But in their father's acquisitions, they have not the right of prohibition, because of their dependence on him, but they must add their consent." Section 221.

10. In the succeeding passage, the author explains consent must be made by the son in the case of a disposition by the father of his self-acquired wealth in accordance with the text. "There shall be neither gift nor sale when all the sons are not together." But in the case of the paternal grandfather's wealth there exists the difference that he has the right of prohibition because the proprietorship of both is without distinction. Section 222.

11. In treating of the acquisition of ownership by brith, Varadaraja in his Vibhaga, while admitting the right of the father to make a gift out of affection, because the text mentions property generally, appears to have regarded the father's power to make a gift as absolutely unrestricted only in respect of self-acquired moveable property; for he adds but in the case of immoveable property acquired by himself, there is dependence in the sons, &c, as is said. As for immoveable property and bipeds, even though self-acquired, there is neither gift nor sale without making all the sons parties." Section 4, Burnell's Daya Vibhaga, page 6.

12. Subsequently, when treating of partition, the author declares that unequal partition at the will of the father would be allowable only in respect of the father's self-acquired wealth, Section 5; and that the rule that the father may take two shares, applies to that class of property only, and he adds, "In no case is there an unequal partition in the case of the grandfather's property. Hence we infer that in the case when an undivided father gives away, or sells the grandfather's property, the son may forbid him." Section 16.

13. In the Vyavahara Nirnaya, Varadaraja also declares that an equal partition can be made only of self-acquired property, and citing texts of Yajnavalkya, Brihaspati, Vishnu, Katyayana, Viyasa, he proceeds, ' from these and similar sayings it is inferred that sons and grandsons have equal right to a paternal grandfather's (property), but that the father is independent as regards self-acquired property." Burnett's Translation, pp. 4--6.

14. I have, in a recent case (Ponnappa Pillai v. Pappuvayyangar I.L.R. 4 Mad. 56--62, considered the decisions of this Court respecting the right of a co-parcener to make an alienation of his share. I have nothing to add to the observations I then made. The doubts expressed by the Privy Council in Lakshman Dada Naik v. Ramachandra Dada Naik L.R. 7 I.A. 194, suggest that the Court should reconsider the question when opportunity occurred.

15. Respecting the question now before us, the competency of a father to make a gift of ancestral estate to a stranger to the prejudice of his son, it appears to me that we have in the one side the unanimous consensus of the commentators accepted in Southern India, and the opinions of the most eminent English writers on Hindu Law.

16. On the other, we have a decision of this Court which rests on no sufficient authority; the principle on which alienation was permitted to satisfy a judgment-debt, or to give effect to a contract made with a purchaser for value, implies that, ordinarily, the power to alienate is absent, and it appears to me we cannot recognize, as a rule, what was intended as the justification for an exception to the rule.

17. I would reply to the Division Bench that a Hindu father, if unseparated, has not power, except for purposes warranted by special texts, to make a gift to a stranger of ancestral estate, moveable or immoveable.