

**(1909) 06 BOM CK 0006**  
**In the Bombay High Court**

Ahmedbhoy Habibbhoy

APPELLANT

Vs

Sir Dinshaw M. Petit and Others

RESPONDENT

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**Date of Decision :** 14-06-1909

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 11

**Citation :** 3 Ind. Cas. 124

**Hon'ble Judges :** Beaman, J

**Bench :** Single Bench

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## Judgement

Beaman, J.—The question in this case is whether certain of the defendants are precluded from contesting the plaintiff's allegation that the property in his hands is his self-acquired property by the decision in Ahmedbhoy Ilubibbhoy v. Cassumbhoy Ahmedbhoy 12 B. 280. And this question breaks up into two main parts, first, whether this point was in fact decided in Ahmedbhoy's case 12 B. 280. Next, whether if it, was so decided, that decision constitutes resjudicata against the defendants concerned.

2. With reference to the first of these points, it is material to quote their Lordships' actual words, which are : this is sufficient for the decision of the case," that is to say, their finding upon the point with which they had just dealt is sufficient to dispose of the case. But they go on to say: "We think it advisable to express an opinion on the question &c. and, therefore, they proceed to discuss the evidence relating to the character of the property in Ahmedbhoy's hands and come to the conclusion, a somewhat hesitating conclusion, that the evidence was not sufficient to enable them to say that property had the impress of what is called joint ancestral family property. Now I confess it appears to me impossible, merely reading those words, to hold as the plaintiff has asked me to hold, that what follows them is in the nature of a decision of the question raised. I think that their Lordships' meaning is easy to be guessed. The Court below had come to its own conclusion upon this part of the case and if that decision had not already appeared in the law books, it had been the common property of the bar;

and, therefore, it is quite intelligible that if their Lordships of the Appeal Court took a different view they would have wished to intimate that other Judges sitting alone on the original side were not to consider themselves bound by the decision arrived at by Mr. Justice Jardine. That, I apprehend, to be the intention of their Lordships in going into this second question at the length they did, and, therefore, upon that point I should feel considerable hesitation in holding that this part of the decision in Ahmedbhoy's case was in any sense a decision within the meaning of Section 11 of the Code.

3. Passing on from that, however, to the more important question whether if this is to be regarded as an answer to the question, it constitutes *res judicata* between the present parties concerned; it is necessary to bear in mind what the nature of this suit was. It was brought by Cassumbhoy, the son of Ahmedbhoy, as a partition suit and two main questions arose. First, whether it was competent to the plaintiff according to the law governing Khojas, to enforce a partition in his father's life-time? That was the first and perhaps the principal issue. Next, assuming that that point was found in his favour, the second question would arise whether the property of which he sought partition was ancestral family property? The Court below appears to have found both these points in plaintiff's favour. Then on appeal their Lordships decided the first point against the plaintiff-respondent, that is to say, they held that amongst Khojas a son cannot enforce a partition in his father's life-time and that, of course, completely disposes of the whole case. For this, as I have said, was merely a suit for partition and as soon as the Appeal Court held against the plaintiff that there was no right to enforce a partition during his father's life-time, so far as this suit goes there is an end of it. However, their Lordships proceeded to deal with the second question whether the property in the hands of Ahmedbhoy was ancestral family property and no doubt they discussed the evidence and came to their own conclusion upon that point, a conclusion which differs from that arrived at by the Judge of the first Court; and they end by saying: "therefore, we must reverse the decree with costs." Now, it appears to me perfectly plain that if we look both at the words of Section 11 and the principle of *res judicata*, even assuming that this second decision was intended to be a decision of the question raised by their Lordships, it would not satisfy all the conditions and requirements of *res judicata*. In all such cases where Courts come to a final decision so far as they are concerned upon any point which is sufficient in itself to dispose of the suit or appeal and then proceed thereafter to discuss some connected or ancillary point, it is perfectly clear, I think, that throughout the whole current of decisions in English Courts, at any rate the Judges have never doubted that what follows is merely an *obiter dictum*, and cannot be treated as *res judicata*. And that, I think, for a very simple reason of principle and only a reason of principal, but a reason expressed in the plain words of the section. To constitute *res judicata*, something substantially and materially in issue between the parties must have been finally decided by the Court empowered to deal with it. And while no doubt everything which is necessary for the disposal of the suit, even though only incidentally

necessary, yet necessary, does fall within the scope of those words and would constitute *res judicata*, yet once a decision has been come to upon any preliminary point, be it Other a point of law or of fact or a mixed question of law and fact, which is sufficient in itself to dispose of the whole suit, if the Judge goes on to discuss merely perhaps for the satisfaction of the Appellate Court other questions, the decision of them would not be. final. The test again is exceedingly simple. For, indeed, what can be or is meant by a final decision? Where we have Courts in steps from the grade of Munsifs up to the Privy Council, it is plain that only that decision can be final which is (a) final in itself, or (b) allows the party aggrieved by it to carry it further and get it made final. And, therefore, a decision upon any question which does not open the door to the parties aggrieved to carry it to the next Court is not in any sense a final decision unless the Court which has decided it is itself the Court of final jurisdiction for that suit. The underlying principle may be clearly illustrated by the converse case—a case which frequently occurs in the *mofussil*, of a plaintiff while he is substantially successful and obtains a decree, having some important issue decided against him. Now, in such a case although if the decree had been against him, he could have carried it up first to the District Judge and then to the High Court and then other conditions were fulfilled to the Privy Council, having so obtained the decision of the Court; of final jurisdiction upon the whole case including questions which were decided against him, as it is he cannot proceed a step. He cannot appeal against the decree which is in his favour and there is no provision of law allowing him to appeal against part of a judgment. It would thus lie with his adversary to decide whether what was decided against the plaintiff should remain *res judicata* against him. I have thus, I think, reduced the argument, upon which the plaintiff relies in this case, to quite an evident absurdity. In all such cases, notably in this—the decision *obiter* of any question not necessary to the disposal of the suit is not a final decision.

4. For these reasons and without going into numerous other points which have been raised and which have been very exhaustively and ably pressed by the learned Counsel on both sides, it appears to me beyond all reasonable doubt that a decision of the kind in *Ahmedbhoy's* "case .011 the second question which their Lordships set themselves to consider could not be, within the meaning of Section 11, a final decision of that question, then substantially and materially in issue between the parties. Had it been and had the defendant in that suit been dissatisfied with it and wished to take it before the Privy Council, it is quite obvious that he would not have been in a position to do so. For, on the first point, namely, that a son had no right to enforce a partition against his father in his lifetime, a point which was not likely to be further contested, the appeal would have at once gone out. I believe the principle of this decision is supported by every English and Indian case, with the single exception of one *Calcutta* case. And speaking with the greatest respect to the learned Judges who tried that case, I cannot approve of or follow it.

5. I must, therefore, hold that this question is not *res judicata* between the

present parties to this suit.

6. This is a suit for specific performance of a contract of sale of certain landed property, situated at Mount Pleasant Road, Malabar hill, in the City of Bombay, the said contract being alleged to be contained in two letters of the 31st January 1907 and 1st February 1907.

7. On further steps towards the completion of that contract disputes arose, which resolved themselves finally (and for the purposes of this suit solely ), into a question of the plaintiff's title. The defendants objected that the plaintiff could not make a good title, and had not in fact made a good title, until he had obtained in a regular manner the concurrence of all his male issues. Further that in spite of their, the defendants," requisitions in this behalf the plaintiff had not taken any steps to make the title good in this essential particular, and had not complied with the defendants" requisitions. A great deal of correspondence passed between the plaintiff and the defendants between January 1907 and 26th September 1907 on which date the plaintiff filed his plaint in this suit. In view of the course this suit has taken, a most unfortunate and I fear ill-advised course, it be-comes material to look closely into the terms of the original plaint. I need not particularize the various points which had arisen while the correspondence was going on further then to say, that those which are now alone material, were that the plaintiff appears to have thought that the doubt cast upon the title by the defendants was removed in two ways. First", he relied upon his own exclusive possession of the property since 1870. Second, he contended that any claims which his issue might have on this or any other property in his hands, were res judicata by the decision in the suit of Cassumbhoy v. Ahmedbhoy 12 B. 280 brought-in 1884 and decided in 1887 in the Court of first instance, and again in 1889 by the Court of Appeal Ahmedbhoy v. Cassumbhoy 13 B. 534. In the original plaint filed on 26th September 1907, the plaintiff proceeded against Bai Awabai alone. The plaintiff states" therein, para. 4 that he has from the first been anxious to complete the said sale without-any delay but the defendant"s solicitors have from time to time raised various, questions as to the title of the plaintiff to the said land, with thy object as it appears to the plaintiff of putting off the completion of the said sale. The plaintiff says that the various points raised, by the defendant have been disposed of in the course of the correspondence which has taken place between the plaintiff"s and the defendants" solicitors, and that the plaintiff has made out a good title to the said land free from all encumbrances and claims and that the defendant is liable to complete the said sale without further delay " etc.

8. In para 5 he goes on to say " the particulars of the plaintiff"s title appear from the said correspondence and the plaintiff will rely thereon, and upon the fact that he and his predecessors-in-title have been in possession of the whole of the said land since the year 1846 and that he himself has been in sole absolute and exclusive possession of the whole of the said land from the 27th June 1870." In para. 6 ho says that having regard to the possession of himself and his

predecessors-in-title as aforesaid the defendant was not entitled to make any requisitions on title. Then in para 7 he goes on: "it appears from the said correspondence that the defendants' chief objection to the plaintiff's title is based upon the contention that the plaintiff cannot dispose of the said property without the concurrence of the sons and grandsons of the plaintiff. The plaintiff says that none of his sons or grandsons have any interest in or claim in respect of the said property, or any part thereof, and none of the plaintiff's sons or grandsons have made any claim in respect thereof, although prominent advertisements of the said intended sale were inserted in the local newspapers by the defendants' solicitors, and the usual Battaki was beaten." And in the prayers all that the plaintiff asks is that the defendant be ordered to complete, pay interest and costs and so forth. There is not a word about any declaration affecting the sons and grandsons, nor is any hint given of making them parties. Now a perusal of that plaint with all the correspondence which led up to it makes the relative positions of the real parties to the present litigation perfectly clear, at the date of its institution. The plaintiff's reliance upon his long exclusive possession, as absolving him from any further obligation to answer defendant's requisitions on title, evinces a surprising obtuseness to the most elementary principles of the Hindu law. It is difficult to understand how any responsible lawyers could have been found to advise the plaintiff in view of the decision in *Cassumbhoy v. Ahmedbhoy* 12 B. 280 that this circumstance could, assuming to be proved, suffice in itself to remove the doubt cast upon his title. I shall have occasion, I dare say, to make one or two more comments on the decision of that suit, as affecting the progress and result of the present litigation. But I need now only point out that it ended in a decision that during the life-time of the father Ahmed-bhoy, his sons could not, according to Khoja custom, enforce a partition of the family estate, even were that estate joint family, or joint ancestral family, estate., It is, therefore, perfectly obvious, that as far as it went it left the present question, namely, whether the property was "or was not ancestral, and, therefore, whether the sons and grandsons had or had not a vested interest in it, wholly untouched. And it follows as obviously that the possession of the father during his life-time could, in no sense, be adverse to his sons, or suffice in itself to give the father a complete title, should he desire, as in the present instance, he did desire to alienate any part of it. It is hardly less surprising to find, as the case developed, that the plaintiff relied on the decision of the Appeal Court in that case, as making all claims of his male issue upon any part of his property *res judicata*. It is clear from the correspondence that Ahmedbhoy was advised to adopt this attitude : so much so indeed that it has been said more than once in the course of this trial, that he did not believe he had anything at all to fear from his sons and grandsons. This view predominated so strongly at first, that in the plaint I am now considering they are not mentioned. Later as I shall presently show more cautions counsels appear to have prevailed, but still involved in the most curious confusion of ideas as to what really are the essential points to be kept in view to the exclusion of all others in deciding the really extremely simple question in issue between Ahmedbhoy and the executors of Bai Awabai. Thus

when the plaint came to be amended the sons and grandsons are made party defendants although the plaintiff still maintains that he does not anticipate any resistance from them, nor seeks any relief against them. Still, *ex majore cautela*, I suppose he throws in a prayer, that should they insist upon their rights as members of an undivided Hindu family, the Court will declare that they have no interest in the property which is the subject of this suit.

9. The point I wish to insist upon here is that when the plaint was filed, and so an end put to all further negotiations, the plaintiff contended and no doubt believed that he had made a good title. It was a mere afterthought, and I cannot help, saying a most unfortunate afterthought, to join his male issue, and so entangle the decision of what was a clear cut and well defined issue, with all sorts of other and wholly irrelevant considerations. When the plaintiff brought the defendants into Court in September 1907, all that was to be decided between them was whether the plaintiff had made out a good title, such a title as the Court would force upon an unwilling purchaser? If the suit had gone to trial on that footing it could not, I think, have occupied as many hours as it has in fact occupied days. The principles upon which Courts act in such cases are so simple, and, on the whole so well settled that, an hour or two's argument would have exhausted the subject. All the Court would have then had to say ( and I may add that notwithstanding what subsequently happened all that the Court now has to say) would have been whether, in the state of facts known to be existing when the plaintiff filed his suit, he had shown and made a title which the Court ought to compel the defendants to take?

10. The next step in the proceedings was this. Bai Awabai died in October 1907. Her executors, as soon as they had, had time to look into her affairs, rescinded the contract, by their solicitors' letter of the 14th January 1908.

11. What effect that act might have on their legal liabilities, will not, I think, need to be enquired into at any length. Doubtless it is a question which in some circumstances gives rise to difficulty. In England the majority of the cases seem to look at it from the point of view of the vendor's, not the purchaser's right to rescind—*Hoy v. Smythies* (1856) 22 Beav. 510 But, in my opinion, the point is not of any great importance in this case, where the issue is to be decided upon, general principles commonly governing a vendor's right to force his title upon an unwilling purchaser.

12. Next it appears that the plaintiff obtained three Chamber orders of 27th January 1908 and 3rd February 1908 allowing the plaint to be amended. I do not know how those orders came to be made, as far as I can see the order allowing amendment was a Prothonotary's order, and was probably *ex parte* and merely formal. But the result has been most unfortunate. On the 8th February the plaint was amended so as to bring the sons and grandsons of the plaintiff on the record as party defendants, and raise, as between them, the question whether the property in suit was joint family property or self-acquired property. Any one with an elementary knowledge of Hindu law, especially with the case law of this

Presidency on this subject, might have foreseen what would happen. Not only that but it ought, I think, to have been pretty clear that the result of this amendment would be to merge the issue between the plaintiff and the defendants, executors of Awa-bai deceased, in the much wider, more complicated and wholly different, issue, between plaintiff and his male issue. What has happened? Instead of a single suit between vendor and purchaser, hinging upon the question whether the former had made out a good title, the Court has two suits to decide which have hardly anything in common. It has to try the issue between vendor and purchaser, as it stood when the suit was filed, and it is further asked to try and decide the issue whether this property is the self-acquired or ancestral property of the plaintiff.

13. If the amendment had been refused, as it certainly ought, in my opinion, to have been refused, this confusion, and consequent waste of time and money would have been avoided. If, when after that amendment the trial began here, the defendant-executors had objected on the ground of misjoinder and stated their position plainly to the Court. I have no doubt the trial would have been over in a couple of days. But (again I think most unfortunately) the defendant-executera and the male issue of the plaintiff were represented by the same counsel. The plaintiff was allowed to open his case, defendants raised issues, and no exception whatever was taken to the array or the line of attack. The course of the case was from the first unusual and difficult to follow. An enormous mass of matter taken bodily out of the former suit of 1884 was by consent offered as evidence. While all this was being done I confess that I was unable to get a clear view of what both sides were aiming at. That is almost inevitable on the Original Side of this Court, when huge cases of this sort are brought up for trial. Pleadings are read through at high speed, a great number of issues are framed, and the Court has to pick its way by degrees as the case unfolds to what are the essential questions; and to discard superfluous and irrelevant matter. Ahmedbhoys examination, relieved by constant references to what had happened and what had been said in the previous suit, went on for days, while the Court was groping about for clues to what all this might really mean. The long searching cross-examination of Ahmedbhoys conducted by counsel for both the executors and the male issue appeared to be almost exclusively directed to establishing the facts of the latter. It was only by degrees that the Court realized the true state of affairs. As soon as I did, I at once pointed out to counsel for Ahmedbhoys that it looked as though there had been a misjoinder of parties and causes of action, as though this litigation had taken a hopelessly wrong turn, and if persisted in in that direction must inevitably prove, as to the greater part of what was being laid before the Court, wholly infructuous. The Court suggested that the plaintiff should abandon his claim against the executors and proceed, if he could, against his male issue, or leave them out altogether and keep to the narrow issue between himself and the executors. But counsel refused to adopt any suggestion of the kind. The usual arguments were pressed upon me. My view might be wrong. The Court of Appeal might take a different view. In any

case the parties meant to go to the Privy Council, and, therefore, the Court was bound to provide their Lordships there with the amplest materials upon which to rest a final judgment. Last it was said that by the time the Court had got a clear sight of what in its opinion was the only question to be answered, little evidence remained to be taken and the Court was earnestly requested to take what remained, so that whatever its own decision might be the superior tribunals might not be able to say that the record was too imperfect to allow them to deal with any or all matters, which in their opinion, if not in the opinion of; this Court, were property in controversy. It is true that by this time the case was coming to an end, and considering the time that had already been spent in tracing the sources of Ahmedbhoy's income, considering too that rightly or wrongly counsel for the executors joined with counsel for plaintiff in soliciting the Court to complete) the record, a day or two more or less did not seem to matter very much. So I consented to let the plaintiff finish his two cases together. Not that I was much impressed by the argument that my view upon the true nature, and proper principle of deciding this suit, might be wrong, and that if it were the Courts above might wish to be in a position to decide the further and immeasurably larger question between Ahmedbhoy and his sons. But there were just two points upon which I felt throughout the tedious enquiry into the history of the family fortunes, it was just possible that clearing up some at least of that mass of involved transactions might contribute to a correct answer to the question between Ahmedbhoy and the executors. These two points were: (1) Whether irrespective of the character of the whole of Ahmedbhoy's property, the deeds and accounts of this particular property standing alone might not suffice to make out Ahmedbhoy's title to it P (2) Whether even if this and all the rest of Ahmedbhoy's property were joint family property he might not have a good title to dispose of any part of it, without the concurrence of the other members of the family? I thought perhaps the elaborate and on the whole illogical investigation made by counsel on both sides, might throw some light on these points and if it did, it might after all turn out to have some value.. And it was not really till counsel for the executors opened in a few words for them, before addressing himself to the case of the male issue,, that it became clearer ever to my mind,, how utterly this trial had gone astray in its earlier stages. This conviction was confirmed as soon as Mr. Lowndes came in to sum up for the executors. Up to that time he had taken no part in the trial leaving his clients' case, with that of the sons and grandsons in the hands of his learned senior. Had these interests been in separate hands, had Mr. Lowndes been retained alone for the executors I feel sure that what, was made so unmistakably clear at the end, would have been made clear at the beginning of the case, and, so the Court and all concerned would have been saved a great deal of valuable time.

14. The plaintiff's position upon this point is, as I understood his learned Counsel when he finally addressed the Court, this. We Say we had a good title. We showed a good title The only real doubt upon it was whether the property belonged to us, or to us and A. B. C. Now how could we possibly clear that doubt

without suing A. B. C. and,, getting the Court's decision? And what better or more reasonable course could we have taken than joining A. B, C. with our purchasers, and .so making the title clear by a decision between all of us which would bind the only people who had any right (if they had any right which of course we deny) to dispueto our title?

15. That reasoning seemed to me so plainly wrong so staringly opposed to the principles which govern this branch of the law that I felt and still Peel some doubt whether it was seriously, meant. It is true that it gains some faint, and, I think, wholly fallacious colour from a comparatively modern innovation, a legislative innovation, in England. Certain acts of a very special character provide in that country fot joining parties who have registered claims against a property to be sold, in a suit between vendor and purchaser. And it does appear that those special Acts contemplate in special circumstances a departure Prom, the perfectly well-established rule that in suits for specific performance between vendor and purchaser, third parties cannot be brought in. Upon what principle this is done, I have not been able to satisfy myself. The old principle. is plain and, intelligible. It may, however, be conjectured, though this is a very diffident conjecture, that where within the scope and operation of these Acts, there is a formal registry of rights, and where upon an intended sale it is found that adverse rights have been registered against the property, the ascertainment of those rights, as well as their legal effect upon the title in dispute might be promptly and definitely ascertained. It is, to say. the least of it, possible that they might be as quickly and certainly proved or disproved, by deed or short parol, as any other point disputed upon the requisition on title, and ordinarily referred for enquiry after decree for specific performance. However that may he in the first place we have no acts of the kind in this country, and in the next place it is I apprehend as certian as anything can bo, that no such question as that which arises upon an assertion that a huge fortune dating back to an origin a century old, is self-acquired or not self-acquired, could ever arise or be dealt with in that summary way in England. Assertions of that kind are peculiar (as to ;the line of. investigation and proof) to this country and the administration of the Hindu law. Nothing of the kind is known in England. Nothing of the kind has ever entered into the heads of the Judges or Lawgivers of that country. No analogy drawn from the comparatively simple and. easily resolved disputes about registered titles or claims in England could be anything but. misleading when sought to be transferred to such a state of facts as that with which this Court is now confronted. While I do not suppose any competent person is at all likely to dispute that, I think that mutatis mutandis, when a Court in this country is asked. to decree specific performance, it will have recourse for guidance to the principles which have always found acceptance in like circumstances in the "English Courts. It is only when the principles come to be applied, when we have to analyze and fix degrees of doubtfulness, influencing the Court's discretion in forcing titles of that questionable kind upon purchasers, that the infinitely greater complexity of certain sets of facts, which would have to be gone into, proved,

and appreciated,. as well as the much greater uncertainty of the law, even when the facts are capable of being ascertained, which governs them, in this country contrast strikingly and a little discouragingly, with the corresponding elements of difficulty in applying the same principles to particular oases, in England.

16. Now as far as the English Courts are concerned, although there has been a considerable divergence of opinion upon minor points, the fundamental principles upon which this branch of the law rests, appear to me to be fairly clear and firmly established. Probably no better summary of the whole question can be found than in Chapter XVIII of Fry on Specific Performance upon which counsel for the executors and the plaintiff have almost exclusively drawn for their arguments. The first and widest principle-stated in the most general terms is that where the vendor of land sues the purchaser for specific performance of the contract, the defendant is entitled to have the action dismissed, if it appear that the plaintiff cannot make out a good title to the land. Now, of course, what is and what is not a good title is precisely the point to be found in cases of this" kind; also there may be differences owing to differences of procedure in England to which there is no equivalent in this country, in the method of deciding between the parties to such a dispute, what is a good title. And as I have said that I do not propose if I can help it to deviate a hair's breadth from the principles of the English Courts in dealing with matters of this kind, I shall have to examine one or two at least of the English cases, which may seem to suggest doubts and difficulties in the way I understand and apply those principles. *Baskcomb v. Phillips* (1856) 22 Beav. 510 decided that where the defect of title had not been put prominently forward but only appeared at the trial, the Court refused to grant specific performance. I note the case because from the reference it might be thought an indirect authority for the plaintiff's contention here, that any doubt thrown upon the title ought properly to be cleared up at the trial, and that in order to do so the party whose claim occasioned the doubt ought to be joined. For part of the plaintiff's argument was that the principle of all the English cases, so far as it bears on this point, is that specific performance is refused in England where a third party has a prima facie claim, because decreeing it in those" circumstances would not bind that third party and would still leave the purchaser exposed to a law suit. Therefore, it was said the proper course is to join the third person and settle his claim along with all other disputes arising between vendor and purchaser upon the requisitions etc Now as I have said if that argument had not been strenuously pressed upon the Court by the senior counsel at this bar, I should hardly have thought it merited notice. But as it was I must be careful to be sure, that what seems to me so obvious and incontrovertible, but what evidently did not appear to Mr. Inverarity to be anything of the kind really is so. And no doubt the procedure followed in England introduces some slight confusion Now in *Baskcomb v. Phillips* (1856) 22 Beav. 510 what happened was that the defendants refused to take up the lease because he found that the plaintiff had misrepresented material facts, such as that the water supply was constant, the fernery completed, the stables drained, and so on, none of which were" true.

Then there was a reference referred to in the judgment of the Master of the Rolls as a trial. At least that is what I gather from the report. The plaintiff was interrogated and his replies disclosed quite a new defect of title. The defendant: had not known of that when; he repudiated the lease. Still as it was a substantial defect, the Master of the Rolls refused to. force the title on the defendant although most of the objections he had raised were purely frivolous. I" also observe that the Master of the Rolls in giving judgment laid great stress on the fact that the dispute had been going on from March to December" and that the plaintiff even then was not in a position to give the defendant possession and a good title. As the defendant had entered into the contract on the understanding that ho was to have early possession, this fact alone appeared to the Master sufficient warrant, for refusing specific performance." And remembering that granting specific performance is always within the Court's discretion, this consideration must, in all cases, be weighty, did the-purchaser buy with the object of getting present possession? If he did, and if owing to a defect of title the vendor cannot give him present possession or anything like it, if he must be kept out for four or five years at least, would any Court force such a bargain on him?

17. I here note a sentence in Fry which no doubt helped to ground plaintiff's argument, "Though every title must in itself be either good or bad, there must be many titles which the Court cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting" both alternatives, and without having heard the evidence they might have to produce, and the arguments they might be able to urge; and it is in the absence of these parties that the question is generally agitated in proceedings for specific performance". The words "the question is generally agitated" appear on the face of them to imply that this is not and need not always be the case. So that the plaintiff might contend that as in the present trial those parties have been present, and all that they have to say has been heard the Court cannot avail itself of the common reasoning in support of the latitude allowed to Courts in England to refuse specific performance not because a title is bad but because it is doubtful. I shall have to say something more about that later. Here it is sufficient to say that I am obliged to conclude that the qualified form of Fry's expression is due to the special legislation I have already mentioned. For oases falling within it are tried on a full array of all concerned including the objectors to the plaintiff's title. J. must suppose that the sentence is really so limited, because I have not been able to find a single case in the English Courts (not falling within the scope of those Acts) in which the person, whose claim threw a doubt on the plaintiff's title, was made a party to the suit between the plaintiff-vendor and the defendant-vendee for specific performance. In *re the Trustees of Hellis Hospital* (1899) 2 Ch. 540 : 81 L.T. 90 W.R. 691 : 68 L.J. Ch. 673 is no exception; rather the reverse. There, it is true, that the person claiming adversely to the vendor was a party to the suit. But that was in his capacity as one of the trustees who were the vendors. In his private capacity, as claiming adversely to the trustees"

right to sell, he refused to plead or be bound by the decision. now in such a case had any English Judge, thought for a moment that it was proper to drag in a third party, make him a party; to the suit for specific performance, and try out the questions in issue between him and the vendor, this is the case in which it would have been done. For the only objector was, in fact, in another capacity before the Court, the Court held a very strong opinion against the validity of his claim, yet it would not join him, (though. that, claim rested entirely on the decision of a point of law and would not as far as I can see have involved taking evidence) and so after deciding upon that claim as between him and the trustees, declare the title good On the contrary, notwithstanding its opinion that the objector had no legal claim at all, none, that is to say, that the Court would be at all likely to affirm, what did the Court do? It refused to decree specific performance, for the sole reason that doing so would expose the purchaser to a suit at the instance of the objector. In other words the Court although it did virtually know all the facts which were material, and although it inclined to hold that the title was, or could be made good against the objector, held that it was a doubtful title as between vendor and purchaser, because this outstanding dispute could not be settled in that litigation, and remaining unsettled would or might expose the purchaser to immediate further litigation. I think that is about as strong a case as could be put against the plaintiff's argument that where the doubtfulness of the title depends upon the settlement of a bona fide claim, however shadowy, brought by a third person against the vendor, the Court is at liberty in a suit for specific performance to bring in that third party, and try his case, along with the case of the vendor and the vendee. The former of these two cases has obviously nothing to do with the latter. It is in no sense the same cause of action, nor are the legal interests involved in any sense the same. (Cf. Luckumsey Ooherda v. Fazulia Cassumbkap 5 B. 177. I hope I am making it, clear throughout all this part of my judgment that my observations apply to the state of affairs existing at the time the suit was filed, and not to the state of affairs which did exist, though in my opinion, it never ought to have existed when the trial was over, I wish to clear the ground in this way to a right understanding of what I believe to be the only real issue in this suit. Doing so involves a consideration of arguments which were addressed to the Court at the close of the trial, but which I do not think would have boon used had the amendment of the plaint not been allowed, and as a result had the litigation not been deflected into totally wrong channels.

18. Coming back now from what has been rather in the nature of a digression, to the simple question, was this a good title which the Court would enforce upon an unwilling purchaser when the suit was filed and negotiations broken off, let us first consider the basic principle of the English law on this subject.

19. The old practice of the Court of Chancery, says Fry, in all eases of dispute as to the title of the estate sold was to decide either for or against the validity of the title, and either to compel the purchaser to take it as good or to dismiss the bill, on the score of its being bad. This rule follows the logical process of dichotomy; a

thing is good or not good and so on. But the rigorous application of rules of logic has never been found possible in the administration of law. There are too many practical variations, and numerous cases under this head must always arise, in which it is virtually impossible for a Judge to say that a title is positively good or positively bad. Just as in practice, although the English law has refused to adopt the exception in criminal trials there constantly occur cases in which while a jury is loath to say that a man is positively proved to be guilty, the same jury would find still more difficulty in saying positively that the man was not guilty. The English law surmounts this difficulty by the doctrine that where there is a doubt the prisoner is to have the benefit of it; so that not guilty often means no more than that the Jury entertains a reasonable doubt on the evidence for the prosecution, whether the offence is brought home. The not proven verdict of Scotland is really far more logical and corresponds in the criminal law exactly with the "doubtful title" recognized by the English Courts since *Murrow v. Smith* (1723) 2 P. Wms. 198 which has frequently since that time been made the object of attack on the ground of its illogicality.

20. Still the doctrine stands. And it is plain that it ought to stand. It is as plain that it ought not to stand if "the plaintiff's" argument in this case is sound. For if it were open to Courts wherever a title is impugned, not for any defect in the deeds, but by reason of a third party claim involving the taking of evidence, and a separate, often an extremely complicated, trial to bring that party on the record and try that claim along with the other, there never could have been any room for the doctrine of doubtful titles, which has become firmly established and is indisputably a part of the law of England. If every possible doubt thrown upon the title might be tried out and resolved in the same suit, if that is to say where there were a dozen persons having a dozen distinct claims to a property, thirteen suits (including that for specific performance) might all be tried together, in the end it would be right to say that the Court could not feel any doubt at all, and that it would be in a position and logically bound to declare that the title was either good or bad. But such a procedure is wholly unknown to our system of law, and would directly conflict with the principles upon which Courts have always gone in the exercise of their discretionary power to force a title upon an unwilling purchaser.

21. Allowing a class of titles to be doubtful in the sense that the Courts of Equity would not force them on an unwilling purchaser, started with *Marlow v. Smith* (1723) 2 P. Wms. 198 and was settled by *Shapland v. Smith* (before Lord Thurlow) Lord Eldon did not approve of the rule but followed it, although he allowed himself to bewail the mischief he thought it occasioned. In spite of the doubts thus expressed by that great Judge the rule stood, and received the sanction of the House of Lords in *Parker v. Tootal* (1865) 11 H.L.C. 143

22. Now before going further, this is I think the place to limit and define, the scope and incidence of my remarks upon the principles which I feel I ought to follow, and my reasons for the conclusion to which I shall come-In determining

whether a title is so doubtful that a Court of Equity will not force it upon a purchaser, my first proposition is that the ground of that determination must be the state of facts existing at the time the suit was brought. I entirely dissent from the proposition that the Court ought to, or for that matter has the power to join parties who have separate adverse claims of their own after suit filed by the vendor against the vendee, and then start a trial of all that may be at issue between those third parties and the vendor, matters in which the vendee can have no interest, about which he knows nothing, and keep him dangling at the wheels of that litigation may be for years, so that at the end the Court may or may not be in a position to say that the result justifies it in forcing the title on him.

23. I say confidently that that ought not to be done, that it never has been done (excepting the procedure under special Acts) in England, that it never has been done in India, and that it is altogether contrary to the usually accepted principles of all litigation. And it follows that I am to dispose of this question as though the male issue had never been joined and as though no evidence had been gone into between them and the plaintiff, with the object of showing not only that this property, but all the rest of the property in the plaintiff's hands was joint family or joint ancestral family property, in which the said male issue had vested interests.

24. Considering, said Mr. Inverarity, that the only real doubt thrown upon this title is whether the vendor owned the property exclusively or in co-parcenary with his male issue, how is it possible for the Court to resolve that doubt without joining the male issue, and ascertaining what the true nature of the property, as between them and the plaintiff is? That argument appears to me to put an end to the plaintiff's case. If the title really is so doubtful, that no Court could say whether it was good or bad without undertaking a suit between all the members of an alleged joint Hindu family, and tracing back the source, as well as the developments, by way of accretions of the family wealth over more than a century, it seems to follow that the Court having no right or power, as I believe, to undertake any suit of the kind as part of this suit, would be compelled to adopt Mr. Inverarity's own alternative and say at once. At the time you profess to have shown and made your title, this great doubt hung over it." It is a doubt which no Judge in the world could presume to resolve upon such facts as were available to the vendor and the purchaser on the mere requisitions of title, and so the title is not so plainly good that any Court of Equity would force it on a purchaser. It is also quite plain from the course of the correspondence, and from what has occasionally been let fall here for the plaintiff, that that was his opinion, when he filed the suit. I mean that his opinion was that no question of this extremely complicated kind could fairly be raised. He believed that his male issue were already concluded for two reasons, by adverse possession, and by *res judicata*. If they really were, then his suit for specific performance would have been in order, and as far as I can see must have succeeded. Having thus blundered into it, relying upon very treacherous ground which soon began to

give way beneath him, the plaintiff bethought him of fortifying his position and correcting his mistakes by the extraordinary advice of gutting the whole huge question, latent no doubt for many years but none-the-less alive and really in issue between him and his descendants, decided as ancillary to this suit for specific performance. I told plaintiff more than once in the course of the trial that my own mind was perfectly clear on this point; I had not the least doubt that he was ill-advised and following a course that would end in a useless impasse. Nothing that was said for him by his learned and eminent counsel at the conclusion of the case, has shaken my conviction in the slightest degree. Rather, when I analyse the arguments that were used for that purpose they all tend to confirm my opinion. And I shall, therefore, now proceed to try the case as I think it ought to have been tried, from the commencement as a case between the plaintiff and the executors, on such facts as were available when the suit was filed and might properly have been laid before the Court on the trial of that suit.

25. Now what were the facts when the negotiations ended? There had been a suit in the year 1884 between one of the sons of the plaintiff and his father the plaintiff. In that-suit Cassum, the son, claimed that all his father's property was joint family property liable to partition. All that the Court of Appeal (where the suit ended) decided was, that according to Khoja law (or custom) a son" could not enforce partition by suit against his father. What followed was, in my judgment, merely obiter. The plaintiff relied on that. He thought it was res judicata. He thought that the Appeal Court had decided that his property was self-acquired. I held in an interlocutory judgment upon the preliminary issue of res judicata, that this was not so. I see no reason whatever to doubt the correctness of that ruling. Nothing was res judicata in that suit but the right of the sons to enforce a partition against their father during his life-time. And the implication certainly is that there was at least a possibility of their being able to claim a partition between themselves after their father's death. All that the public could know from that suit was that the sons claimed that the whole of Ahmed-bhoy's property was joint family property. That, as the result of a suit contained in a judgment of the Court, was common property; It was enough to put any cautious purchaser on enquiry. I repeat that if the concluding part of the Appeal Court's judgment does constitute a res judicala as to the nature of Ahmedbhoy's property then the plaintiff would succeed. If not we may leave that judgment aside altogether, as having no greater bearing on the present suit than I have ascribed to it, namely raising a well-founded doubt in the minds of the public generally as to Ahmedbhey's unqualified right to dispose of the whole or any part of his property.

26. Then there was the allegation of undisturbed exclusive possession since 1870. The plaintiff strongly relied on that also. But in view of the decision in Cassumbhoy v. Ahmedbhoy 12 B. 280 amd the general principles of the Hindu law governing the reciprocal rights and liabilities of members of joint family-principles I may add of which the application to Khojas is further complicated and obscured-by the uncertainty still existing-as to the precise extent to which that

community is governed by Hindu law, and how far where it is the rules of Hindu law may not be modified by Khoja custom-it is only too plain that the plaintiff was here propping himself on a very broken reed indeed.

27. further it is proved that the plaintiff tried to get his sons to renounce in writing all claims to this property. One of them was sent to the defendant's solicitors to admit that neither he nor any of the male issue had any interest whatever in it. But he refused to make any such admission, and the result of the interview must have been to convince the solicitor that in the interests of his client, the intending purchaser, it was indispensable that this point should be cleared.

28. Now if at this stage of the negotiations the plaintiff had frankly said, Your doubts are natural but they are quite groundless. I will, if you wish it, bring a suit against my male issue, and I will guarantee you against any loss, in consequence of that suit, so certain am I of my rights over this property," the position might have been different. I am not myself sure what view a Court might then have taken of the plaintiff's right to have specific performance, had the defendant then resiled.

29. But the plaintiff did nothing of the kind. He first makes time an essence of the contract and ho then becomes very peremptory, and insists upon the defendant completing. He declares that the objection to title is utterly frivolous; be the does not take any step at all to remove it. Ho comes at once into Court, alleging that ho has made a good title. As to any distinction which there may be between showing and making a good title-cf; Parr v. Lovegrove (1857) 4 Drowry 170-all I need say is that nothing, in my opinion, turns on it in this case. I am only concerned to see whether at the time the negotiations were broken off the plaintiff had shown or made (it does not much matter which) a good title, or was in a position-limiting the controversy to himself and his vendee-to do so.

30. That being the real position, as T. understand it, I will proceed to discuss the law governing the rights of the parties to it.

31. Now where the question is whether a title is good enough to be forced on a purchaser it has often been said that there is no room " for any doubt, that pretending a doubt is logically absurd and practically injurious. Every Court ought to know whether a title is good or bad. But we must remember that these confident assertions are made in England by English lawyers, with reference to conditions, and a systematized legal system, to which this country cansupply no counterpart. Probably those who maintain in England that us soon as a title is laid before a Judge he ought to know, as a Judge must know, whether it is good or bad, speak primarily with reference to legal interpretation, and that only. I do not suppose that they contemplate cases in which a claim might conceivably be brought against the title, to settle which would necessitate a long trial between third parties and the taking of am enormous amount of evidence, upon questions of fact. Of course, they might in England even contemplate as much as that, and

yet say that a Judge ought to be able to say, merely on the requisitions and answers, and such further enquiry as is made on the reference, whether there was any possibility of such a claim being successful. Circumstances are so widely different in England and in India, that no such instance as a dispute between members of a Hindu family about the nature of the family funds, their mode of acquisition, and their first origin could ever have entered the head, or touched the imagination of an English lawyer.

32. Quoting again from Fry on this point. It must be remembered that a judgment of the Court in such an action is in personam and not in rem; that it binds only those who are parties to the action, and those claiming through them, and in no way decides the question in issue as against the rest of the world." Upon this Mr. Inverarity, as I before pointed out, argued that in the present case, the judgment would in effect be in rem, as every one who had any interest in the property had been made party to the suit. But if that had been contemplated as possible in England, Fry would not have laid down this line of reasoning. He would have said at once that it was bad, for that the difficulty could and ought to be removed in every case by bringing the objectors on the record, and trying all the suit together. (Cf. remarks of Jessel, M. R., in *Osborne to Rowlett*, (1880) 13 ch. D. 774 It is not easy to gather from the report what the learned Master of the Rolls had in mind when he referred regretfully to the "old rule" as being sounder law in the interests and for safeguarding of purchasers; or what his exact meaning was in referring to *Alexander v. Mills* (1870) L.R. 6 Ch. p. 124 with approval, while pointing out that decisions of this kind did not technically bind any one not a party to the suit, and, therefore, would not prevent the purchaser being exposed to further litigation. Probably the parties he had in mind were parties who might have objected on the same grounds, that is, on the construction of the deeds, or their legal effect. But what would have been said to a claim which is in effect this. The vendor is not sole owner of the property. I am a co-owner; the fact cannot possibly be proved by any deed. It will have to be proved by an enquiry into the history of, the family,. and the conduct of its businesses, varying in kinds, carried on under different names, for. more than a century in all. It will have to be proved by an exhaustive examination of hundreds of account books, and a multitude of collateral facts, of which little direct evidence now survives; and when all the facts are found, the legal effect to be given to them will depend upon a branch " of the law which is still extremely unsettled, and in which very often apparently conflicting decisions are being constantly given. That is a kind of difficulty which I am quite certain never presented itself to any of the great English Judges who have built up this part of the English law. Turning to *Alexander v. Mills* (1870) L.R. 6 Ch. p. 124 James, L.J. says: "We do not say that there may not be cases in which a question of law may be considered so doubtful that a Court would not on its own view compel a purchaser to take a title; still as a general and almost universal rule the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may, what the law is, and to take that to be

the law which it has so ascertained and determined. The exceptions to this will probably be found to consist, not in pure questions of legal principle but in cases where the difficulty and doubt arise, in ascertaining the true construction and legal operation of some ill expressed and inartificial instrument." This is the dictum to which Jessel, M. R., refers with complete approval. It serves to illustrate the distinction which I feel so strongly. Where the only doubt to be resolved is a doubt about the law (implying that all the facts are known) I agree that the Court ought to decide whether the title is good or bad in law. But observe, the Court has in view a case strictly limited to the vendor and purchaser; between them the duty of the Court, as in all other cases is clear, it must decide what is in controversy. But that is a different thing from saying that it can predict with certainty what will be the end of another litigation; also a very different thing from saying that it ought itself to take up that litigation, link it with the litigation between vendor and purchaser and then decide the two together.

33. Fry continues" "If therefore there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the" Court may consider this to be a circumstance which renders the bargain a hard one for the purchaser, and one, which in the exercise of its discretion, it will not compel him to execute." And again, concluding this part of the discussion. " The Court, when fully informed, must know whether a title be good or bad; when partially informed it often may and ought "to doubt." On this I pause. Of course the plaintiff's argument is that the Court is now fully informed, and, therefore, must know whether the title is good or bad, That is all very well; but I am not to be drawn off the proper line of this litigation, by the unfortunate circumstance, that wrong parties were joined, and that what was originally and ought to have been kept a suit for specific performance, has developed into a suit for a declaration between Ahmedbho'y and his male issue, that the latter have no interest in this property. The real question is, in applying that principle whether when the suit was filed and if after being filed it, had been kept within its proper bounds the Court could or would have been fully informed, whether it would not and ought not to have felt a doubt? Let me now following Fry consider what the amount of doubt is which should justify a Court of Equity in refusing to decree specific performance. One mode of measuring the doubt has been by applying the question whether it is such a title as that the Judge himself would lend his own money upon it. Lord Eldon said in *Jervoise v. Duke of Northumberland* (1820) 1 J. & W. 559 : "The Court has almost gone the length of saying that unless it is so confident that if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it." Now we know that Lord Eldon viewed the class of doubtful titles with considerable disapproval. And here no doubt Lord Eldon expresses that disapproval in what is meant to be an extreme case, But, I confess I do not see that it is an extreme case at all. On the assumption that Judges, ought to know the law, that they must know whether a title is good or bad what extra

veganee is there in requiring that a Judge who is so confident as to force the title on a reluctant purchaser, should be willing to invest all his own money in it? Ex hypothesi he is certain that it is a good title; therefore, there is no risk at all. The title must be good or bad; the Judge knows it is good; let him stake his own money on his conviction. That seems to me a perfectly fair test; though I fancy that were it practically insisted upon, we should find judicial language suddenly modified, and a much stronger inclination in favour of doubtful titles characterizing judicial minds.

34. What a Judge forces upon a purchaser as good, he ought to be willing to take himself as good, And those Judges who have hold the loftiest language about the absurdity and impropriety of other Judges giving effect to judicial doubts about the invulnerability of a title, might conceivably shrink from accepting the personal test. In England the questions of law which Judges are called upon to decide before decreeing specific performance, are comparatively simple; most of them are or ought to be referable to well-settled principles. In other words the law is clear, it is well-known, and there is relatively little difficulty in applying it, Even so, as the case law on this subject shows, there have been endless differences of opinion. One Judge has held a title bad, and another Judge has held the same title good. These have been Judges of the greatest eminence, an eminence to which no Judge of an Indian Court can think of aspiring. Yet one or the other of these great Judges did not know the law; and if he had staked his ? 95,000 on the title he would have lost it. After such an experience it is unlikely that ho would ever have declared a title good again. In India the position is altogether different, especially where the vexed question turns upon applying the principles, such as they are or can be said to be settled, of the Hindu law, and applying them too to a set of facts, which for mass and. intricacy have hardly a parallel in English Courts. It is not too much to say that no Judge in India, confronted with a claim by sons to vested interests in the large accumulations of a Hindu merchant, when the family history goes back over a hundred years, would care to risk a sixpence, let alone ?95,000 on his decision, (after trial) both upon the facts and the law being certainly correct. And before such a trial, how can he really have any such opinion at all? How is he to decide whether property is self-acquired or ancestral? Let us remember all that is implied in this claim. The law itself really does not" present much difficulty; although there are points upon which the law still vacillates. But taking it to be the law that where there has been a nucleus, of ancestral property, all accretions, referable to that nucleus and not consistently kept separate from it, and acquired without detriment to the ancestral fund, partake of its character, as water flowing in to a cistern from two pipes of different diameters, nevertheless when the cistern is full is indistinguishable, no one drop being possibly referable to this or to that pipe, conceive what sort of an enquiry this opens up? And before the enquiry has been made who would be bold enough to say what the result would be? First it is to be found whether there was a nucleus or not. Then if there was not, it is to be found whether the family constituted itself a joint family at a later stage without a

nucleus. And in either case every source of income has to be scrutinized, and its proper and peculiar character assigned to it. In the case of rich localized families like that of Ahmedbhoy,. Khojas, who did not know they were governed by the Hindu law till the Courts told them so not very long ago, a suit of Such a kind as that which the plaintiff has ingeniously tacked on to his suit, for specific performance would mean reviewing the, whole family history back to the first member who can be shown to have had more than enough money to get himself buried, an enquiry which widens out with the increasing prosperity of the family, until it embraces the history and accounts of half a dozen partnerships, and the analysis of more accounts in one suit, than probably come by, way of evidence directly before; any English Court in ten years of litigation. As I said before there is not only this difficulty, which is serious enough, but in the case of Khojas the law is still almost in embryo. Most unfortunately I cannot help thinking for themselves, the Khojas have in comparatively recent times been declared subject to the Hindu law of inheritance and succession; Considering that their leading men reside chiefly in Bombay, and are eminent in trade; leading merchants on a large scale, they will soon feel, I expect, if they do not already, feel, the case law affecting them in this manner, to be intolerable and disastrous, It. is not even certain. It is limited to inheritance and succession. It has not yet taken into account such an obvious matter as alienation, though I presume that that will be regarded by the Courts as comprised within succession. Already the Courts have gone out of their way to give the Khojas a separate law of partition, and surely a most remarkable law? While under the general principles of the Hindu law a son has a vested right in all his father's estate, other than self-acquired property, he has no right to enforce a partition. And apparently he may be turned out, and left wholly unprovided for until his father dies. It would seem to be a logical corollary to this that no restrictions are imposed upon a Khoja father's power to alienate during his life-time. But that is a point I must deal with separately, as it has." always seemed to me to be the strongest point in the whole of the plaintiff's case, although it was not mentioned by defendants' counsel at all, and only by plaintiff's counsel at the very end of his concluding address. It can scarcely be said to be definitely raised in the pleadings, though, of course, it may come in under the general head of the allegation that the plaintiff did" make a good title. I believe, however, that it did not occur to counsel on either side till almost the last words in the case were being said. I had often had it on my tongue to mention, but I expected every moment that the defendant would deal with it, and whether he did or not I meant. to consider it for myself should it be wholly overlooked by the learned gentlemen concerned. Thus then we see that while the administration of the Hindu law by our Courts is very far indeed from being consistent or as yet systematized, while judgments are constantly emanating from the highest tribunal, which it is not too much to say take the profession in this country by surprise, and are hard to reconcile with former decision, or what the text-books lay down as the fundamental principles of Hindu law, while in a word Hindu law is still in a state of flux and undergoing repeated modifications at the hands of our Judges, the Khoja law is vastly vaguer

and more indeterminate.

35. Such then are the facts and such the law upon both of which a Court may be asked to decide unhesitatingly, and without any of the members of the family being parties to the suit (for they have no right to be parties and should not be parties, unless they join in the conveyance") whether the impugned title of the father claiming that the property is his exclusive self-acquisition is good or bad.

36. In *Williams v. Scott* (1900) A.C. 409 : 69 L.J.P.C. 77 : 82 L.T. 727 : 49 W.R. 33 the Privy Council refused to force the title on the purchaser not only because the purchaser would be running the risk of proceedings being taken by the costui quc trust to re-open the transaction; ho would be saddled with a property which he would be unable for many years to put upon the market unless recourse was had to some special restrictive condition. Now, would not that principle apply here, supposing that all the Court knew was that the sons claimed a vested interest in the property, and that that interest could not be adjudicated, unless the father cared to make the first move, until he died, which might be ten or it might be forty years. I think the true principles are very clearly expressed in *Pyrke v. Waddingham* (1852) 10 Hare 1 Turner, V.C. after stating that the title would be good in certain contingencies (the question arose on the construction of a will), went on; It has now for so long a time been the settled rule of Courts of Equity, not to compel a purchaser to accept a doubtful title, that it is quite unnecessary for me to make any observations on that subject; but I have found it necessary to look into the question what titles are to be considered doubtful within the meaning of this rule, whether the rule applies only in those cases in which the Court itself entertain doubts upon the title, or whether it extends further to eases in which although the Court itself may entertain an opinion in favor of the title it is satisfied, that that opinion may fairly and reasonably be questioned by other competent persons." Now the latter part of that dictum may be neglected I think, It can scarcely be the business of a Court to speculate upon what other competent persons may think of the correctness or otherwise of its decision. And this opened the way to all those rather conflicting cases in which the opinion of some other even inferior Court was or was not held enough to make the title doubtful. On that Lord St. Leonards made some forcible remarks in *Sheppard v. Doolan* (1862) 3 Dr. & W. 8 A good deal was said in the argument of the effect which Jardinc, J.'s decision in *Cas-sumbhoy v. Ahmedbhoy* 12 B. 280 ought to have on my mindnowin considering whether Ahmedbhoy's title was good or bad. Jardine, J. in that suit held that the property was ancestral, and that Cassum was entitled to partition. And so it was contended that one learned Judge having come to that conclusion, it would be impossible for another, oven after re-hearing the whole case, to say that the contrary conclusion was wholly beyond doubt. On the other hand plaintiff contended that as Jardine, J.'s judgment was reversed in appeal, by a parity of reasoning this Court ought now to feel no doubt that Ahmedbhoy's title was good. Of course that does not follow. It is not well-reasoned, and in strictness Mr. Lowndes is right. It might be an occasion of doubt that another learned Judge of equal authority in this Court

held that all the property was ancestral; but it would not make the title more or less doubtful that the Court of Appeal reversed that decision on another ground, and added obiter, that it did not agree with the learned Judge below upon the character of the property either.

37. Going back to Pyrkas case (14), we find the Vice Chancellor stating that from Lord Eldon's time the rule rests on this that the purchaser is entitled to require a marketable title, (unfortunately an accurate analysis of the terms shows that this is arguing in a circle), and further on that this is the true rule, is I think, the more apparent from the repeated, decisions that the Court will not compel the purchaser to take a title which will expose him to litigation or hazard."The learned Vice Chancellor proceeds to give the scale upon which the doubt is to be measured, "If the doubts arise upon a question of the general law the Court is to judge whether the general law upon that point is or is not settled, enforcing specific performance in the one case and refusing to enforce it in the other. If the doubt arises upon the construction of particular instruments and the Court is it self doubtful upon the points, specific performance must, of course, be refused. And even though the Court may lean in favour of the title its duty is either as expressed by Lord Eldon in *Jarvoise v. Duke of Northumberland* (1820) 1 J. & W. 559 to consider whether it would trust its own money upon the title, or at least to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances which neither the purchaser nor the Court has the means of satisfactorily investigating, specific performance is to be refused." Now that last sentence appears to me to lit this case exactly. It is clear that without making the male issue parties to this suit neither the purchaser nor the Court could satisfactorily investigate all the extrinsic circumstances necessary to be investigated before the doubt could be resolved. Observe not a word is said or the remotest hint given of the feasibility of joining those other persons with whose co-operation the extrinsic circumstances might be satisfactorily investigated in the suit. *Turner, V. C.*, goes on: "I think that each case must depend upon the nature of the objection and the weight which the Court may be disposed to attach to it and that in determining whether specific performance is to be enforced or not, it must not be lost sight of that the exercise of the Court of its jurisdiction in cases of specific performance is discretionary; and that, as was observed in *Cooper v. Denne*, the Court has no means of binding the question as against adverse claimants or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well-founded." Now I glean a great deal of useful matter from these observations. For one thing it is plain beyond doubt that had such a case as this come before *Turner, V.C.*, at the stage when the suit was filed, and had he realized all that was involved in the objection, he would, upon the principles he has enunciated, have unhesitatingly refused specific performance. The cases he contemplates are all cases in which the doubt arises upon the general law of the land or the particular construction of documents. Even in such cases there may be extrinsic circumstances which

cannot be satisfactorily cleared up between the vendor and purchaser but they could hardly be of the extensive and complicated kind with which this objection confronts the Court. It appears to me equally certain that had the proposal been made to Lord Turner to join the male issue, and their go on to try, the suit between them and the plaintiff as an incident and preliminary to the suit of the plaintiff for specific performance, it would have been utterly scouted. In each case we are to look at the nature of the objection, And it is safe to say, I think after studying the whole case law on this subject, that it is only where the doubt thrown upon the title arises out of the law, general, or particular, that a Judge ought to confidently decide it. Where, further, in order to prepare for the application of the law. disputed facts have to be proved, as of course they often have, the Court is to consider whether the facts are of a nature which can be adequately, and with some prospect of finality, be found between vendor and vendee. For if they go beyond that, and the proof of them depends more or less upon resources and knowledge peculiar to third parties, then as those parties cannot be joined in the suit, nor can be bound by the decision, it would be going too far, first to say that the Court could give a confident judgment upon what must be ex hypothesi imperfect materials, second, that it ought to try to do so, when doing so would expose the purchaser to further litigation, Hence the old rule of thumb that no man ought to be forced to buy a law suit. And a very sound practical rule too. But if the procedure which has been followed here and which as the plaintiff admits was necessary if he was to have any chance of success, is the right procedure, the purchaser is not only compelled to buy a possible law suit, but has one ready made thrown in with the rest of the bargain. He cannot escape it. The position is absurd. He is tied already to the tail of a litigation, to avoid which he rescinded his contract. And the Court is gravely told that whatever decision it comes to upon this heavy and costly litigation neither party will accept it but will carry it through to the Court of final appeal. And willy nilly I suppose the unhappy purchaser must go along with these refractory litigants through this Court, and the Court of Appeal, and then to England where in four or five years he may reasonably hope their Lordships of the Privy Council will be in a position to give a final decision. That is ludicrous enough, but after all it is not so bad as what the defendants had to expect if what ought to have been done had been done, and this litigation between the vendor and his own male issue postponed. For them, assuming that the defendants had had this title forced upon them, there can be no question that they would have been exposed to the risk of precisely this litigation as soon as Ahmedbhoy died, with the difference, that they would have had to pay all the costs of the plaintiffs had the plaintiffs succeeded; whereas if this matter went on as it has begun, and the decision were finally against Ahmedbhoy and in favour of his sons, Ahmedbhoy would have had to defray the taxed costs of the whole and that comes to this, that supposing with this imminent possibility before it the Court had forced the purchaser to take the title and pay say four and a half lacs to Ahmedbhoy, no sooner does he die, than the purchasers will have to prepare to defend themselves in a litigation, which upon the most moderate computation would

hardly cost them less than another lac before they came to the end of it. Suits of this kind, in this Court, have unfortunately become so unwieldy, and from their very nature susceptible of almost indefinite protraction, while every account book that has ever been used in the business of the family is labouriously inspected, and laid out in detail before the Court that any litigant who embarks upon such a suit would I suspect reckon himself fortunate if success cost him less than half a lac while failure would, of course, be much more costly. A law suit in England is forbidding enough, and no wonder that Chancery Judges hesitated to force purchasers into one. But as things are going in this country, an English suit is child's play to one of these big Indian cases. It, therefore, behoves Judges here to be still more careful before forcing a title on a purchaser to be quite sure that it will not involve him in litigation at all, if that be possible, but at any rate in unsuccessful litigation. I will, before passing on from *Pyrke v. Waddingham* (1852) 10 Hare 1 repeat that one of Lord Turner's guiding principles was that where the doubt arose on the general law, if that law were still unsettled, specific performance ought to be refused. And this has an important and direct bearing upon the decision of this case in two ways. First, can it be said that the law governing Khojas is settled? Can it be said that it is yet settled law that property bequeathed by will to a son is taken as self-acquired property? Is it settled law that a Khoja father can alienate ancestral property during his life-time without the consent of his sons. I shall have to say a word or two upon these points" later in their place, after I have finished what I may call the more general part of my judgment.

38. *De Hoghton v. Money* (1866) L.R. 2 Ch. App. 164 is only important for this reason that it very emphatically lays down the principle that a party to a contract cannot enforce specific performance against those who were not parties to the contract. Turner, L. J. says : The defendants against whom this bill has been dismissed and against whom this appeal insists that it ought not to have been dismissed were not parties to this agreement. They were entire strangers to it claiming under an adverse title, and I take it to be well settled, both upon principle and authority, that a mere stranger claiming under an adverse title, cannot be made a party to a suit for specific performance. There is no equity against him independently of the agreement, and the agreement, to which he was not a party, cannot create such an equity." Now is not that precisely the case here? All the male issues are, wholly outside this agreement; they were not parties to it and cannot, upon any principle which occurs to me, be made parties to a suit for its specific performance.

39. *Palmer v. Locke* (1881) 18 Ch. D. 381 a later case than *Sheppard v. Doolan* (1862) 3 Dr. & W. 8 appears to take the law back to where it stood after *Pyrke v. Waddingham* (1852) 10 Hare 1 This was a question of law decided, it is to be noted originally by Jossel, M. R., who in *Osborne v. Roullet* had adopted the language of *Sheppard v. Doolan* (1862) 3 Dr. & W. 8 and the Court of Appeal held that the title was too doubtful to be forced on the purchaser. Selborne, L. C. said: "It does not appear to me necessary to say positively and finally that the law is

one way or the other on the point argued. There are many cases in which it is necessary and proper to do so, but when you have a question raised upon the construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities or that the previous authorities are conflicting, then, in the terms of Lord Justice Turner's judgment in *Pyrke v. Waddinyham* (1852) 10 Hare 1 that cannot be treated as a question of general law so settled as to exclude that kind of question which the Court has paid regard to when it sees there is a doubtful question of title which cannot be forced upon a purchaser.... When the Court finds, according to the principles explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought not to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable, that the Court, whatever may be the opinion it has formed upon the question and on the materials presented in a suit for specific performance, should think that that should conclude all questions as against persons who are not before it."

40. On this the comment suggests itself, that at the time the parties to this sale fell out the matter in difference between them did not turn on any rule of the general law. For the general law is clear enough that if Hindus hold property jointly, all have a vested interest in it, if one of a joint family has self-acquired property the others have no interest in it. True, the plaintiff relied on one or two other points, as for instance that he had taken his estate under his father's will, and the law is that what passes under a will comes into the hands of a devisee as self-acquired and not ancestral property; also as I have before said on *res judicata*, and adverse possession. But speaking broadly the main question was not a question of law at all but a question of fact answering which would necessarily entail taking a vast amount of evidence in a suit between the plaintiff and others who were not parties to this contract and, therefore, not subject to any of its terms, conditions, or resultant equities whatever they might be.

41. Fry lays it down that the doubt may be a doubt arising out of the general law, or the construction of particular instruments, or it may be a doubt of fact.

42. I have shown that in this case the doubt is really of the latter kind. As to that "Fry says the doubt may be as to facts appearing on the title, or facts extrinsic to it. Again it may be about a matter of fact which admits of proof but which has not been satisfactorily proved. The learned author then attempts a classification, parts of which are highly instructive. He conceives that the Court would consider a title doubtful where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable. the Court, to use a favourite expression, will not compel the purchaser to buy a law suit. *Price v. Strange* (1820) 6 Mad. 159; *In Re Hollis' Hospital* (1899) 2 Ch. 540 : 81 L.T. 90; 47 W.R. 691 : 68 L.J. Ch. 673 There the reverter had given notice, and this was taken to be a threat, making it probable that the purchaser would be exposed to litigation, although the Court knowing all the facts was confident that that litigation would fail. Now that is a much stronger case than this for while the litigation was as

certain to follow here as In Re Hollis (1899) 2 Ch. 540 : 81 L.T. 90 W.R. 691 : 68 L.J. Ch. 673 no Court could possibly forecast the result, unless indeed it accepted without any qualification the rule laid down in Sir Mangal-das" case; and even then it is doubtful whether the male issue might not have persuaded the Court to go further back and enquire into the character of Habibbhoy's property. The unwillingness of the Court is increased where the title depends on a question of fact to be proved by the oral testimony of witnesses, whom, at the time when the controversy is raised, it may be difficult to find, or who may be dead, or out of the jurisdiction. That is to say, when the witnesses are of a kind who might all be brought before the Court by one or other of the parties to the contract. Much more than must the doubt be increased when the facts to be proved would have to be proved by other parties not parties to the contract, who could not, therefore, properly be brought before the Court at all in a suit for specific performance. Now applying this passage to the facts of the case before me, it comes to this; a question of fact was raised between Ahmed-bhoy and Awabai, namely, whether the property to be sold was the self-acquired, or the joint family property of the vendor. That fact could only be proved as between these parties, if it could be proved at all, by bringing forward witnesses to the whole commercial history of the family from the beginning of the 19th century. Many of those witnesses have long been dead, many could not now be found. It is clearly a case in which the doubt would be sensibly increased by such considerations. And it is pretty certain that if such questions ever could arise in England no English Court, acting on the well-settled principles governing this branch of the law, would be in any doubt as to what ought to be done.

43. I am not to be supposed to think that every title is doubtful, which depends in any degree upon proof of fact. For virtually every dispute involves in the last analysis some question of fact. But there are facts and facts; and it seems to me that the true rule is that where the doubtfulness of the title cannot be resolved except by proof of facts extrinsic to it, and agitated between parties other than parties to the contract of sale, no Court would force that title on a purchaser. Thus in *Smith v. Death* (1820) 5 Mad. 371; *Leach, V.C.* held that it could not be insisted that the purchaser was not bound to take a title which in some measure depended upon matter of fact, for almost every title must in some degree depend upon such matter that the matter of fact upon which a title depended might be such as not in its nature to be capable of satisfactory proof as in the case of *Lowes v. Lush* (1808) 14 Vesey 547 (decided by Sir W. Grant) and such a title a purchaser could not be compelled to take; or the fact might in its nature be capable of satisfactory proof, and yet, not satisfactorily proved.

44. In *Lowes v. Lush* (1808) 14 Vesey 547 an act of bankruptcy was proved, and Sir W. Grant held that a purchaser could not be compelled to take a title depending on evidence that the alleged bankrupt was not so indebted that a commission could issue. It will be seen I think from all these cases, what kind of facts were to be proved, how they were to be proved and how very cautious even in such cases the Court was of the purchaser's interests. There is no case, as far

as my researches have gone, in the least resembling this, or that can by any fair analogy be said to support the plaintiff's contention, that the doubt raised was of a kind which might rightly be resolved upon a trial between the objectors and himself, enclosed so to speak, in the trial of the main issue between himself and his purchaser.

45. Fry continues his classification thus:

(ii) Where there has been a decision by a Court of co-ordinate jurisdiction adverse to the title or to the principle upon which the title rests, though the Court thinks that decision wrong.

46. The defendants rely on this, because of the decision of *Jardine, J.* But I do not attach much importance to it.

(iii) Where there has been a decision in favour of the title which the Court thinks wrong."

(v) Where the title rests on a presumption of fact of such a kind that if the question of fact were before a jury, it would be the duty of the judge not to give a clear direction in favour of the fact, but to leave the jury to draw their own conclusion from the evidence." See *Lowes v. Lush* (1808) 14 Vesey 547; *Freer v. Hesse* (1883) 4 Gex. M. & G. 495 : 22 L.J. Ch. 597 : 2 Eq. R. 13; *Eyton v. Dicken* (1817) 4 Price 303 This appears, to be a good sound practical rule. Applying it, no Court assuming that such a question as that raised by the main issue were to be tried before a jury could suppose for a moment, that it would be its duty to give a clear direction in favour of plaintiff's assertion of fact. Most assuredly, it would be for the jury to find on the evidence, what was the true character of Ahmedbhoys's estate. In *re Douglas and Powell's Contract* (1902) 2 Ch. 296 : 71 L.J. Ch. 850 *Byrne, J.*, said, But apart from this, and assuming that I am wrong in the view I take, it is quite clear that the title is one depending on the establishment of facts and dealings of a complicated, and in some instances of an ambiguous nature, such as are not merely practically capable of being challenged, or put in issue, but not unlikely to be raised, and with a reasonable chance of success.... I think I ought to follow the course pursued in other cases the last of which is *In re Handman and Willcox Contract* (1902) 2 Ch. 296 : 71 L.J. Ch. 850 and hold that the title is not one which ought to be forced upon a purchaser." In *In re Handman and Willcox Contract* (1902) 2 Ch. 296 : 71 L.J. Ch. 850 the Court of Appeal held following *Freer v. Hesse* (1883) 4 De. Gex. M. & G. 495 : 22 L.J. Ch. 597 : 2 Eq. R. 13 that assuming that the lease was voidable only and not void, the title was not such as ought to be forced upon the purchaser, since it depended on a doubtful question of fact namely whether his predecessor-in-title, the vendor, purchased without notice of the defect in the title. *Cozens Hardy, L. J.*, in the course of his judgment quotes the judgment of *Knight Bruce, L. J.* in *Freer v. Hesse*, (1883) 4 De. Gex. M. & G. 495 : 22 L.J. Ch. 597 : 2 Eq. R. 13 where he says, "This is a question not between incumbrancers claiming rights against the estate; it is one arising in a suit for specific

performance between the person in possession who wishes to sell the estate, and the person to whom he wishes to sell it and the safety of the title depends for this purpose on the point whether the vendor had notice of the encumbrance. The vendor says that he had not. His agents say they had not. This is perhaps true; but I am not aware of any instance, and counsel have not been able to supply any to the Court of a title depending on such a fact being forced on a purchaser." Then Cozens Hardy, L. J., goes on, I think that is still good law. I should not hesitate to force upon a purchaser a title depending upon the construction and effect of a general statute, even though my view differed from that of the Court below. A striking instance of this is furnished by *In re Garter and Kenderdine's Contract* (1897) 1 Ch. 776 : 76 L.T. 475 W.R. 484 : 4 Hanson 34 : 66 L.J. Ch. 408 But different considerations apply where the title depends upon the proof of a fact, such as notice or want of notice. The decision of the Court in such a case based upon the evidence before it would not be binding upon or indeed in any way influence the Court in a litigation between other parties where different evidence might be adduced." Of course, this brings up again the peculiar difficulty of the present case, where that which, in my opinion, ought not to have been done has been done, and has so given the plaintiff the opportunity of distinguishing between the reason of so many of the decisions in the English cases, and the reason which he maintains now governs or ought to govern the decision in this case. But I remain quite unshaken in my belief that the principle of this decision must be precisely the same as the principle of the long course of English decisions. The Court has to decide one point and one point only, whether the title which the plaintiff had to offer when the suit was filed was such a title as the Court would force upon a purchaser, and the decision of that point is not to be affected by the course which the litigation has, since the filing of the suit, been allowed to take. After a careful study of the cases in which Fry conceives that the Court would not consider the title doubtful and would force it on a purchaser, I am of opinion, that none of them can be of any assistance to the plaintiff. The only case which in principle might be thought to touch the principle of this case, and possibly to be capable of being extended far enough to, at least, throw some light on it is *Spencer v. Topham* (260). There Lord Romilly, M. ft., forced on an unwilling purchaser a title depending on the validity of a purchase by a solicitor from his client on proof of the validity of the transaction, though given in the absence of the client, who, it was urged might possess other evidence and ultimately set aside the sale. There the possible invalidity of the title depended upon facts that might have been in issue between Spencer's vendor Moss Phillips, and one Bate, a client of Moss Phillips. There is no suggestion that Bates had made or would make any claim to have his sale to Moss Phillips set aside. But the Court dealt with the case in this way. Assuming such a claim to have been made the onus of proving bona fides etc. would have on Moss Phillips. And in this action he had given that evidence, although not against Bates. Lord Romilly thought it was enough to prove good faith and so forth. That got rid of all the special difficulties. All that remained open was the question of adequacy of price, and of course that could be as well tried and

decided in this action as in an action between Bate and Moss Phillips. That is essentially a different case from this. Here the doubt thrown on the plaintiff's title, involves an enquiry of an altogether different and more comprehensive sort. Besides while in *Spencer v. Topham* (1856) 22 Beav. 573 there was no more than a possibility and a remote possibility that the objection would ever be taken at all, here it had in effect been taken already, at the interview between Hussain and the defendants' solicitors, when Hussain declined to renounce his rights in the property to be sold. It was perfectly certain, and that, too, to the knowledge of all the parties, that the plaintiff's title would be challenged after his death. Nor could any amount of evidence given by the plaintiff, as now appears, and is, I think, admitted by his counsel, have availed to lay that doubt to rest, unless the other claimants had been parties to the suit. That is enough to distinguish this from *Spencer's* case.

47. This preliminary critical analysis has, I think, cleared the way and enabled me to establish beyond all possibility of serious doubt the main premises upon which the further treatment of the case depends.

48. The first and the most important of these is, that in a suit by a vendor for specific performance, only the parties to the contract, can, in the absence of special legislation, be properly parties to the suit. But for the line of argument adopted by plaintiff's counsel in this case, I should have thought that an almost self-evident proposition, resting on unimpeachable authority, referable to the plainest principle, and uniformly accepted in all the Courts of England and India. It was briefly and clearly affirmed in this Court by Sir C. Sargent. *Luchumsey Ookarda v. Fazulla Cassumbhoy* 5 B. 177.

49. It follows from this that where doubt is thrown upon a title owing to strangers making claims upon the property, the truth or falsehood of which can only be ascertained in a litigation between those strangers and the vendor, obviously that doubt cannot be resolved in a suit for specific performance.

50. Next it appears to me that the quality of the title is to be investigated, as at the time it was last offered to the purchaser. No doubt if at that time there were facts in controversy between vendor and purchaser, of a kind which might be ascertained in an enquiry between them alone, then, in strictness, the quality of the title is found not as when it was last offered, but as when the enquiry has been made; and in England that is usually after decree for specific performance (appears) to have been provisionally made. Still the quality of the title, though the Court can only declare it after the enquiry, was potentially the same as between vendor and purchaser, when last offered. Nothing has been done to strengthen it, as between them. That is not the case, when in order to clear the title, the claims of third parties have to be investigated and separate suits filed and decided. I do not find a single case in all the English law books in which a purchaser was even compelled to wait till the vendor had removed a doubt thrown on his title by some outsider, by suing that outsider, and so getting that question judicially and finally answered,,,

51. When the question between vendor and" purchaser is, whether a title is good, bad, or doubtful, the Court has to decide between those parties to which category the title is to be assigned. Where the question turns upon the general law or the construction of particular instruments, the Court ought to be and usually is in a position to declare the title good or bad.

52. But whether good or bad it is one of the simplest and most firmly established of all the rules guiding English Courts of Equity in the exercise of their discretionary power to force titles on purchasers, that where there is a reasonable probability that doing so will involve the purchaser in litigation, the discretion ought not to be exercised, and the title ought not to be forced on an unwilling purchaser. A fortiori, when it is practically certain that forcing him to buy the property will also force him to buy a law suit, English Courts have, as far as my researches go, without exception refused to decree specific performance. I do not treat the case before Lord Hardwicke as an exception. The principle of that decision was, really, that no further litigation ought, in reason, to be anticipated. Of course, when I say that the Court will not force a purchaser to buy a law suit, I mean a rational law suit, founded on at least a colourable right. A mere threat to bring a suit by some busy body who had no semblance of right or interest would not bring the rule into-operation.

53. Wherever a title is challenged and the challenge can only be met by the proof or disproof of facts, the title must, to that" extent, be doubtful. For no Judge, however," competent to lay down the law infallibly, can forecast the result of an enquiry into facts. But where the facts are of a kind of which satisfactory proof can be adduced between vendor and vendee, the doubt may be removed upon enquiry. Not so where the facts are peculiarly within the knowledge of strangers to the contract, and where they are only persons who could lay all the proof adequately before the Court.

54. If it be objected that any purchaser who" wishes to avoid his contract, has only to-put up a stranger to advance "-a claim against the property, so that the contract" of sale will not be specifically enforced the answer is that the claim to have this" "effect" must be prima facie a sustainable claim. And collusive strangers would find it hard to hoodwink the Courts so far. All the English cases show this. It is true that in very few indeed of those cases, do we find that a definite claim has been made. The Courts have proceeded on the probability of some person both being in a position to make a claim, and making it. That is to say, as observed in one of the cases, not only that there is a probability of a claim being brought against the purchaser, but also a reasonable probability of it being successful. No doubt the latter consideration is not essential, when in fact it is known that a claim will be made, as in *In re Hollis*" Hospital (1899) 2 Ch. 540 : 81 L.T. 90 W.R. 691 : 68 L.J. Ch. 673 The Judge was satisfied in his own mind that the claim would fail, but as there was a practical certainty of litigation, the intention to bring a suit having been expressed, the Court would not make the purchaser buy a law suit. That might be pushed too far, so as to support the

objection. I have just anticipated, for then it might be said that all a purchaser need do is to get some collusive stranger to threaten him with a suit.

55. I do not, however, anticipate that any practical difficulties would be felt in dealing with plainly fictitious and dishonest claims of that kind. It is enough to say that in the whole history of the English law, recorded in the reports, there is not, I believe, a single instance of the kind. In the *Hullis* Hospital case (1899) 2 Ch. 540 : 81 L.T. 90 W.R. 691 : 68 L.J. Ch. 673 the learned Judge thought that the proposed suit would fail, but it had a show of legal right and it was perfectly bona fide. In the present case, as I have frequently said, we have to deal with sets of facts to which the English law affords no parallel. And strictly speaking it is not a case of the title being put in doubt owing to a claim having been made, but rather to the title being in law doubtful, till certain definite renunciations had been made. Given a Hindu father, in possession of large property, and having male issue, any purchaser would have a right to demand from him, when he offered a part of that property for sale, an assurance that it was not joint family property. It is perhaps too much to say that there is any legal presumption either way; but it is not too much to say that there must always be a doubt in the minds of those unacquainted with the circumstances and history of the family as to the true nature of the property. More-over in this case, that very question had formed the subject of an inconclusive litigation, so that all the world knew this much that the sons claimed a share in Ahmedbhoy's property.

56. That then was the position when the parties broke off negotiations. Before going further I will finally dispose of what has been really the most serious difficulty in the case, the plaintiff's contention that he had a right to join the members of his family in this suit and so get the Court's decision on their alleged interest in the property to be sold. I have conclusively shown that this ought not to have been allowed. But the plaintiff says, that whether it ought or ought not to have been done, it has in fact been done, and it is now a case of *factum valet*. Rightly or wrongly the male issue have been brought on the record, their case has been fully heard, and in the light of all that evidence, the Court is now bound to decide between them and their father as a preliminary to clearing the title, whether in fact this was Ahmedbhoy's self-acquired property or not.

57. To meet that contention it is necessary to keep clearly in view, what the object of this suit was. The plaintiff asked the Court to force a title on the defendants. He claimed to have made it perfectly good. How? By denying that his sons had any interest in it. By fortifying that denial by a statement of adverse possession. This I have already pointed out was utterly worthless. It is strange that he should have been advised to press it. Then he relied on a *res judicata*. This would have been decisive had it existed. It did not. So far then the title was as doubtful as ever. His bare denial of his sons' right to a share in the property could not be enough. Lastly there is the assertion that he took his estate under a will, and, therefore, it must have come into his hands as self-acquired property. That remains as good or as bad an answer to the defendants' objections,

standing alone and without enquiring into the question of the character of all Ahmedbhoy's properties as between him and his male issue. For my present purpose, therefore, I will ignore it

58. It comes then to this that the Court had to see whether the title which Ahmedbhoy was offering to the defendants was so good, so free from all doubt that the Court would force it on them? Now suppose these other defendants had not been added (and waiving for a moment all further considerations) the Court would most assuredly have said, I cannot say whether this property is really your self-acquisition or not, it may be, it very probably is; but since your male issue say that it is not, and since they are precluded from taking any farther steps to establish their rights, by the decision in *Cassumbhoy v. Ahmedbhoy* 12 B. 280 till your death, it is plain that unless you can get them to join in the conveyance, there is so much doubt on the title, such a high probability amounting in fact to moral certainty, that they will sue the purchaser on your death that the Court could not force the title on him. I apprehend that there can be no doubt at all that that is how the matter would have been disposed of had the male issue not been joined (I still and throughout this discussion of the plaintiff's argument accept all other answers he might have to make to the defendants' objections.)

59. And the reason of the decision would have been simply this. It is entirely immaterial whether in the result Ahmedbhoy's male issue are proved to have had or not to have had an interest in the property. It is enough that they claim such an interest; that that is at least a plausible claim; that on the face of it they have a very good fighting chance; and they are perfectly certain to fight. Is the Court then going to compel the defendants to buy this property, and so lay up for themselves huge and costly litigation in the near future? In the ordinary course of nature, Ahmedbhoy who is already over 70 must soon die. Then the defendants will find themselves or may find themselves sued by Ahmedbhoy's sons and grandsons, and if such a suit is launched it is most unlikely that it will end within less than three or even five years, while the expenses are sure to be enormous. Those considerations I apprehend would be amply sufficient to warrant any Court of Equity refusing specific performance. And they are entirely independent of any finding one way or the other about the rights of Ahmedbhoy and his Sons inter se.

60. Suppose now the Court does assent to plaintiff's request and goes into this question and finds that the title so far as this objection goes is good, still would it force it on the defendants? I think not. It is all very well to say that Judges ought, when fully informed, to be able to say definitely and finally whether a title is good or bad. I am as little in the habit of distrusting the soundness and rightness of my conclusions as most men; but there are limits even to a Judge's arrogation of infallibility. And I am quite certain that not one of the great English Judges who have given authority to this view, would, upon an examination of the record in this case, upon a full realization of its complexity, and the mass combined with the ambiguity of the materials on which I should be asked to base

my decision, believe that his findings on the facts would be indisputably and absolutely correct.

61. Moreover, there is another way of testing the soundness of the plaintiff's contention. Suppose as I have said that I held that the property was Ahmedbhoy's self-acquisition and, therefore, that the defendants must take the title and suppose that both Ahmedbhoy and the purchaser were quite satisfied with that decision, what follows? Is the litigation at an end? By no means. The male issue would of course appeal right up to the Privy Council, with the result that the only parties to the contract who were now at one, their differences happily composed, would still be dragged from Court to Court, the result uncertain, the possibility of an adverse decision hanging like a sword of Damocles over their heads, for the convenience of strangers, whose grievance had nothing whatever to do with, the contract, or the subject matter of this suit. Again if the decision were the other way and against the title, since these large interests, infinitely-larger than all that is at stake between Ahmedbhoy and his vendees, have been involved, Ahmedbhoy would have no choice but to carry the case up to the last tribunal. If the decision went no further than that the title was bad, or at any rate too doubtful to be forced on the purchaser, Ahmedbhoy might be content to stop there. But if it goes further and declares that his male issue have an interest in this property, and, therefore, by implication in all the rest of his great fortune it is obvious that he could not let the matter drop. Either way then, the unfortunate defendant-purchasers would be committed to a litigation, which they cannot control, and which has already assumed much greater proportions than it ever ought to have done.

62. I have no hesitation in concluding that I ought not to go into this question between Ahmedbhoy and his sons; it lies outside the scope of this suit altogether. It is not necessary to be decided, in deciding whether or not the title which Ahmodbhoy had to offer to Awabai was good enough to be forced on her, now on her executors. And the futility of doing what the plaintiff asks me to do is, amongst other things, this, that were I to do so, were I to lengthen this judgment four or fivefold, as I should then have to do, and were my decision to be that the title was bad or good, as I found for or against the claims of the male issue, it seems to me perfectly clear, that whoever appealed and on whatever ground the decision, never could really rest upon any other ground than this, that at the time the litigation was started the title was (barring other considerations) so doubtful that no Court of Equity would use its discretionary power to force it upon an unwilling purchaser, and if that were so all the rest of the elaborate enquiry, and still more elaborate judgment would be obiter. Of course the plain truth is that Ahmedbhoy is much more anxious to get the question between himself and his sons decided, than he is to force this sale on the defendants purchasers. And he has, unfortunately for himself, been advised that he can do it in this indirect way. That advice has been I say most unfortunate for him, but he is a rich man, and can bear the loss. The position of his male issue, who appear to have been advised to the same purpose, is still

more, unfortunate. For they are by no means wealthy. And it does seem to me that all the money which has been spent by them and Ahmedbhoy in thus irrelevantly protracting this case has been utterly thrown away and wasted.

63. If my view is correct, and I have not the slightest doubt that it is, no decision of mine on this point could be of any service to these ill-starred litigants. This is the second effort they have made at, I fear, enormous costs to get their rights inter se settled. On the first occasion Ahmed-bhoy really believed that the Court had decided that all his property was his self-acquired property. No doubt that was the view to which the learned Judges of this Appeal Court did incline. But the decision was entirely unnecessary, just as it would be unnecessary here, and so, the whole of that part of the judgment is merely obiter. The quality of Ahmedbhoy's possession is as nebulous and unascertained as ever.

64. If I thought that I could give a decision on the question which any other Court, should the case go higher, would look at, I should be only too glad to do so. No one deplores more than I do the disappointment and pecuniary loss to which Ahmedbhoy and his sons have been subjected. But I am perfectly clear that in deciding this suit I ought to treat it as though it were between Ahmedbhoy and the purchaser, and utterly neglect all that could not properly be evidence between them. It would be most unfair to the purchaser when the Court is asked to force a title on him, to look at it, not as it was when it was offered to him, but as it might appear after four or five years litigation between his vendors and strangers who had claims on it. It never was a question whether Ahmedbhoy might or might not succeed in repelling the claims made upon his property by his sons, but it was and remains a question whether while those claims were still alive and undecided Ahmedbhoy could force this title on Awabai, which is a very different thing. If the former had been the real question, it would clearly have been Ahmedbhoy's duty to repel those claims before he began offering titles in the market. But to suppose that he can do that, along with enforcing the titles, which have been repudiated because of those very outstanding claims, appears to me to argue a strange confusion of thought, and subversion of first principles. It might be a great improvement on the settled law, if this practice were permitted; so much is suggested by Pry in reference to the Land Registry Acts. But I doubt whether in this country at any rate, it would be an improvement, I doubt very much whether mixing up litigation, as the plaintiff has tried to mix up this litigation, and involving purchasers, who refuse doubtful titles, in extremely complicated and almost interminable litigation, with which they have no interest, but from which, once entangled, it is almost impossible for them to extricate themselves, would not produce far more evil than good. However that may be, the truth is that there is absolutely no precedent for anything of the kind in this country, and speaking for myself, I should be most reluctant to create one.

65. I shall now consider in the light of all the foregoing commentary on English case law, and such conclusions as I have already drawn, what remains of the

case between Ahmedbhoy and the executors of Awabai.

66. What sort of title was this which Ahmedbhoy was offering? If the property was his own, that is to say, if there had been no question of the rights of members of a joint Hindu family in it, it would have been of course a perfectly good title. Ahmedbhoy had bought it, all the deeds are in order. The only question all along was with whose money did he buy it? And this is the kind of doubt which never could arise in England, with which, therefore, the English Courts are not familiar, which English lawyers and English Judges happily for themselves have never had to deal with, and in all probability have never contemplated.

67. For in such circumstances the mere fact that A has paid the purchase-money, will not get over the difficulty, leaves it indeed exactly where it was. If the money which A paid was joint ancestral money, then the property would retain that character, and all A's sons would have vested interests in it at birth. It is plain, therefore, that the defendants were only exercising a reasonable caution in trying to find out whether Ahmedbhoy was the sole owner of this property.

68. Now he claims to be so on various grounds. Barring the main general ground that all his property is his own self-acquired property, a point not directly raised in this suit, he claims to have been able to show that the price he paid for this property, whatever is to be said about the rest, was his own money, his self-acquired money. And if that could be satisfactorily proved as between him and the purchaser that would be quite enough to put the male issue out of the discussion, and effectually clear the title. I allowed much of the long examination and cross-examination of Ahmedbhoy to go on, in the hope that this might prove a happy solution; and narrow the controversy to this definite question. But apart from what was finally said by Mr. Inverarity on this point it became clear to me that the case could not be disposed of in that way. The plaintiff's case was that this property was bought out of the profits of Ahmedbhoy's business, and that all that was his self-acquired money, coming out of the firm which he carried on in partnership with Rahimbhoy Habibhoy alone. But keeping in view the doctrine of Hindu law on the subject of what is and what is not self-acquired property, it is obvious that no such line of separation could be drawn without going at length into the whole history of the family accumulations, and that is precisely what could not be done without bringing in the claimant male issue, who ought not to be brought in. It is not as though the purchase-money of this house could be accurately allotted to a separate fund, the origin and whole history of which could be made clear, between Ahmedbhoy and Awabai when the title was offered. All that Ahmedbhoy could then say or for that matter all that he can now say is, that he carried on partnerships, and made profits, and that out of the profits he bought this property. Conceded. That leaves the doubt exactly where it was. In a suit by the sons against Ahmedbhoy the Court would want to go much further back and trace the capital of those partnerships, as well as the manner in which the profits were distributed. And if these were not always kept

wholly distinct from any moneys which might have come in from the father Habib-bhoy, then the usual difficulty would at once arise, whether the total was not coloured by the infiltration of a certain amount of ancestral money. In this case, it is quite possible that it was not; it is quite possible that had this suit been confined to Ahmedbhoy and his sons, I should have been able to say that all Ahmedbhoy's property was his self-acquired property. But what I want to make clear is that I could not possibly have done that, no Court could have done that, in respect of this isolated piece of property without going into the whole question. No Court looking only at what Ahmedbhoy had to offer in support of his allegation that this particular parcel of property was bought out of his own money, the proof being restricted to what Ahmedbhoy might have brought against Awabai could possibly have decided with any confidence, on that evidence, between those parties, that that allegation was well proved. And that is the whole point. I am not saying that Ahmedbhoy did not buy this property with money which he had earned by his own independent exertions, money, therefore, that was his self-acquired money; indeed I think it extremely probable that he did. But I do say very emphatically that in a suit between him and Awabai, offering the evidence on the point which he did, it would have been impossible to come to that conclusion affirmatively, without regard to the past history of the family, all its commercial transactions, and much proof which might well have been thought to be within the exclusive knowledge and control of persons who were wholly strangers to this contract. So that is where that line of attack breaks down. For where there is a great family estate, larger and interconnected mercantile dealings, covering a very long period, and when the allegation is that the whole remaining in the hands of one of the members is by reason of origin and so forth ancestral joint family property, it is virtually impossible for that member to set apart one item of expenditure, and say, this at any rate was my own money. I say that is impossible unless the whole affairs of the family estate are gone into from the beginning, because although at the first view it may appear as though the sums going to make up the price paid for this particular property all come from the profits of a business, that is not enough. And going further back to see whether other funds mixed up with those spent on this property had the same or a different character and if a different character, then whether that was not imparted to these funds too, it becomes necessary to re-open the entire history of all the family dealings. And to do that it is again necessary that all those surviving members of the family who claim to be interested in the products of the whole trade, should be before the Court and should have an opportunity of proving what they can in their own favour. In other words it is not practicable in a suit of this kind between vendor and purchaser, where the vendor admittedly holds and owns other large properties and funds, to separate off one of them, and limit the enquiry into its character, as the plaintiff would upon this restricted presentment of his case wish the Court to do.

69. I come now to consider another point which might quite properly be taken between vendor and purchaser. Ahmedbhoy contends that he took whatever

money he did take from his father Habibbhoy ( excepting gifts, which after all are on the same, or from Ahmedbhoy's point of view, a better footing ) under a will. And according to the decision in Sir Mangaldas' case, money or property taken under a will is taken as self-acquired property. Therefore, Ahmedbhoy might very well say to the purchaser, whatever my sons may choose to say it is settled law that the money I got from my father is my self-acquired property. Out of that I bought this property and no one has any right to question my own absolute right and title to it. This giving rise to a question of law, is very proper to be considered and dealt with by the Court in a suit for specific performance.

70. Is it then the general law of this presidency that moneys taken under a will are the self-acquired property of the legatee? Let us limit the case to father and son. If a father possessing (for the sake of the argument) self-acquired property leaves it by will to his son, does the son take it as self-acquired or as ancestral property? If there were no will, and the son took by inheritance he would, of course take the property as ancestral. Is the nature of the property, as and when it comes into his hands altered by the mode of transmission? That is the question, and it is a question of considerable importance.

71. When I come to consider the judgment of the first and Appeal Court, in Sir Mangaldas case, carefully and critically, I feel grave doubt whether they really do go the length of settling the general law on this basis. Scott, J.'s judgment at any rate more than once insists upon the particular intention of the testator inferred from the particular words of that will. If the testator intends that his son shall take the property under the will, as his self-acquired property and says so, then the property comes into the hands of the legatee impressed with that character. Such I take to be the extreme length to which that judgment can fairly be taken. And the judgment of the Court of Appeal really goes no further, if as far. The Privy Council case of Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee 12 M.I.A. 1 : 9 W.R. 15 does not touch this question, except inferentially. Certainly their Lordships say that decisions too numerous now to be questioned have established the testamentary powers of Hindus, at least to the same extent and subject to the same restrictions as in the case of gifts inter vivos. But it may well be doubted whether their Lordships, then or at any subsequent time, have decided that property devised, to a son comes into his hands as self-acquired property. It is strange that except in Sir Mangaldas' case, this question never seems to have come prominently forward in this Court. while in the other High Courts the decisions show that there is no disposition to accept Sir Mangaldas' case, as having finally settled the law; no decision of the Privy Council exists on the point. Until this question has been definitely put and answered by their Lordships of. the Privy Council, I should hesitate to say that the general law, depending upon it, was settled. So far from that being the case, the inclination of my own mind is to doubt whether the reasoning upon which the judgments in Sir Mangaldas' case proceed, is satisfactory or conclusive. Doubtless that decision is binding upon this Court; but the question here is different. I am to determine whether assuming that there were no further

difficulties, the whole of Ahmedbhoy's property did come to him under his father's will, and assuming that will contained a clear expression of intention that the property was to be taken as Ahmedbhoy's self-acquired property, those facts, taken with the decision in *Sr Mangaldas* case would render the title so secure, under the settled law of this country," that I could without fear or risk force it on a purchaser. I doubt. The analogies which were pressed on both the Courts during the argument in *Si? Mangaldas* case, drawn from the old English law, are entirely deceptive and misleading. Where a testator bequeathed to his heir an estate of the same quality which he would have taken without the bequest, the rule was that the heir took as heir, and not as devisee. And it was actually argued that that could throw some useful light on the question whether assuming that a Hindu had the right to dispose, by will, of his self-(sic) immovable property, and exercised that right by bequeathing it to his son, the son took it as ancestral or self-acquired? The reason of the English rule was perfectly clear and intelligible; but it has, of course, on bearing not the remotest, on the vexed points of this question.

72. An heir in England took a perfectly well-known and defined estate; there was no doubt about the power of a testator to bequeath; no doubt whatever about the right of legatee, no doubt about a single factor in the whole problem. Because in English law the one estate was higher than the other, a devise to an heir, of the same estate that he would have taken as heir, became a nullity. It served no purpose. Had there been no devise the heir would have been better off. Hence the rule. But every factor in the Indian problem is doubtful. First, whether a Hindu had the right to make a will at all; that was settled. Then whether he had the right to dispose of his self-acquired property by will; and, if so, whether of both kinds of self-acquired property movable and immovable? That was settled too, on the analogy of the Hindu law of gifts *inter vivos*. It must, of course, be borne in mind, that our Courts are always trying not only to interpret, but to make, what we then call Hindu law. They have to adapt that-archaic and in many respects obsolete set of rules to the requirements of expanding and developing civilization. The real Hindu law knew nothing whatever of wills. No Hindu lawyer had ever imagined a will. And it may very well be doubted whether wills can be consistently engrafted upon the Hindu law of inheritance, or, to put it more broadly, property. For at the root of their whole system, seems to have lain the idea, that death ended all, and as the succession opened at death, the notion of allowing a person to retain his power of disposition after death, by means of a will, would have been wholly repugnant to the principles of their law of inheritance,

73. Still, since wills have long been recognized, and since they have been brought into line with alienations by gift *inter vivos*, with the object as far as possible of systematizing what has always been a vague, and rather amorphous body of ancient rules and ritual, passing loosely under the name of Hindu law, the question must, of course, sooner or later, come up. What effect has this extension of the power of disposition beyond life, upon the quality of the estate

so transmitted? If a Hindu has self-acquired immovable property, and dies leaving sons, they take the property as ancestral. That is the true Hindu law. If during his life-time he had chosen to give it to any of his sons, I suppose, he would have taken it as a self-acquisition. But it does not necessarily follow as most of our Judges appear to have thought, that a Hindu lawyer would immediately assent to the extension of what is at best a doubtful and artificial analogy, so as to impress upon all property given by will, the same character as property given *inter vivos*. Because in the latter case, it may well be doubted whether the doctrine does not Court a collision with a very deep seated principle of the true Hindu law. And trying to find an explanation for what would satisfy the sentiments of Hindu lawyers on such a point, by means of an inexact and useless English analogy, is likely to make the confusion worse.

74. Attempting to find a reason for making new Hindu law, upon a point which never could have occurred to Hindu lawgivers, in the technicalities of very old and well-settled English law implies a parallelism between the fundamental notions and systems of English and Hindu law which never existed. Analogies which appear to be the closer owing to the accident of both systems now being necessarily interpreted in the same language, native to one, foreign to the other, are in that degree the mere misleading if they are not, as in the instance I am considering the analogy certainly was not, true. The analogical method has its own value; it has its special dangers. Used without as keen an eye to differences, as to analogies, it is certain to breed confusion, and lead to unsound conclusions. I make these observations, not because the particular point calls for them, though it is a good illustration; but because in studying all the case law which has been cited both in this and the very similar case of *Chabildas Lallubhai v. Ramdas Chabildas* 11 Bom. L.R. 606 : 3 Ind. Cas. 257 (Infra). I have been struck by the manner in which English Judges have over and over again, quite unconsciously, I believe, in many cases, read English analogies into the Hindu law.

75. Taking the decision in *Sir Mangaldas'* case, as it stands; conceding that it states the general law; there would still remain three points of grave doubt resting on *Habibbhoy's* will. To make property left by a Hindu father to his son by will, self-acquired in the son's hands, there are according to *Sir Mangaldas'* case, three essentials. The property must have been the self-acquisition of the father; the father in leaving it to his son, must have intended the son to take it as self-acquired property, and that intention must be plainly expressed on the face of the will, or at any rate capable of being collected with certainty from the language of the will, and circumstances aliunde. Here the sons deny that the property which *Habibbhoy* left by will was his self-acquired property. It was, therefore, necessary, and would have been necessary even if the suit had been confined to *Ahmedbhoy*, and the purchasers, to carry the enquiry back to the time of *Ibrahim*, father of *Habibbhoy*. It was necessary to ascertain whether *Ibrahim* had left any property. If he had, and had not left it by will, it would have come to *Habibbhoy* as ancestral property, and forming a nucleus, would again

have necessitated a minute and difficult enquiry into the mode of all his acquisitions, and the extent to which they too might have been infected with the character of joint ancestral property. Such an enquiry could not of course, have been attempted, much less made, in the absence of all the surviving members of the family; and the fact that, on such an allegation, it would have been necessary shows clearly the limitations within which the Court would have had to act and decide between the vendor and purchaser. No Court would" have thought of entering upon an enquiry into such remote and uncertain facts, under those conditions.

76. In *Casumbhoy Ahmedbhoy v. Ahemdhot Habibbhoy* 12 B. 280 the issue was definitely raise"d,-tried and found upon against Abmedbhoy. The Court found that Habibbhoy's property was ancestral. In appeal their Lordships dissented from this view, but as it was not necessary to decide the point, I can only treat that part of the" judgment as an expression of opinion. It is, however, obvious that while the point remains in doubt, Ahmedbhoy's reliance on the fact that he obtained his property under" the" will of Habibbhoy, and, therefore, under the ruling in *Sir Mangaldas"* case, that fact alone met and disposed of the defendants" objection; to the title was and is wholly misplaced.

77. It would also be easy to distinguish the facts here from! the facts in *Sir Mangaldas"* case; for the question in every case remains open, whether the testator had, and if he had whether he has clearly expressed a certain intention.

78. And here I wish to make an observation or two upon the principle of the decision in *Sir Mangaldas"* case, which in the opinion of many eminent Hindu, lawyers, revolutionized the true Hindu law. The ground of that decision is the intention of the testator. The reasoning, summarized, amounts to this. The Hindu law permitted a father to dispose of his self-acquired property by gift inter vivos. If in the exercise of that power he gave any part of it to a son, who would in the ordinary course have taken, on his death as heir, that part came into the hands of the son as self-acquired property. Had there been no gift, what came to the son by inheritance would have come to him as ancestral property. The power of testamen-. tary disposition was unknown to Hindu lawgivers. But now that it is recognized, it must be catalogued with the power to dispose of self-acquired property by gift inter vivos. And the legal consequences which attach to the one, must likewise attach to the other mode of disposition. So far, although it may very well be doubted whether, having regard to the time and circumstances when the Hindu law was made, any such correspondence between the modes of disposition would have been accepted, the reasoning is simple and intelligible. But the Courts were not content to leave it there. Had they done so we should have had a plain uniform rule, to be applied in all cases. All property left by will comes to the hands of the taker as his self-acquired property. And then the only doubt that ever could have arisen would have been whether the testator had acquired the property himself in such a way as to make it, within the contemplation of the Hindu law, his self-acquired property. There can of course

be no question that a Hindu cannot dispose of ancestral property by will. In such a case the will would be a nullity. Not of course because the heir takes a higher estate or a lower estate, or for any such technical, and fanciful reason, but because property once impressed with the character of ancestral cannot by any act of mere volition be divested of that character. The converse is equally true, though in moulding the law on this subject, this side of the question appears to have been overlooked. The impress of ancestral property cannot be stamped on any property by mere volition.

79. Thus when the Courts go on, as they immediately did, influenced no doubt rather unconsciously than consciously by English ideas, to qualify the rule, the door was opened to uncertainty and confusion. The whole basis of the Judge-made law (for of course it is, in no sense, really Hindu law) is the supposed correspondence between the power to dispose of property by gift inter vivos and by will. From this the rule is deduced that as in the former case what is given is self-acquired, so in the latter case what is left by will is self acquired. But the qualification which is immediately added, and has since been embroidered with considerable finesse and delicacy in other Courts upon the Rule cannot be rightly deduced from that supposed correspondence or from any principle of the Hindu law. In effect it amounts to this, a testator who has self-acquired property may devise it to his son, so that by the expression of the testator's intention one way or the other, the son will take it either as ancestral or self-acquired property. With the utmost respect for the many eminent judges who appear to have approved, without questioning that addition, I submit that it is illogical and untenable. First, with reference to its source, the supposed correspondence between gifts and wills. Under the true Hindu law could a father give to his son, or to anyone else, inter vivos, property, to be taken by the donee as ancestral? I apprehend not. Therefore, if the new doctrine is deduced from the old, if it corresponds with it in one part, it should logically correspond with it in the other.

80. But the root of the error, as I venture humbly to think, lies deeper. My submission is that a correct understanding of the Hindu law will yield this fundamental principle. The nature of property, as ancestral or self-acquired, is wholly independent of any volition, when it has undergone transmission. I have to add the last words, else the universality of my principle might be challenged in this way. Self-acquisitions by a member of a Hindu family living jointly, may retain the character, or lose the character of self-acquisitions, as the acquirer chooses to keep them wholly separate, or throw them into the common fund. And that would be apparently a case of volition operating to impress one or the other character on the property. I doubt, however, whether a more accurate analysis of what is implied in this current statement, would not further confirm the general truth of the principle. But this appears to me certain and universally true, that when property passes from one Hindu to another, its character is to be ascertained in the hands of the latter by (a) the relationship existing between transmitter and transmittee, and (b) the mode of transmission. In neither case is there any room for the play of intention or volition beyond this point, that the

transmitter may select one of two modes of transmission. But having selected one, he cannot, by expressing an intention to the contrary, prevent that mode leaving its impress on the property when it reaches the hands of the recipient.

81. I would illustrate my meaning by a simple figure. Suppose, there are two conduit pipes the top end of both being the same, but the bottom end of one being circular, and of the other triangular. Suppose the owner of self-acquired property to have the option of sending his property by the rounded or the angled conduit pipe, to his heir legatee or donee; and suppose that the property like molten metal must take the shape of the mould. Now it appears to me that this gives an exact and useful illustration of what according to the Hindu law happens and must happen when a Hindu devises to his son self-acquired property. He can put it in the one pipe or the other, that is to say he can make a will or not. If he makes a will, he puts the property into we will say, the triangular mouthed pipe, if he does not, he puts it in the round mouthed pipe. But if he puts it into the former, it is useless for him to add a wish, or express an intention, that it should emerge circular all the same. That is impossible.

82. The simile of the pipes is useful, of course, only to show what I mean by a part of my proposition. Relationship cannot be illustrated by this figure. But it is obvious that no Hindu can make property ancestral by devising or giving it to persons, who are not so related to him as to make that form of property possible. Such considerations lead me to doubt whether when this question comes before the Privy Council, as sooner or latter it must, their Lordships will lay down the general law as the particular decision in Sir Mangaldas case has left it.

83. For these reasons, to which I might add others owing to the actual distribution under Habibbhoy" s will, as well as circumstances in the family history which had preceded it, I do not think that the plaintiff's contention that the mere fact that he took his estate under Habibbhoy"s will avail him anything in this suit to enforce specific performance of the sale.

84. There remains then only one question. Whether, assuming the family to be a joint Hindu family and the property in suit joint family property, the proposed sale by the father would not be valid and binding on the sons? If in all circumstances it would, then the objection to the title on this ground, which is the only substantial objection, fails.

85. At the very end of the argument counsel for plaintiff mentioned this point. It evidently took the defendants executors by surprise. Yet it has always lain on the face of the whole discussion, plain to be seen by all.

86. But I do not think there is much in it after all. True the plaintiff's contention has some seeming support in a decision of the Privy Council in Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee which lays down, though not I think as more than the expression of a reason for their Lordships" conclusion, that the right to impeach alienation is exactly co-extensive with the right to

enforce partition. Thus, where, on that footing, a son could not enforce partition, he could not object to an alienation. And as among the Khojas the law at present is that by custom a son is precluded from demanding partition during his father's lifetime he is likewise precluded from challenging any alienation of the joint family property by the father. This at first looks like a very strong position. And if the general Hindu law were settled on the basis of that principle, if further the Khojas were definitively in all respects subject to the Hindu law, there would be an end of the matter. In the first place it may well be doubted whether the dictum of the Privy Council ought to be or was meant to be extended beyond the facts of that case. If we go to the Hindu law itself it would, I think, be hard to find either in texts or general principles any support for thus connecting the power of alienation on the one hand with the right to demand partition on the other. I question whether any Hindu lawyer of eminence would unhesitatingly assent to the proposition, as a general proposition of Hindu law, that where the sons' right to insist upon immediate partition is suspended (if indeed upon a true understanding of the Hindu law it ever is) the father may during such suspension alienate the whole or any part of the joint family estate at pleasure. The truth is that the two powers are rooted in totally different notions. Whatever is to be said of the restrictions imposed by some of our Courts upon the right of a son to insist upon immediate partition (as in the case of an impartible Raj which is, of course, a special case, or as among Khojas, where the restriction is admittedly an exception to the Hindu law and is founded on proof of a Khoja custom) it may well be doubted whether the reason for such a restriction anywhere impinges upon the theory of a father's power to alienate as agent and manager for the rest of the family any part of the joint family property. Making the two interdependent, seems to lead to entangling two quite distinct theories. The former if referable to anything really to be found in the Hindu law might be referable to some extension of the patria-potestas, some survival of the sanctity and reverence belonging to the father and head of the family. As a consequence of that and by way of special privilege it might follow that the father occupying a higher position was not to be exposed to compulsory partition of the estate at the will or caprice of any junior member of the family. Where all are equal as upon the father's death, the brothers would be, this reason ceases to operate, and hence possible the origin of this rule. But no reasoning of that sort could fairly be extended to empower the father, not only to prevent the sons insisting upon partition and obtaining so each his share, during the life-time of the father, but of disposing of the whole family property and thus depriving the rest of the family of all even after his death, in which from birth they had vested interests.

87. In respect of alienations I submit that the governing principle is really no more than a principle of agency; and that even so viewed it is subject to severe restrictions. It is only where the circumstances of the family as a whole make it necessary, in order that its corporate life may be best continued, to alienate the whole or any part of the family property, that the Hindu law allows the father to do so. No doubt what constitutes necessity and what falls short of it must in each

case be a question of fact, and the degrees of necessity shade nicely and finely off into what is not really necessity but advantageousness. It is possible that Courts would look upon an alienation, which was extremely advantageous to the family, as justified. But that assumes that it had been done. I question whether any Court in India has yet gone the length of allowing an alienation by the father without the consent, and against the wishes of sons, merely upon the ground that it would be a very good bargain. In this case, of course, there is no question of necessity at all. Suppose this sale were decreed and the vendor, still having during his life-time the absolute control of the money, were to speculate and lose every penny of it could not the sons come in after his death and claim to have the sale set aside? And if they could what would be the position of the purchaser? He would find himself involved in costly and interminable litigation which upon a moderate estimate would cost him a quarter of the price he had paid for the property, even if it did not end in his losing the property as well. Ought any purchaser to be exposed to such a risk?

88. There is too the additional difficulty I have mentioned. Taking the decision in *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab So.* see 12 M.I.A. 1 : 9 W.R. 15 to be binding, as, of course, it is upon all Indian Courts, and further that it has established the law to be that as long as sons cannot insist upon partition, the father may alienate at pleasure still the Khojas are not in all respects subject to the Hindu law. In this respect they might say that they were not. No decision has yet been given upon what limitation if any Khoja customs impose upon the Khojas in matters of alienation. Doubtless alienation may be taken to be a part of the law of inheritance and succession, so too one would have thought might partition. But already the Khojas are excepted from the general Hindu law of partition and possibly they may be excepted again from the Hindu law of alienation. Indeed it is not too much to say that no one at present knows or possibly can know how the Khojas stand in relation to Hindu law on the one hand and Mussulman, or English law (in the Presidency towns) on the other. Every point as it arises is sure to be tried out on a plea of custom, just as in *Cassumbhoy v. Ahmedbhoy* 12 B. 280 the decision of the principal point there rested on a proved custom.

89. Further in dealing with the Khoja community it must be remembered that what is to be ascertained is not how much Hindu law, the Khojas have adopted, but how much Hindu law they have discarded. And it may well be doubted whether until our Courts re-imposed it on them, they had not desired and intended to disembarass themselves of most of the more rigid rules of Hindu law governing the accumulation of family wealth. If the Khojas really have a custom" that sons cannot enforce partition during the lives of their fathers, that probably means no more than that the community to that extent had abandoned the Hindu law of the family. And proceeding along the same line, it would have been but a short and a natural step to have abandoned the whole Hindu law of joint family estate.. I have little doubt that this is what the Khojas, or as many of them, as reside in great cities and carry on large businesses, would wish to do.

Nothing could be well more unsuited to a growing commercial community, than the doctrines of joint ancestral, or joint family, property. Unless, however, special legislation frees them from the yoke, it must be for the present taken to be settled that in these important aspects of life, the Khojas are under the Hindu law. Therefore, it would be at present out of the question to presume that an alienation of ancestral family property made without necessity, and without the assent of the co-parceners, would bind the latter.

90. Thus after giving careful attention to every point which fairly arises between the vendor and the purchaser, I am forced to the conclusion that this suit fails.

91. It may well be objected that if I am right no father of a family governed by the Hindu law could ever offer a good title to an intending purchaser unless he got all his male issue to concur and join with him in executing the conveyance. And this notwithstanding that in fact the property to be sold was the self-acquired and sole property of the intending vendor. I admit that that seems a harsh rule, especially to be applied to the wealthy Hindu inhabitants of this great city. But it seems to me the only logical and consistent rule. The fault is not with Courts but with the requirements of the Hindu law, which was made for a society living under altogether different conditions, framed to secure objects which need not be regarded as of much importance in modern commercial circles, and now appearing, with reference to all the surrounding circumstances, badly in need of adaptation to a new environment. No Judge, who has to administer the venerated Hindu law to a progressive society, can help feeling that in some respects it is an anachronism; and that its archaic form needs re-casting. But as long as it remains what it is, there can I apprehend be little doubt but that in effect the rule really is in a case like this, that no title offered by the head of a joint Hindu family, or a family in which whether in fact joint or not claims are put forward by members, to the property as ancestral could be good enough to be forced on an unwilling purchaser, unless all the co-parceners (or possible coparceners) concurred. In this view it would be obviously idle to proceed, as I have been asked to proceed, and further determine whether as between Ahmedboy and his male issue, this property is a self-acquisition of the former. Whichever way I decided, assuming that my decision on the main issue is right, I should only be dealing with a point immaterial to the suit, a point which is not necessary to be decided, and so my decision would be obiter and would have no binding effect upon Ahmedboy and his male issue.

92. I come to this conclusion with regret, not only because I feel that it will be a great disappointment to the principal litigants, but because in the course of the trial and arguments, many interesting and important points have been raised which have engaged my attention for weeks. Still, in the circumstances of the case, I feel that I ought to refrain from expressing any opinion upon the merits of this part of the controversy.

93. The result is that this suit for specific performance must be dismissed with all costs upon the plaintiff.