
(1959) 11 BOM CK 0009
In the Bombay High Court
Case No : Appeal No. 27 of 1954

Ramaji Batanji

APPELLANT

Vs

Manohar Chintaman and Others

RESPONDENT

Date of Decision : 20-11-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 5, Order 20 Rule 12
Evidence Act, 1872 — Section 13, 34, 90
Limitation Act, 1908 — Article 141
Transfer of Property Act, 1882 — Section 51

Citation : AIR 1961 Bom 169 : (1960) 62 BOMLR 322

Hon'ble Judges : Raju, J;Kotval, J

Bench : Division Bench

Advocate : D.B. Padhye and S.V. Padhye, for the Appellant; C.S. Dharmadhikari, M.R. Bobde, R.K. Manohar and V.R. Manohar, for the Respondent

Judgement

Raju, J.—This is a first appeal by Plaintiff Ramaji whose suit for a declaration of title to three houses Nos. 190, 580 and 582, New Shukrawari, Nagpur, for possession and for mesne profits was dismissed by the Fifth Additional District Judge, Nagpur. The relevant facts which are necessary for the disposal of this appeal are as follows:

2. One Maroti son of Damaji died in 1920 leaving behind him his widow Sarubai and two daughters Jaibai and Vithabai. Plaintiff is the son of Jaibai. Defendants Nos. 1 and 2 are the grandsons of Vithabai, their father Namdeo having predeceased them in 1943. Defendant No. 1 who died during the pendency of the suit was represented by his widow Defendant No. 1 (c) and his two minor sons Defendants Nos. 1 (a) and 1(b). , Defendants Nos. 3 to 15 are tenants in occupation of the houses in dispute. It is common ground that Maroti who died in 1920 owned three houses bearing Nos. 190, 579 and 582. The suit relates to two of these houses namely Nos. 190 and 582 and another house bearing No. 580. It is also common ground that after the death of Maroti in 1920 his widow Sarubai who succeeded him and had widow's life interest died in 1921 and that after

1921 the two daughters Jaibai and Vithabai became heirs under the Hindu Law. Plaintiff claims that Marotirao owned house No. 580 in addition to the three properties, admittedly owned by him. It is also the Plaintiff's case that he is the next reversioner after the death of Vithabai who died in 1950, her sister Jaibai having predeceased her in 1936. According to the plaintiff, he being the daughter's son of Marotirao, is the next reversioner in preference to defendants Nos. 1 and 2 who are the daughter's son's sons of Marotirao. Plaintiff, therefore, filed the suit for possession of the houses bearing Nos. 190 and 582 which admittedly belonged to Marotirao and house No. 580 in regard to which there is a dispute as to whether it was the property of Marotirao or not.

3. The defence of Defendants Nos. 1 and 2 was that house No. 580 never belonged to Marotirao, that the two other houses Nos. 190 and 582 which admittedly belonged to Marotirao had been sold by Sarubai widow of Marotirao to Vithabai in 1921 for the payment of the debts of her husband and for her maintenance and that after the sale-deed, Vithabai, the grandmother of Defendants Nos. 1 and 2 became the absolute owner of the two houses. It was also their case that Marotirao was governed by the Bombay School of Hindu law and that the two daughters of Marotirao became absolute owners of Marotirao's property as his heirs. A will, dated 28th December 1949, by Vithabai was also alleged by these two Defendants. But this will is not the subject of arguments in appeal. They also claimed that they were in adverse possession of the houses for more than 12 years before the suit. In the alternative they claimed that if the plaintiff succeeded in his claim the defendants should be reimbursed to the extent of Rs. 10,000 which were spent on reconstructing the houses Nos. 190 and 582, in view of the provisions of Section 51 of the Transfer of Property Act.

4. The defence of defendants Nos. 1 (a) and 1(b) was similar. Defendant No. 10 denied his liability. The other defendants did not appear though served and were treated as ex parte.

5. The learned Additional District Judge held that the parties were governed by the Benares School of Hindu law, that Marotirao owned only the houses Nos. 190, 579 and 582 but not house No. 580, that Sarubai, widow of Marotirao, sold the houses Nos. 190 and 582 on 10-1-1921 to her daughter Vithabai for paying off the debts of Marotirao, that the sale-deed was not bogus, that after the sale-deed dated 10-1-1921, Vithabai and after her defendants Nos. 1 and 2 were in exclusive and adverse possession of the houses. The learned Additional District Judge, therefore, held that the plaintiff's suit in regard to house No. 580 should fail as it was not proved to be the property of Marotirao and that the suit should also fail in regard to houses Nos. 190 and 582 because these two houses had been sold by Sarubai, widow of Marotirao, to Vithabai for purposes justified under Hindu law. He therefore dismissed the plaintiff's suit, although he gave a finding that if the plaintiff had succeeded the defendants would have been entitled to be reimbursed to the extent of Rs. 3,000 only which they had spent in house No. 582.

6. Aggrieved by this judgment, dismissing the plaintiffs suit, plaintiff has now come up in appeal and his learned counsel has urged the following points:

(1) The lower Court erred in holding that house No. 580 did not belong to Marotirao.

(2) The lower Court erred in finding that the sale-deed, dated 10th January 1921, executed by Sarubai, widow of Marotirao, in favour of Vithabai, one of her daughters, was not bogus and was justified by legal necessity.

7. These contentions are repelled by the learned counsel for the respondents Nos. 1 and 2 and also by learned counsel for respondents Nos. 1(a) and 1(b), the other respondents not being represented. In addition, the learned counsel for the respondents who have appeared has urged the following grounds:

(1) The lower Court erred in holding that the parties are governed by the Benares School and not by the Bombay School of Hindu law,

(2) The suit is barred by limitation.

8. It has also been urged that the lower Court erred in holding that in case the plaintiff is ordered to get possession of the houses, he should be ordered to reimburse the cost of reconstruction of both the houses Nos. 190 and 582. The issue regarding the will of Vithabai has not been argued in appeal.

9. The points for determination in this appeal are:

(1) Whether house No. 580 belonged to Marotirao.

(2) Whether the sale-deed, dated 10th January 1921, by Marotirao's widow Sarubai in favour of Vithabai was bogus and not intended to be acted upon.

(3) Whether the sale by a Hindu widow was an absolute alienation of the property and was justified under Hindu law.

(4) Whether the parties are governed by the Benares School or by the Bombay School of Hindu law.

(5) Whether the plaintiffs suit is barred by limitation.

(6) Whether the defendants have proved adverse possession for more than 12 years.

(7) What orders, if any, should be passed u/s 51 of the Transfer of Property Act.

Our findings are:

(1) House No. 580 did not belong to Marotirao.

(2) The sale-deed, dated 10th January 1921, is not proved to be bogus or one not intended to be acted upon.

(3) The sale-deed is not justified under Hindu law and was, therefore, not an

absolute sale.

(4) The suit is not barred by limitation.

(5) The defendants have not proved adverse possession for 12 years.

(6) The parties are governed by the Benares School of Hindu law.

(7) The plaintiff's suit, therefore, succeeds in regard to houses Nos. 190 and 582 only but u/s 51 of the Transfer of Property Act. We hold that the plaintiff should pay Rs. 4,000 to the defendants in view of the money spent by Vithabai for reconstructing house No. 582.

10. As regards house No. 580, the case of the plaintiff was that it originally belonged to Pandurang Damaji, sister's son of Marotirao, who sold the house along with other property to one Kashinath by a sale-deed of 1896 and that the sale-deed in favour of Kashinath was really benami in favour of Marotirao. In order to prove this case the plaintiff relied on two judgments, exhibit 1-2 P-9, judgment of the trial Court in a suit filed by Pandurang (Civil Suit No. 216 of 1918), and exhibit 1-2- P-8, judgment of the first Appellate Court in the same litigation, and on the register of Civil Suits showing that Second Appeal No. 427 of 1919 in this matter was dismissed by the Judicial Commissioner's Court. They also relied on the entries in the municipal jamabandis at P-4 and P-4-A showing that Vithabai's name was entered from 1920-21 onwards and that up to 1920 there was the name of Maroti. Entries in the municipal jamabandis cannot prove title. Therefore, reliance is placed mainly on the judgments. It is not clear from the judgment of the first Appellate Court (exhibit 1-2 P-8) to what property that appeal related. Those proceedings arose out of a suit filed by Pandurang against Maroti and Kashinath and it is contended by the learned counsel for the appellant that this judgment is evidence of the fact that the sale-deed of 1896 in favour of Kashinath was benami for Maroti. There is no reference in that judgment to the sale-deed of 1896 although there is an observation in the judgment that the fact that defendant No. 2 Kashinath was a mere benamidar is proved beyond all reasonable doubt by the admission made by defendant No. 2 to the effect that defendant No. 1 was all along in possession of the house and by the evidence given by the said defendant in the witness-box to the effect that he executed a deed in favour of plaintiff Pandurang at the instance of Maroti defendant No. 1. According to the learned counsel for the appellant this appeal related to house No. 580, but the judgment shows that although originally the claim was in respect of a house, the plaintiff ultimately confined his claim only to a site shown by the letters C.C.D.D. in the sketch filed with the plaint. The sketch filed with the plaint has been referred to by the learned counsel for the appellant. It is difficult to conclude that it has anything to do with house No. 580 which is the subject-matter of the present litigation, The boundaries as described in the present plaint do not at all tally with the boundaries as given in the sketch referred to by the learned counsel for the appellant.

11. A judgment in another suit which is not Inter parties may be evidence u/s 13

of the Evidence Act for certain purposes, namely to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject-matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings; to establish the transaction referred to in the judgment; as evidence to show the conduct of the parties or particular instances of the exercise of a right or assertion of title (vide Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others, or to identify property; or to show how properly had been previously dealt with; to establish a particular transaction in which a right is asserted and the name of the person, if any, who is declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matters decided in that judgment. AIR 1937 69 (Privy Council) . The findings of fact arrived at on the evidence in one case are not evidence of that fact in another case. Gopika Raman Roy v. Atal Singh 56 Ind App 119 : AIR 1929 PC 99. "The reasons upon which a judgment is founded cannot be regarded as, nor can any finding of fact there come to other than the transaction itself be, relevant in another case". AIR 1931 89 (Privy Council) ; Lakshman v. Amrit ILR 24 Bom 591; Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani 29 Ind App 24 and Mahamad Amin v. Husan ILR 31 Bom 143.

12. As already observed, even if the judgment is evidenced for certain purposes, the finding of fact that defendant No. 2 was a benamidar in respect of certain transactions is not evidence in the present proceedings.

13. Moreover, as already observed, there is nothing to identify the property referred to in the judgment exhibit P-8. It is impossible to conclude that that judgment relates to House No. 580 or even part of house No. 580 as the boundaries of that house as given in the present plaint do not correspond or tally with the boundaries or the dimensions given in the sketch referred to by the learned counsel for the appellant. The judgments relied on by the learned counsel for the appellant therefore do not assist him in establishing that House No. 580 originally belonged to Marotirao. In fact, as the plaintiff relies on the registered sale-deed of 1896 to prove his case, he should have produced the registered sale-deed to show that House No. 580 had been sold to Kashinath and he should then have led evidence to show that the sale in favour of Kashinath was benami in favour of Maroti. To prove that a particular sale-deed in favour of a particular person was benami in favour of another he cannot rely on the reasoning given in another judgment between third parties. In fact, it is not clear in the judgment referred to whether it relates to the sale-deed of 1896. We are therefore clearly of the opinion that the plaintiff has failed to establish that House No. 580 belonged to Marotirao.

14. We therefore hold that the lower Court rightly dismissed plaintiff's claim in regard to House No. 580.

15. In regard to the other two houses, namely, Houses Nos. 190 and 582, which admittedly belonged to Marotirao, ordinarily plaintiff would be entitled to

possession as the next reversioner, unless the sale-deed executed on 10-1-1921 by Sarubai, widow of Marotirao, in favour of Vithabai was justified under Hindu law. This is the most important point contested in the appeal. The lower Court held that the plaintiffs case that this document was a bogus one had not been proved, that the burden was on the defendant to prove that this sale-deed by a Hindu widow was justified by legal necessity, that this burden was discharged by drawing a presumption as the sale-deed was more than 30 years old, as the transferor and the transferee and the attesting witnesses were dead, as Jaibai, sister of Vithabai, does not appear to have questioned the transaction during her lifetime and as Jaibai and her son (the plaintiff) acquiesced in reconstruction of House No. 582 by Vithabai and her son Namdeo after making applications to the Municipal Committee. The lower Court also relied on the conduct of Jaibai and her son (the Plaintiff). According to the lower Court their failure to raise objections could justly and properly be attributed to their knowledge of the sale of the home by Sarubai in favour of Vithabai, and that it was for a lawful purpose. The learned Judge also held that the existence of the debts of Marotirao to the extent of Rs. 400 was proved, and that the payment of husband's debts by a Hindu widow was a religious and charitable purpose for which the widow could alienate the property. Relying both on the evidence and on presumptions, the learned Judge held that the sale by Sambai in favour of Vithabai was justified by legal necessity and that it passed absolute property in the two houses in question to Vithabai. The learned counsel for the appellant challenges the findings and reasoning of the learned Judge, while the learned counsel for the respondents supports the findings and the reasoning of the trial Court.

16. As regards the alleged bogus nature of the sale-deed, it is the CLISC of the Plaintiff that the sale-deed of 1921 was executed because Kashinath and other persons were putting forward claims to the property on the death of Maroti. As to the alleged bogus nature of the sale-deed the Plaintiff himself has given no evidence localise according to him he became aware of the sale-deed only after he had filed the present suit. The learned counsel for the Plaintiff-appellant, however, relies only on the evidence of Trimbak (P. W. 7) who has deposed that Sambai had told that some persons were putting forward Claims to the property and she consulted him. He advised her to get the sale-deed executed in favour of her two daughters. It is doubtful if this statement alleged to have been made by the pleased Sarubai is admissible in evidence. In any case, the evidence of this witness is only on the point that the witness had given advice to Sarubai. It does not show that Sarubai had executed a bogus sale-deed merely with the intention of forestalling the supposed claims of Kashinath and others and not with the genuine intention of meeting legal necessity. We therefore agree with the finding of the trial Court that the alleged bogus nature of the sale-deed has not been proved.

17. We have been referred at length to various authorities on the question of principles applicable to alienations by a Hindu widow, the presumptions to be drawn, the circumstances in which such presumptions can be drawn, the burden

of proof, the importance of the recitals, and the purposes for which a Hindu widow can make an absolute alienation of her husband's property. The general principles applicable may be thus stated before applying them to the facts of the instant case.

18. In any suit where an absolute sale had been made by a Hindu widow the burden would be on the alienee or the transferee from the alienee or the person who relies on the validity of the alienation, whether he is Plaintiff or Defendant, to show that the absolute alienation of the property was justified under Hindu law in cases in which the Hindu widow had only a limited estate, *Kondama Naicker v. Kandasami* 51 Ind App 145 : AIR 1924 PC 56 *Banga Chandra Dhur Biswas v. Jagat Kishore* 43 Ind App 249 : AIR 1916 PC 110, *Rangaswami v. Nachiappa* AIR 1918 PC 196 and *Sham Sunder Lal v. Achhan Kunwar* 25 Ind App 183. If the person relying on the validity of the alienation by a Hindu widow is the Plaintiff, the burden of proof would of course be on him and the burden of showing that the alienation is justified under Hindu law would rest on him even if the Defendant has not taken the plea that the alienation is not justified. It is for the Plaintiff to allege and prove the circumstances which alone will give validity to the transaction. Defendants are not required to plead the absence of legal necessity. 25 Ind App 183 : 51 Ind App 145 : AIR 1924 PC 56 and *Lala Amarnath v. Achan Kuar*, 19 Ind App 196. Such a burden of proof rests on the person relying on the alienation whether he is Defendant or Plaintiff, because a Hindu widow who has a limited estate has no power to make an absolute alienation except under certain circumstances and whosoever alleges that her absolute alienation of such property is valid must prove the existence of any such circumstances. The circumstances justifying absolute alienation by a Hindu widow under Hindu law are certain religious and charitable purposes and those which are supposed to conduce to the spiritual welfare of the husband, or legal necessity, or benefit to the estate, which may for brevity be referred to as justifying circumstances, vide AIR 1918 PC 196, and *Karim-ud-din v. Gobind Krishna Narain* 36 Ind App 138. Legal necessity is one of the circumstances justifying an absolute alienation by a Hindu widow. The existence of such circumstances may be shown by establishing that there was "such consent to the alienation, by such reversioners as might fairly be expected to be interested to quarrel with the transaction and such consent will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one", vide, AIR 1918 PC 196.

When there is no evidence of such a consent, the person on whom the burden of showing the validity of the alienation lies, may discharge the burden by proving that there were in fact circumstances justifying the alienation or that he made a proper enquiry about the existence of justifying circumstances and was led to believe that there were such justifying circumstances and that his belief in the existence of such justifying circumstances was honest. AIR 1918 PC 196, *Kalishanker Das and Another Vs. Dhirendra Nath Patra and Others*, , *Bhagwat Dayal Singh v. Debt Dayal Sahu* 35 Ind App 48 : 25 Ind App 183, 51 Ind App

145 : AIR 1924 PC 56, and Ravaneshwar v. Chandi Prasad AIR 1915 PC 57. A mere recital in the deed of alienation of the existence of justifying circumstances is not enough to prove their existence AIR 1918 PC 198 and 43 Ind App 249 : AIR 1916 PC 110. But, if the alienation is an old one and owing to the lapse of time direct evidence of the facts and circumstances recited in the deed of alienation has disappeared, the recitals acquire importance and maybe presumed to be true and presumptions are permissible to fill in the details which had been obliterated by time. The recitals in the alienation deed, consistent with the circumstances and probabilities, will assume greater importance, Vide Chintamanibhatla Venkata Reddi v. Hani of Wadhwan 47 Ind App. 6 : AIR 1920 PC 64 and 43 Ind App 249 : AIR 1916 PC 110. In such cases the recitals would also be clear evidence of the representation made to the alienee about the existence of justifying circumstances and in such cases when proof of an actual enquiry by the alienee has become impossible, if the circumstances were such as to justify a reasonable belief that an enquiry would have confirmed its truth, the recital coupled with the circumstances would be sufficient evidence to support the deed. In 43 Ind App 249 : AIR 1916 PC 110 their Lordships of the Privy Council observed as follows.-

"....it is well established that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute recitals in deeds can only be evidenced as between the parties to the conveyance and those who claim under them.

But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor. On the other hand, can any fixed and inflexible rule be laid down as to the proper-weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away a recital consistent with the probability and circumstances of the case assumes greater importance and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then, when proof of actual inquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed."

19. When there are no recitals in the sale-deed showing legal necessity, the

Court may be justified in drawing presumptions about the existence of legal necessity provided such a presumption is supported by the evidence that may have been adduced and the circumstances of the case. A Full Bench of the Madras High Court, observed in *Marla Subrahmanyam Vs. Chelikani China Soorayya*, :

"In those cases where there are not even recitals of necessity in deeds of sale by limited owners, mere lapse of time does not have the effect of rendering an alienation by the limited owner binding on the reversion.....The burden of proof is not altered nor is evidence of justifying necessity, direct or circumstantial, positive or presumptive dispensed with by mere lapse of time."

These observations were followed by the Bombay High Court in *Mukabasappa Bhimappa and Others Vs. Hanmantappa*, . It is not correct to say that apart from circumstances and available evidence the Court will be justified in presuming that the alienation was for legal necessity merely on the ground that it was an ancient one. *Mukabasappa Bhimappa and Others Vs. Hanmantappa*, . If the sale-deed purports to have been made entirely for legal necessity and such legal necessity is either proved or presumed, but only a part of the amount for which the property has been sold is applied to satisfy the legal necessity, the whole sale will be upheld because a vendee is not bound by law to see that the whole amount paid by him is applied to satisfy the legal necessity, vide AIR 1927 37 (Privy Council) , AIR 1927 121 (Privy Council) and *Richhpal Chand and Others Vs. Richhpal Singh and Others*, . If the alienation is justified in part, but not in its entirety, the reversioner will be entitled to a decree for possession of the whole property on condition that he paid the alienee the consideration for the part of the same that was justified. AIR 1927 37 (Privy Council) . If the alienation is not at all justified by legal necessity, then it conveys only the limited estate of the widow to the alienee.

20. These principles have to be applied to the facts of the instant case. On the question of legal necessity, the case made out in the written Statement of the Defendants is that the alienation was for the payment of the debts of Maroti, husband of Sarubai, and for the maintenance of the widow Sarubai. In the sale-deed (exhibit 2-D-1), it is recited that the sale for Rs. 800 was for the payment of debts and for business. In the sale-deed there is no mention that the debts were of Marotirao nor is there a mention that the debts of the ancestral business of Maroti had to be paid. In answer to interrogatories, the Defendant stated that the debts were of Joharpurkar, Kaluram Bachraj and others. But evidence was adduced to show that there was a debt of Rs. 400 due to one Sundarsao and another debt of Rs. 200 or Rs. 300 due to one Champalal. Evidence was also adduced to show that Maroti used to spend money lavishly and that his annual income was only Rs. 1,000 to Rs. 1,500. On behalf of the Plaintiff the evidence was that Maroti owned at least 3 houses, that he looked like a rich man, and his expenditure was like that of a rich man, that he was a leading commission agent, that his financial condition was good, that he had 6 or 7 servants, and that his

annual income was about Rs. 8,000 to Rs. 10,000, vide the evidence of plaintiff Ramaji (P. W. 11. Rangdeo (P. W. 5), Trimbak (P. W. 7) and Marolrao (P. W. 8). Narayan (2 D. W. 3) was admittedly a servant of Maroti for 10 years. He admitted that Marotirao was doing the business of a broker, that every year about 4,000 carts of cotton used to be sold through his dalal and that he had 4 or 5 servants. According to this witness Marotirao used to take loans from Mojasa, Sundarsa and Gulabsa. In cross-examination the witness stated that Marotirao was an ordinary dalal and his income was up to Rs. 1,000 per year. Marotirao had spent about Rs. 1,000 to Rs. 2,000 in the criminal case against Namdeo. The witness Sakham, (2 D. W. 2) was in the service of Marotirao's daughter. He has deposed that Marotirao who was doing the business of broker used to have two to three servants. The evidence of witnesses about the financial condition of Marotirao may be relevant, but it would not directly prove or disprove the existence of Marotirao's debts. A poor man may have no debts, while a rich man may have debts. But in any case there must be clear evidence on the point and vague evidence cannot prove the existence of debts. In *Medai Dalavoi v. Nainar Tevar* AIR 1922 PC 307 their Lordships made the following observations:

"There is no reliable evidence that at his death Shanmuga was wealthy man or left personal property out of which his debts could have been paid; there are some vague statements of witnesses that he had been a wealthy man."

Vague statements cannot therefore take the place of positive and reliable evidence.

21. To prove that Maroti had to pay a debt of Rs. 400 to one Sundarsa, the Defendants relied on the evidence of one Mahadeo. (2 D. W. 1) and on the entries in the account books, 2 D-8, produced by him. In his evidence Mahadeo stated that he was a servant of Sundarsa from 1918 onwards. He and one Tukaram used to do the court-work of Sundarsa and the work of writing his account books. First Tukaram and Pandurang used to write the account books and later the witness used to write. Tukaram is dead. In 1917 there was a partition between Sundarsa and his brother Bhagwansa on the one hand and the rest of the family on the other. The witness deposed that he had brought account books pertaining to the partition and he proved an entry relating to the partition, to the effect that on 12th July 1917 at the time of the partition, the debt of one Maroti son of Dama Teli of Rs. 400 had been credited to the share of Sundarsa and Bhagwansa. This entry relates to the year 1917 whereas the witness Mahadeo entered the service of Sundarsa in 1918.

22. The original account books were produced but they were returned after the Court placed on record a copy of the entries. It is true that under Order 13, Rule 5, Civil Procedure Code, when a document admitted in evidence is an entry in a shop-book or other account book, a copy of the entry may be furnished and after the copy is examined, compared and certified and marked, the original may be returned to the person producing it. But where documents or books of account

are admitted in evidence Courts admitting them in evidence must note that this provision relates only to account books in current use. If the original account book produced is not in current use, the Court should not return it. It is only if the original account book is in current use that the procedure under Order 13, Rule 5, may be followed. In the instant case, the account relates to the year 1917 and was produced in 1953. The Court should not therefore have returned the original.

23. According to the witness Mahadeo, one Tukaram had given two account books to him informing him that he should keep them safe with him. The account books are therefore coming from the custody of Mahadeo and not from the shop of Sundarsa whose accounts they purport to be. The witness Mahadeo has also not deposed that the books produced by him are account books regularly kept in the ordinary course of business at the shop of Sundarsa. In the absence of such evidence the account books should not have been admitted, but it appears that no objection had been taken at the time of admission in evidence of the account books produced by Mahadeo. If no objection was taken at the time of the production of the account books, no objection can subsequently be taken in appeal, vide *Jagannath Pershad v. Hanuman Pershad* 36 Ind App 221 (PC) and AIR 1932 118 (Privy Council) . In such cases, therefore, it is essential that objection should be taken at the earliest stage, i.e., as soon as the books of account are sought to be admitted in evidence. However, even if no objection could be taken in appeal to the admissibility of the evidence, their reliability and the weight to be given to the account books have still to be considered. Sundarsa, the alleged creditor has not been examined by the Defendants. It the case of the Defendants is that one of the dents for which the alienation had been made was a debt due to Sundarsa and when Sundarsa is alive, the Defendants should have examined him as their own witness, but they have not done so. However, he has been examined as a witness for the Plaintiff as P. W. 4. He deposed that in 1917 a partition took place between himself and hiw brother Bhagwansa on the one side and his father and cousin-brother on the other side. The moneylending business came to the share of the witness and his brother. The witness had seen Marotirao Dalai but he does not remember whether or not Marotirao had a khata in his shop from 1917 to 1920, but Mst. Vithabai had an account in bis shop. The witness had advanced her (Vithabai) a loan. That loan was not paid The witness filed a suit and a decree was passed in his favour. One Borikar accepted the liability therefore and paid off the debt. According to Sundarsa, Mahadeo was in the service of the witness from 1917 till 1928 but he was in charge of the cloth shop. Sundarsa had two shops, a cloth shop and a moneylending shop. It was only after 1928 that Mahadeo used to look after the money lending business. In 1947 there was a partition between the witness and his brother Bhagwansa. Mahadeo accepted service with Bhagwansa. In cross-examination the witness stated that when there was business of moneylending account books were maintained, but white ants had eaten up the old account books. He burnt the old account books about 10 years ago as they were eaten by

white ants. The witness had with him account books only for the years after 1941. According to the witness, who is the alleged creditor, the old account books had been burnt because they had been eaten up by white ants, but surprisingly enough two of these old account books have been produced by Mahadeo who has proved them. The account books have not been shown to Sundarsa although they had been produced in Court before he was examined. The best witness to prove the account books would have been Sundarsa. In fact, Mahadeo was not in the service of Sundarsa in 1916 when the alleged debt was incurred by Marotirao or in 1917 when the alleged debt was allotted to the share of Bhagwansa and Sundarsa at the time of the partition. The account books were also not admittedly written by Mahadeo. Moreover, the entry was not made in 1916 when the debt referred to in the entry was incurred but in 1917. It is doubtful whether this entry which relates to the partition of 1917 can be relevant on the question whether Marotirao had incurred a debt in July 1916. An entry in a book of account is relevant to prove a matter if the entry was made at that time. Admittedly this entry was not made in 1916 but in 1917. Its value is therefore very little. Moreover, as already observed, according to Sundarsa the old account books had been burnt as they had been eaten up by white ants. It is difficult to believe that Sundarsa, whose account books they were, was not interested in preserving the books but that Mahadeo had preserved them up to the year 1953. We, therefore place no reliance on this entry of 1917 in the account books produced by Mahadeo. Moreover, the entry of 1917 does not prove that Marotirao had a debt in 1920 or 1921, or at the date of the alienation.

24. It is contended however that even if the account books are not accepted, still the evidence of Mahadeo itself is sufficient to prove that Marotirao had a debt of Rs. 400 owing to Sundarsa. In paragraph 9 of his evidence Mahadeo (2 D. W. 1) has deposed that in 1921 Vithabai executed a fresh bond for Rs. 400 in respect of Marotirao's loan. She paid the interest in cash and Tukaram wrote the accounts. At that time both Sundarsa and Ms brother Bhagwansa were present. Vithabai renewed the bond in 1924 and again in 1927. It is, therefore, urged that the evidence of Mahadeo itself proves that Marotirao had a debt of Rs. 400, but the case of the defendants is that the debt of Rs. 400 duo to Sundarsa was repaid in 1921 when the alienation in question was made. It is, therefore, difficult to believe the evidence of Mahadeo that the same debt had been renewed in 1924 and again in 1927 by Vithabai. Moreover, the alleged debt of Rs. 400 was of the year 1916 and Mahadeo could have no personal knowledge of the transaction between Marotirao and Sundarsa in 1916 as Mahadeo entered the service of Sundarsa only in 1918. The evidence of Mahadeo, therefore, does not prove that Marotirao had a debt of Rs. 400 to pay to Sundarsa. Sundarsa, the alleged creditor, does not speak of the debt of Marotirao.

25. It is also the case of the Defendants that there was another debt due to one Champalal, (2 D. W. 8). Champalal has deposed that he was on lending and borrowing terms with Marotirao and had to recover from Marotirao about Rs. 200 or Rs. 300. The debt was repaid by Vithabai. The learned counsel for both sides

concede that there is no reference to Champalal's debts in the judgment of the trial Court. There is no reference to Champalal in the answers to the interrogatories furnished by the Defendants regarding the names of the creditors of Marotirao. It is however contended that Champalal was in the service of Kaluram Bachraj. Champalal does not say that he was in the service of Kaluram. The learned counsel for the Defendants-respondents relies on the statement of the second Defendant himself as 2 D. W. 9 (paragraph 16) where he deposed that he (the witness) had gone to Kaluram Bachraj and there he met the witness Champalal. Even the Defendant does not depose that the name of the shop of Champalal was Kaluram Bachraj or that Champalal was in the service of Kaluram Bachraj. Champalal has deposed that he does not know whether Bhaurao had come to him for making enquiries between the years 1950 and 1953. Moreover, Champalal has not deposed that the debt was outstanding in 1921 at the time of the alleged alienation. Champalal has not given the date of the debt referred to by him. It is therefore difficult to conclude from his evidence that in 1921 at the time of the sale-deed there was a debt of Marotirao outstanding. We, therefore, reject the evidence relating to the alleged debts of Marotirao.

26. It is next contended that although there can be no satisfactory evidence to prove the debt of Marotirao, as the sale-deed is an ancient one, a presumption should be drawn about the existence of legal necessity for the alienation. It is contended that both the vendor and the vendee are dead as also the attesting witnesses to the document, and that all evidence relating to the transaction has disappeared owing to the long lapse of time. It is true that the vendor and the vendee are admittedly dead. As regards the two attesting witnesses Mukunda and Vijaram, the trial Court observed that it appears from the evidence of the plaintiff that they are both dead as the plaintiff used past tense while describing the relationship of the attesting witnesses with the deceased Marotirao and also because Trimbak (P. W. 7) also used the past tense with reference to Vijaram's relations with Ramaji. Trimbak has deposed that Vijaram was the jeth of Ramaji's sister and hence, he was Marotirao's relation. Plaintiff as P. W. 1 has deposed that Vijaram Teli was the brother of Marotirao's grand-daughter's husband and Mukunda was the brother of Marotirao's wife. But there is also the evidence of the Defendant himself (2 D. W. 9), who in paragraph 20 of his deposition has deposed that the attesting witness to the sale-deed, dated 10-1-1921, is the real "bhasra" (husband's elder brother) of Ramaji's sister. He does not know whether or not Mukunda the other witness is the real brother of Sarubai. The argument based on the use of past tense in relation to the attesting witnesses' relationship with Marotirao is therefore not conclusive because the Defendant himself has used the present tense. If the Defendant wanted to prove that the attesting witnesses were not alive at the time, the Defendant should have put questions to the witness as to whether the attesting witnesses were alive, and if necessary a further question should have been asked as to the relationship of the attesting witnesses. On the evidence adduced therefore we are not prepared to hold it as proved that the attesting witnesses are not alive.

27. The trial Court also relied on Section 90 of the Evidence Act for drawing a presumption, as to the existence of legal necessity. As already observed, if the alienation is an ancient one, and all the parties who could have given evidence about the circumstances of the alienation are dead, and lapse of time had obliterated the evidence regarding the circumstances, the recitals in the deed of alienation acquire importance and may be presumed to be true and presumptions are permissible to fill in the details which had been obliterated by time. Vide 47 Ind App 6 : AIR 1920 PC 64. The Privy Council has not relied on Section 90 of the Evidence Act to justify such a presumption. In some decisions of some High Courts (see Babulal v. Maniklal ILR 1941 Nag 124 : AIR 1941 Nag 79 Section 90 of the Evidence Act has also been relied on to show that every document more than 30 years old may be treated as ancient. u/s 90 of the Evidence Act a presumption may be drawn in the case of documents which are 30 years old and which are produced from proper custody that the signature and every other part of such document which purports to be in the handwriting of any particular person is in the handwriting of that person and that the document is duly executed and registered by the persons by whom it purports to be executed and attested. In Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others, their Lordships held that u/s 90 of the Evidence Act when a document is signed by a person P as agent of another person Q, there is no presumption as to the existence of authority on the part of P to represent Q. Apart from the presumption of due execution, there is no presumption that the document has the legal effect that it purports to have. In the case of an alienation by a Hindu widow, even if the execution of the document by her is admitted or proved, on the question whether she alienated only her life estate in the property or whether she made an absolute alienation, no assistance can be derived from Section 90 of the Evidence Act. The question as to the effect of a document after its due execution is admitted or proved is outside the scope of Section 90 of the Evidence Act. When a Hindu widow makes an alienation, the circumstances justifying the alienation such as legal necessity, are matters extraneous to the execution of the document and Section 90 of the Evidence Act cannot be called in aid to presume matters extraneous to the actual execution.

28. However, as observed by the Privy Council, a presumption can be drawn in certain circumstances in the case of ancient alienations by Hindu widows. The presumption rests mainly on the fact that all evidence has disappeared. In the present case, Sundarsa, the main creditor, is alive and has been examined. The Defendant in his evidence has stated that Ramaji's sister Mst. Gahenabai had told him about Marotirao's debt and accordingly Defendant gave his reply to interrogatory No. 4. The Defendant has also admitted that Gahenabai does not reside with Ramji but resides with the Defendant himself and is alive. Mst. Gahenabai, therefore, according to the Defendant himself, had knowledge about Marotirao's debts and could have been examined as a witness but she has not been examined for the Defendant although she is alive and lives with the Defendant. This is not a case, therefore, where all evidence as to the

circumstances of legal necessity has disappeared. The alienation was of 1921 and the suit was filed in 1951. In these circumstances, no presumption can be drawn as to the existence of legal necessity from the single circumstance that the alienation was of 1921.

29. The trial Court relied on ILR 1941 Nag 124: AIR 1941 Nag 79 for drawing a presumption that there was a legal necessity, and in particular, on the following observations at pages 129 and 130 (of ILR Nag): (at p. 82 of AIR):

"It is clear that in the case of an ancient transaction, it must be presumed that the alienation was lawful i.e., justified by legal necessity. The difficulty no doubt lies in fixing the length of time (intervening between the transaction and its challenge in a suit) that would be necessary to justify the application of that presumption. It is impossible to lay down any hard and fast rule. But it appears to us that on the principle underlying Section 90 of the Evidence Act relating to documents 30 years old, the presumption in favour of the existence of necessity may well be applied to transfers more than 30 years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded. The presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the life time of the alienor. It would not be unreasonable to assume that the failure to sue for declaration was due to the existence of evidence proving necessity. In any case, application of the rule as to presumption would depend on the particular facts of each case and We are decidedly of opinion that the facts and circumstances of this case are such as to justify the placing of onus on the reversioner of proving absence of legal necessity."

30. This case has been referred to in *Mukabasappa Bhimappa and Others Vs. Hanmantappa*, where Dixit, J. observed that the principle was too broadly stated in the Nagpur case, that in the case of an ancient transaction relating to the alienation of a Hindu joint family property, it must be presumed that the alienation was lawful, that is, justified by legal necessity. As already pointed out, in the case of ancient transactions when all evidence relating to the circumstances justifying legal necessity has disappeared the presumption is that the recitals in the sale-deed may be presumed to be true if they are consistent with the evidence and other circumstances and that it may be presumed that representations were made to the alienee that the alienation was for purposes justified in Hindu law. The presumption is not an absolute presumption of the existence of legal necessity but a presumption with reference to the recitals in the deed of alienation and the circumstances.

31. In the Nagpur case it was also observed that the presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the lifetime of the alienor. With great respect again, this proposition appears to be too broadly stated because, as observed by the Privy Council, a reversioner can treat an alienation by a Hindu widow or daughter as a nullity

without the intervention of the Court. Vide 51 Ind App 145: AIR 1924 PC 56 and Bijoy Gopal v. Krishna Mahishi Debi 34 Ind App, 87 which was a case where an alienation of 1863 was challenged after the widow's death in 1893. It is, therefore, not necessary for a reversioner to go to the Court to get a declaration that the alienation is a nullity. He can himself treat it as a nullity. The reversioner may expect that the widow may not live long and that he need not unnecessarily file two Suits, one for declaration during the lifetime of the widow and another for possession after the death of the widow, or the reversioner may not like to hurt the feelings of the widow during her lifetime. In any case, even if he is aware of the alienation, he can treat it as a nullity. In the instant case it is the case of the Plaintiff that he became aware of the alienation only after he filed the present suit. The mere failure to file a suit for declaration cannot therefore be treated as adding to the weight of the presumption which may be drawn in the case of ancient alienations.

32. In some cases it was observed that the inactivity of the reversioner in not challenging the alienation may itself be a good ground for presuming the validity of the alienation and the Privy Council case of Magniram Sitaram v. Kasturbhai Manibhai ILR 46 Bom 481 : AIR 1922 PC 163 appears to have been relied on in support of the proposition. But if we look at that case, it would appear that that decision is not an authority for the proposition that a presumption can be drawn from mere inactivity. In that case the question was whether the lease granted by a shebait in 1824 was a lease from year to year or whether it was a permanent lease. A shebait has in special circumstances the power of making a wider grant than one which enures only during his life. In 1909 a suit was brought alleging that the lease granted by the shebait was a lease from year to year and that the tenancy had been terminated by a notice. Their Lordships observed as follows:

"In the case of Chockalingam Pillai v. Mayandi Chettiar ILR 19 Mad 485 it was pointed out that although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Their Lordships have no hesitation in applying that doctrine to the present case. It is in fact the grant was made by a person who possessed the limited power of dealing under which a shebait holds lands devoted to the purposes of religious worship, yet none the less there is attached to the office, in special and unusual circumstances, the power of making a wider grant than one which enures only for his life. At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Court always adopts, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made."

33. This is a case where the alienation was challenged not because of the death of the shebait who made the alienation but on the ground that the lease was terminated by a notice given by the Plaintiff and such a notice had been given long after perhaps more than 12 years after the death of the alienor shebait, and therefore the delay and the long lapse was used against the Plaintiff. Their Lordships also observed that it is not plain that the original alienation in 1824 was made by anybody in the position of a shebait at all. That case was not, therefore, a plain case of alienation by a person with limited powers of alienation. The presumption of lawful origin drawn from long possession and enjoyment is a different one from the presumption that is drawn in Hindu law in the case of ancient alienations by a Hindu widow or daughter because in the case of an alienation by a Hindu widow long possession and enjoyment of alienee may be due to the long life of the widow even if the alienation was limited to the lifetime of the Hindu widow and was not absolute. In some cases reliance was placed on *Annamalai v. Subramanian* AIR 1929 PC 1 in support of the proposition that a presumption may be drawn from mere inactivity on the part of the reversioner. But, with great respect, this authority of the Privy Council does not support such a proposition. That was a case where a suit was filed in 1919 by a member of the joint Hindu family, claiming a share in dwelling house. Fourteen years earlier i.e. in 1905 he himself had sought to mortgage his share of the house and his right to do so was challenged and the mortgage money was returned to him. In 1915 a public notice was also given to him that he had no power to whatever deal with the house and that the house was not joint family property. In 1919 he filed a suit claiming that the house was joint family property and that he had a share in it. It was in these circumstances that the Privy Council observed as follows:

"Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet the fact that in 1905 when his right to mortgage was challenged the appellant took no steps, strongly suggests that at that time when evidence might have been more readily available he had no great faith in the value of his claim."

Their Lordships merely used the facts as suggesting some inferences. There was no question of any presumption drawn. Moreover, a challenge had been thrown to the person and in spite of the challenge he took no steps. When a reversioner is inactive or keeps silent he does so not in spite of any challenge made to him but due to the fact that under law he can treat the alienation as nullity without intervention of the Court and generally the alienee does not challenge the reversioner's rights. The Privy Council case was a case of inactivity in the teeth of a direct challenge and certain inferences were drawn from it. In view of the clear right of a reversioner to keep silent and to treat the alienation as nullity without the intervention of the Court, mere inactivity on his part cannot give rise to a presumption.

34. Moreover, as already observed, when the presumption can be drawn, the presumption which is drawn is that the recitals in the deed of alienation may be

presumed to be true provided the recitals and the presumptions are supported by the circumstances of the case. It is therefore necessary to look at the recitals in the deed of alienation. The deed of alienation recites that the houses had been sold for payment of the debts of creditors and for business purposes. The deed does not say that the creditors were the creditors of Marotirao, nor does it mention that there were also debts of the business left by Marotirao. It cannot therefore be interred from the sale-deed that the debts were of Marotirao himself. As regards the other purpose mentioned in deed of alienation, namely, the purpose of business, it is urged that such a purpose is justified under Hindu law. Mr. Bobde, learned counsel for the respondents has drawn our attention to the following observations in Mulla's Hindu law, 12th edition, Paragraph 194A:

"A widow or other limited heir may alienate or charge the estate for payment of debts properly incurred by her in connection with, the business inherited by her from the deceased owner"

and reliance is placed on 25 Ind App 183. But in this case their Lordships of the Privy Council observed at page 192 that there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business. They also observed that when a family business is being carried on by the manager of an undivided family estate, the manager of a family business has a certain power of pledging assets for the requirements of the business, but the position of the Hindu widow or daughter is not by any means the same as that of the head of the undivided Hindu family, and even in the latter case the validity of the mortgage by the manager of the family business, without the concurrence of the other members of the family or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. The powers of a Hindu widow or daughter are not the same as that of the manager of a Hindu family. This case does not lay down the proposition enunciated by Mulla. The Privy Council explained the powers of the manager and further stated that the powers of a Hindu widow are not the same. The Privy Council did not state what the powers of a Hindu widow are in regard to the debts properly incurred by her in connection with the business, inherited by her from the deceased owner. The case of 19 Ind App 196 also does not state the extent or limits of the powers of a Hindu widow in such matters. In any case, in the instant case there is no recital in the sale-deed that there were any debts of the business.

35. In the case of an ancient document, even if there is no evidence of actual legal necessity, the recitals in the deed may justify the inference that the alienee had made proper enquiries and was honestly led to believe and honestly satisfied himself that there was legal necessity. In the present case in view of the recitals in the sale-deed, the alienee was told in plain terms that the alienation was for business purposes. He was not told that there were any debts of the business. It may be that Marotirao had two shops, which were being run by his two daughters Vithabai and Jaibai. According to the Plaintiff, Marotirao had two shops

and Vithabai used to sit at one of them which was located in house No. 190, and Jaibai used to sit at the grocery shop located in the same house. Dada (P. W. 3) has deposed that Marotirao had one shop and his two daughters Vithabai and Jaibai used to sit at that shop. After the death of Marotirao Vithabai ran the shop. Trimbak (P. W. 7) has also deposed to the same effect. There is no evidence that after the death of Marotirao the shop or shops of Marotirao were run by Sarubai. In any case there is no evidence to show that there were any debts of the business. We therefore hold that the second reason given in the sale-deed for the alienation is not a reason recognized in Hindu law as justifying the alienation. The first ground for the alienation also does not justify the alienation because it does not mention that the debts were of Marotirao. We therefore hold that in view of the recitals in the sale-deed itself, the alienation must be treated as not justified under Hindu law.

36. In the jamabandi, exhibit P-4, the values of the two houses in question are shown as Rs. 900 and Rs. 450 in the year 1921. These values are not challenged in the course of the arguments before us. The two houses worth Rs. 1,350 in 1921 were alienated by a Hindu widow to her daughter for only Rs. 800. This circumstance also shows that the alienation was not a bona fide one for real legal necessity. If the alienation is to be justified it must be for adequate consideration: AIR 1927 37 (Privy Council) .

37. The learned Judge of the trial Court was therefore wrong in drawing an absolute presumption of legal necessity in the circumstances of the case. We also hold that his finding as to the existence of legal necessity is wrong and we hold that the sale-deed of 1921 was not justified under Hindu law.

38. It is then contended that even if the alienation is not justified the parties belonged to the Bombay school of Hindu law and that consequently even if the alienation is not justified the two daughters Vithabai and Jaibai would have an absolute estate in the property of their father Marotirao after the death of his widow Sarubai in 1921. According to the Plaintiff, however, Marotirao belonged to the Benares School of Hindu Law. The learned trial Judge held in favour of the Plaintiff, observing that although in an affidavit sworn by Defendant No. 2 in reply to Plaintiff's interrogatories it was stated that Marotirao's ancestors migrated to Nagpur from Badnera in Amravati district, there was no evidence to show this migration, and that as the family lived in Nagpur they would be presumed to be governed by the lex loci of the place in which they reside.

39. In such matters as the Law of Succession, a person is governed by his personal law unless he migrates to another place and there gives up his personal law in favour of the personal law of the place where he is domiciled afresh. If nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails at that place, but if evidence is led to show that the man had migrated from another place, then his personal law would be the personal law of the lex loci of the place from which he had migrated unless he has given it up. Even if there is no evidence to show that

he had migrated from another place, evidence can be led to show his manners of living, ceremonies and customs observed by him, and an inference can be drawn from such evidence that his personal law is not the same as the *lex loci* of the place where he is residing and that he must have hailed from another territory where such ceremonies and customs and mode of life are common. *Vide Babu Mortising v. Durgabai* ILR 53 Bom 242 : AIR 1929 Bom 57 and *Balwant Rao v. Bajirao Rao* 16 Nag LR 187 : AIR 1921 PC 59. In *Pralhad Sheonarayan Chokhani Vs. Damodhar Rankaran Vaishnao and Others*, , it was observed that it is well settled that if nothing is known about a person except that he lived at a certain place it will be assumed that his personal law would be the law where he lives at such a place, but if more is known then in accordance with that knowledge, his personal law must be determined unless it can be shown that he has renounced his original law in favour of the law of the place to which he has migrated. On the facts of the case it was held that in matters of adoption the family of the deceased Agarwal of Yeotmal in Berar originally belonged to Hissar district in Punjab and that the family was therefore governed in the matter of adoption by the customary law prevailing in Hissar district so far as it was in variance with the law of the domicile. This case is therefore relied on only for general principles and not for any decision in regard to the personal law applicable to Marathi Teli or the *lex loci* of the Nagpur district.

40. In the instant case there is no evidence to show that Marotirao had migrated from another part of India or as to the mode of living of Marotirao or the ceremonies or customs observed by him. In the absence of any such evidence it must be presumed that the personal law of Marotirao was the *lex loci* of the place where he was living viz. of Nagpur.

41. It is however contended that the Plaintiff in his evidence has admitted that they were Marathi Teli's. It is therefore urged that Marotirao was governed by the Bombay School. In addition, it is also contended by Mr. Dharmadhikari for respondents 1 (a) and 1 (b) that the *lex loci* of Nagpur is itself the Bombay schools of Hindu law. In view of the admission of the Plaintiff that he is a Maratha Teli reliance is placed on 16 Nag LR 187 : AIR 11921 PC 59, *Keshao Rao v. Sadasheo Rao* ILR 1938 Nag 469 : AIR 1938 Nag 163 *Laxman v. Gangabai* AIR 1955 Mad 138 and *Udebhan Rajaram Vs. Vikram Ganu*, for the contention that all Maharashtra Brahmins wherever they live are governed by the Bombay School of Hindu law. ILR 1938 Nag 469 : AIR 1938 Nag 163 it was held that all Maharashtra Brahmins in Central Provinces arc governed by the Bombay School even when migration was not proved. This case was followed In (S) AIR 1955 Mad. 138. In *Udebhan Rajaram Vs. Vikram Ganu*, it was held that all families belonging to Maharastra Teli community residing in Sausar, Chhindwara district, Madhya Pradesh, were governed by the Bombay School of Vyawahara Mayukh. There is no doubt from the authorities that all Maharastrian wherever they live in India are governed by the Bombay School of Hindu law, and it is possible to include in the term "Maharastrian" all "Marathas" although "Maratha" represents a caste. All Marathas may therefore be treated as Maha-rashtrians, for the

purpose of personal law, but in the instant case there is no admission by the Plaintiff that he is Maharastrian Teli or a Maratha Teli. He has merely stated that he is a Marathi Teli. Marathi is the name of a language and not of a caste or community or race. Marathi cannot be treated as synonymous with "Maharashtrian" or "Maratha". In any case, even if there is an ambiguity we must remember that reliance is sought to be placed on what is termed an admission made by the Plaintiff. If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission, especially because that is the only circumstance relied on this point. An admission must be clear, precise, not vague, or ambiguous. Vide Rani Chandra Kunwar v. Narpat Singh 34 Ind App 27 and Nagubai Ammal and Others Vs. B. Shama Rao and Others, .

42. Moreover the admission of the Plaintiff however relates to himself and not to the position of Marotirao. The Plaintiff is the daughter's son of Marotirao and we do not know whether the personal law of Marotirao is the same as that of his daughter's son. There is no evidence on the point. In any case, the question is whether Marotirao is governed by the Bombay School of Hindu Law in the matter of succession and not whether the plaintiff is governed by this law. We therefore hold that the admission of the Plaintiff does not justify the conclusion that Marotirao was governed by the Bombay School of Hindu law.

43. It is however contended by Mr. Dharmadhikari for the respondents 1 (a) and 1 (b) that even the lex loci of Nagpur is the Bombay School of Hindu Law and he relies on ILR 1938 Nag 469 : AIR 1938 Nag 163 where at page 478 (of ILR Nag) : (at p. 167 of AIR) it was observed that the earliest decision in the Central Provinces in Mst. Laxmibai v. Krishna (Second Appeal No. 270 of 1877) was decided on the 27th October 1877, where the Judicial Commissioner after referring to an article on Nagpur in the Central Provinces Gazetteer, gave his decision, on examination of historical records, that the lex loci of the Nagpur District was the law of Western India. Reliance is also placed on the following observations at page 473 (of ILR Nag) : (at p. 165 of AIR):

"These Provinces (Central Provinces) were not either a geographical or political unit till the advent of the British, and even then were not taken over wholesale, but were slowly amalgamated by the addition of tracts of territories from time to time from different persons and for different reasons. On the other hand Hindu religion and culture, its laws and traditions, with its varying usages and differing interpretations, had crystallized as entities long before this time. Therefore, we have to visualise the scene as it existed before the British era. It does not follow that the ideas then prevailing in one section of the area now known as the Central Provinces were equally prevalent in another. It is impossible to make a sweeping assertion that this or that is the lex loci of the Provinces as a whole without finding out whether the influences at work which impressed themselves upon a particular locality to such an extent as to make them the predominating factors in determining its law and usages were also at work elsewhere and were

equally successful."

44. The question as to what was the *lex loci* of Nagpur depends on the history of migration of people to Nagpur, of which there is not much record, but there are several cases where it has been held that the *lex loci* of Nagpur is the Benares School of Hindu Law. Vide *Ramlu v. Vithal* ILR 1947 Nag 207 : AIR 1947 Nag 180 at pp. 181-182) *Bhaskar v. Laxmibai* ILR 1953 Nag 187 at p. 198 : AIR 1953 Nag 326 at p. 329 and *Laxminarayan Vs. Ram Sarup*, . In the first of these cases it was held that although. Central Provinces

"are not an ethnic or linguistic entity, still the *Milakshara* as interpreted by the Benares School is the law of this Province (excluding Berar). The Hindus of this province are accordingly governed by the Benares School and it is in this sense that the Benares School can be said to be the *lex loci* of this province".

Reliance was also placed on *Rajeshwar v. Kesheo* 1944 Nag LJ 291. In *Bhaskar v. Laxmibai* ILR 1953 Nag 187 : AIR 1953 Nag 326, it was held at page 198 (of ILR Nag) : (at p. 329 of AIR) that:

"It has been consistently held at least from the year 1887 that the *lex loci* of the Central Provinces is the Benares School of Hindu Law: Vide *Hiralal v. Tanibai* 2 C. P. L. R. 18, *Deorao Zamindar v. Mt. Sakhubai* 11 C. P. L. R. 49, *Rukhmabai v. Jalpal* 23 Nag. LR 108 : AIR 1927 Nag 122, *Rambhabai v. Totaram* AIR 1923 Nag 183 at p. 190 : 1944 Nag. LJ 291, *Gano. v. Beni* 14 Nag. LR 82 : AIR 1917 Nag 7 and ILR 1938 Nag 469 : AIR 1938 Nag 163."

In such cases the principle of *stare decisis* is important. It is far more important in such matters that the law should be certain than that it should be correct or sound, because in such matters in the absence of sufficient historical records It may not be easy to give a correct decision. But ever since 1887 the general current of authority has held that the *lex loci* of the Central Provinces is the Benares School of Hindu Law and that of Berar is the Bombay School of Hindu Law. We are therefore not prepared to differ from this strong trend of authority. In any case, these decisions can work no hardship on any party be-cause it is always open to any party to lead evidence to show that he or his ancestors migrated from another place and to show that his personal law is different or to show that he follows the customs and mode of living of persons belonging to a different school of personal law.

45. There is another circumstance to be noted in the present case. *Vithabai* admittedly had filed a suit (19-A of 1937) in 1937 claiming to be reversioner in respect of house No. 579 which was in the possession of her sister *Jaibai* and which was sold in execution of a decree against *Jaibai*. *Jaibai* had lost that house in execution of the decree, but *Vithabai* succeeded in her suit in establishing that after the death of *Jaibai* she was entitled to that house as a reversioner. *Vithabai* was the predecessor-in-title of the present Defendants and she therefore claimed to be governed by the Benares School of Hindu Law because she could be reversioner after the death of her sister only under the Benares School of Hindu

Law and not under the Bombay School of Hindu Law. We therefore hold that the lower Court was right in finding that Marotirao was governed by the Benares School of Hindu Law and not by the Bombay School of Hindu Law. The contention of the learned counsel for the Respondents on this point therefore fails.

46. It is next contended that Vithabai had been in adverse possession ever since 1921 and that therefore the suit is not in time. It is contended that the suit is not in time because the daughters take full estate under the Bombay School of Hindu Law and that Jaibai died in 1936 more than 12 years before the date of the filing of the present suit. We have already held that the parties are not governed by the Bombay School. The starting point of limitation would therefore not be the date of death of Jaibai but the date of death of Vithabai who died on 12th January 1950. The suit is therefore in time.

47. As regards the contention that Vithabai had been in adverse possession from 1921 onwards, it is clear that the adverse possession against Hindu widow cannot be treated as adverse possession against a reversioner. In this case adverse possession is claimed by Vithabai as the daughter of Sarubai, the Hindu widow in question, if the adverse possession of a stranger against a Hindu widow cannot be reckoned as adverse possession against the reversioner, the adverse possession of a daughter of a Hindu widow can a fortiori not be reckoned as adverse possession against a reversioner. In *Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others*, :

"the statute of limitation does not begin to run against the reversioner when there is dispossession of a Hindu female holding a limited estate; and in such cases the reversioner has a right to institute a suit within 12 years from the death of the female heirexcept where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner."

We therefore hold that in this case there can be no adverse possession as against the Plaintiff who is a reversioner.

48. It is next contended that if the sale is held to be not binding on the reversioner, u/s 51 of the Transfer of Property Act, the Plaintiff should, be ordered to refund the amount spent on the reconstruction of houses Nos. 583 and 190. Section 51 of the Transfer of Property Act reads as follows:

"When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the

estimated value thereof at the time of the eviction.

* * * * "

The learned Judge of the lower Court disallowed the cost of reconstruction of house No. 190 on the ground that the expenditure was incurred after a notice had been given by the Plaintiff claiming to be entitled to the house as reversions. We agree with the lower Court in regard to this house because the fact that the house was constructed after notice had been given by the Plaintiff would disprove the ingredient of good faith which is necessary u/s 51. As regards house No. 582, the trial Court accepted the evidence of the Plaintiff that as. 3,000 had been spent by Vithabai but it did not discuss the evidence adduced on behalf of the Defendants, namely, the evidence of Balaji, (2 D. W. 7), who is a carpenter, that Vithabai spent more than Rs. 5,000 on the house. In such cases one party tries to exaggerate and the Other party tries to underestimate. u/s 51 of the Transfer of Property Act, however, the value at the date of eviction has to be awarded and on this point there is no evidence. It would therefore be reasonable to hold that u/s 51 of the Transfer of Property Act the Defendants would be entitled to Rs. 4,000 as compensation for the improvements made in respect of house No. 582.

49. We therefore partly allow the appeal and set aside the decree of the lower Court dismissing the suit. There will be a decree in favour of the Plaintiff for possession of houses Nos. 582 and 190, provided the Plaintiff pays Rs. 4,000 to the respondents 1 (a), 1 (b) and 2. As regards costs, as the Plaintiff has succeeded in regard to two houses and failed in regard to one house, there will be no order as to costs of the appeal. The Plaintiff will however get proportionate costs of the suit in the Court below. We therefore direct that the Plaintiff shall get possession of houses Nos. 190 and 582 after paying Rs. 4,000. The learned counsel for the Plaintiff says that he claims mesne profits only from the date of suit. This will be determined in an enquiry to be made after an application is made under Order 20, Rule 12. Civil Procedure Code.

50. Appeal partly allowed.