APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

SUBBAYYA (PLAINTIFF), APPELLANT,

and

CHELLAMMA (REPRESENTATIVE OF DEFENDANT No. 1) AND OTHERS, RESPONDENTS. *

1886. July 27.

Hindú Law—Self-acquisition—Burden of proof.

Where waste land was taken up and cultivated by the father of an undivided Hindú family and the question was whether it was family property or self-acquired:

Held that the burden of proof lay on those who asserted that it was self-acquired.

Quære, whether under Hindú Law a father has power by a nuncupative will to dispose of self-acquired immovable property to the complete disinherison of a son.

APPEAL against the decree of T. Rámasámi Ayyangár, Subordinate Judge at Cocanada, in suit 188 of 1883.

Plaintiff, Varidhinidhi Subbayya, alleged that Gundabogulu Putramma (defendant No. 3), junior widow of Chowdhri, gave him a lease of certain land in June 1881; that Ammirázu (defendant No. 2), son of Chowdhri by his senior wife, prevented him from taking possession, claiming title; that in October 1881 he obtained a sale-deed of the land from defendant No. 2 who acquired the land on partition with defendant No. 1; that defendant No. 3, at the instigation of Surayya, defendant No. 1, the divided brother of defendant No. 2, thereupon sued him for rent and obtained a decree. Plaintiff claimed to have the lease of June 1881 cancelled and the sale-deed of October 1881 confirmed. Defendants Nos. 1 and 3 pleaded that defendant No. 2 had been adopted into another family and had no title.

The Múnsif found that defendant No. 2 had not been given in adoption, that the land was the self-acquisition of Chowdhri, and that before his death he had made provision for his family by marrying defendant No. 2 into a family in which he was to be brought up as son and heir according to local custom (Menarikam) and by giving the property in suit to defendants Nos. 1 and 3.

* Second Appeal 703 of 1885.

SUBBAYYA v. CHELLAMMA.

The suit was dismissed.

On appeal the Subordinate Judge found that defendants Nos. 1 and 3 had divided Chowdhri's property after his death in accordance with directions given by him shortly before death, and that the effect of Chowdhri's direction was to transfer the property at once to defendants 1 and 3.

Plaintiff appealed, on the following among other grounds:—

(1) because, if the land was self-acquisition, Chowdhri could not dispose of the whole estate without making provision for defendant No. 2;

(2) because there was no evidence to rebut the presumption that the land was family property;

(3) because Chowdhri had not transferred the land to defendants 1 and 3.

Mr. *Norton* for appellant.

Mr. *Michell* for respondent No. 3.

The Court (Collins, C.J., and Parker, J.) delivered the following

JUDGMENT:—The plaint land appears to have been taken up by Chowdhri at the request of the tahsildar when it was waste, and had been abandoned by other cultivators. We cannot infer from that fact alone that it is necessarily to be regarded as self-acquired property. The ordinary presumption would be that Chowdhri acquired it for the benefit of his family and brought it under cultivation by the aid of family funds in the absence of evidence that he had self-acquired funds which he utilized for that purpose.

The District Múnsif says that Chowdhri acquired the land without the use of any patrimony, and he might have said without the expenditure of any funds at all, since the land was taken up from the Revenue authorities when it was waste. The true test is whether it was brought under cultivation by family or self-acquired funds and the *onus probandi* lies upon those who allege the latter. The Subordinate Judge has clearly put the burden upon the wrong side.

We must ask the Subordinate Judge to re-try the 5th issue upon the evidence on record and upon any further evidence which the parties may adduce, and in the event of his again finding that the land was the self-acquired property of Chowdhri, he

will proceed to try the further issue whether according to Hindú Law a father has power by a nuncupative will to dispose of self-acquired immovable property as he pleases and to the complete disinheriting of an undivided son.

We are clearly of opinion that the evidence as to what took place the day before Chowdhri died—if it is true—would establish a bequest to take effect after the death of the testator, and not a gift *inter vivos*.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

PADSHA (DEFENDANT), APPELLANT,

and

TIRUVEMBALA (PLAINTIFF), RESPONDENT.*

1886. July 14, 30.

Rent Recovery Act (Madras Act VIII of 1865), ss. 39, 41, 43, 44—Delivery of possession—Appeal—Limitation.

A. obtained a warrant ejecting B. for arrears of rent under s. 41 of the Rent Recovery Act. B. appealed within fifteen days, but A. was put into possession on 13th May 1882, B.'s appeal came on for hearing and was dismissed on 30th June 1883. B. instituted this suit to recover possession of the land on 28th July 1883:

Held, that B.'s suit was not time-barred under s. 44 of the Rent Recovery Act.

APPEAL from the decree of C. W. W. Martin, District Judge of Salem, reversing the decree of S. Manavalayya, District Múnsif of Salem, in suit No. 339 of 1883.

The plaintiff being a tenant of land in a certain jaghir failed to pay rent for fasli 1290 and the defendant obtained a warrant from the Collector (see s. 41 of the Rent Recovery Act), "authorizing him to enter on, and take possession of, the premises." Within fifteen days after service of the warrant, the plaintiff appealed to the Deputy Collector under s. 43 of the above Act, but the appeal did not come on for disposal for a year, and in the meanwhile, on 13th May 1882, the police put the defendant in possession of the premises.

On 30th June 1883 the appeal was dismissed; and on the

* Second Appeal 936 of 1885.