PRIVY COUNCIL.

P.C. *
1889.
July 16, 17.

PUTHIA KOVILAKATH KRISHNAN RAJA AVERGAL (DEFENDANT),

v.

PUTHIA KOVILAKATH SRIDEVI AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Madras.]

Concurrence of Lower Courts in findings upon questions of fact—Agreement for division of family property in equal shares—Malabar custom.

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below.

APPEAL from a decree (23rd March 1885) of the High Court, affirming a decree (3rd April 1884) of the Subordinate Judge of South Malabar.

The suit out of which this appeal arose was brought by the respondents against the appellant for Rs. 37,633, with interest, calculated from the 19th January 1881, as money received by the defendant on that date on behalf of the plaintiffs, having been paid by the Official Trustee as part of a one-fourth share of joint property to which the plaintiffs were entitled. They alleged that the defendant having received the whole of their share had paid over only part, improperly retaining the balance now claimed.

The defence was that according to an agreement for partition contained in a razinama filed in a suit in which a decree was made by the High Court, the plaintiffs were entitled to no more than the sum which they had received. The plaintiffs and defendant were members of a family of zamorins, or rajas, at

* *Present*: Lord WATSON, Lord HOBHOUSE, Sir BARNES PEACOCK and Sir RICHARD COUCH.

Calicut, comprising three "kovilakams," or houses, and the parties belonged to the first of these called the Puthia Kovilakam. They were governed by the Maramakatayam law of inheritance, under which descent is traced in the female line, a person's heirs being the children of his sisters. Each kovilakam, or house, had its separate estate, and the senior female representative of each, known as the Valia Thamburatti of such kovilakam, was entitled to the management of the property belonging to it. There were also five stations, or places of dignity, known as stanoms, to which separate property was attached, and these belonged to the senior male members of the kovilakams in succession as explained in *Vira Rayan* v. *Valia Rani of Pudia Kovilagom*(1). The fund, of which the partition led to the present litigation, consisting of jewels, and money of the value of Rs. 4,77,996, constituted the bulk of the joint estate of the Puthia Kovilakam, and was derived from a zamorin, who died in 1845. The mother of the first and second of these respondents, and grandmother of the third, was the Valia Thamburatti of the Puthia house, and manager. She, being anxious for the safety of the fund, made it over for safe keeping to the Collector of South Malabar, and then at his request to the Official Trustee at Madras.

The first branch, dissatisfied at this, in September 1879, sued the Official Trustee and the Valia Thamburatti, claiming to have the right of that branch to one moiety of the fund declared, as being the defendants of one of the two sisters, whom they declared to have been the donees in 1845.

The Valia Thamburatti in her defence denied their right to interfere with her management. But while matters so stood, a compromise was entered into among the four branches of the family at Calicut. By this it was agreed that the fund in question should be divided into four equal parts, each branch taking one, and to carry this out, an authority to a vakil at Madras was signed at Calicut, to have four persons (parties afterwards to the present suit) made defendants to the then pending suit, and to have it disposed of and partition made. The result was that there was executed at Madras the razinama, which the present suit alleged to be fraudulent, by reason of its arranging, without due consent, and contrary to the subsisting understanding,

(1) I.L.R., 3 Mad., 141.

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that the moiety of the fund should be unequally divided between the two of the parties, one of whom represented, without due authority, the present respondents. On the 5th May 1880 the razinama was filed, and a decree made by consent; the present appellant receiving the moiety of the fund now in question from the Official Trustee on the 19th January 1881.

In the present suit the issues raised between the parties were as to the validity of the razinama, and the decree founded thereon, and also as to limitation.

The Courts below concurred in finding that the agreement in question was for the equal division into four parts, and that the razinama of 1880 was in violation of that agreement, and the result of fraud so that the decree which followed it was not binding on the respondents. The Courts below also concurred in holding that the plaintiff's suit was not barred by limitation, whether it were regarded as a suit to recover money received to their use, and improperly retained, or for relief on the ground of fraud, inasmuch as the suit was brought within three years of the fraud in question becoming known to these respondents.

Mr. *J. D. Mayne*, for the appellant, argued that there were grounds for doubting the correctness of the finding of the Courts below. (Their Lordships referred to *Venkateswara Iyan* v. *Shekhari Varma*(1), where they interfered with concurrent decisions, but pointed out that in that case the question raised was one dependent on the admissibility of subordinate facts and the construction of documents). He took, *seriatim*, the grounds mentioned in the Original Court for its decision, and contended that on important points the Court was in error. (Their Lordships also referred to *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty*(2), where concurrent judgments on fact were allowed to be disputed, but they distinguished the present case). The whole evidence showed that the plaintiffs left their interests in the hands of the Valia Thamburatti, the legal manager of their estate, and there was nothing establishing fraud in the razinama of 1880(3).

(1) L.R., 8 I.A., 143; I.L.R., 3 Mad., 385.

(2) L.R., 4 I.A., 109; I.L.R., 1 Mad., 252.

(3) The cases reported in Moore's I. A. in which the concurrence of two Courts upon fact has been adverted to, are given in a list under the title "Practice," in the Digest of the Moore's I. A. Ca. made by the late H. J. Tarrant, Esq., in 1874, see pp. 242, 250, 251 and 258.

Mr. *T. H. Cowie*, *Q.C.*, and Mr. *R. V. Doyne*, for the respondents, were not called upon. Their Lordships' judgment was delivered by

Lord HOBHOUSE.—Their Lordships consider that this case is concluded by the findings of the Courts in India. So far as regards the merits of the case, two questions are raised: first, whether there was an agreement between the parties interested in the fund which is the matter in dispute, that it should be divided into equal fourth parts among the four branches of the family; and, secondly, whether the unequal division, which actually took place and which was affirmed by the decree of the Court, was due to underhand or foul play. On the first point the Subordinate Judge finds that there was an agreement for equal division, and he finds that on the ground of oral evidence which he believed. It is quite true that in assigning reasons for preferring that evidence to evidence given the contrary way, he relies upon some documents which are contemporary, or nearly contemporary, with the transaction, showing that letters were written or instructions given by other branches of the family in terms which point to the division of the property in equal fourths, and one of which refers to similar documents written on behalf of all the branches of the family. Then it is stated by the defendant that there were letters and papers containing instructions which warranted the actual transaction that was carried out, and the actual division of the money, but none of those letters or papers are forthcoming, and the mention of them and their disappearance does not benefit the case of the defendant. Those are the reasons assigned by the Subordinate Judge for preferring the evidence which affirms an agreement for equal division into fourths. Whatever his reasons are, the question remains one of pure fact. The two Courts have found the same way on that question of fact. Nothing is stated to make their Lordships conclude that if they went through the whole of the evidence, and differed from the Courts below, they would differ from them on anything but questions of pure fact. Therefore the case clearly falls within that wholesome rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. Their Lordships think they would be making a departure from that principle if they were to allow

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this evidence to be canvassed for the purpose of reversing the decision.

The same thing may be said with respect to the second question of dishonesty or foul play. It all resolves itself into a question of credit due to the witnesses, and their Lordships have the same reluctance to interfere with the findings of the Court on that question. So far as to the merits of the case.

Then a defence is raised on the ground of bar by lapse of time; and it is said that the case falls within article 95 of Act XV of 1877. That article provides that a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, must be brought within three years from the time when the fraud becomes known to the party wronged. Whether the case does fall within that article or not is a question in controversy, but their Lordships will treat it for the sake of this judgment as falling within that article, that being the ground which is most favourable to the appellant's case. Then the question arises, when did the fraud become known to the plaintiffs in this suit? That again is a question of pure fact. Both Courts have found that there is no evidence that the fraud became known before the month of December 1880. It is doubtful whether it became known so early, but that is sufficient. The plaintiffs swear, and are believed when they swear, that they did not know of the fraud within the statutory time; and as they have given as much evidence of a negative as people can be expected to give, it was for the defendant to come forward and show something which might carry the knowledge home to them. He has not done it. That issue is found against him, and upon those findings their Lordships think that the Court was right in holding that, even if the case falls within article 95, the plea of limitation is not proved.

The result is that the appeal fails, and should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant—*Lawford, Waterhouse, and Lawford.*

Solicitors for the respondent—*Burton, Yeates, Hart, and Burton.*