ARUNA-CHELLAM v. ARUNA-CHELLAM.

doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them and they give judgment, they assume that there was a substantial injury and that the property, in consequence of this mis-description, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and; therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court, which were appealed against, affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal.

Appeal allowed.

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

Solicitors for the respondents—*Rowcliffes, Rawle & Co.*

PRIVY COUNCIL.

P.C. & J.C.*
1888.
May 3 & 4.
June 23.

APPASAMI ODAYAR AND OTHERS (PLAINTIFFS),

and

SUBRAMANYA ODAYAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Madras.]

Limitation Act, 1859, *s.* 1, *cl.* 13—*Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period.*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiffs' father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

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* *Present:* Lord MACNAGHTEN, Lord HOBHOUSE, and Sir R. COUCH.

Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first Limitation Act.

APPEAL from a decree (1st April 1884) of the High Court reversing a decree (13th April 1882) of the Subordinate Judge of Kumbakonam.

The appellants, plaintiffs in the suit, and the respondents, who were defendants, belonged to branches of a family whose gentile name was Odayar and who were mirasidars, the former being residents of Karuppattimulai, in Mannargudi taluk, and the latter living on the family land at Aravur in Kumbakonam. The question on this appeal was whether the plaintiffs had a still subsisting right to sue, notwithstanding the law of limitation, as members of an undivided family, to have partition made of estate, alleged to be ancestral and joint, and to hold their share in severalty from the defendants, their alleged coparceners, who were in possession, or the coparcenary had ceased for so long a time as that the claim had become barred by limitation.

The plaint (25th July 1881) claimed one-fourth of the family property at Aravur, land, houses, and appurtenances, setting forth the descent of the parties in the manner stated in their Lordships' judgment. The plaintiffs alleged that down to 1877 they had not been excluded from joint enjoyment of the profits of the lands at Aravur to which they were entitled, but that since that year their share had been denied to them. As to their own lands at Karuppattimulai, these had been partly obtained by their mother as stridhanam and inherited by them from her, and partly had been purchased out of income, so that they were not joint property of the family in general.

The defendants alleged that the branch of the family to which they belonged had been separate as to food, residence, and property since the time of the defendants' grandfather, Thoppai, who died in 1838 or 1839; and that he and Chidambara, who died in 1868, the father of the first defendant, had themselves acquired the properties in suit after the cessation of joint living on the part of the plaintiffs' father. They also relied on the law of limitation.

The issues were: 1st, whether the parties were members of an undivided or divided family, and if the latter, when and how

APPASAMI ODAYAR v. SUBRAMANYA ODAYAR.

divided, and down to what period did the coparcenary last? 2ndly, whether the claim was barred by limitation? 3rdly, whether the property claimed was acquired as alleged for the defence?

The Subordinate Judge found that there had been no partition, and that the property claimed was not the self-acquisition of the defendants or of any of them. He found that the coparcenary had continued down to 1877. He, therefore, made a decree for partition in favor of the plaintiffs.

On appeal the High Court (Turner, C.J., and Muttusami Ayyar, J.) reversed the decree of the Subordinate Judge. Their judgment was as follows:—

"It is scarcely possible, upon the evidence before us, to resist the conclusion that for upwards of 45 years there has been no participation on the part of the plaintiffs' branch in the beneficial enjoyment of the property in question. There is a great deal of documentary evidence to show that from 1835 the plaintiffs and their father have lived at Karuppattimulai, whilst the first defendant and his father and the second defendant and his branch of the family have always lived in their ancestral village Aravur. The plaintiffs' fourth witness, Kuppu Odayar, to whose evidence the Subordinate Judge attaches weight, and who is certainly not biassed in favor of the defendants, has deposed that the joint family at Aravur was reduced in circumstances at the time of the father Palaniappa Odayar's marriage; that upon his marriage a moiety of the village of Karupattimulai was granted to his wife as stridhanam, and that he then removed to that village and lived and died there. Documentary evidence shows that this was about 1837, and that the property which Palaniappa Odayar or his wife then acquired consisted of 14 velis 12 mas $44\frac{1}{16}$ kulis of land. It is also in evidence that subsequently to 1837 the members of the family at Aravur bought lands, from time to time, extending to nearly 85 velis, while the total extent now belonging to the defendants' branch is nearly 120 velis. This affords a reasonable ground for the inference that when the father left Aravur to take up his residence at Karuppattimulai, the joint family probably owned about 35 velis of land, of which his quarter share would have amounted to $8\frac{3}{4}$ velis if a division had then been effected. This fact and the evidence of witness Kuppu Odayar to the effect that the family

at Aravur was then in reduced circumstances convey the impression that Palaniappa Odayar, who acquired by marriage considerable separate property, did not probably intend or care to claim a share from his coparceners, who were considered to be worse off than himself, either from the unproductiveness of the family property or from the number of members in the family who had to be supported.

"It was suggested for the defendants at the trial in the Court below, and also mentioned at the hearing of this appeal, that, at or before this time, there was a partition or some arrangement which determined the coparcenary between the two branches of the family. On referring to the evidence, however, it appears that this suggestion is made more in reference to the subsequent conduct of the parties than to any express agreement between the plaintiffs' father and his coparceners. Although the second defendant spoke of his having heard of a formal division from the deceased members of his family between the plaintiffs' grandfather Karuttasami Odayar and the defendants' father Chidambara Odayar, we cannot rely on his evidence as it is inconsistent with the rest of the evidence, which discloses that Palaniappa Odayar had lived in coparcenary with the defendants' branch until his marriage. It is also inconsistent with the defendants' statement that he knew of no formal partition in the family at any time. The other evidence bearing on the question of division is only an opinion founded on separate residence and separate enjoyment for a considerable length of time. We are therefore not prepared to hold that the Subordinate Judge was in error in declining to accept the plea of formal division or any other express agreement equivalent to it. Neither do we see reason to doubt the propriety of the finding that were the plaintiffs entitled to claim partition, the plea of self-acquisition set up by the defendants could not be upheld. The effect of the evidence on this point is that there were about 35 velis of land in the family when Palaniappa Odayar separated from it, while there was no other ostensible source of income to which subsequent acquisitions might be reasonably traced. There may have been good husbandry, thrift and care on the part of those who managed the affairs of the family at Aravur subsequently to 1837, or the property itself may have become more productive. In the absence of clear evidence disclosing an independent source of income and an inde-

APPASAMI ODAYAR v. SUBRAMANYA ODAYAR.

pendent means of acquisition, we cannot hold that the later acquisitions have been made otherwise than with the aid of family property. The material question, therefore, is whether the relation of coparcenary was continued after Palaniappa Odayar's separation, and if it was not, what is its legal effect upon the plaintiffs' claim.

"It does not appear that the plaintiffs' or their father ever received part of the income derived from the family property. The first plaintiff no doubt deposed that at one time he took some money from the family house at Aravur. But his statement is not corroborated, and as he is an interested party, it cannot be accepted without corroboration. It was next alleged by the plaintiffs that the first plaintiff had lived at Aravur until four years ago and that his joint residence was a continuation of the coparcenary."

In regard to this subject, the Court found that in some of the written transactions of the family between 1864 and 1881, the defendants were described without exception as residing at Karuppattimulai. The Court considered it unlikely that Palaniappa would have lived at Aravur without taking part in the family affairs. In regard to money said to have been received by the defendants for marriage expenses, the Court said that the evidence of its having been paid was doubtful, and added "were we to accept it, these payments would not show that the plaintiffs' father had not already virtually relinquished his interest in the joint property. It occasionally happens, when even divided cousins are married at one time in the same house and there is an elderly member in either branch, that that member bears the whole cost more from family affection and pride than in acknowledgment of a subsisting coparcenary. If the coparcenary had continued, the managing coparceners would have ordinarily interfered in the case of every marriage in the plaintiffs' branch and paid its expenses from family funds. The only other matters mentioned as evidence of coparcenary are that Chidambara Odayar, the defendants' father, lighted the funeral pyre when Ponnammal, the plaintiffs' paternal grandmother, died, and that the daughters of Ayyadorai Odayar, the second defendant's cousin, are still living at Karuppattimulai with the plaintiffs. As to the first, it proves nothing more than that Chidambara Odayar acted as proxy for the first plaintiff, on whom the duty of setting fire to the

funeral pyre devolved in consequence of his father having predeceased his grandmother. If the evidence is intended, as seems to be the case, to convey the impression that Chidambara Odayar lighted the funeral pyre, because there was coparcenary, such an effect cannot be attached to it under the ceremonial law. Whether the family is joint or divided, it is the duty of the son, and, in his absence, of the grandson to perform the funeral obsequies; and when he is too ill or too young to undertake the duty, some elderly member, either an undivided or divided uncle or granduncle, acts as his substitute. As to the residence of Ayyadorai's daughters in the plaintiffs' house at Karuppattimulai, it may be owing to their junior paternal aunt living there, and it cannot be accepted as evidence of coparcenary."

The judgment concluded thus :—

"The conclusion we come to upon the whole evidence is that from 1837, when the plaintiffs' father went to Karuppattimulai, the two branches have acted as if they had no community of interest, and that the plaintiffs' branch has neither directly nor indirectly participated in the beneficial enjoyment of the property in dispute. In this view of the facts of the case the suit was clearly barred when Act XIV of 1859 was in force. By s. 1, cl. 13, there must be a participation in the family income, or some act equivalent to it, within twelve years, from which a joint interest may reasonably be inferred, and the evidence on record discloses neither the one nor the other.

"It has been held that what is necessary to bar the claim is proof of possession and enjoyment of the property as the possessor's separate property, to the absolute exclusion of the person suing to enforce the right to a share, for more than twelve years. We are of opinion that the appeal must be decreed; that the decree of the Subordinate Judge must be set aside, and the suit dismissed with all costs."

On this appeal Mr. *T. H. Cowie* and Mr. *R. V. Doyne* for the appellants argued that the judgment of the High Court was not completely consistent with the case set up for the defence. A case of abandonment by Palaniappa of his joint interest, after 1837, should have been proved by definite acts, or omissions, on his part, of which there had been no sufficient evidence. Moreover, as regards the immovable property of the family, upon the construction of cl. 13, s. 1, of Act XIV of 1859, the claimant, in

APPASAMI ODAYAR v. SUBRAMANYA ODAYAR.

order that a bar might be constituted, must have been entirely out of possession, from which he must have been excluded altogether by those former coparceners against whom he claimed. *Govindan Pillai* v. *Chidambara Pillai*(1). But here the evidence showed no such entire exclusion. Again, although Act XIV of 1859, s. 1, cl. 13, required a plaintiff to prove possession on his part within twelve years, the corresponding enactment in Act IX of 1871 required adverse possession on the part of the defendant. Reference was made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(2) and *Rao Karan Singh* v. *Raja Bakar Alikhan*(3).

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* for the respondents were not called upon.

On a subsequent day (June 23rd) their Lordships' judgment was delivered by

Sir R. COUCH.—This is a suit between the members of a Hindu family, of which the common ancestor was one Ramalinga Odayar. He had two sons, Kutti Odayar and Subramanya Odayar. Kutti had an only son, Thoppai, who had three sons, one of whom died without issue, another, Subba, had three sons who have died without leaving issue, and the third, Sabhapati, left an only son, the second defendant Sami Odayar. Subramanya had two sons, Karuttasami and Chidambara. Karuttasami had an only son, Palaniappa, the father of the three plaintiffs, and Chidambara left an only son, the first defendant Subramanya. At the time the suit was instituted the plaintiffs and defendants were the only remaining members of the family. The share of the plaintiffs would be one-fourth if they are entitled to any part of the property claimed in the suit. They sued for possession of that share. The first defendant Subramanya, in his written statement, said that the plaintiffs and defendants were not members of an undivided family; that no portion of the property sued for was ancestral property of Chidambara and Thoppai; that they lived jointly and acquired some property through their own exertions, and the properties in litigation consisted of such self-acquisitions and of property subsequently acquired by their descendants, including the defendants.

Palaniappa, the father of the plaintiffs, was married in 1837, and there is no doubt that up to that time the descendants of

(1) 3 M.H.C.R., 99. (2) L.R., 7 I.A., 181; I.L.R., 5 Bom., 48.
(3) L.R., 9 I.A., 99: I.L.R., 5 All., 1.

Ramalinga were a joint family. The material questions are whether Palaniappa then separated himself from the family in respect of the family property, or if he did not, whether he afterwards participated in the profits of it. It appeared from the evidence of Kuppu Odayar, who was connected by marriages of his own and his younger brother's daughter with both the plaintiffs and defendants, that Palaniappa married the daughter of Kuppu's paternal uncle, and on his marriage went to live at Karuppattimulai, the village of that family, which is about ten miles distant from Aravur, the residence of the Ramalinga family. At that time the family at Aravur was reduced in circumstances, and a moiety of the village of Karuppattimulai was given to his wife by her family. Palaniappa continued to live at Karuppattimulai and died there. The property thus acquired by him consisted of rather more than 14 velis of land, and it is said by the High Court that the family at Aravur probably owned about 35 velis, of which Palaniappa's share would have amounted to $8\frac{3}{4}$ velis. The High Court say that this fact and the evidence of Kuppu Odayar as to the circumstances of the family at Aravur convey the impression that Palaniappa did not probably intend or care to claim a share from his coparceners. It may be that he did not, but in order to see whether he lost his right to a share, what was done afterwards must be considered.

By s. 1, cl. 13 of Act XIV of 1859 a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st July 1871, when Act IX of 1871 came into force. Consequently if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law they would not revive the right of suit.

The plaintiffs sought to avoid the law of limitation by evidence of the actual receipt of money, by payments of marriage expenses by Chidambara and Sabhapati, and by residence in the family house at Aravur. Appasami, the first plaintiff, in his evidence said that about fifteen years ago he took from Aravur Rs. 2,000 or Rs. 3,000. This, if true (and he was not corroborated), would not avail to prevent the operation of Act XIV of 1859.

APPASAMI ODAYAR, v. SUBRAMANYA ODAYAR.

There was evidence of the payment by Chidambara of the expenses of the marriages of members of the plaintiffs' family, when there was at the same time a marriage in his own family. The High Court justly say that this evidence is vague and unsatisfactory. Even if true it cannot be said to prove a participation in the profits of the estate received by Chidambara as manager for the family. As to the residence, their Lordships have been carefully referred by Mr. Doyne to all the evidence on this subject. It is conflicting, and the evidence of Ramu Odayar, one of the defendants' witnesses, is that the plaintiffs would come to Aravur on marriages and deaths and take their meals either in the old or new house, and would either come alone or with their family. This would explain what residence there was, and is more probable than the plaintiffs' case that the eldest member of their branch of the family resided at Aravur as a member of the joint family. Looking at the whole of the evidence it appears to their Lordships that whatever may have been Palaniappa's intention when he left Aravur, a suit for his share of the family property became barred by the law of limitation. This was the decision of the High Court, which reversed the decree of the Subordinate Judge and dismissed the suit. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants—*Burton, Yeates, Hart, & Burton.*

Solicitors for the respondents—*Gregory, Rowcliffes & Co.*