APPELLATE CIVIL.

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

1892. Nov. 7, 8 & 18.

SANGILI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MOOKAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 392—*Reference to a commissioner—Local inquiry.*

The local investigation referred to in Civil Procedure Code, s. 392, presupposes the existence on the record of independent evidence which requires to be elucidated, and that section does not authorise a Court to delegate to a commissioner the trial of any material issue which it is bound to try.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 32 of 1887.

Suit for partition of family property which was described in the plaint. The defendants pleaded that the plaintiff had been adopted by one Tayumuthu and consequently was not entitled to share in the family property. The first issue framed on this plea was decided in favour of the plaintiff. Other issues were framed as follows:

"Whether all plaint properties are family properties?

"Whether the plaint-mentioned moveable properties are in "existence, and, if so, what is their value?

"Whether the debts enumerated in the plaint are due to the family?

"Whether plaintiff is in possession of any immoveables, and, "if so, what is their value?"

The District Judge made an order as follows:

"I think it is necessary, before going into the evidence on "the other issues in order to save a tedious enquiry, to appoint "a commissioner under section 392, Civil Procedure Code, to pro- "ceed to the spot and make a local investigation with regard to

* Appeals Nos. 110 of 1891 and 38 of 1892 and Civil Miscellaneous Petition No. 170 of 1892.

"the items of family property which are said by the defendants "not to be in their possession and report whether they are or are "not in the defendants' possession."

The District Judge passed a decree in accordance with the report of the commissioner.

The defendant preferred this appeal.

Bhashyam Ayyangar and *Krishnasami Ayyar* for appellants.

Subramanya Ayyar, *Sundara Ayyar* and *Rajogopala Ayyar* for respondent.

JUDGMENT.—The first point taken in appeal is as to the alleged adoption of the plaintiff by his aunt Tayumuthu. As to this we agree with the District Judge that the evidence adduced to prove the adoption is altogether unreliable. Tayumuthu was not called as a witness. According to first defendant's own evidence, she had been a widow five or six years at the date of the alleged adoption. It is not explained why she should have delayed so long if she really wished to adopt a son to her late husband, and not a single question was put to show that the lady had any authority to make an adoption either from her late husband or from his sapindas. The only witness for defendants not of the Kallar caste, the kurnam, fifth witness, deposed that the plaintiff had lived with his father till he was turned out of the house on account of his marriage, and we agree with the District Judge that this was the true cause of the quarrel between father and son.

The next point urged is that the District Judge was in error in deputing to the commissioner the inquiry as to what items of property were in possession of the defendants and their title thereto. It is pointed out that the Judge virtually transferred the trial of every issue except the first issue to a commissioner, thus investing him with much larger powers than can be legally delegated under section 392 of the Code of Civil Procedure. On this point we are constrained to hold that the objection must prevail. We are of opinion that "a local investigation requisite "for the purpose of elucidating any matter in dispute" presupposes the existence of some independent evidence on record which requires to be elucidated, and that a Court is not at liberty under section 392 to delegate to a commissioner the trial of any material issue which it is bound to try. This was the view taken by another Bench of this Court in *Narasimharazu* v. *Suria-*

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...arayana(1), and is in accordance with the view taken by the High Court of Calcutta in *Iswarchandra Das* v. *Jugal Kishor Chuckerbutty*(2); see also *Bindabun Chunder Sirkar Chowdhry* v. *Nobin Chunder Biswas*(3) and *Buroda Churn Bose* v. *Ajoodhya Ram Khan*(4). Earlier cases have been quoted, which go to show that evidence taken by a commissioner may legally be treated as evidence; but in the case before us no evidence was taken by the Judge before the issue of the commission on any issue except the first. We are of opinion that section 392 does not authorize the wholesale delegation of these important issues for investigation to the commissioner, and that the local investigation comtemplated by that section has reference to questions relating to the identification of lands, their physical features, market value, and estimate of profits, but not to question of title to, and possession of, the lands themselves.

We must, therefore, set aside the decision of the District Judge upon these issues and remand the case in order that they may be properly determined. In so doing we may point out that the issues themselves require amendment, and that fresh issues should be framed as to the different plaint items so as to leave the parties no room for misconception as to the burden of proof. With regard to items which are admitted to be family property, the only question can be as to plaintiff's proportionate share. Other items are claimed as belonging to the family, the possession and existence of which first defendant denies. As to these the burden would be on plaintiff. Then again there are properties of which first defendant admits the possession, but alleges to be self-acquired. As to these the onus is on him. Proper issues have to be framed with reference to the allegations in the written statement. The plaintiff must prove subsisting outstanding debts due to the family, and we observe that it is alleged one debt due to the family has been discharged.

We observe also that the Judge decreed partition in jewels of the value of Rs. 150 merely on the ground that first defendant's wives were wearing some of that value. That reason is manifestly insufficient when the jewels worn by the ladies are alleged to be their stridhanam.

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(1) Second Appeal No. 1149 of 1887, unreported.
(2) 4 Beng. L.R., App. 33.
(3) 17 W.R., 282.
(4) 23 W.R., 286.

The District Judge has made no provision for debts due by the family. It is admitted on both sides that he was also in error in decreeing mesne profits for six years before suit when only mesne profits from date of suit were prayed for in the plaint.

With reference to civil miscellaneous petition No. 170 of 1892, we are of opinion that the proportionate share to be decreed to plaintiff must be that to which he is entitled on the date of the final decree. No final decree has yet been passed, since no issue except the first has been tried. As the father has died during the pendency of these proceedings, the plaintiff is apparently at the present moment entitled to one-fourth share. We must set aside the decrees of the Court below in both appeals and remand the suit in order that the District Judge may frame and try fresh issues and after recording findings on them pass a fresh decree for partition. The costs hitherto incurred will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

RATHNAM (DEFENDANT), APPELLANT,

v.

SIVASUBRAMANIA (SUPPLEMENTAL PLAINTIFF), RESPONDENT.*

1892. November 18. December 23.

Hindu law—Legacy by an undivided father of a Hindu family—Bequest for religious purposes.

A Hindu made his will, whereby he bequeathed Rs. 600 to supply a silver image for a pagoda, and died leaving the defendant, his undivided adopted son, him surviving. He was not shown to have been possessed of any separate property. In a suit by the trustee of the pagoda to recover the above amount:

Held, that the legacy was not binding on the defendant.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 161 of 1889, confirming the decree of M. A. Tirumalachariar, District Munsif of Kulitalai, in original suit No. 10 of 1889.

Suit brought by the manager and trustee of a Hindu pagoda to recover from the defendant a sum of Rs. 600 for a silver Vrishabhavahanam for the temple in accordance with the will left

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* Second Appeal No. 396 of 1892.