PONNAMBALA TAMBIRAN v. SIVAGNANA DESIKA GNANA SAMBANDHA PANDARA SANNADHI.

no inference can fairly be drawn from it. Their Lordships cannot attach much weight to the evidence that Ponnambala said he came from the Madura adhinam. Assuming that the witnesses intended to speak the truth, it is possible they may not have exactly recollected what was said. He may have said he came from Madura, which appears to be true, and it may have been supposed by the witnesses that he meant he came from the Madura adhinam.. Their Lordships do not give credit to the evidence that he belonged to Panangudi, and that there was a Kallianpuram Ponnambala who is dead. Upon the question whether the nominee, Ponnambala, was a Tambiran of Dharmapuram the High Court was silent, but as they may have thought it was unnecessary to decide it, no inference can be drawn from their silence. Upon the questions of fact in the case their Lordships have come to the same conclusion as the Subordinate Judge, and they will humbly advise Her Majesty to reverse the order of the High Court, and to order that the appeal to it be dismissed with costs, and to affirm the order of the Subordinate Judge. The respondent, Sivagñana Desika Gnana, will pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant -*Mr. R. T. Tasker.*

Solicitors for the first and third respondents—*Messrs. Keen, Rogers and Co.*

APPELLATE CIVIL.

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

1893. Nov. 30. Dec. 1, 6, 7. 1894. March 9.

MALLIKARJUNA PRASADA NAIDU (DEFENDANT), APPELLANT,

v.

DURGA PRASADA NAIDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu law—Partition—Maintenance—Arrears of maintenance—Wrongful withholding.

Where, in consequence of a suit for partition of the entire family property, a portion of the property is divided, but the remaining portion is declared impartible, the family remains undivided in respect to the latter portion.

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* Appeals Nos. 47 and 48 of 1893.

In a suit for arrears of maintenance it is incumbent on the plaintiff to prove that there has been a *wrongful* withholding of the maintenance to which he is entitled.

Jivi v. *Ramji*(1), *Mahalakshmamma* v. *Venkataratnamma*(2), *and Sri Raja Satrucharla Jagannadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(3) followed.

APPEALS against the decrees of G. T. Mackenzie, District Judge of Kistna, in original suits Nos. 10 and 13 of 1891.

These two suits were filed by the younger brothers of the Zamindar of Challapalli or Devarakota, who was the defendant in both suits. The plaints were similar, and set forth that plaintiffs and defendant were members of an undivided Hindu family; that their father died on 6th April 1875, leaving these three sons; that disputes arose and plaintiffs lived apart from defendant from 1st May 1875; that their father left a valuable zamindari estate, regarding the partition of which the parties engaged in litigation, which terminated with the decision of the Privy Council, dated 1st May 1890, that the zamindari was impartible; that the plaintiffs, while engaged in the partition litigation, did not ask for or receive maintenance from defendant; that defendant in a written statement and in an affidavit admitted his liability to give plaintiffs maintenance; that each plaintiff received Rs. 19,500 as maintenance during the pendency of the partition suit by order of Court; that each plaintiff claimed Rs. 2,000 per mensem as maintenance from defendant, with arrears bearing interest, and sums for the marriages of their children, furniture and residence; that this was demanded by a letter, dated 30th March 1891, and had not been given; and the plaintiffs prayed for a decree for these sums as a charge upon the zamindari with costs and subsequent interest.

The defendant filed similar written statements in the two suits. He pleaded that plaintiffs had been divided from defendant since 30th September 1882, the date of the decree of the District Court in the partition suit, and that they had no claim upon defendant for maintenance. Defendant denied that he had ever made any admission that he was liable to maintain plaintiffs after a decree for partition. Defendant pleaded that the amount of maintenance claimed was excessive, and that the other sums claimed were contrary to law and custom. Defendant also submitted that the

(1) I.L.R., 3 Bom., 207. (2) I.L.R., 6 Mad., 83.
(3) I.L.R., 14 Mad., 240.

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Court must take into account the amount of property which has come into the hands of plaintiffs from other sources, and suggested that Rs. 3,000 per annum to each plaintiff would be a sufficient grant. Defendant also stated that the plaintiffs were maintained until February 1879 out of the estate funds, and that defendant was ready and willing to maintain the plaintiffs in the family house in the accustomed manner. The defendant contended that plaintiffs by their acts and omissions had deprived themselves of the right to claim arrears of maintenance, and that the claim for arrears was for the most part barred. If arrears were granted, they ought not to be at the rate of Rs. 2,000 per mensem, and they ought not to bear interest, and that the maintenance ought not to be a charge upon the zamindari.

The District Judge decreed in favour of the plaintiffs and the defendant preferred this appeal.

Pattabhirama Ayyar for appellant.

The *Advocate-General* (Hon. Mr. *Spring Branson*) and *Venkatarama Sarma* for respondent.

JUDGMENT.—The plaintiffs and defendant are sons of the late Raja Ankinidu, Zamindar of Challapalli, who died in the month of April 1875. The zamindari, as it has now been finally decided by the Privy Council, is an impartible one, and consequently the eldest son of the late zamindar, that is the defendant, is in enjoyment. The present suits are brought against him for maintenance.

The main question raised by the defendant is whether the family has, in consequence of proceedings in the suit ultimately determined by the Privy Council, become a divided one.

A larger question was raised by the defendant's vakil with regard to the right of a younger brother of the holder of an impartible zamindari to any maintenance at the hands of the zamindar for the time being. Having regard to the pleadings and issues, this general contention, we think, cannot properly be allowed on this appeal. If it could have been successfully maintained, it ought to have been raised in the Court of First Instance. The plaintiff would then have had an opportunity of meeting it by showing that at any rate in this family it has been usual for the reigning zamindar to make provision for the other members of his family, and there are some indications that such was in fact the case. Moreover, in his written statement in the partition suit, the zamindar admitted his liability in this respect.

The real defence is based on the admitted fact that in 1880 the plaintiffs brought a suit against the defendant for partition of the entire family property, and, so far as the partible property was concerned, obtained a decree. It is said that the effect of a partition of any part of the property of a Hindu family is to sever the joint ownership in respect of the whole property, and that it is not legally possible for a family to divide a portion of their family estate and yet to remain undivided in respect of the remainder. It is true that, when a partition is effected in a family either by agreement or by decree, the result generally is to bring about a complete severance of the coparcenary, and that this consequence may follow, although in fact a portion of the property remains undivided. In the case however of division by consent of parties, it is clear that they may, if they choose, reserve and keep undivided part of the property. With regard to such part they must necessarily retain the status of undivided family. (See *Sri Raja Satrucharla Jagganadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*(1). No authority for the contrary proposition was cited by the zamindar's vakil. In the present case, with regard to the property which remains undivided, there was on the plaintiff's side a demand that it should be divided, but that demand was ineffectual because in point of law the property was not partible. No partition has taken place either by decree or by consent, and therefore, in our judgment, the rights of the junior members of the family remain as they were before any demand was made. That is to say, they retain "such right and "interest in respect of maintenance and possible rights of succes-"sion as belong to the junior members of a raj or other impartible "estate descendible to a single heir." (See *Sartaj Kuari* v. *Deoraj Kuari*(2). If the plaintiff is entitled to maintenance he is, we think, entitled to have it charged on the zamindari property or part of it. (See *Coomara Yettapa Naikar* v. *Venkateswara Yettia*)(3). In view of the liberty of disposition enjoyed by the zamindar there is no other way in which the rights of junior members can be secured. No reason was suggested why in this respect any distinction should be made between the male and female members of a family, and in the case of women there is no

(1) I.L.R., 14 Mad., 240. (2) I.L.R., 10 All., 285.
(3) 5 M.H.C.R., 405.

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doubt that a decree for maintenance in their favour is generally accompanied with a direction making it chargeable on certain specified property. We think, however, that the zamindar is justified in objecting to the decree as framed by the District Judge, inasmuch as it fetters him unnecessarily in the disposition of his property. It is sufficient that the decree should make the maintenance chargeable on certain villages, and if the parties cannot agree, we must ask the Judge to find what particular property will form sufficient security.

The next question is as to the rate at which maintenance should properly be allowed. It was contended on behalf of the zamindar that in estimating the rate the Court should take into account the property alleged to be in the hands of the plaintiff, and the finding of the Judge with regard to that property was impugned.

The zamindar's vakil relied particularly on certain letters put in by the plaintiff himself and admitted in some unaccountable way, although the writer of them was not called and was admittedly alive. The case made for the zamindar was that lanka lands of considerable value had been acquired by the plaintiff in his own name, and in June 1890, when the unfavourable judgment of the Privy Council had been heard of, transferred *benami* to Janakiramayya, the District Munsif. We do not think this is proved, and agree with the conclusion stated by the Judge in the 41st paragraph of his judgment. Janakiramayya's letters, some written to the zamindar's brother Ramalinga and some to the plaintiff's servant Suryaprakasa (11th witness), cannot fairly be construed as implying that the lands belonged to the plaintiff or his brother. The District Judge has found that a monthly allowance of Rs. 500, with an additional Rs. 250 in lieu of any provision for a house, furniture, cattle or occasional expenses, *e.g.*, on account of marriages, is an adequate and fair allowance. The plaintiff had asked for a much larger sum, viz., Rs. 2,000, and the defendant had named a smaller one, viz., Rs. 250. It appears from the notes that the quantum of the allowance was in a great measure left to the Judge, and considering his experience in the district, we should be slow to disturb his judgment in the matter. On the part of the plaintiff it is urged that the allowance ought to be raised at least to Rs. 1,000 per mensem, and that some provision ought to be made from the allotment to the plaintiff of a house and garden. On the other hand, it is contended for the

zamindar that the allowance of Rs. 750 is excessive. We think that the District Judge has given good reasons for refusing to grant the use of a house to the plaintiff, and we are not satisfied that the money allowance he has made is either excessive or inadequate.

The District Judge has granted arrears at the rate of Rs. 500 per mensem for twelve years prior to the institution of the suit. In this we think he was wrong. The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable. The circumstance, however, that a person entitled to maintenance has not in fact been maintained by the person chargeable does not necessarily give him a right of action for arrears. On proof of failure to maintain without more, he cannot be said to become a creditor of the person in default. It is incumbent on him to prove that there has been a wrongful withholding of the maintenance to which he is entitled. *Jivi* v. *Ramji*(1) and *Mahalakshmamma* v. *Venkataratnama*(2). If it were not so, it would mean that the manager of the family could, at the choice of any member preferring to reserve his claim for maintenance out of current income, be compelled to pay him from time to time sums of accumulated arrears which could only be paid out of capital. In this case it is admitted that the plaintiff has, since the 1st May 1875, been living apart from the defendant, and as neither asked for nor received maintenance except what he received under the order of the High Court pending the appeal to the Privy Council, that is, between December 1887 and July 1890.

In our opinion it is clearly the plaintiff's own fault that he has not received maintenance for the whole period of twelve years for which he claims it. In his suit brought in 1880 he made another and inconsistent claim, and therefore he has no right now, that he has failed in that litigation, to complain that a claim not made by him, though conceded by the defendant, was not satisfied. There has been no wrongful withholding on the part of the defendant. We must, therefore, reverse the decision of the District Judge with regard to the arrears, except as regards the period above mentioned, during which payment was actually made. The allowance for that period was demanded and given on the footing of maintenance, and as the sum will have to be refunded by the

(1) I.L.R., 3 Bom., 207. (2) I.L.R., 6 Mad., 83.

MALLI-KARJUNA PRASADA NAIDU v. DURGA PRASADA NAIDU.

plaintiff in execution of the decree of the Privy Council, we think that plaintiff is entitled to a decree for the same sum, *viz.*, Rs. 19,500 in the present case, to which must be added Rs. 3,500 for the seven months between the date of the institution of the suit and the making of the decree, for the Judge has decreed payment of the higher rate of Rs. 750 per mensem only from the latter date, and in that respect we do not alter the decree.

Subject to the alterations required by this judgment, the decrees are confirmed, and plaintiffs must pay proportionate costs of these appeals.

Their memoranda of objections are dismissed with costs. We see no reason to interfere with the decrees of the Judge on the point raised.

If the parties do not agree within one week from date of receipt of this order, the Judge must proceed to inquire as to the property which should be charged with the maintenance.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. December 20. 1894. March 29.

MADHAVA RAU (PLAINTIFF), APPELLANT,

v.

P. M. FERNANDES (DEFENDANT), RESPONDENT.*

Tort—Injury to property—Contributary act—Test thereof.

As in the case of contributary negligence, so an act of one party can only be contributary to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

SECOND APPEAL against the decree of S. Subbarayar, Subordinate Judge of South Canara, in appeal suit No. 321 of 1891, confirming the decree of A. Babu Rau, District Munsif of Udipi, in original suit No. 25 of 1890.

The plaintiff was the owner of a garden. The defendant was his neighbouring proprietor on the north and east. The plaintiff's case was that his garden was surrounded on three sides—north,

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* Second Appeal No. 651 of 1893.