of such a character as to make section 74 of the Contract Act applicable.

According to the view expressed in *Nanjappa* v. *Nanjappa*(1) and adopted elsewhere, a stipulation for retrospective enhancement of interest is generally a penalty which has to be dealt with by the Court under the provisions of section 74. The Court has to give a reasonable compensation not exceeding the amount named. In addition to the interest at 21 per cent. on the two instalments up to the dates when they respectively fell due, I would allow interest from those dates at the rate of twelve per cent. up to the date of the institution of the suit and subsequent interest at six per cent.

APPELLATE CIVIL.

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

SUBBA AYYAR AND OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

GANASA AYYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1894. Nov. 19, 20. 1895. January 9.

Hindu law—Partition of family property—Suit by plaintiffs against their father and uncles.

In a suit for partition of family property, the plaintiffs were the sons of one and nephews of others of the defendants who defended the suit:

Held, that the suit was maintainable.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 253 of 1893, modifying the decree of T. Venkatarama Ayyar, District Munsif of Valangiman, in original suit No. 183 of 1892.

Suit for partition of the family property. The plaintiffs, of whom the second being an infant sued by the first as his next friend, were the sons of defendant No. 2 and the defendants Nos. 1 and 3 were his brothers. Defendants Nos. 4 and 5 were the sons of defendant No. 1; the other defendants were strangers to the family who were in possession of part of the property of which the plaintiffs claimed their share. It was objected by the contending

(1) I.L.R., 12 Mad., 161.

* Second Appeal No. 1297 of 1894.

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defendants that the suit was not maintainable. This contention was overruled by both the Lower Courts, who passed decrees in favour of the plaintiffs.

Defendants Nos. 1, 2 and 3 preferred this second appeal.

Subramanya Ayyar for appellants.

Pattabhirama Ayyar for respondents.

JUDGMENT.—Appellants are brothers and respondents are the sons of the second appellant Natesayyan. Respondents sued appellants for partition, and the question raised for decision in this appeal is whether the suit is maintainable under the Mitakshara law.

The property, of which partition is decreed by the Subordinate Judge, is admittedly ancestral, and it is conceded that if the second appellant had no brothers the suit would lie. The contention on appellant's behalf is that when the father has brothers, and when he is alive, the sons cannot enforce partition against his will according to the Mitakshara. We are of opinion that both in principle and on authority the contention must be disallowed. The son's right to demand partition from his father arises from the coparcenary right of the former by birth, and it is confined to ancestral property, because the son and the father confer equal spiritual benefit upon the grandfather and ancestors and they have equal right in such property, whilst in paternal property the father has a dominant right as its acquirer. The basis on which the son's right of partition rests is the same whether the father has brothers or not, and there is therefore no legal foundation for the contention.

It is further at variance with *placita* 8 and 11, Mitakshara, chapter I, section V.

Placitum 8 shows that the partition takes place by the will of the son, though the mother is capable of bearing more sons and the father does not desire partition.

Placitum 11 refers to Manu, IX, 209, and draws an inference from it to the effect that the father, however reluctant, must divide with his sons, at their pleasure, effects acquired by the paternal grandfather.

Placitum 3 refers to the Smriti of Yajnavalkya to the effect that the ownership of father and son is the same in land which was acquired by the grandfather. *Placitum* 5 contains Vigyaneswara's comment upon it. "In such property which was acquired "by the paternal grandfather through the acceptance of gifts, by

"conquest or other means, the ownership of father and son is noto-
"rious and therefore partition does take place. For, or because,
"the right is equal or alike, therefore partition is not restricted to
"be made by the father's choice nor has he a double share."

Thus, the Smritis of Yajnavalkya and Manu, as commented on in the Mitakshara, recognize the son's right to enforce partition against the father's will of immovable property acquired by the paternal grandfather on the ground that they have equal ownership in the same.

Appellant's pleader relies in support of his contention on *placita* 1, 2, and 6.

Placitum 1 refers to the equal division of paternal estate and states that a special rule is propounded by Yajnavalkya concerning the division of grandfather's effects among grandsons. That special rule is among grandsons by different fathers, the allotment of shares is according to the fathers. *Placitum* 2 comments upon that rule and explains and illustrates it. *Placitum* 6 repeats the rule. It is contended that since the grandson's share has to be carved out of the father's allotment, there can be no partition at the instance of the grandson when the father is alive, has brothers and does not desire partition, and consequently, the son's right of partition is taken away in the case suggested. Reliance is placed in support of this view on a passage in Mayne's treatise on Hindu Law, section 432, and on West and Buhler, page 295. This suggestion rests on a misconception of the reason of the special rule. *Placitum* 2 commences with the words, "although grandsons have by birth a right in the grandfather's estate equally with the sons," and goes on to say "still the distribution of the grandfather's property must be adjusted through their fathers and not with reference to themselves."

Thus the very text which prescribes the special rule postulates the existence of the equal right of father and son in the grandfather's property. It is therefore not correct to infer from the text a negation of that right. It is then asked how is the father's allotment to be ascertained if he does not desire partition? The answer is it is to be ascertained against his will, leaving him, after the son separates, to reunite with his brother if he desires to do so, or in the same way in which a brother's share is ascertained when one of three or more brothers desires partition and the others desire to continue in coparcenary. The right to demand partition is in the

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son and it is by his will, and not by the father's desire, the partition takes place. *Placitum* 8 gives the same answer.

It is again asked why then is division *per stirpes* enjoined between class and class whilst partition *per capita* is prescribed among the sons of the same father?

The answer is that a coparcenary family is, according to Hindu theory, to be disintegrated in the same manner in which it is constituted. When several brothers or sons of the same father live in union by choice, on the understanding that when they elect to separate, they are to take equal shares in their father's property, we have before us a coparcenary family in its simplest form. When the brothers have sons, grandsons and great-grandsons who stand in their shoes by right of representation, we have a coparcenary family in its complex form. When death removes some and birth introduces others, the complexity is enhanced. According to Hindu Law, partition is but a mode whereby the coparcenary family is disintegrated into individual or single families, without prejudice to the natural rule of inheritance that sons take like shares in their father's property. Hence it is that division *per stirpes* is sanctioned between class and class, in order that no violence may be done to the understanding on which the coparcenary family was first constituted.

Appellants' pleader next lays stress on *placitum* 3, section 5, chapter I. In this *placitum* the commentator anticipates an objection and answers it, and the rule of decision is to be sought for, not in the anticipated objection but in the answer given to it. The first part of the *placitum* states the objection and the answer to it is contained in these words. To obviate this doubt the author Yajnavalkya says "for the ownership of father and son is the same in land which was acquired by the grandfather" implying thereby what is stated in *placitum* 5. "For, or because, the right is equal or alike, therefore partition is not restricted to be made by the father's choice nor has he a double share." Thus it appears to us that on the correct interpretation of section V, chapter I, Mitakshara, there is no exception to the rule that a son is entitled to demand partition from his father of ancestral property.

The foregoing is the view taken by this Court in 1862 in *Nagalinga Mudali* v. *Subbiramaniya Mudali*(1). In that case the

(1) 1 M.H.C.R., 77.

ancestor who acquired the property was one Tirumalai Mudali who died many years before, leaving two sons, the defendants Subramania and Veerasami. The defendant Subramania had two sons, one named Perumal, the plaintiff's father who died in 1850, the other was the defendant Dharmalinga. It was held by Sir Colley Scotland, C. J., and Bittleston, J., that a grandson may by Hindu Law maintain a suit against his grandfather for compulsory division of ancestral family property. The same view of the law under the Mitakshara was also taken by the Full Bench of the High Court at Allahabad in *Jogul Kishore* v. *Shib Sahai*(1), and Viramitrodaya, chapter II, part 1, verse 23, is also cited in support of the decision. A similar view was also expressed in *Laljeet Singh* v. *Rajcoomar Singh*(2). We should have considered ourselves concluded by authority had it not been for the decision of the majority of the High Court at Bombay in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni*(3). After carefully reading the judgments in that case and comparing them with the Mitakshara and the decision in *Nagalinga Mudali* v. *Subbiramaniya Mudali*(1), we agree in the opinion of Mr. Justice Telang who has reviewed at length all the authorities on the subject and dissented from the conclusion arrived at by the majority of the Court. This appeal must therefore fail and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar.

RAMASAMI AYYAR (PLAINTIFF), PETITIONER,

v.

MUNICIPAL COUNCIL OF SALEM, (DEFENDANT), RESPONDENT.*

1894. August 1, 13.

District Municipalities Act (Madras)—Act IV of 1884, *s.* 53, *sched. A—Profession tax—District Court pleader—Court situated outside municipal limits.*

The plaintiff, who was a pleader, lived and had his office and occasionally practised in Courts within the limits of the municipality of Salem, but he claimed to be entitled to the refund of a sum levied on him for profe ion tax under the

(1) I.L.R., 5 All., 430. (2) 12 B.L.R., 373. (3) I.L.R., 16 Bom., 29,

* Civil Revision Petition No. 143 of 1893.