APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

CHENGAMA NAYUDU (PLAINTIFF), APPELLANT,

1896. November 12, 20.

v.

MUNISAMI NAYUDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Subsequent acquisitions—After-born son—Right to partition.

A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds:

Held, that the plaintiff was entitled to the relief claimed.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 113 of 1893, confirming the decree of T. Swami Ayyar, District Munsif of Chittore, in original suit No. 337 of 1892.

The plaintiff sued for partition of certain property as the ancestral estate and property acquired with profits derived from the ancestral estate of the family, of which the plaintiff and his brothers, defendants Nos. 1 and 2, were the members. Defendant No. 3 was alleged to be a stranger in possession of part of the property of which partition was sought.

The first defendant pleaded that his share of the ancestral property had been separated and delivered to him many years before suit, and that part of the property now in question had been acquired by him since that date. Defendant No. 3 claimed to be an illatom member of the family, and raised other pleas similar to those of defendant No. 1.

The Subordinate Judge found that the third defendant was a member of the family as he claimed to be; that there had been partition of the family property before the plaintiff was born; that in 1891 when the plaintiff was an infant, the partition was re-adjusted under an instrument executed by the adult members of the family. He also found that at the time of the original partition the father had reserved no share for himself. The

* Second Appeal No. 880 of 1895.

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Subordinate Judge, upon those findings confirmed the decree of the District Munsif, under which the plaintiff obtained a one-third share of the lands originally divided between defendants Nos. 1 and 2, but not in the subsequent acquisitions. He said :—"The "acquisitions could not be considered as self-acquired if there was "no previous division. There having been already a division, "subsequent acquisition made by their profits must be held the "acquirer's separate properties in ordinary circumstances. Here, "we have a case of an after-born son. The father reserved no "share for himself and the whole property was distributed among "the sons in existence at the time of partition. There is no con- "tention that the father had any subsequent acquisitions. In such "a case Yagnavalka says, that the posthumous son, whose mother's "pregnancy was not manifest at the time of partition, must "receive, out of his brothers' allotments, a share equal to their "shares after computing the income which has accrued and the "father's debts that have been discharged.

"Mitakshara, chapter I, section VI, paragraph 8, ordains that "in such case the allotments must be made out of the visible "estate, and paragraph 9 explains the meaning of the visible estate "by saying 'Received by the brethren.' From this it is evident "that the Mitakshara contemplates a share to be allotted out "of the shares previously allotted, but not out of acquisitions "subsequently made by the brethren.

"I think, therefore, that the finding of the Lower Court in "regard to plaintiff's share out of the shares allotted to first and "second defendants is not open to question."

The plaintiff preferred this second appeal.

Sriranga Chariar for appellant.

Jambulinga Mudaliar for respondents.

JUDGMENT.—There was a partition between the appellant's brothers, the first and second respondents, and their deceased father before the appellant was born. At that partition the father reserved no property to himself. The Lower Courts have held that the appellant is entitled to a share out of the property taken by the said respondents at the partition. The appellant was, however, not allowed a share out of certain other items of property in the hands of his brothers. These were excluded from the partition decreed to the appellant, not because they were the separate property of the parties in possession having been acquired by

them without the aid of the ancestral estate, but, as we understand the Subordinate Judge, simply on the ground that acquisitions after the partition, even though made with the aid of the property obtained at the partition, belong solely to the acquirer. This view is clearly not supported by the authorities, to some of which the Subordinate Judge himself refers. The word 'income' or 'profit' in Yagnyavalkya's text "The visible estate corrected for income or expenditure" (as translated by Colebrooke)(1) or "the visible estate corrected by profit or loss" (as rendered by Mandlik)(2) on which the Mitakshara in chapter I, section VI, 8 and 9, bases its conclusion on this point, undoubtedly includes accretions made to the shares taken on partition and gives to the after-born son a right to obtain his allotment out of the subsequent additions also, provided, of course, they are shown not to have been acquired without the aid of ancestral property. The principle of the rule as pointed out by Subodhini when commenting on Mitakshara, chapter I, section VI, 9, cited above, is that so far as the after-born coparcener is concerned, the individual shares taken by the parties who made the division prior to his birth are as much patrimony after the division as before it and consequently he, the after-born son, is entitled to participate in the gain arising out of such patrimony(1).

The appellant is thus entitled to his share also out of the properties in the hands of the first and second respondents in respect of which his claim was rejected by the Lower Courts. The decree passed by them must, therefore, be modified accordingly. The said respondents will pay the appellant's costs disallowed in the Lower Court as well as his costs in this second appeal. But as against the third respondent the appeal is dismissed with costs.

(1) Stokes' Hindu Law Books, p. 395.
(2) Mandlik's Hindu Law, p. 216.