SUBBIAH IYER v. SUBRAMANIA AIYAR.

Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(1) shows that the provisions of section 522, Civil Procedure Code, as to appeals, must be strictly enforced. The case of *George* v. *Vastian Soury*(2), and the cases there cited, are not in point, as, in each of these cases, after the order of remittal under section 520, Civil Procedure Code, had been made, the arbitrators refused to reconsider their award, which consequently, became void under section 521, Civil Procedure Code, and the Court proceeded to try the case and pass a decree in the ordinary way.

The appeal must be allowed and the decree of the Subordinate Judge set aside, and that of the District Munsif restored, with costs here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Abdur Rahim.

1908 July 31.

RANGANATHA RAO AND OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

NARAYANASAMI NAICKER AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 4 TO 8), RESPONDENTS.*

Hindu Law - Partition, Proof of—Presumption of general division from the separation of one.

Separate residence is not, of itself, conclusive or even strong evidence of partition.

There is no presumption of a general division among all the members of a coparcenary from the fact that one of its members has separated.

Balabux v. *Rukhma Bai*, (I. L. R., 30 Calc., 725), referred to.

SUIT for partition.

The plaintiff and the defendants were members of a Hindu family which was once joint. There was a partial partition in 1864, and a list was made of the properties which remained joint.

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(1) I. L. R., 29 Calc., 167. (2) I. L. R., 22 Mad., 202.

* Second Appeal No. 1183 of 1906, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 1440 of 1905, presented against the decree of M. R. Ry. A. N. Anantarama Ayyar, District Munsif of Tanjore, in Original Suit No. 207 of 1903.

This list was marked as exhibit A in the suit. The senior member of the family, the first defendant, was in possession of the properties kept joint. This suit was brought by the plaintiff for the division and allotment of his share.

The District Munsif dismissed the suit. On appeal his decree was modified, and the plaintiff was decreed a share in some of the items claimed.

Defendants Nos. 1 to 3 appealed.

S. Varadachariar for The Hon. the Advocate-General for the appellants.

T. R. Krishnaswamy Ayyar for *T. R. Ramachandra Ayyar* and *G. S. Ramachandra Ayyar* for the first respondent.

JUDGMENT.—We are asked to hold that the family was divided in 1864, although the District Judge has found that it was not; but we do not think we can disturb his finding on this point. The question depends almost entirely on the construction of exhibit A, from which it may be gathered that all the moveable property of the family except certain outstandings, was divided, while the immoveables and the outstandings were kept joint. The outstandings were to be collected by a third party to be appointed and paid by the members of the family jointly; and irrecoverable items were written off, with a proviso that should anything out of them be recovered it should be divided. Exhibit B executed in the following year refers to the land and outstandings as remaining joint or common.

There is little other evidence on which to form an opinion as to the meaning of these documents: it is said that the parties have always lived apart, but that is not of great importance. But the parties declare that this property is kept joint; there is no sort of division into shares, and nothing to show that the third party if he collected the outstandings was to divide them between the parties. In these circumstances the fact that the other moveables were divided is not, we think, strong evidence in favour of a complete division in status and we accept the District Judge's finding that there was no division in 1865.

It is then contended that a division of the family was effected by the decree in a former suit of 1890 in which another member of the family obtained a money decree for his share of collections made for the family by the first defendant. Reliance is placed on

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Balabux v. *Rukhma Bai*(1), where their Lordships of the Privy Council point out that when one member separates from the family there is no presumption that the others remain joint. Their Lordships however do not say that in such a case the family is in all cases to be deemed to be divided; they point out that there may be cases where the shares of all the members of the family have to be ascertained, and say that, it is in that sense that the separation of one is said to be the separation of all. It is not suggested that in the suit of 1890 it was necessary to fix and set out the shares of all, and there is here evidence that, after 1895, the plaintiff was given a share of some land which he till then had enjoyed along with the first defendant. The decree in the suit of 1890 does not in these circumstances prove a complete division of the family.

As to limitation, the District Judge says that once it was found that article 127 of the second schedule of the Limitation Act is applicable, it was not denied that the suit was not barred. Here it is urged that even if article 127 be applicable, the suit is barred as the plaintiff was excluded, to his knowledge, from participatio n in the family property at least as early as 1890.

This is based on evidence of the witnesses in the suit of 1890 which has not been printed, but probably the point was not contested in the lower Appellate Court because it was found at the first trial of the present suit that in 1895, the plaintiff obtained a share of land which had been purchased by the first defendant out of the family money collected by him. However that be, there is no evidence before us on which we can sustain the appellants' contention.

We agree with the District Judge that the evidence is insufficient to prove the collection of item No. 3 by the first defendant and the memorandum of objections fails.

The appeal and the memorandum of objections are dismissed with costs.

(1) I. L. R., 30 Calc., 725 at pp. 735, 736.