SANKARAN-NAIR AND ABDUR RAHIM, JJ.

MUTHUSAMI MUDALIAR v. MASILAMANI.

invalid in a Court of Law though they may entail expulsion from those sub-divisions.

I am, therefore, of opinion that this marriage is valid (1) on the ground of custom, (2) because it is in conformity with Hindu Law which does not prohibit marriages between any persons who are not dwijas or twice-born persons, (3) because when the caste of which the parties are accepted members, recognize a marriage as valid, then it is legal marriage under Hindu Law.

I would, therefore, reverse the decree of the Sub-Judge and dismiss the suit for possession and restore that of the Munsif.

As, however, the alienation has been found to be not binding on the reversioners, there must be a declaration to that effect. It was contended that on the death of the original plaintiff the suit abated so far as the declaration is concerned. But as the suit for declaration was brought by the plaintiff not on his behalf only but also on behalf of the reversioners, the right to sue survives and the suit does not abate. Each party will bear his own costs throughout.

ABDUR RAHIM, J.—I agree.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

1909. December 6, 7.

CHIDAMBARAM PILLAI (PLAINTIFF), APPELLANT,

v.

MUTHU PILLAI (DEFENDANT), RESPONDENT.*

Variance between pleading and proof—Where plaintiff sues in ejectment on the ground of exclusive title, he cannot be given a decree for partition when the claim set up is found to be barred.

Where a plaintiff sues the defendant in ejectment on the ground that he and defendant were separately enjoying properties, he cannot, when such claim is found to be barred by limitation, rely on a tenancy in common not alleged in the plaint and claim a decree for partition.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 118 of 1907 presented

* Second Appeal No. 388 of 1908.

against the decree of K. S. Lakshmi Narasaiyar, District Munsif of Valangiman, in Original Suit No. 390 of 1905.

The facts for the purpose of the report are sufficiently stated in the judgment.

N. R. K. Thathachariar for appellant.

K. V. Krishnaswami Aiyar for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—The point which arises for consideration in this appeal is whether there is a finding by the lower Appellate Court which we can accept and act upon with regard to the status of the family since the separation. The family consisted of a father and five sons. In 1873 the father and one son separated from the other sons including Manikam and Seenu. Later on, there was another division and another son Venkatachalu separated. And the question which the lower Appellate Court put to itself is "What effect had the separation on the position of Manikam and Seenu?" "Did they," as the lower Court thinks, "become tenants in common, or did they remain joint or subsequently become joint after a temporary separation?" The learned Judge has answered his own question. We have to look to a later portion of the judgment, *i.e.*, paragraph 3, for the answer. There, he says: "In these circumstances I dissent from the lower Court's conclusion in favour of division and the tenancy in common which is necessary in order to support it." That is no doubt by implication a finding that the tenancy was joint.

In an earlier portion of that paragraph we find the learned Judge referring to the decision of the Privy Council which is reported in *Balabux* v. *Rukhmabai*(1). But I am not satisfied that the learned Judge appreciated the effect of that decision. For this is what he says at page 23, line 13, "In the present case, if the lower Court's finding is right, these concerned returned so far towards joint tenancy that they became tenants in common. That relation is abnormal as between persons, who have been and are competent again to be co-parceners and I think that proof of it would be sufficient to raise a presumption that the further incidents of survivorship, by which joint tenancy would be reached, were intended, until the contrary were proved." That passage, to my mind, rather suggests that the view of the

(1) (1903) I.L.R., 30 Calc., 725.

WHITE, C.J., AND KRISHNASWAMI AYYAR, J.

CHIDAMBARAM PILLAI v. MUTHU PILLAI.

learned Judge was that there was, at any rate, in this case a presumption in favour of the joint tenancy and that seems to me to be inconsistent with the decision of the Privy Council to which I have referred. There they lay down that "there is no presumption when one co-parcener separates from the others that the latter remain united . . . . And an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact."

However, I do not think it necessary to proceed with this point further, because it seems to me that the defendant is entitled to succeed on his plea of limitation.

The finding of the lower Appellate Court with regard to this question of limitation is "As regards enjoyment I concur in the lower Court's conclusion from the evidence." And the lower Court's conclusion is "My finding on this issue is that the properties of Manika and Seenu were enjoyed only by Manika and defendant after the death of the former. Seenu Pillai died 15 years ago, for plaintiff's first witness says it was three years after Kannamal's marriage which was eighteen years ago." It seems to me that, accepting that finding, the defendant has established his plea of limitation.

The plaint was originally to eject upon the ground that properties were enjoyed separately. Nothing can be clearer than the allegation in paragraph 8 of the plaint: "Defendant's father, Manika Pillai, the said Seenu Pillai and I are divided brothers. Each of us has been separately enjoying his respective properties." The Munsif treated the case on the footing that notwithstanding that the suit was one in ejectment, the plaintiff was entitled to be given a decree for partition and he gave him a decree for partition.

He originally set up in the plaint the right to evict and I do not think the plaintiff is entitled to rely upon tenancy in common which he does not allege in the plaint for the purpose of getting rid of the plea of limitation.

For these reasons and for the reason that the plea of limitation is made out I would affirm the decree of the lower Appellate Court and dismiss the second appeal with costs.

KRISHNASWAMI AYYAR, J.—I agree in the decision arrived at by the learned Chief Justice. It is argued for the appellant on the authority of *Ahmad Wali Khan* v. *Shamsh-ul-Jahan*

Begam(1) that the plaint ought to be liberally construed and relief should be given him on the basis of a tenancy in common. I do not think we shall be justified in putting this liberal construction. For in the circumstances of this case where the plea of limitation has been raised by the defendant and made good by him, on the case set up by the plaintiff, the plaintiff's allegation of exclusive title to the suit properties is what he should be confined to.

In respect of the alternative case which the plaintiff wants us to accept I am not inclined to put the liberal interpretation which the plaintiff asks us to give to the plaint.

As regards the question which has been argued at considerable length as to the effect of a partition decree which gives the plaintiff a share in property for which it is necessary to determine the shares of the other members, namely, whether these other members are to be treated as tenants in common subsequent to the partition decree or as joint tenants, it is unnecessary for us to determine it in this case.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Krishnaswami Ayyar.

PORAKA SUBBARAMI REDDY (PLAINTIFF), APPELLANT,

v.

VADLAMUDI SESHACHALAM CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1909. November 29, 30.

Specific Relief Act I of 1877, *ss.* 14, 15, 16, 17—*Contract entered into by a person on his behalf and on behalf of minors—Form of decree in suit for specific performance of such contract, when contract found not to be binding on minors.*

Where a contract of sale entered into by a person on his own behalf and on behalf of minors is found not be binding on the minors, no decree for specific performance can be passed against the interest of such minors in the properties.

Sections 14—16 of the Specific Relief Act do not enable such contract to be separated as regards the adult person who entered into the contract; and section 17 of the Act precludes the passing of a decree against the share of such party alone or a decree for the whole against such person.

(1) (1906) I.L.R., 28 All., 482.

* Second Appeal No. 1287 of 1907.