APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

THANDAYUTHAPANI KANGIAR AND ANOTHER (DEFENDANTS NOS 1 AND 2), APPELLANTS,

v.

RAGUNATHA KANGIAR AND OTHERS (PLAINTIFFS, AND DEFENDANTS NOS. 128 TO 130, 27, 88, 90 AND LEGAL REPRESENTATIVES OF THE DECEASED PLAINTIFFS), RESPONDENTS.*

1911. January, 30. February, 1, 2, 8.

Hindu Law, partition—Decree partition, preliminary—Effect of appeal against such decree—Decree effects severance, which is not affected by the subsequent appeal.

A preliminary decree directing a partition effects a severance of the joint family and the divided status is not effected by filing an appeal against such decree. Subsequent births or deaths cannot deprive any of the parties or their representatives of the shares allotted to them by such decree.

Subbaraya Mudali v. Manicka Mudali [(1896) I. L. R., 19 Mad., 345], followed.

Sakharam Mahadev Dange v. *Hari Krishna Dange* [(1881) I. L. R., 6 Bom., 113], dessented from.

Joy Narain Giri v. *Girish Chunder Myter*, [(1878) I. L. R., 4 Calc., 434], referred to. Such a decree like other decrees, if right at the time it was passed, cannot be varied by reason of events subsequently happening.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suits Nos. 109 to 131 of 1907, presented against the decree of V. Subramanyam Pantulu, Subordinate Judge of Tanjore, in Original Suit No. 27 of 1904.

The facts of this case are fully set out in the judgment.

S. Srinivasa Ayyangar for the Hon. the Advocate-General and *G. S. Ramachandra Ayyar* for appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for eighth and ninth respondents.

M. Subrahmania Ayyar for tenth respondent.

K. B. Ranganadha Ayyar for respondents Nos. 2 to 7.

WALLIS, J.—The plaintiff obtained a preliminary decree for partition which was confirmed with modifications on appeal, and died while a Second Appeal was pending. His legal

* Second Appeal No. 1734 of 1908.

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representatives have petitioned to be brought on record and the petition is opposed on the ground that the plaintiff's share passed on his death by survivorship and that there is nothing for the representatives to succeed to. Whether this be so or not is a question to be decided in the appeal itself after hearing both sides. The legal representatives deny that the plaintiff's share passed by survivorship on his death, and they are entitled to be brought on the record for the purpose of contesting the point. We therefore overrule the objection and direct the legal representatives to be brought on the record.

On the main question it was held by this Court in *Subbraya Mudali* v. *Manika Mudali*(1) differing from *Sukharam Mahadev Dange* v. *Hari Krishna Dange*(2) that a decree for partition effects a severance of the joint family, that this severance is not affected by the subsequent filing of an appeal from the decree; our attention was however called to certain observations in *Gorakala Kanakayya* v. *Janadana Padhi*(3) (where the point did not arise for decision) in which *Sukharam Mahal v Dange* v. *Hari-Krishna Dange*(2) was referred to with approval. We have accordingly reconsidered the question, but after listening to the able and exhaustive argument addressed to us by Mr. S. Srinivasa Ayyangar I see no reason to differ from the previous decision of this Court. Partition may be effected by consent and in proper cases by decree. When it is effected by decree, I can see no reason why the decree should not hold good as other decrees do, unless and until it is reversed. It is not a feature of our law or any other legal system, so far as I know, that the filing of an appeal should affect the operation of a decree; and unless the Court intervenes to stay proceedings the property may be partitioned and distributed in the shares fixed by the decree before the appeal is finally determined, possibly years before, in cases where there are a series of appeals. Where a decree for partition has been properly made and has directed the division of the property in appropriate shares, I can see no reason for altering this portion of the decree on appeal by reason of births or deaths afterwards supervening in the family. A partition by consent in certain shares when

(1) (1896) I. L. R., 19 Mad., 345. (2) (1882) I. L. R., 6 Bom., 113.
(3) (1910) M. W. N., 841 at p. 844.

once made is not affected by subsequent births or deaths in the family, and there does not appear to be any reason why it should be otherwise when it is made by decree.

The ordinary rule admittedly is that decrees which were right at the time they were passed, are not varied by reason of events which subsequently happen, and I can see no reason why an exception should be made in the case of decrees for partition, or why partitions by decree should be put on such an unfavourable footing as compared to partitions effected by consent. Assuming alienees would not be prejudicially affected, it would still be a hardship to the parties themselves to make their rights on partition to depend on their surviving the appeal proceedings. In *Jay Narain Giri* v. *Giris Chunder Myti*(1) their Lordships of the Judicial Committee after construing a decree of the District Court not then under appeal as a decree for partition observe:—"That being so, their Lordships are of opinion that although the suit is not actually in terms for partition, yet that the decree does effect a partition, at all events of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appvier* v. *Rama Subba Aiyan*(2) where it was held that a mere agreement to divide, effects a severance of the joint family without waiting for a partition by metes and bounds. What their Lordships appear to lay down in the passage cited is that a decree directing partition has the same effect as an agreement to divide. In the particular case the decree-holder who had obtained the decree above referred to died while an appeal was pending to the Privy Council, but the decree was nevertheless confirmed by their Lordships in a judgment which is not reported. The report deals with two consolidated appeals, one against an order in execution of the previous decree and another against the dismissal by the High Court of an appeal from a decree of the District Court dismissing a fresh suit filed by the defendant in the previous suit on the ground that the previous decree had not severed the joint family, and that consequently the property passed to him by survivorship on the death of the plaintiff in the previous suit. It does not appear to have occurred to anyone in this hotly contested litigation that, assuming the first decree effected a severance, the

(1) (1879) I. L. R., 4 Calc., 434; 5 I.A., 228. (2) (1866) 11 M.I.A., 75.

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subsequent death of the plaintiff pending an appeal made any difference. And assuming the law to be correctly laid down by their Lordships, that the decree of the Court of First Instance effected a severance, there does not appear to be any reason why the subsequent filing of an appeal should be held to effect a reunion and justify the Appellate Court in making a fresh distribution of shares according to the condition of the family at the date of the decision of the appeal, and so depriving parties or their representatives of the shares originally allotted to them. In *Chidambaram Chettiar* v. *Gauri Nachiar*(1) which also came before the Privy Council, the District Judge tried the first issue as to whether the zamindari was partible first and in his judgment held that it was, and that, this being so, the plaintiff was admittedly entitled to partition. It was not clear if any decree or order had been drawn up on this judgment, but an appeal from the decree of the High Court affirming the final decree of the District Court, their Lordships hold that the judgment of the District Judge on the first issue was equivalent to a declaratory decree and rendered the parties separate in estate, if they had not already been so, and that the subsequent death of the plaintiff before the final decree of the District Court did not make any difference or cause the suit to abate. Their Lordships no doubt observed that the defendant had not appealed from the judgment of the District Court on the first issue and appeared to have acquiesced in it but these remarks were probably due to the fact already mentioned that no decree or order directing partition was forthcoming, and it does not appear that the result would have been different if these features of the case had been absent. The ruling in *Singili* v. *Mookan*(2) that the plaintiff's share must be determined with reference to the condition at the date of the final decree in the suit is opposed to both of the Privy Council decisions above mentioned, although the actual decision may possibly be supported on other grounds, as in that case the only decree passed by the lower Court was set aside. As regards *Sakharam Mahadev Dange* v. *Hari Krishna Dange*(3) the decision rests on the proposition that the decree of the Subordinate Judge in that case did not operate as a severance so long as it remained under appeal. For the reasons already given, I prefer

(1) (1879) I.L.R., 2 Mad., 83. (2) (1893) I.L.R., 16 Mad., 350 at p. 353.
(3) (1882) I.L.R. 6 Bom., 113.

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to follow the decision of this Court in *Subbaraya Mudali* v. *Manika Mudali*(1) and dismiss the second appeal with costs.

SANKARAN-NAIR, J.—I agree and I have only to add that I believe the practice in this Presidency has always been in accordance with the law as laid down in *Subbaraya Mudali* v. *Manika Mudali*(1).

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

GOLLA HANUMAPPA AND OTHERS,

v.

EMPEROR.

1911. April, 24, 25, 28

Penal Code, Act XLV of 1860, s. 149—Existence of common object before commencement of fight not necessary to constitute offence—Criminal Procedure Code, ss. 237, 238, 423 (b)—Appellate Court has power to convict accused of an offence of which he is acquitted in cases not falling under ss. 237, 238.

To constitute an offence under section 149 the existence of a common object before the commencement of the fight in not necessary. It is enough if the common object is adopted by all the accused.

The power of an Appellate Court under section 423 (*b*) of the Criminal Procedure Code to alter the finding while maintaining the sentence is not confined to cases falling under sections 237 and 238 of the Code.

The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under sections 237 and 238 without a distinct charge. In cases not falling under sections 237 and 238, he cannot be convicted of an offence with which he was not charged in the lower Court. Where however he has been charged and the lower Court has recorded a finding on such charge, the Appellate Court can alter the finding.

APPEAL against the conviction and sentence passed upon the appellants by B. C. Smith, Sessions Judge of Bellary Division, in Calendar Case No. 72 of 1910.

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

Dr. *S. Swaminadhan* and *S. Ranganadha Aiyar* for appellant.

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(1) (1896) I.L.R. 19 Mad., 345. * Criminal Appeal No. 22 of 1911.