fourth defendant a party to the original mortgage suit. We do not think that this is a case where interest ought to be allowed.

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The decree of the Lower Court will be modified accordingly. The parties will pay and receive proportionate costs. No personal decree. Time six months.

K.R.

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice and Mr. Justice Kumaraswami Sastri.

SENGODA GOUNDAN (FIRST DEFENDANT), APPELLANT,

1924, January 29.

v.

MUTHU GOUNDAN (MINOR), BY NEXT FRIEND KOMARAVELU GOUNDAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 5), RESPONDENTS.*

Hindu Law—Partition—Suit by two minor sons for partition against their father—Compromise decree for partition and delivery of two-third's share—Minor sons, whether thereby divided inter se—Presumption of division—Subsequent death of one of the minor sons—Right of surviving son to share of deceased son by survivorship.

Where some of the members of a joint Hindu family sued for partition and recovery of their shares from the other members of the family, the suit and the decree do not necessarily divide the plaintiffs *inter se*.

Mussamat Jatti v. *Banwari Lal*, (1923) 45 M.L.J., 355 (P.C.); *Balabux* v. *Rukhmabai*, (1903) I.L.R., 30 Calc., 725 (P.C.); *Rangasami Naidu* v. *Sundarajulu Naidu*, (1916) 31 M.L.J., 472; and *Palaniammal* v. *Muthuvenkatachala Maniagarar*, (1917) 33 M.L.J., 759, referred to.

Where two minor sons of a Hindu father instituted a suit for partition against their father, and a decree was passed on compromise for partition and delivery of two-thirds share to the minor plaintiffs, and a subsequent suit was instituted by the

* Second Appeal No. 767 of 1922.

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survivor of the two minors, on the death of one of them, to recover possession of the two-thirds share of the lands by division from his father and the other divided co-owners on the ground of subsequent trespass by his father,

Held, that the minors had not become divided *inter se* by the previous suit or the decree;

and that the plaintiff was entitled to the one-third share of his deceased brother by right of survivorship, and was entitled to recover the two-thirds share in the family properties as against his father and the other divided co-owners.

SECOND APPEAL against the decree of E. H. WALLACE, the District Judge of Salem, in Appeal Suit No. 45 of 1921, preferred against the decree of T. K. GOVINDA AYYAR, the District Munsif of Nāmakkal, in Original Suit No. 1269 of 1918.

The plaintiff, who was a minor son of the first defendant, had instituted a previous suit (Original Suit No. 1936 of 1915) along with his brother who was also a minor and now deceased, represented by a common next friend, for partition and delivery of possession of their two-thirds share in the family lands from their father, the first defendant. The suit ended in a compromise decree for partition and delivery of a two-thirds share in all the family lands against their father. The parties stated that they had effected a division of the properties as per compromise petition. While the minors were in enjoyment of their shares through their next friend, the elder brother died a minor and unmarried. The surviving minor brother instituted the present suit to recover possession of the two-thirds share in the lands of which he was in enjoyment and alleged that his father subsequently trespassed on the entire two-thirds share and that some of the items of the lands were not divided from the lands belonging to the other co-owners who had been already divided from the first defendant. The first defendant contended, *inter alia*, that the minor sons (who were both

plaintiffs in the previous suit) must be deemed to have become divided *inter se* by the institution of and decree in the previous suit, and that consequently the present surviving minor brother was not entitled to the one-third share of the deceased minor brother, to which the first defendant claimed to succeed by inheritance. The lower Courts decreed the entire two-thirds share in favour of the plaintiff. The first defendant preferred this Second Appeal.

T. M. Krishnaswami Ayyar for appellant.

T. Rangachariar and *V. Venkatavarada Ayyangar* for respondents.

JUDGMENT.

SPENCER, OFFG. C.J.—This suit is for partition and the question argued before us relates to the plaintiff's claim to succeed to the share of his deceased minor brother by right of survivorship. There was a previous suit by the plaintiff and his brother, both being minors represented by a next friend, for partition, which ended in a compromise decree Exhibit A, dated 24th November 1915. It has been argued before us that, when two persons ask for a partition, it should be implied that they intend to get divided from each other as well as from the joint family to which they belong. Nothing can be gathered from the fact that in the former suit the two minor plaintiffs combined to ask for a partition as to their intention to become divided *inter se*. The right to obtain a partition, though personal, happened to be common to both the plaintiffs and common questions of law and fact arise out of their suing. The mere fact that there was one trial and one decree in the former suit was a consequence of procedure applicable to persons suing under the same cause of action rather than conduct showing an intention to become separated *inter se*.

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SPENCER, OFFG. C.J.

In *Mussamat Jatti* v. *Bamwari Lal*(1) the Privy Council quoted a former decision by that body, *Balabux* v. *Rukhmabai*(2) in which Lord DAVEY remarked that there was no presumption when a co-parcener separates from others that the latter remained united. The agreement to remain united must be proved like any other fact. The Privy Council did not say that there was no presumption in such a case that the other co-parceners became divided, as it was not necessary to do so for that decision. But it seems to me that such is the case. In *Rangasami Naidu* v. *Sundarajulu Naidu*(3) it was held that the separation of one member of a co-parcenary was not necessarily a separation of the remaining members, and in *Palaniammal* v. *Muthuvenkatachala Maniagarar*(4), Sir JOHN WALLIS, C.J., and my learned brother held that, if a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit. I think that SADASIVA AYYAR, J., went too far in *Balakrishna Mudaliar* v *Raju Mudaliar*(5), in observing that there was a presumption that, when one of several co-parceners has become divided, the others also have become divided in status. The Privy Council decisions to which he referred do not support such a proposition.

If the effect of the former decree is to be determined by the terms of it, we find from Exhibit A that in the former suit both the plaintiff and his brother had the same next friend to represent them and the decree speaks of their two-thirds share, not of their properties as two shares, each representing one-third of the whole. There was no order that their two-thirds share should

(1) (1923) 45 M.L.J., 355. (2) (1903) I.L.R., 30 Calc., 725.
(3) (1916) 31 M.L.J., 472. (4) (1917) 33 M.L.J., 759.
(5) (1195) 27 I.C., 736.

be divided into separate shares, and no authority has been shown for a guardian of two undivided minors dividing their status so as to make them lose their rights of survivorship to each other. The District Judge observes that the plaintiff and his brother did not sue for division *inter se* and that the decree does not divide their shares, and he formed a conclusion from their conduct that they remained undivided, agreeing with the first Court on that point. I see no reason to interfere with that finding on any point of law. I would, therefore, confirm the decree of the Lower Appellate Court, and, as the other grounds of Second Appeal are untenable and have not been seriously pressed, this Second Appeal must be dismissed with costs.

The Memorandum of Objections, which relates to mesne profits anterior to the date of the institution of the suit, is dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree with my Lord. I think there is no authority for holding that, where two members of a joint family sue for partition, it *necessarily* divides them *inter se*. The observations of the Privy Council in *Ram Pershad Singh* v. *Lakhpati Koer*(1), and the decisions of this Court in *Rangasami Naidu* v. *Sundarajulu Naidu*(2), and *Palaniammal* v. *Muthuvenkatachala Maniagarar*(3) are clearly against that contention.

K.R.

(1) (1903) I.L.R., 30 Calc., 231 (P.C.).
(2) (1916) 31 M.L.J., 472. (3) (1917) 33 M.L.J., 759.