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Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May, 1871 (1). But the Full Bench judgment of this Court (2) must, I think, be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court (2) and must hold that the order of the Munsiff under s. 327, Act VIII of 1859, for filing the award does not operate as a decree and is not appealable.

BEFORE A FULL BENCH.

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April 24.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, and Mr. Justice Oldfield.)

KALI PARSHAD (PLAINTIFF) v. RAM CHARAN (DEFENDANT)

Hindu Law—Undivided Hindu Family—Ancestral Immoveable Property—Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the lifetime, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

The facts of the case, so far as they are material for the purposes of this report, were as follows:—

The plaintiff, his father the defendant, and his brother, Lachman Parshad, were members of an undivided Hindu family. The plaintiff claimed to establish his right to a one-third share of certain shares in certain villages forming the ancestral immoveable property of the family, and to obtain possession of the same. He alleged that he was excluded from inheritance, inasmuch as the defendant, describing him as an outcast, had made over possession of a portion of the property to Lachman Parshad and a portion to the wife of a deceased son. The defendant pleaded that, under Hindu law, such a claim by a son in the lifetime of his father was invalid. The Court of first instance overruled this plea and gave the plaintiff a decree. The lower appellate Court held that the plaintiff was only entitled, under Hindu law, to a one-fourth share of the

(1) 8 B. L. R. 315: 8 C. 15 W. R., that case expressed opinions to the P. C. [illegible] Judges to same effect.

(2) H. C. R., N.-W. P., 1867, p. 353.

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ancestral property, and that possession of the share could not be given to him in his father's lifetime (1).

The plaintiff appealed to the High Court on the ground that, under Hindu law, he was entitled to a one-third share of the property, and to possession of it.

The Court (Stuart, C. J., and Oldfield, J.) referred the following question to a Full Bench, *viz.* :—

"Whether, under Hindu law as prevailing in this part of India, a son can obtain possession by enforcing a partition of his share in immoveable ancestral property during his father's lifetime and against his father's wish, and under what circumstances."

The learned Judges referred to the following authorities—*Deo Bunsee Kooer* v. *Dwarkanath* (2); *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (3); and *Nagalinga Mudali* v. *Subbramaniya Mudali* (4).

The *Senior Government Pleader* (Lala *Juala Parshad*), for the appellant, cited Mitakshara, ch. i, s. 1, v. 27, and ch. i, s. 5; *Goor Surun Doss* v. *Ram Surun Bhukut* (5); *Beer Kishore Suhye Singh* v. *Hur Ballub Narain Singh* (6); *Raja Ram Tewary* v. *Luchmun Pershad* (7).

Lala *Lalta Parshad*, for the respondent, contended that the law, under the Mitakshara, relating to the partition of property, whether ancestral or acquired, was laid down in ch. i, s. 2. Partition is at the will of the father if alive. S. 5 does not relate to partition. He cited Menu, ch. ix, v. 104, referred to in Strange's Hindu Law, 2 ed., ch. 9, p. 179.

The opinion of the Full Bench was as follows:—

The answer to the question referred to us is, it appears to us, supplied by express texts of the Mitakshara. The fifth section of the first chapter of that work treats of the rights of father and son in property ancestral, and in the fifth paragraph the author declares that for or because the rights are equal or alike, therefore partition is not restricted to be made by the father's choice; and having explained

(1) See p. 102, note (3).
(2) 10 W. R., 273.
(3) 1 Bom. H. C. Rep., 23 (1st App. 76.
(4) 1 Mad. H. C. Rep. 358.
(5) 5 W. R., 52.
(6) 7 W. R., 502.
(7) 7 W. R., 15; S. C., 2 I. A., Sup. Vol., 731

in the seventh paragraph [illegible] which he had discussed in the second section referred to property which had been acquired by the father himself. In the eighth paragraph he distinctly enounces the rule in the following terms:—"Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son." In the ninth and tenth paragraphs he treats of the son's right of interference in the father's dealings with ancestral property as the consequence of their indiscriminate right, and in the eleventh paragraph, in support of his position that "the father, however reluctant, must divide with his sons, at their pleasure, the effects acquired by the paternal grandfather," he deduces the authority of Menu from the text—"If the father recover paternal wealth not recovered by his co-heirs, he shall not, *unless willing*, share it with his sons, for in fact it was acquired by him." In which text the nature of the father's interest in the property so recovered is declared to be the same as would have been the interest of any one member of a joint family in such property so recovered, that is to say, he would have the right to treat it as his own.

The author of the Mitakshara himself reconciles what seeming discrepancy there may be between the rules as to partition expounded in s. 2 and the rules expounded in s. 5 by the statement that the texts cited in the former section refer to the father's property, and not to the ancestral property.

In the Vyavahára Mayúkha, ch. iv, s. 4, v. 4, it is declared that the unqualified right of the sons to insist on the partition of ancestral property against the father's will has also the sanction of Brhaspati:—"The father and sons are equal sharers in houses and lands derived regularly from ancestors, but sons are not worthy (in their own right) of a share in wealth acquired by the father himself, when the father is unwilling."—"From which," says the author, "it results that sons are worthy of a share in property acquired by the grandfather or other (ancestor), even though the father do not wish it."

Seeing that the language of the Mitakshara is free from reasonable doubt, and that in cases governed by the Mitakshara the right

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of the son to demand partition *invito patre* has been recognized in *Beer Kishore Suhye Singh* v. *Hur Bullub Narain Singh* (1); *Raja Ram Tewary* v. *Luchmun Pershad* (2); *Deo Bunsee Koer* v. *Dwarkanath* (3); *Nagalinga Mudali* v. *Subbiramaniya Mudali* (4), and that if there be no reported cases in this Court it has been accepted hitherto as well established law in this Court, we would answer that, in the case of ancestral immoveable property, the son has, under the Mitakshara law, an unqualified right to demand partition. It is unnecessary for us in the present reference to express an opinion whether the same rule applies to ancestral moveable property (5).

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April 21.

CRIMINAL JURISDICTION.

(*Sir Robert Stuart, Kt., Chief Justice.*)

QUEEN *v.* JAGAT MAI.

Act X of 1872, ss. 468, 471, 473—Offence against Public Justice—Offence in Contempt of Court—Prosecution—Procedure.

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X of 1872 (6).

The Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X of 1872, is not precluded by the provisions of s. 471 from trying the accused person itself for the offence charged (7).

(1) 7 W. R., 502.
(2) 8 W. R. 15; S. C., B. L. R., Sup. Vol., 731.
(3) 10 W. R., 273.
(4) 1 Mad. H. C. Rep., 77; also in *Lalject Singh* v. *Rajcoomar Singh*, 12 B. L. R., 373.
(5) With regard to the plaintiff's share, under Hindu law, in the ancestral immoveable property, and to the question of possession, the Division Court (Stuart, C.J., and Oldfield. J.), when the case was returned to it, in delivering judgment, said:—"There appears to us to be no doubt that the Judge (lower appellate Court) has erred, the extent of the share in ancestral property to which a son is entitled here, equal to that of the father, and he is entitled to such equal share at partition—Mitakshara, ch. i. s. 5, v 3, and other texts. In the present case the family interested in the partition consisted of the father and two sons, each of these three being entitled to one-third of the ancestral estate, and that is the extent of the share for which the plaintiff is entitled to a decree in this suit.....
(6) So held by Oldfield, J., in *Queen* v. *Kultaran Singh*, *ante* p. 129, and by the Calcutta High Court in *Sufatoollah*, petitioner, 22 W. R., Cr., 49. But see *Reg.* v. *Navranbeg Dulábeg*, 10 Bom. H. C. Rep., 73; and 7 Mad. H. C. Rep., Rulings, xvii and xviii.
(7) See, however, *Queen* v. *Kultaran Singh*, *ante* p. 129, *Sujat*[illegible] petitioner, 22 W. R., Cr., 49; and 7 Mad. H. C. Rep., Rulings, xvii and xviii, in which cases the opposite construction is placed on the section.