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tion or present any argument in support of it, I have not thought it necessary to deal with it in disposing of the appeal.

CANDY, J. :—I concur. I think the absence of a writing in this case does not make the order invalid. The vital point according to the section is the desire of the parties that the order should be made, and there is no doubt that in this case that desire existed.

Appeal dismissed with costs.

Attorneys for plaintiff:—Messrs. *Smetham, Bland and Noble.*

Attorneys for defendants:—Messrs. *Thakurdas, Dharamsi, Cama and Hormasji.*

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

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GANPAT VENKATESH DESPANDE (ORIGINAL PLAINTIFF), APPELLANT, v. GOPALRAO VENKATESH DESPANDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partition—Son born after partition—Right of such son to partition—Share of such son—Family arrangement—Limitation—Hindu law.

In the year 1875, one Venkatrav having at that time three sons, *viz.*, defendants Nos. 1, 2 and 3, divided his property, allotting one-third to the first defendant and retaining the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3), who were then minors. The latter continued to live with him, and he managed the property. The first defendant was the son of Venkatrav's elder wife and the second and third defendants were the sons of his younger wife. In 1880 the plaintiff was born and in 1894 he brought this suit by his mother (the younger wife) as next friend for a partition of the whole of Venkatrav's property, including that which in 1875 had been allotted to the first defendant. The plaintiff claimed a fourth share.

Held, that the plaintiff was not entitled to any part of the property which had been given to the first defendant in 1875. The family arrangement then made had been acquiesced in for more than twelve years and could not be disturbed. The plaintiff could only claim against defendants Nos. 2 and 3, who lived with their father in union and with whom the plaintiff himself had lived as member of a joint family.

APPEAL from the decision of Ráo Bahádur G. V. Bhanap, First Class Subordinate Judge of Dhárwár.

Suit to set aside a prior partition and for a fresh partition.

* Appeal, No. 64 of 1898.

The plaintiff was the youngest son of Venkatrav Despande and was born in 1880. Venkatrav Despande had two wives, the elder of whom was the mother of one son (defendant No. 1) and the younger of whom was the mother of the plaintiff and two other sons (defendants Nos. 2 and 3).

In 1875 (*i. e.*, four years prior to the birth of the plaintiff) Venkatrav, having then only three sons (defendants Nos. 1, 2, 3) and having disagreed with defendant No. 1 (the eldest of them), made a division of his property and gave a one-third share to the defendant No. 1, and retained the remaining two-thirds in his own possession in the interest of his other two sons (defendants Nos. 2 and 3). These two sons were then minors. Venkatrav continued to live with them and to manage the property until his death.

In 1894 the plaintiff, who was then still a minor, brought this suit claiming a fourth share of the whole of his father's property, including that which had been allotted to defendant No. 1 in 1875 as well as that retained by Venkatrav for defendants Nos. 2 and 3. He prayed that the partition effected in 1875 might be declared cancelled, and he claimed mesne profits. He contended that he was not bound by the partition in 1875, as Venkatrav's wife was then capable of bearing children, and Venkatrav was, therefore, not competent to make a partition.

The first defendant contended that the share allotted to him in 1875 was exempt from a fresh partition; that he had been ever since that time in undisturbed possession as owner; that the plaintiff's claim should be limited to that portion of the property which was in the hands of his (plaintiff's) full brothers (defendants Nos. 2 and 3).

Defendants Nos. 2 and 3 admitted the claim and prayed that their respective claims should be awarded to them separately.

Defendants Nos. 4 to 23, some of whom did not appear, resisted the claim on the ground that they were alienees, either by purchases or mortgages, of parts of the properties from defendants Nos. 1, 2 and 3.

The Subordinate Judge disallowed the claim as against defendant No. 1. He passed a decree directing the plaintiff to recover

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one-third share from the property in the possession of defendants Nos. 2 and 3, after paying one-third share of the debts due by them.

The plaintiff appealed. Pending the appeal he attained majority and the name of his next friend was struck off the record.

Branson (with *Daji A. Khare*) for the appellant (plaintiff):—The Judge erred in rejecting our claim for the cancellation of the partition of 1875. At the time of that partition our mother had not passed the stage of child-bearing, and consequently the partition then made cannot stand to our detriment. The authorities are quite clear and they show that we are entitled to a fourth share in the whole property including that allotted to defendant No. 1, as well as that retained for defendants Nos. 2 and 3. The Judge held that our claim to a share in the property allotted to defendant No. 1 cannot lie. This is not a correct view. We are entitled to have the partition re-opened—Mayne's Hindu Law, para. 431; Colebrook's Hindu Law, Vol. II, p. 268; *Krishna* v. *Sami*[1]; *Chengama* v. *Munisami*[2]. The partition deed of 1875 shows that the immoveable property only was divided and not the moveable. We, therefore, contend that the alleged partition was merely a family arrangement made for the purpose of settling quarrels between the father and one son. The arrangement was not by itself a partition.

Inverarity (with *Manekshah J. Taleyarkan*) for respondent No. 1 (defendant No. 1):—The view taken by the Judge as to the plaintiff's position according to Hindu law is correct. The partition effected by Venkatrav in 1875 is binding on him. The plaintiff is entitled to recover only a share in the property which was in his father's hands at the time of his birth—*Yekeyamian* v. *Agniswarian*[3]; *Nawal Singh* v. *Bhagwan Singh*[4]. If the allegation of the plaintiff be correct that his father retained only moveable property, then these rulings show that he can take a share in that property only, and has no right to a share in the immoveable property. If Venkatrav had made a *bonâ-fide* alienation of a portion of the property to a stranger before the plaintiff's birth,

(1) (1 8) 9 Ma'., (4.

(2) (1896, 20 Mad., 75.

(3) (1869) 4 Mad. H. C. Rep., 307.

(4) (1882) 4 All., 427.

such an alienation would have bound the plaintiff—*Rambhat* v. *Lakshman* (1). The cases of *Krishna* v. *Sami* (2) and *Chengama* v. *Munisami*(3) do not apply.

Dhondu P. Kirloskar for respondents Nos. 7, 8, 11, 12 and 16 (defendants Nos. 7, 8, 11, 12 and 16).

RANADE, J.:—The appellant, who is now major, brought this suit as minor by his next friend, his mother Lakshmibai, against his step-brother and two full-brothers (respondents Nos. 1, 2, 3) and others claiming through them, to cancel a partition made in 1875 in his life-time by their father Venkatrav five years before appellant was born, by which partition a third share in ancestral family property had been assigned to respondent No. 1, and the remaining two-third share had been retained by Venkatrav for the use of the respondents Nos. 2, 3 (who were then minors) in his own possession. Appellant also sought a repartition of his one-fourth share in all the ancestral property.

Respondents Nos. 2 and 3 offered no opposition to the claim, but only asked for a separation of their own shares in the whole of the property.

Respondent No. 1 contended that the appellant had no right to sue him for a cancellation of the partition effected in 1875, and that the claim was time-barred. The appellant might sue his full-brothers and obtain a partition of his one-third share from them.

The lower Court held that this contention of respondent No. 1 was well-founded, and, while rejecting appellant's claim for cancelling the partition of 1875 as against respondent No. 1, it allowed the claim of the appellant as against his full-brothers, respondents Nos. 2 and 3, and directed that appellant might recover his one-third share of the property in their possession after paying one-third share of the debts due by them.

In the appeal before us, it was contended that, as an after-born son, appellant had a right to the relief claimed by him, namely, a cancelment of the partition of 1875, and a repartition

(1) (1881) 5 Bom., 630. (2) (1885) 9 Mad., 64.
(3) (1896) 20 Mad., 75.

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of his one-fourth share in the entire property in the possession of the respondent No. 1, as also of the respondents Nos. 2, 3. The appellant's counsel placed his reliance chiefly on two decisions of the Madras High Court. In the first of these decisions—*Krishna* v. *Sami*[1]—the question in dispute related to the right of the sons of a person, disqualified by reason of his being deaf and dumb, to claim a share with their uncles in the property of their grandfather in the life-time of their disqualified father, even though they were born after the death of their grandfather. This right had been negatived in two decisions of the Calcutta High Court—*Pareshmani* v. *Dinanath*[2] and *Kalidas* v. *Krishan Chandra*[3]. Turner, C. J., distinguished these Bengal decisions as being governed by the law of the Dayabhaga, and held that, under the Mitákshara law, the sons of a disqualified sharer, though subsequently born, had a right to divest their uncles, and claim a share of the inheritance.

It will be at once seen that this Madras case did not involve any question as to the binding character of any partition already made, such as is the case in the present dispute. In the course of his judgment, Turner, C. J., referred to the analogy which exists between the right of a disqualified person to inherit, when he is cured of his malady, and the right of a son born after partition, and it was stated that "the son who is begotten and born after partition takes the share of his parents and acquisitions made after partition, or *if his father has reserved no share to himself,* he may call on his brothers to make up a share for him." It was contended by Mr. Branson that, in the present case, Venkatrav reserved no share to himself in the partition of 1875, and that, therefore, appellant, as his son begotten and born after partition, had a right to call upon all his three brothers to make up his one-fourth share. In the other Madras case also—*Chengama* v. *Munisami*[4]—the father had reserved no share to himself, and the High Court allowed the after-born son to claim a share from the separated brothers, not only in the property divided, but also in the accumulations made with the help of the divided property.

(1) (1885), 9 Mad., 64.
(2) (1868) 1 Ben. L. R., 117 (A. C.).
(3) (1869) 2 Ben. L. R., F. B., 103.
(4) (1896) 20 Mad., 75.

If the present dispute had been a case of equal partition between brothers, and the father had reserved no share to himself, but had distributed his property between his three sons, there would be some force in the appellant's contention that the appellant, as an after-born son who could not fall back on his father's share or acquisitions, would have a right to claim re-partition as against the brothers. The peculiar feature of this case, however, is that here there was no partition between the three sons of Venkatrav in which Venkatrav left no share to himself. The appellant-plaintiff in his plaint has stated that what really took place in 1875 was that Venkatrav, owing to his disagreement with respondent No. 1, who was his son by one wife, effected a division by giving one-third of his property to respondent No. 1, and retained the remaining two-third share in his own possession in the interest of his two other sons by a younger wife. These two sons were then minors, and he lived with them and continued to manage this property as owner till his death in 1890, and these two sons as well as plaintiff remained in union with him, and after his death, the respondents Nos. 2, 3 managed the property, and the appellant lived with his brothers and his and their mother. The so-called partition-deed brings out this fact very prominently. The deed is called a memorandum made with the full concurrence of the two persons, Venkatrav and respondent No. 1, who have signed it. It recites that, owing to differences, one-third share was separated, and given to respondent No. 1. The details of the lands so set apart are then mentioned, and the deed states that respondent No. 1 and Venkatrav were to recover the profits of the one-third and two-third shares, and pay the judi in proportion. The lands which had come to Venkatrav in right of his eldership were impartible, and, therefore, they were retained by him in his possession for life, but these eldership lands were to revert to respondent No. 1 after Venkatrav's death. The respondent No. 1 was next required to accept responsibility for one-third of the debts due by Venkatrav, and Venkatrav was to be responsible for his two-third share of the debts. The vatan lands were to be entered in respondent No. 1's name after Venkatrav's death, and the three brothers were to enjoy the vatans and

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perform service in their turns. The moveable property was to remain in the possession of Venkatrav and respondent No. 1 as it was in their respective possession on the date of the division. Towards the end there is a re-affirmation of the object of the division, namely, that respondent No. 1's one-third share being separately allotted to him, no disputes remained. Venkatrav put himself forward as making the division of his own accord. The separate shares of respondents Nos. 2 and 3 are nowhere specified, and Venkatrav and respondent No. 1 secured the peace of the family by entering into an amicable arrangement by which respondent No. 1 got a one-third instead of a one-fourth share, but most of the eldership property remained with Venkatrav for his life. It was not, therefore, a case of equal division between brothers or sons in which the father reserved no share to himself. Seeing that he was more than sixty years old at the time, and both his sons by the younger wife were minors, whose interests he would have to protect for the few remaining years that he expected to live, there was nothing surprising in Venkatrav's allotting one-third share to his eldest son. He could not well expect that another son would be born to him when he was nearly seventy years old. The arrangement made in 1875 was thus in every way fair and equitable, and it was acquiesced in as such by all the parties for over twelve years.

The father in a Hindu family has a right when he so desires to make a partition, and it binds his grown-up as well as minor sons. In *Kandasami* v. *Doraisami* (1), such a partition made by a father between two sets of his sons by different wives was upheld when it was shown to be *bonâ fide* and in conformity with Hindu law. Such a family arrangement once made is final, and cannot be re-opened on the ground of the inequality of shares—*Moro* v. *Ganesh* (2). In *Yekeyamian* v. *Agniswarian* (3), a father had adopted a son, and then a son was born to him. To prevent disputes between the adopted and natural born son, he allotted a certain portion of his property to the adopted son. More sons were born to him by another wife subsequently, and these sons sued the father and the adopted son and the first

(1) (1880) 2 Mad., 317. (2) (1873) 10 Bom. H. C. Rep., 444.
(3) (1869) 4 Mad. H. C. Rep., 307.

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natural born son for a share in the property. The claim was allowed as against the father and natural born son, but the High Court of Madras refused to disturb the arrangement made by the father in favour of his adopted son on the express ground that the evidence showed that the father had ample property to provide for all his after-born sons.

Even if the partition of 1875 had been between the three brothers, the Madras decisions would not apply to this case. The general rule of Hindu law, as expounded by the Mitákshara, Mayukha and the Smriti Chandrika, is that a son born after partition has no claim on the wealth of his separated brother. He has a preferential claim on the wealth of his parents. He can have a share of it with those brothers who lived in union with the father, or were reunited with him. The separated brothers have no claim over this distributed parental share. A partition is limited to the interests of the person demanding it, and has no enforced general operation against those who desire to live in union[1].

The somewhat vague texts of Vishnu and Yajnyavalkya, which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them, and have further been explained by the commentators as applicable only to the case of posthumous sons. In the present case, there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for over twelve years, and it cannot now be disturbed at appellant's instance. His claim can only be made against respondents Nos. 2 and 3, who lived with their father in union, and with whom he himself has been all along living as a member of a joint family. For these reasons, which are not exactly those assigned by the lower Court, we confirm the decree with costs.

Decree confirmed.

(1) Brihaspati; Manu, Chapter 9, verse 216. Gautama. W. and B., p. 366.