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QUEEN-EMPRESS v. KHANDU.

The following judgment was delivered by the learned Chief Justice :—

SARGENT, C. J. :—It is to be regretted that the attention of the Civil Surgeon was not drawn to the statement of the prisoner that he struck the deceased three blows, two of which were on the ears, and that he was only questioned as to the probable consequences of the wound on the back of the head. Having called for and seen the stick with which the blows were struck, I think there is but very little reason for doubt, more especially as the deceased was a leper in a feeble state, that the blows proved fatal, as the accused himself says was the case. But, assuming that the deceased would not have died from the effect of the blows, I agree with Mr. Justice Birdwood that as the accused undoubtedly believed he had killed his victim, there would be a difficulty in regarding what occurred from first to last as one continuous act done with the intention of killing the deceased. Under the circumstances the offence should be held to have been only the attempt to murder, and that the sentence should be transportation for life under section 307.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1890.
December 2.

MURA'RI VITHOJI AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MUKUND SHIVÁJI NA'IK GOLATKAR AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Partition—Joint family—Separate enjoyment of portions of family property for several years—Entries in survey records—Dealings with portions of property—Sole enjoyment of a certain property by a branch of the family—Separate acquisition.

In a partition suit it being found that the several branches of a Hindu family had lived separate for forty or fifty years, had enjoyed during that period separate and distinct portions of the family property or portions of the property in regular rotation and had dealt with the separate portions in every respect as their own property, and that in the survey records the lands were entered in the names of the several branches in respect of their separate shares,

* Cross Appeals, Nos. 98 and 137 of 1888.

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Held, that this evidence as to the mode of enjoyment by the several branches of the family during so long a period ought to be taken as establishing a tacit agreement of enjoyment according to their shares.

There being no evidence on the record to show when and by what member of the family certain property in the possession of a particular branch of the family was acquired, and the entry in the survey records with respect to it being different from that of the ancestral fields, that is, the entry being in the name of the representative of that particular branch with no sub-division of shares, and the party seeking partition of such property having failed to give evidence to rebut the presumption arising from the sole enjoyment of the particular branch and the entry in the survey records,

Held, that such property was the separate acquisition of that particular branch.

Moro v. *Ganesh*,(1) *Appovier's Case*,(2) *Bannoo* v. *Káshi Rám* (3) referred to.

THESE were cross-appeals from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Ratnágiri.

Suit for partition. In April 1879, the plaintiff, Mukund Shiváji Náik, filed this suit for partition in his capacity as manager of the joint family against 16 defendants, alleging that the property in dispute, including the three *thikáns* (fields) Juwa Pankhol, Sidi Mahomad, and Huda, was the joint ancestral property of the parties to the suit; that each branch of the family had one-sixth share therein; that some of the properties were in the joint occupation and some in the separate occupation of the parties; that in March 1879 the plaintiff demanded his one-sixth share from the defendants, and they declined to give it. The plaintiff, therefore, sought to recover his one-sixth share in the properties by partition.

Defendants Nos. 12—16 contended (*inter alia*) that *thikán* (field) Juwa Pankhol, a portion of *thikán* Poyi, *thikán* Huda and *thikán* Sidi Mahomad were their exclusive property, having been acquired by their ancestor Sambháji; that Sambháji acquired these properties after he became separate from the plaintiff's ancestor; that in the rest of the properties these defendants had one-sixth share which had been in their separate possession for many years; that similarly, the other parties had been in possession of their separate shares, &c., &c., and that the suit was barred by limitation.

(1) 10 Bom. H. C. Rep., 444. (2) 11 M. I. Ap., 75.
(3) I. L. R., 3 Calc., 315.

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The First Class Subordinate Judge (Khán Bahádur M. N. Nánávati) found (*inter alia*) that the plaintiffs had proved their right to all the properties in suit; and that, except as to *thikán* Huda, the plaintiff's claim was not barred by the law of limitation, and that the plaintiffs were entitled to the relief they sought.

Against the decree of the Subordinate Judge, defendants Nos. 12—19 and 22—25, and defendant No. 1, Shankar Raghuji, preferred to the High Court two separate appeals, Nos. 98 and 137 of 1888, respectively.

Branson (with *Ghanashám Nilkanth Nádkarni*) for the appellant in Appeal No. 98:—The evidence in the case shows that the several sharers were in separate enjoyment of their shares. The plaintiff admits in his plaint that some of the properties were in the joint occupation and some in the separate occupation of the parties. The plea of joint occupation relates only to the three *thikáns*, Juwa Pankhol, Sidi Mahomad and Huda. There is abundant evidence, both oral and documentary, to show that these *thikáns* were acquired by an ancestor, and that our branch of the family had been in exclusive possession. The plaintiff in his deposition says that he had separate management of his share for many years. Some of the cosharers say that they have been paying assessment on their shares, and this circumstance is corroborated by the receipts passed to them by the Revenue Department. Though actual partition by metes and bounds was not effected, still the survey records show that several lands have been entered on the names of different sharers. They have been separately enjoying the produce of their shares. Some of the cosharers have mortgaged their shares, and have dealt with them as if they were their exclusive property.

Pándurang Balibhadra (with *Ganpat Sadáshiv Ráo*) for the respondents:—The ancestors of the parties could not have become divided without division of the property. No such division is proved. The appellants have admitted that there was no evidence showing the alleged division. The evidence adduced by the appellants indicates, at the most, mere separation, but it does not indicate division. Separate management of common lands is

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not to be taken as evidencing division. When a family is large, and the family is scattered about in different places, it is natural that several members of the family should remain in possession of separate portions of the property for the sake of convenience. Mere separate management cannot give rise to the presumption that the family was divided—*Chabhila Múnchand* v. *Jádavbái*.(1) There is nothing to prevent an undivided cosharer from mortgaging the property in his possession. The burden of proof that the property was divided was upon the appellants, and they have failed to discharge it. The entries in the receipt-books and the survey records cannot help the appellants. It has been often held that such entries are not evidence of title. The appellants have not shown that the three *thikáns* were acquired by any ancestor of theirs after separation from the ancestors from whom we claim. They have also failed to show that the *thikáns* were acquired by their ancestors with their private funds. It must, therefore, be presumed that the three *thikáns* were acquired for the benefit of the family, and with family funds while the family was in union.

CANDY, J. :—The real dispute between the parties is centred in the three *thikáns* Juwa Pankhol, Sidi Mahomad and Huda. It is obviously in order to obtain a share in these three fields that this suit was brought. As to the remaining fields, set forth in the plaint, and which are admittedly ancestral property, the Subordinate Judge, it is true, has remarked that there was no evidence of actual partition, but there is evidence as to separate enjoyment, from which we think that partition according to the authorities may be properly inferred.

It is clear that when the present suit was filed, the several branches of the family had been living separately for forty or fifty years, and either enjoying for that long period separate and distinct portions of the family property or portions of the property in regular rotation—that they dealt with the separate portions in every respect as their own property—and, lastly, that in the survey records the lands are entered in the names of the several branches in respect of their separate one-sixth shares.

(1) 3 Bom. H. C. Rep., 57.

This evidence as to the mode of enjoyment by the several branches of the family during so long a period ought, we think, to be taken as establishing what West, J., describes in *Moro* v. *Ganesh* (1) as a tacit agreement of enjoyment according to their shares, which would bring the case within the principle of *Appovier's* case.(2)

But when we come to consider the evidence regarding the *thikáns* Juwa Pankhol and Sidi Mahomad, the case is found to be very different. [The Huda field is omitted, as the finding of the Subordinate Judge was adverse to plaintiffs regarding this land, and no appeal was filed by plaintiffs, and their cross-objections are beyond time.] In the first place, the form of the entry in the survey records in respect of the above two fields is entirely different from that of the ancestral fields, being entered in the name of the representative of the sixth branch, with no sub-divisions of shares. There is no evidence on the record to show when or by whom the Sidi Mahomad *thikán* was acquired—and the plaintiffs have failed to give any evidence sufficient to rebut the presumption from the sole enjoyment by the sixth branch and the entry in the survey records.

With regard to the Juwa Pankhol, it appears that Nároji, the founder of the family, had for several years anterior to the *sanad* (106) an interest in part of the land, having acquired the right to plant cocoanut trees therein. He seems also to have built a family house there, which, when the members of the family separated, was replaced by smaller houses; and the members of the family owning these houses, and the yards round the houses, with the trees in the yards, have dealt with those properties as their own separate properties. On the other hand, it appears that the *makhta* for the cultivated portion of the Juwa Pankhol *thikán* is in the name of Sambháji, the sixth son of Nároji, and the evidence shows that he and his descendents have continued to enjoy this land to the complete exclusion of the plaintiffs' branch of the family. It is proved that in 1867 the plaintiffs tried in a possessory suit to show that they were in possession of a part of this *thikán*, but failed. In that case the

(1) 10 Bom. H. C. Rep., pp. 444, 454. (2) 11 M. I. A., p. 75.

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father of the present defendant No. 2 admitted that the land belonged to Vithoji, the son of Sambháji, mentioned above.

In this state of the evidence we must hold, as the Privy Council did in *Bannoo* v. *Káshi Rám* (1) under similar circumstances, that the defendants 12 to 25 have satisfactorily proved that the Juwa Pankhol and Sidi Mahomad *thikáns* were their own separate acquisitions.

With regard to the *factum* of the adoption of the son of Murár (defendant 12) by Yeshwádá, we think that, though there may be discrepancies as to details, there can be no doubt that the adoption did take place. The registered deed of adoption, the genuineness and validity of which are not impugned, is almost conclusive on the point. The motive for the adoption is so patent, that it is difficult to understand why the deed should have been registered without the ceremony being performed.

Under the above view of the facts, we must reverse the decree of the Subordinate Judge and reject the plaintiffs' claim. Plaintiffs to bear their own costs and the costs of defendants 1 and 12 to 25 throughout. The other defendants to bear their own costs.

Decree reversed.

(1) I. L. R., 3 Calc., p. 315.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1890. *December* 2.

RINDÁBÁI KOM SHRINIVA'SA'CHA'RYA, (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* A'NA'CHA'RYA BIN PA'NDURANGA'-CHA'RYA AND OTHERS, (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu law—Inheritance—Succession—Sisters take absolutely in severalty—Daughters.

In the Bombay Presidency sisters take by inheritance from a brother absolute estates in severalty.

"On the death of a son without leaving wife or child his estate goes to his mother and on her death to his sisters as his heirs. The sisters take an absolute estate in severalty and not as joint tenants."

* Second Appeal, No. 855 of 1889.