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31 C. 256=31 I. A. 52=8 C. W. N. 649.

was referred to, to show that it could not be presumed that the Collector had acted rightly.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. Their Lordships are of opinion that there is no irregularity in the sale to which this appeal relates, or in the notifications issued in respect of it. All the objections which Mr. Arathoon has placed before their Lordships very fully, and very clearly, are so completely disposed of by the reasons given by the learned Judges of the High Court, that their Lordships are quite satisfied to adopt their judgment. It is not necessary to go through these reasons again.

Their Lordships will, therefore, humbly advise His Majesty that this appeal ought to be dismissed. The appellants will pay the costs of the first respondent—the only respondent who appeared—down to the filing of his case, and the costs of his application for payment thereof.

Appeal dismissed.

Solicitors for the appellants: *Dallimore & Son.*

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31 C. 262 (=31 I. A. 10=8 C. W. N. 146=14 M. L. J. 8=6 Bom. L. R. 1.)

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GANESH DUTT THAKOOR *v.* JEWACH THAKOORAIN.*

[13th, 14th, 15th, 19th, 25th May and 12th November, 1903.]

[*On appeal from the High Court at Fort William in Bengal.*]

Hindu Law—Partition— Evidence of partition—Cesser of commensality—Partition by sons without giving mother a share—Decree altering shares on partition—Permission to sue—Suit for both moveable and immoveable property—Civil Procedure Code (Act XIV of 1882) *s.* 44, *Rule* (*a*)*—Cause of action, identical.*

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive.

Anundee Koonwur v. *Khedoo Lal* (1), followed.

In this case it was held by the Judicial Committee that the evidence in other respects supported the theory that the cesser was adopted with a view to a partition which was eventually completed.

A partition was made between four sons forming a joint family governed by Mitakshara Law, without allotting their mother a share:—

Held, that it not being shown that she consented to relinquish her share, or acquiesced in the partition, the mother was not bound by it.

Krishnabai v. *Khangowda* (2), referred to.

In a suit by the widow of one of the sons for the one-fourth share which had on the partition been allotted to her husband, in which suit all the parties interested were represented:—

Held (varying the decree of the High Court) that the plaintiff was entitled to a one-fifth share only, and that the mother was entitled to have a one-fifth share allotted to her.

Held, further (affirming the decision of the High Court), that s. 44, Rule (*a*) of the Civil Procedure Code (Act XIV of 1882) was not applicable to the suit (one for property, both moveable and immoveable) inasmuch as the cause of action was the same for both kinds of property.

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* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble and Sir Arthur Wilson.

(1) (1872) 14 Moo. I. A. 412.

(2) (1893) I. L. R. 18 Bom. 197.

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Giyana Sambandha Pandara Sannadhi v. *Kandasami Tambiran* (1), referred to

[Dist 17 M. L. J. 135 ; Ref. 32 M. 191; 17 M. L. T. 183=33 I. C. 349 ; 33 All. 118= 7 A. L. J. 980 ; 26 C. L. J. 217.]

[263] APPEAL from a judgment and decree (3rd February 1897) of the High Court at Calcutta, which varied a decree (5th May 1894) of the Subordinate Judge of Muzaffarpore.

The defendants, Ganesh Dutt Thakoor and others, appealed to His Majesty in Council.

The suit out of which this appeal arose was brought by Jewach Thakoorain, the widow of one Balmukund Thakoor, who was originally a member of a joint family governed by the Mitakshara Law and consisting of himself and his three brothers—Raja Thakoor, who was the managing member, Ganesh Dutt Thakoor and Chhedi Thakoor. He died on 11th December 1887. On 11th April 1890, the District Judge of Muzaffarpore granted her a certificate entitling her to collect one-fourth of the debts due to her deceased husband on the ground that, at the time of his death, he had become separate from his brothers. That decision was reversed by the High Court on 6th January 1891 on the ground that, even if such a separation had taken place, she was not entitled to a fourth of the debts until a settlement of accounts had established the amount due to her.

In the plaint which, though filed as in a pauper suit, on 27th November 1901, was not finally admitted as such till 23rd April 1902, the defendants were Raja Thakoor, Ganesh Dutt Thakoor, and Chhedi Thakoor, the three brothers of Balmukund Thakoor, the wife of Raja Thakoor, and Harakhbati Thakoorain, widow of one Doorga Dutt Thakoor and mother of the first three defendants.

The plaint alleged that in Baisakh 1290 Fusli (April-May 1883) Balmukund separated in mess from his brothers, and built a separate residence in which he and his family lived ; that an actual partition was then made of the moveables and the *zerait* lands in the *milkiat* mouzahs, but that the mahajani business and the zemindari collections remained joint until Assin 1295 Fusli (September 1887), when they also were divided ; that after the death of her husband, his brothers invited her to their house in Magh 1295 Fusli (January 1888), and during her absence demolished Balmukund's house and carried away its contents ; that she went to her father's house in Bhadro 1295 Fusli August-September 1888) and on 21st August 1889 applied for [264] a certificate, which was granted by the District Court, but refused by the High Court. The plaint set up further acts of the defendants in violation of her rights, and claimed one-fourth of the whole property.

The written statement of the three brothers denied the alleged partitions, and asserted that Balmukund was a member of the joint family until his death, and died in the family house where his *sradh* was performed by his brother, Chhedi Thakoor. They denied all the specific wrongful acts alleged in the plaint.

The wife of Raja Thakoor pleaded that she ought not to have been made a defendant ; and Harakhbati Thakoorain supported the case set up by her sons, and further stated that, as she herself was entitled to a share, the plaintiff ought not to obtain one-fourth of the property.

The only issues now material were—(i) Does s. 44 of the Code of Civil Procedure bar this suit ? (ii) Does limitation bar part of the claim

(1) (1887) I. L. R. 10 Mad. 375, 506.

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for moveable properties? (iv) When plaintiff's husband died, was he separate from the defendants? and (vi) If the plaintiff succeeds, what will be the extent of her share?

On the first issue the Subordinate Judge said :—

"The causes of action in reference to the two kinds of property arose admittedly on different dates, and in my opinion the plaintiff should not have joined the two together without the previous permission of the Court."

On the second issue he held as follows, as to the bond debts and decrees realized by the defendants since Balmukund's death, and as to the articles said to have been taken when Balmukund's house was demolished :—

31 C. 262=31 I. A. 10=8 C. W. N. 146=14 M. L. J. 8=6 Bom. L. R. 1.

"The causes of action in reference to the items contained in the 3rd and the 4th schedules are alleged to have accrued on the 27th Magh and 25th Sawan 1295, corresponding to the 26th January and the 17th August 1888. The claim in reference to them having been made after the lapse of three years, has been barred by lapse of time."

On the sixth issue the Subordinate Judge held as follows :—

"The defendant, Harakhbati Thakoorain, it appears, is entitled to a share according to Mitakshara law in a partition and her share is one-fifth, she having four sons at the time of the alleged partition. The plaint does not state what became of her share or how the plaintiff's husband got one-fourth share, although he had a mother alive. There is no evidence that defendant, Harakhbati Thakoorain, relinquished her claim or that any partition took place with her consent or knowledge. The plaintiff alone in [265] her deposition says that the said defendant raised no objection. The share of the plaintiff's husband during his lifetime was one-fifth and not one fourth. If the plaintiff succeed, her share will be one-fifth and not one-fourth except as to the last item of schedule No. II, in reference to which as will be shown hereafter, the claim of defendant, Harakhbati Thakoorain, has been barred."

On the general question whether there was a separation or not he held it proved that Balmukund did separate in mess in 1290, and that he removed from the family house and built himself a new residence where he died and where his *sradh* was celebrated. As regards the division of the moveables in 1290, he thought it unnecessary to come to any finding, as he had held that the claim was barred by limitation; but he found that the evidence in respect to the partition of the *zerait* lands in that year was unreliable. As regards the further partition which was said to have taken place in 1295, he held that there was a separation in respect of some of the properties in schedule I (the immoveable properties), and he gave the plaintiff a decree for a one-fifth share in these (with mesne profits) and dismissed the claim in respect of the rest of the items in that schedule.

Both parties appealed from this decision, and the appeals came before a Division Bench of the High Court (BEVERLEY and AMEER ALI, JJ.) who on the issue as to the effect of s. 44 of the Civil Procedure Code said :—

"In the first place it is contended that the entire claim in respect of the moveable properties should be dismissed, inasmuch as the plaintiff did not obtain the previous leave of the Court to join that portion of her claim with the claim to recover the immoveable property, as required by s. 44 of the Code. This contention was raised in the defendants' written statement filed on 17th August 1892, and it appears that on 2nd September following, the plaintiff applied for the requisite permission. On the 24th October the following order was recorded :—As regards the prayer for permission to join in the same suit moveable and immoveable properties, an issue has been framed. As the cause of action is alleged to be one and the same, s. 44 of the Code does not, I think, apply to a case like this. The application for permission, if at all necessary, should have been made with the plaint or before filing it. No further order need now be passed in reference to it.

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"In his judgment the Subordinate Judge says that in his opinion the plaintiff should not have joined the two causes of action together without the previous permission of the Court, but we do not understand that he dismissed any portion of the claim on this ground. On the contrary, he has given the plaintiff a decree not only for some of the immoveable properties, but for the last item of schedule II, and in truth it would have [266] been in our opinion most unfair, had he, after allowing the whole suit to be tried out, dismissed any portion of it on the technical ground. Moreover, the reason alleged by the Subordinate Judge for the opinion he expressed, namely, that the causes of action in reference to the two kinds of properties arose admittedly on different dates, does not commend itself to our judgment. It is true that in the plaint several dates were mentioned as the dates on which the plaintiff was dispossessed from different kinds of property or from which she thought that limitation would begin to run against her. But the general cause of action was the denial of the plaintiff's right to succeed to the estate of her husband, and in this view we think that not only were the alleged dates of dispossession from different portions of the estate immaterial, but that the plaintiff was entitled and indeed bound to include in her suit the whole of the claim she had in respect of that estate. In this view we are supported by the remarks made in paragraph 102 of the judgment in the case of *Giyana Sambandha Pandara* v. *Kandasami Tambiran* (1). We think therefore that there is no force in this objection."

On the issue as to limitation, the High Court held that no portion of the plaintiff's claim was barred.

On the 6th issue as to the share to which the plaintiff was entitled, they observed :—

"The Subordinate Judge is wrong in holding that plaintiff can recover no more than a one-fifth share in the immoveable properties in respect of which he has given her a decree. The question as to whether, in a partition among the sons after the father's death, in which one son separates from his brothers who remain joint *inter se*, the mother is entitled to a share equal to a son, was argued before us at some length, but we are of opinion that that question does not arise in the present case. This is not a suit for partition. It is a suit for recovery of a certain definite share which it is alleged was allotted to the plaintiff's husband in a partition made with the consent of the brothers, and acquiesced in by the mother during Balmukund's lifetime. If the partition took place as alleged, then the plaintiff would be entitled to the share, viz., one-fourth which according to the plaintiff's case, was, as a matter of fact, awarded to Balmukund. If that partition is not proved, then the plaintiff is entitled to nothing. One of the curious features in the decision of the case by the Lower Court is that, while holding that plaintiff is entitled to a fifth share only of the immoveable properties, the Subordinate Judge has actually given her a decree for a fourth share of the last item of schedule II."

On the 4th issue as to the question of separation, the High Court discussed the evidence at considerable length and came to the conclusion that a partition was commenced in 1290 and completed as to the whole of the property in 1295. They stated four facts which confirmed them in this opinion on the evidence, *first*, the separate payment of Government revenue for [267] the September kist of 1887 ; *second*, the execution of a certain *kobala* (Exhibit 34) in October 1887, in which for the first time property was purchased by the brothers "in equal shares" ; *third*, the drawing out of certain decretal money from Court in shares of one-fourth and three-fourths in November 1887, and, *fourth*, the payment of rent by the other factory in shares of one-fourth and three-fourths in October 1887 and January 1888. Of these facts they said :—

"These four facts then corroborate in the strongest manner the oral and other evidence in the case to the effect that the separation which had begun in part in 1290 was effectually completed by the division of the mahajani and zemindari business in 1295, and that not in respect of some properties only, but in respect of all. The result is that the plaintiff as heir to Balmukund is entitled to recover his one-fourth share in all the properties, moveable and immoveable, which are shown to have belonged to the family."

(1) (1887) I. L. R. 10 Mad. 375, 506.

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In the result the plaintiff's claim was decreed in full.

On this appeal,

W. C. Bonnerjee and *G. Blair*, for the appellants, contended that the suit was not maintainable under the provisions of s. 44, Rule (*a*) of the Code of Civil Procedure (Act XIV of 1882), citing *Giyana Sambandha Pandara Sannadi* v. *Kandasami Tambiran* (1) that the suit as regarded the moveable property was therefore barred by limitation, citing *Mahomed Riasat Ali* v. *Hasin Banu* (2) that in a partition amongst sons the mother was entitled to a share equal to a son's share ; that the defendant Harakhbati was therefore entitled to a share, and the omission to reserve a share for her invalidated the partition, referring to *Krishnabai* v. *Khangowda* (3) ; that the plaintiff was entitled only to a one-fourth share ; and that the High Court had decided the suit on a case not made in the plaint, whereas it should have been decided on the pleadings in the suit, citing *Eshen Chunder Singh* v. *Shama Churn Bhutto* (4).

Mayne, for the respondent, contended that s. 44 of the Civil Procedure Code was not applicable, the cause of action being the same as to both the moveable and immoveable property ; that the [268] suit as regarded the moveable property was therefore not barred ; that the High Court had rightly decided that there had been a partition of the whole of the property begun in 1883 and completed in 1888, which had been acquiesced in by all the parties ; and that the plaintiff was entitled to the share which on such partition had been allotted to her husband, that is, one-fourth.

Bonnerjee replied.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. This suit was brought by the respondent, Jewach Thakoorain, the widow one Balmukund Thakoor, to determine her rights under a partition of family property which she alleged had taken place in her husband's lifetime, and for such relief as she might be found entitled to under the circumstances of the case. The defendants were the three surviving brothers of her husband,—Ganesh Dutt Thakoor, Raja Thakoor, and Cheddi Thakoor ; Niterbati Thakoorain, the wife of Chheddi Thakoor, in whose name one of the properties alleged to belong to the family had been purchased, and Harakhbati Thakoorain, the mother of the four brothers, would be entitled to a share on the partition, if proved. All the parties are Brahmins of Tirhoot, and the law which governs the case is the Mitakshara law, as modified in its application in Bengal.

Chowdhry Raja Thakoor died on the 7th October 1902, and by an Order of his Majesty in Council dated the 28th day of March 1903, Chowdhry Manindra Narayan Thakoor was substituted in his place.

It is common ground that the four brothers, at any rate up to the Fusli year 1290, formed an undivided Hindu family. They were zemindars, owning considerable interests in land, and in addition carried on a mahajani or money-lending business of a profitable character.

The plaintiff's case is that her husband Balmukund, separated from his brothers in Fusli 1290 ; that a partition of house-hold goods and *zerait* lands took place in that year ; that a further partition of the zemindari and mahajani properties took place in Fusli 1295 ; and

(1) (1887) I. L. R. 10 Mad. 375, 506.
(2) (1893) I. L. R. 21 Cal. 157 ; L. R. 21 I. A. 155.
(3) (1893) I. L. R. 18 Bom. 197.
(4) (1866) 11 Moo. I. A. 7, 19.

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that Balmukund died while the actual division of these assets was in progress. She further alleges [269] that, after her husband's death, the brothers invited her to the family house, and took advantage of her absence from her own house to demolish it and possess themselves of the entire family property. Some months later, when she went to visit her father, she discovered what had taken place, and instituted legal proceedings. These allegations are, as may be supposed, denied by the defendants.

The evidence on both sides is very voluminous, very conflicting, and for the most part unsatisfactory. But both Courts in India concur in finding that Balmukund in Fusli 1290, built a house for himself and went to live in it with his family. He thus became separate from his brothers in food and residence. This fact lends probability to the evidence that at the same time a partition took place of household furniture and other moveable property of a similar character.

Cesser of commensality is an element which may properly be considered in determining the question whether there has been a partition of joint family property, but it is not conclusive : *Anundee Koonwur* v. *Khedoo Lal* (1). It is therefore necessary to consider whether the evidence in other respects supports or negatives the theory that the cesser in this case was adopted with a view to partition in the legal sense of the word.

It is alleged by the plaintiff's witnesses that at the time Balmukund took up his abode in a separate house, a division of *zerait* lands was made; and in support of this allegation, Exhibit 16, which purports to be a list of the *zerait* lands so divided, was produced. This document was discredited by the Subordinate Judge, but accepted by the High Court. In their Lordships' opinion, it is of such doubtful authenticity that they think it safer not to rely on it—at any rate as a correct statement of *zerait* lands in the possession of the joint family in Fusli 1290.

Five years later, in Fusli 1295, the plaintiff alleges that the zemindari and mahajani properties were divided. Here again the evidence is conflicting; but it may be observed that only one of the three surviving brothers was called to support the case put forward on their behalf; that both Courts in India discredited the evidence of Raja Thakoor, the brother who was called ; and [270] that two important witnesses—Jibi Jha and Rajib Nain—were not examined. Upon the evidence as it stood, the Subordinate Judge found that no partition in Fusli 1295 was proved ; while the High Court found that "the separation which had begun in part in 1290 was effectually completed. . . in 1295, and that not in respect of some properties only, but in respect of all."

The entire evidence on the record was very minutely dissected by the learned counsel who appeared before their Lordships in this appeal, and in the result they have come to the conclusion that it is not their duty to advise His Majesty that the carefully considered judgment of the High Court upon the main question at issue should be set aside. In coming to this conclusion they have been influenced by the circumstance that there is no dispute as to five facts which, in their opinion, tend to corroborate the story told by the plaintiff's witnesses :

(i) It is admitted that of 65 revenue-paying estates belonging to the family, payment of revenue of 19 was made separately after Fusli 1295

(1) (1872) 14 Moo. I. A. 412.

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viz., one-fourth in the name of Balmukund and three-fourths in the name of his three brothers.

(ii) It is admitted that of a sum of Rs. 35,004-1 recovered in 1295 under a decree obtained by the family firm against one Gholam Mahomed, three-fourths were credited to the three brothers and one-fourth to Balmukund.

(iii) It is admitted that the rent payable by the Ather Indigo Factory to the family under a lease of certain villages was paid in 1295 as to three-fourths to the three brothers and as to one-fourth to Balmukund, and that after Balmukund's death, one payment of one-fourth of the rent was made to his widow, and then stopped upon an indemnity being given to the Factory by the brother against any claim that might thereafter be advanced by the widow.

(iv) It is admitted that in 1295, an estate was purchased out of the family funds in the name of the four brothers, "in equal shares."

(v) It is undisputed that in a suit brought to recover a debt due to the family, shortly after Balmukund's death, one of the brothers claimed to sue "as heir and adopted son" of Balmukund—a claim entirely inconsistent with the theory of survivorship in an undivided Hindu family.

[271] These facts give material support to the case made on behalf of the plaintiff, however unconvincing the oral evidence might have been, had it stood alone. It was the case of neither party that there was a partial separation, that is, a separation in respect of certain properties only; and their Lordships consequently agree with the finding of the High Court that the plaintiff, as heir to Balmukund, is entitled to succeed to his share in the family property as it existed at the time of his death, or has been subsequently increased by employment of the family funds.

The amount of this share is the next question to be determined. There is no doubt that, according to the law in force in Bengal, the mother though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth. She may of course, acquiesce in the division of the property between her sons without claiming any share for herself; but there is no evidence of any such acquiescence in the case. On the contrary, she claims her share in the written statement, which she has filed in this suit, and denies all knowledge of any partition having taken place between her sons. Under these circumstances the learned Subordinate Judge held that Balmukund's share was one-fifth and not one-fourth. The Judges of the High Court apparently considered that acquiescence on the part of the mother was established, and awarded one-fourth to the plaintiff. But their Lordships have not been referred to, nor have they been able to discover, any evidence of acquiescence except a vague statement by the plaintiff that no share was assigned to the mother "because she did not make any objection." Under these circumstances their Lordships agree with the Subordinate Judge that the mother's claim must be allowed and the decree of the High Court varied accordingly.

It was contended by Mr. Bonnerjee that the omission to reserve a share for the mother rendered the partition invalid; and in support of this contention he relied on the case of *Krishnabai* v. *Khangowda* (1), in which it was decided that a partition effected without reserving any share

(1) (1893) I. L. R., 18 Bom. 197.

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for a minor member of the family [272] and without the consent of some one authorized to act on his behalf, is invalid as against the minor. So here, their Lordships recognize that the mother is not bound by a partition to which it is not shown she ever assented ; and the suit being one for a declaration of rights under the partition, in which all the parties interested are represented, and in which the mother claims her share their Lordships have felt no difficulty in giving effect to her claim in the order which they will humbly advise His Majesty to make upon this appeal.

Mr. Bonnerjee also contended that the suit as framed was not maintainable under the provisions of s. 44, Rule (*a*) of the Code of Civil Procedure. The rule is not very happily expressed, but there can be nothing irregular in seeking to recover in one suit immoveable and moveable property, if the cause of action is the same in respect of both : *Giyana Sambandha Pandara* v. *Kandasami Tambhiran* (1). Here the cause of action arose in the refusal of the three male defendants to recognize the right of the widow to succeed to her deceased husband's share in the family property under a partition which had been completed by actual division at the time of her husband's death ; and it would be a denial of justice to hold that in a suit upon such a cause of action relief could not be given in respect to moveable as well as immoveable property. It follows that the claim as regards the moveable property cannot be held to be barred by limitation.

In their Lordships' opinion the decree of the High Court must be varied so as to include a declaration that the defendant Musummat Harakhbati Thakoorain is entitled to one-fifth share of the family property and that the respondent Musummat Jewach Thakoorain is likewise entitled as heir to her husband to one-fifth share in the said property ; and subject to this declaration, unless the parties shall come to an equitable arrangement approved by the Court, the suit should be remanded to the Subordinate Judge to inquire what was due to the estate of Chowdhry Balmukund Thakoor in respect of his share at the time of his death, and what have been the subsequent accretions thereto from the employment of the family funds, and for that purpose to take the usual accounts, including the accounts of the [273] family business, and to order that the costs of the enquiry and of taking the accounts and of the partition be paid out of the estate.

Their Lordships will humbly advise His Majesty to make an order remanding the suit to the effect and containing the directions above stated. The appellants Chowdhury Ganesh Dutt Thakoor, Chowdhury Manindra Narayan Thakoor, and Chowdhury Chhedi Thakoor must pay the respondent's costs of this appeal.

Decreee varied : case remanded.

Solicitor for the appellants : *W. W. Box.*

Solicitors for the respondents : *T. L. Wilson & Co.*

(1) (1887) I. L. R. 10 Mad. 375, 506.