take such a course to the construction that is least favourable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed; that the judgment of the High Court at Bengal, and the judgment affirmed thereby, should be reversed and set aside; and that the appellant should have judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this appeal.

RAJA SARANENI VENKATA GOPALA NARASIMHA ROY BAHADUR *v.* RAJA SURANENI LAKSHMI VENKAMA ROY.

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ON APPEAL FORM THE HIGH COURT OF JUDICATUE, AT MADRAS.

Mitakshara—Partition—Evidence of Partition—Inheritance.

According to the Mitakshara, an agreement for a partition, although not carried out by actual partition of the property, is sufficient to constitute a division of the family so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers.

The fact of the family having separate house and field, is, according to the Mitakshara, sufficient evidence of partition.

The *onus* of proving re-union is upon the party pleading that there has been a re-union after partition.

Katama Natchair v. *the Raja of Shivagunga* (1) explained.

THIS appeal has been very ably argued by Mr. Latham, who has stated in support of it everything which in their Lordships' opinion could be said; but the facts and the authorities are too strong for him, and their Lordships are unable to see any ground upon which the appeal can be supported.

The proof in this case has, perhaps, been somewhat complicated, and rendered less effective than it otherwise might have been by the introduction of an issue which is now admitted to be out of the case—the issue as to the alleged adoption.

Present:—SIR JAMES W. COLVILE, SIR JOSEPH NAPIER, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.

(1) 9 M. I. A., 539.

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The only question now arguable is, whether at the date of the death of respondent's husband, this family was a divided or an undivided Hindu family, because the course of succession necessarily depends upon that fact. The property is admitted to be ancestral, and it is now also admitted that the zemindari, which forms part of it, is not one of those impartible zemindaries of which there are many in the South of India, but must be treated, as in fact it appears upon some of the earlier documents to have been decided to be, as in its nature partible; therefore, the question is simply whether, at the date abovementioned, the family was still an undivided family, as it was up to a certain period; or whether it became divided by virtue of the agreement which is in the record, and which has been the chief subject of the argument before us.

Now, although Mr. Latham has pointed out here and there some minute differences in the wording of the two agreements, their Lordships find it impossible to distinguish the arrangement come to in this case from the arrangement which had been entered into the case of *Appovier* v *Rama Subba Aigan and others* (1), in which this Committee held that although the agreement for a partition had not been carried out by actual partition by metes and boundaries of the property, it was, nevertheless, binding upon the contracting parties, and operated as a division of the family. Their Lordships observe that the judgment delivered by Lord Westbury was, in fact, an affirmance of the judgments of two of the Courts below, and was fully supported by the authorities then before the Court. It is however satisfactory to find in the present case, that the High Court of Madras not adverting to the case in Moore, which probably had not then come to their khowledge, have in their learned judgment arrived at the same conclusion, and that upon independent grounds, and upon the earlier authorities. The passage which they quote from the Mitakshara fully supports the proposition involved in the judgment. The passage runs thus: "If partition be denied or disputed, the fact may be known, and certainly be obtained by the testimony of kinsmen, relatives

(1) 11 M. I. A., 75.

"of the father or of the mother, such as maternal uncles and "the rest, being competent witnesses as before described;" that is one mode of proving partition. It then goes on in the disjunctive, "or by the evidence of a writing or record of the petition," which we have here. And then it says: "it may also be ascertained by separate or unmixed house and field," that is if other evidence of partition be wanting, it may be supplied by proof that the houses and fields had been actually divided, and were held separately.

It follows from what has been said that, in their Lordships' view, this question is really concluded by authority.

It has, however, been argued by Mr. Latham, that even if this agreement amounted to proof of a partition, yet upon the evidence in the cause their Lordships ought to come to the conclusion either that the agreement was waived, or that there had taken place that which might according to Hindu law, have taken place, namely a re-union of the two brothers. Their Lordships, however, looking at the issues in the cause, which are stated in the record, cannot find that those points have ever been raised. Certainly there is no suggestion of such a thing as a re-union, which would imply that there had been an actual division, and then a coming together by mutual agreement of the two brothers; and their Lordships are further of opinion, that they must presume, that although there was no division of the zemindari, or of the lands, by metes and boundaries, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the plaintiff to show that such was the case. It seems to their Lordships that he has entirely failed to do so, and therefore they can see no ground whatever for interfering with the judgment of the Court below.

Their Lordships deem it right (although it has really no bearing upon the decision of this appeal) to make a remark upon one passage in the otherwise very learned and able judgment of the Court below. This passage is this: "If it" (that is the zemindari) "was not partible, and the brothers were, as the plaintiff contends, "undivided at the brother's death, the widow would, according

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"to the decision of the Privy Council in the *Shivagunga* case (1), "be entitled to the whole estate; so that, whether the plaintiff's "own view or that which we here take is correct, the plaintiff "is not entitled to succeed in this action." Now that seems to proceed upon a singular misapprehension of the effect of the *Shivagunga* case. It is immaterial, as was said before, to the decision of this case, because it is admitted that the zemindari was not impartible; but the *Shivagunga* case was this,—the family was shown to be undivided, but the impartible zemindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the zemindari should follow the course of succession as to separate property, although the family was undivided, but if that zemindari had been shown to have been an ancestral zemindari, as in this case, the judgment of the Board would, no doubt, have been the other way.

Their Lordships think it necessary to make this observation in order to avoid future misconception as to what was decided here in the *Shivagunga* case.

They must humbly recommend Her Majesty to dismiss this appeal with costs.

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GANESH SING *v.* RAM RAJA AND OTHERS.

ON APPEAL FROM THE LATE SUDDER DEWANY ADAWLUT AT AGRA.

Evidence—Unopposed Testimony—Suit for Compensation for Damages—Responsibility of each person forming the Common Assembly.

In a suit to recover damages caused by the defendants plundering the house of the plaintiff, the Court of first instance passed, upon the evidence of two witnesses, a decree in favor of the plaintiff. On appeal by some of the defendants, the Judges of the Sudder Dewanny Adawlut of Agra held that the fact of Plunder was not proved, and dismissed the suit as against all the defendants.

Held by the Privy Council that as the defendants did not come forward to exculpate themselves by their own evidence, and as the evidence in support of the charge was unopposed, the decree of the Court of first instance could not be set aside.

* *Present*: SIR JAMES W. COLVILE, SIR JOSEPH NAPIER, LORD JUSTICE GIFFARD, AND SIR LAWRENCE PEEL.

(1) 9 Moore's I. App., 539.