APPELLATE JURISDICTION (*a*)

Regular Appeal No. 44 *of* 1865.

RÁJA SURÁNENY LAKSHMY VENKAMA ROW.....*Appellant.*

RÁJA SURÁNENY VENKATA GOPÁLA NARASIMHA ROW BAHÁDUR, Zamindar. } *Respondent.*

This was a suit by plaintiff to recover from his brother's widow, the defendant, 1¼ share of the Mailavaram Mutta which he alleged to have been wrongfully delivered by the RevenueAuthorities to the defendant in accordance with a certificate granted by the Civil Court of Masulipatam. Plaintiff alleged that he was undivided, although there was an agreement for a division. Defendant pleaded that there was a complete division under the aforesaid agreement, and that her husband after division made a will bequeathing to her what the plaintiff now claims.

The Civil Judge found separate residence and on the authority of paras. 282, 283 and 284, of Mr. Justice Strange's *Manual*, decided that the family was undivided.

Held, on appeal, that the agreement partially acted upon and not denied is conclusive evidence of the division previously come to by mutual consent ; that, whether the property was actually divided or undivided property, the family was divided,the brothers became capable of contracting and did contract,and that the right to sue upon the contract clearly survived to the defendant, who must have recovered ; that she had, therefore, a perfectly valid defence to the present action.

1866. *January* 25. *R. A. No.* 44 *of* 1865.

THIS was a regular appeal from the decree of the Civil Judge of Guntoor, in Original Suit No. 11 of 1864.

The Advocate General, appeared for the appellant, the defendant.

Tirumala Chariyar, for the respondent, the plaintiff.

The facts of the case and the authorities cited in the course of the argument will be found set forth in the following Judgment, which was delivered by

HOLLOWAY, J. :—This was a suit to recover by plaintiff, brother of Jagganáda Lakshmy Row, from his widow, the defendant, 1¼ share of the Mailavaram Mutta which he alleged to have been wrongfully delivered by the Revenue authorities to the defendant in accordance with a certificate granted by the Civil Court of Masulipatam. Plaintiff alleges that he was undivided, although there was an agreement for a division.

(*a*) Present : Frere and Holloway, JJ.

1866.
January 25.
R. A. No. 44 *of* 1865.

Defendant answered that plaintiff was adopted into another family, but it was admitted in appeal that the Judgment of the Civil Judge negativing this statement could not be successfully assailed. She further pleaded that there was a complete division under the agreement of 1855, and that her husband after division made a will bequeathing to her what the plaintiff now claims.

The Civil Judge found separate residence but that there was no actual division of the estate, and on the authority of paras. 282,283 and 284 of Mr. Justice Strange's *Manual*, decided that the family was undivided and decreed for plaintiff. The import of those passages is that nothing short of actual seisin of the divided property will constitute division, and that an agreement to divide is altogether inoperative.

It appears clearly that, at the period of execution of document VI, the estate was not in possession of the plaintiff and his deceased brother, but was actually under attachment ; and it further appears, from evidence adduced in the suit for a certificate between the same parties, that the property had been mortgaged and was in possession of the mortgagee. The result of the doctrine would therefore be, that no partition was at that time possible, how beneficial soever to the parties.

In *Rewan Prasad* v. *Mussamat Kadha Beebee* (IV. Mo. Ind. Ap. 137), a case from a province governed by the Benares rule of law, the Judicial Committee, confirming a decision of the Sadr Court of Agra, held the widow of a deceased divided brother entitled to take a share of an estate to which he and his brother, the resisting defendant, were entitled in remainder, although the husband had died in the lifetime of the tenant for life. This, therefore, is a distinct decision that partition may be effected without physical possession of the property parted. That was a share still to be ascertained precisely as is that in the present case ; it was a vested interest in an undivided half share which the Courts decreed : several passages of the judgment also strongly conflict with the supposed principle that has been applied in the present case. If the Judgment is supposed to go upon the distinction that delivery in this case was not possi-

1866. *January* 25. *R. A. No.* 44 *of* 1865.

ble, that principle is equally applicable to the present case If weight, too, as in some decisions of the late Sadr Court, was given to the fact that there had been partial division, that circumstance is also to be found in the present case, for the Judge has found separate residence; and, as the deed of division shows, that separate residence was procured by a division of a portion, at all events, of the real property.

Feeling a strong impression, after carefully searching all the authorities within our reach, that there exists in the Hindu Law applicable to this part of India no authority that the most solemn agreement to divide property is absolutely ineffective, if there has not been an absolute physical apportionment to each claimant of his respective share, we requested the vakil for the respondent to furnish us with any such authority if he could find one. He has finally produced two passages which we will consider after dealing with the authorities contained in the decisions and text books. We must observe that the decisions of the Sadr Court are based entirely upon the opinions of the Pandits and the value of those opinions is now too well known to need further discussion.

In Bengal it seems to have been the opinion of the Court that a division as to food and business was sufficient to entitle a widow to succeed to her husband's share although the real property had not been divided, (Mit. 479). A case in the Supreme Court (p. 480) seems to have decided that a decree for partition not actually executed did not render the property divided.

We now advert to the case of *Bhawanicharn Banerjea* v. *The Heirs of Ramkant Bunhojea* (Sud. Dew. II. 202), from which, as far as we can trace it, the whole of this doctrine as to the necessity of absolute delivery of shares to render a family divived has been derived. The case really decided was, that an unequal partition not carried into effect was invalid, and that the heirs were entitled to their shares under Hindu Law. Sir F. Macnaghten, in *The Considerations*, (p. 283), examines the case with reference to the power of a father to dispose unequally of his property.

The decision is very carefully considered by that great Sanskrit scholar, Professor Wilson, who shews (Works, Vol.

1866. *January* 25. *R. A. No.* 44 *of* 1865.

V. p. 76) that the deed was invalid as being a disposition of the ancestral estate altogether beyond the power of the father, and at page 88 of the same volume he examines the discordant opinions of the Pandits as to the necessity of actual possession. The whole argument of the learned author ought to be quoted.

"The deed was invalid on other grounds, as we have had occasion to observe; but the two Pandits, Chaturbhuj and Subha Sástri, two of the ablest Pandits we have encountered, disagreed with regard to the effects of actual possession. The former stated that the Hissanáma could not be available without possession, and Subha Sástri urged much more rationally that the gift was valid though possession was not taken, as that, being obstructed by the suit instituted by the plaintiff, argued no neglect nor relinquishment of right on the part of the defendants. We have no doubt of the correctness of his conclusion according to Hindu Law.

"Possession is in Hindu Law, as well as in English, a very substantial title, no doubt; but Chaturbhuj himself admits that, to become a valid one, it must be in sight of the adverse party, and without molestation on his part, and that even possession for three generations is not sufficient if not in sight of the adverse party, and with his acquiescence. Upon his own showing, therefore, where possession does not constitute right, one would think the converse of this must naturally follow, and that the absence of possession could not invalidate what its presence could not bestow. No, this would not have answered his object, and therefore he proceeds, 'a title-deed *unaccompanied by possession* must be disallowed as evidence of right.' Where did he find this to be the law?

"In Mr. Macnaghten's translation from the *Mitakshara* we find 'Loss accrues to him, who for twenty years observes his land enjoyed by another *without interfering*, and in the case of moveable property for ten years.' In such a case, it would be reasonable, certainly, to infer relinquishment of right or defect of title, but this is very different from the delay of possession arising out of a *disputed claim*. Even in such case, however, it would appear that, if right could

1866. January 25. R. A. No. 44 of 1865.

be ultimately established, it might be claimed; for no length of enjoyment without title can constitute property as, 'He who *enjoys without right*, even for many hundred years the ruler of the earth should inflict on that sinner the punishment of a thief.'

"At the same time it may be admitted, as the *Mitakshara* argues, that there may be some difficulty in reconciling these texts, and although, in the latter case, a right is not created, yet it is forfeited by long protracted neglect, unless adequate cause be shown; as, supposing the parties to be minors or incapable of acting for themselves, or to have been absent from the country, then the property is open to recovery, otherwise a certain period, that of three uninterrupted descents for example, is sufficient to confirm the right of a fourth, although he have no better title to produce. This applies to fixed property; in the case of moveables the term will be limited by their nature, the difficulty of their recovery, and their liability to decay.

"The main arguments in favour of the necessity of possession are the following:—

What is obtained by partition, purchase, or inheritance, or what is received from a king, is secured by possession, and lost by neglect. (*Vrihaspati*). 'Ownership lost by neglect is not resumable at will.' (*Dayatattwa*). Possession without a deed, and not a deed without possession, but proof is firmly established by the union of both.' (*Brahma Sanhita.*) A title to land *may be* established by possession alone, or by an incontrovertible deed, if it is established by the concurrence of both, not otherwise.' (*Vrihaspati Sanhita.*) All this, however, only proves that *wilful neglect* may forfeit right, and that title-deeds and actual possession confirm each other.

"The strongest text, however, is that of Nárada. 'Though there be a writing, though there be living witnesses, yet in the matter of immovables especially, such as is not possessed is not confirmed.' Not *sthira*, stable, firm. The purport of this law turns very much on the meaning of the word *sthira*, and in its most obvious acceptation it does not mean that the right is lost; but that it is less secure, writings and witnesses being proofs of an inferior description to

1866. *January 25.* *R. A. No. 44 of 1865.*

possession. That the latter does not convey right, the same authority positively declares, "Nárada has said, possession with a clear title, affords evidence, but possession constitutes no evidence if unaccompanied by a clear title;' this must be understood, it is true, of the first acquirer of property; but it leaves no doubt of the real intentions of the law-giver.

"Again we have a text from *Yajnavalkya* : * * * 'A deed is not strong where there is not a little possession ;' but what does this imply ? The title requires one of its conditions to be rendered indisputable. This being wanting, it is so far weak. Mr. Macnaghten translates this 'where there is not the least possession, there a title is not sufficient ;' but this *might* be understood to signify what the law does not propose, the text being literally as we have given it, and being explained by the commentator that 'the strength in the deed is not entire.' The same indeed with its context explains clearly its purport ; the author states that 'deeds, witnesses, and possession are the three kinds of proof ; that deeds are of more weight than possession, except where possession has been hereditary ; and that deeds are weak where there is no possession whatever.' That is, the commentator observes, of three persons the first may plead the deed of gift, and the last may urge possession; the second may plead the gift and the 'little possession' the family has had of it. The term 'little' here, although literal, is therefore to be understood in the sense of 'limited' and as applied to individuals, or to time, not to a portion of the thing possessed. The *Vyavahara Matrika*, however, argues upon the literal sense, and concludes that 'as the law declares the occupation of a part of a field, &c., granted by a royal edict to be the virtual occupation of the whole, so the possession of no part is the relinquishment of the whole,' founding this on one of the above-cited texts that the neglect of fixed property is its relinquishment. This conclusion, however, implies voluntary indifference or abandonment, and does not regard the delay of possession occasioned by adequate cause.

"It is, therefore, in our estimation quite clear, that the Hindu Law and common sense go hand-in-hand. A man

1866. *January* 25. *R. A. No.* 44 *of* 1865.

may forego his rights, if he pleases, and any capricious abandonment of them for an unreasonable time is to be punished by their forfeiture. But he is not to be deprived of what is really his, because legal proceedings, interested opposition, accident, distance or disease, debar him from taking possession of it when it first becomes his due."

This seems to us precisely the doctrine derivable from the text-writers, and the commentary of the learned author is peculiarly valuable, because it deals with the very passage which the Vakil has adduced from *Yajnavalkya*, and the passage from the *Viramitrodaya* is only a commentary upon this.

Subodhini, leaf 40.—"What is

Citation of Mitákshara.

verbal is the utterance of (the words) 'this is mine,' &c."

"The meaning is this. Verbal acceptance is the definite understanding indicated by the utter-

Commentary thereon.

ance of (the words) 'this is mine."

"Here, a rule is provided by

Citation of Mitákshara.

Smriti."

"'Here' means on the subject of

Commentary thereon.

corporeal acceptance."

"Let (him) address the animate beings (that are capable of speech) and let (him)

Citation of Mitakshara.

touch, &c."

"The meaning of this is, that if the object to be received be a Práni (that is, a being capa-

Commentary thereon.

ble of motion and speech) then, let the receiver say to the object to be received, 'thou, now here, art mine,' and let him (that is, the object so received) say that 'I am there.' If the object so received be an Apráni (that is, cattle, &c., which are incapable of speech, or a maiden among even the animate beings) the receiver should touch these both."

"Than a derivation accompanied

Citation of Mitakshara.

by it, &c."

"Means 'than a derivation accom-

Commentary thereon.

panied by corporeal acceptance.'"

1866. *January* 25. *R. A. No.* 44 *of* 1865.

Viramitrodaya, leaf 65.—" It has been said by *Yajnavalkya* and others that derivation by gift, &c., cannot create a complete title where any kind of enjoyment does not exist." " There is no strength in derivation itself where there is not the least enjoyment." " Strength means completeness. Nárada, " Even where writing exists and witnesses are alive, what has (not) been enjoyed, is not firm chiefly in the case of immovable property."

" *Query.*—As gift, sale, &c., are of themselves capable of creating a title independently of enjoyment, why then, the least enjoyment is necessary ?"

" *Explanation given to this by Vijnaneswara Chariyar.* The creation of right in another by gift, &c., is necessarily effected by the act of acceptance by that other. Acceptance is of three kinds,—mental, verbal, and corporeal. What is mental is the conviction that it is mine, what is verbal is the utterance of (the words) ' this is mine,' and what is corporeal is of various kinds, such as taking, touching, &c. Here, as there can be no title without mental acceptance, the same is only indispensable. That verbal and corporeal acceptance is also necessary, is concluded from there being a provision of particular kinds of expression and particular acts such as showing the feet, &c., for particular gifts. Here, in the case of gold, cloth, &c., as the receiver's taking, &c., occur immediately after the pouring of water by the giver, all the three kinds of acts are accomplished. In the case of land, &c., corporeal acceptance being impossible except by enjoyment of produce, there must at least be a little enjoyment, otherwise the gift, purchase, &c., are not complete from the want of subsequent (corporeal) acceptance."

These passages relate to gifts, that is, the divesting of one's own right and vesting another with that right. It might well be that a gift might be held invalid because unaccompanied by delivery, but that a contract, based upon a perfectly good consideration, would be valid anden forceable.

As to partition in Bengal and the provinces governed by the *Mitakshara*, there is an important distinction based upon the difference of the theory as to the origin of property.

1866. January 25. 44

According to the former school, it arises at partition; according to the school which prevails here, it is by birth. In Bengal, therefore, a partition made by a father in his lifetime, he being not compellable to divide, would be an act of gratuitous liberality and an enriching of the sons by predating the period at which their shares would vest in possession, and the transaction would therefore there assume all the properties of a gift, and many systems of positive law require delivery to effectuate a gift. In the Benares school, however, the right of demanding a partition even in the life-time of the father is fully established, and the yielding of that which the law would enforce can in no way be regarded as an act of gratuitous liberality. He cannot be said to give who yields that which the law will compel him to yield. The passages adduced apply to gifts only; and the definition given of gift by this Hindu authority is the renunciation of one's own right and the creation of right in another; and for the perfecting of a right to real property obtained by gift, possession is necessary. The true explanation of the passages is, however, undoubtly that given by Professor Wilson, that the author is dealing with the evidence of the transaction. It could scarcely be intended that a cow given by the head and not by the tail would be ineffectually given.

There can exist no doubt that there may be a division by mere agreement where no property exists. This is distinctly declared by the authorities. It is clear also that the document, if there is one, is only one mode of evidencing the agreement already made. In Section 12 of Cap. II of the *Mitakshara*, there is the following passage:—

"Having thus explained partition of heritage, the "author next propounds the evidence by which it may be "proved in a case of doubt. 'When partition is denied, the "'fact of it may be ascertained by the evidence of kinsmen, "'relatives, and witnesses, and by written proof, or by "'separate possession of house or field.'"

"If partition be denied or disputed, the fact may be known and certainty be obtained by the testimony of kinsmen, relatives of the father or of the mother, such as maternal uncles and the rest, being competent witnesses as before described; or by the evidence of a writing or record of

1866. *January* 25. *R. A. No.* 44 *of* 1865.

the partition. It may also be ascertained by separate or unmixed house and field."

In this passage the author is discussing the modes of proof of a partition. It is to be proved by oral or written evidence, or by separate enjoyment of house or field. In the *Dayabhaga*, too, (14 Cap., Sec. 2-7), there is the same doctrine, and all the passages in Colebrooke's *Digest* have the same import. It seems clear, therefore, that the Hindu lawyers make the question of divided or not, one strictly to be determined by the evidence.

On the evidence in this case (document VI), it is clear that the parties, to avoid further dispute, determined that for the future they would act as men with separate interests; they agreed to compromise various questions outstanding between them, and being divided by the prior mental determination by the accordance of their wills which alone was required, they proceeded to record that determination and contract with one another, a process which, according to the Hindu law, would have been impossible, as to their undivided property until partition. Such a contracting is stated by all the authorities as in itself strong evidence of division. The effect of that division was to render the wife, for her life at all events, her husband's heir, and being his heir, she became entitled to sue upon his contracts. Whether, therefore, the property was actually divided or not, is really a matter of no practical consequence, for there can be no doubt that the husband could have enforced the contract, and there exists no reason whatever why his wife should not. There appears to have existed in the minds of the parties very considerable doubt whether the Zamindary was partible, and in his pleadings the plaintiff sets up that contention. If it was not partible, and the brothers were, as the plaintiff contends, undivided at the brothers' death, the widow would, according to the decision of the Privy Council in the Shivagunga case, 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.

Our conclusions therefore, are, that the agreement partially acted upon and not denied, is conclusive evidence as it

1866. *January* 25. *R. A. No.* 44 *of* 1865.

is a full and specific record of the division previously come to by mutual consent; that, whether the property was actually divided or undivided property, the family was divided, the brothers become capable of contracting and did contract, and that the right to sue upon the contract clearly survived to the defendant, who must have recovered; that she has, therefore, a perfectly valid defence to this action.

The decree of the Lower Court must, therefore, be reversed, and the original suit dismissed with costs.

Suit dismissed.

APPELLATE JURISDICTION (*a*)

Regular Appeal No. 61 *of* 1865.

TARA CHAND..... .....*Appellant.*

REEB RAM.....*Respondent.*

The doctrine of Hindu Law that outcasts are incapable of inheritance has no bearing upon the case of the members of new families which have sprung from persons so degraded.

The question of the origin and binding force of customary law discussed and the authorities upon the subject cited and commented upon.

1866. *January* 27. *R. A. No.* 61 *of* 1865.

THIS was a regular appeal from the decree of J. H. Goldie, the Civil Judge of Tinnevelly, in Original Suit No. 1 of 1864.

The suit was instituted for the recovery of one-fifth share of family property, consisting of real and personal property, valued at Rupees 34,978-0-1 together with the subsequent profits of the property, and was brought by the respondent in this appeal against his father the present appellant, and 8 others, of whom the 2nd, 3rd and 4th defendants were plaintiff's infant brothers.

The plaintiff alleged that the 1st defendant had wasted the family property by living extravagantly, and by alienating portions of it, and that he was entitled under the Hindu Law to one-fifth share, of the family property.

(*a*) Present : Frere and Holloway, JJ.