1869. *April* 16 *R. A. No.* 78 *of* 1868.

1862 and directing the Civil Court to inquire and ascertain by a proceeding in execution of the decree the clear amount of such mesne profits with which the 1st and 2nd defendants and the 3rd defendant are and is separately chargeable. The amount so ascertained the said defendants must be ordered to pay to the 1st appellant. The parties, we think, should bear their own costs of this appeal and in the Lower Court.

Appellate Jurisdiction (*a*)

Special Appeal No. 384 *of* 1868.

YEKEYAMIAN.....*Special Appellant.*

AGNISWARIAN and another.....*Special Respondents.*

According to Hindu Law sons acquire rights only in the property which belonged to their father at the time of their birth and have no legal claim to property of which a bona fide disposition, effectual as against their father, had been made long before they were born.

The right of an after-born son to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of a partition.

The father of the plaintiffs adopted the 3rd defendant. After the adoption the wife of the father gave birth to a son. Thereupon the father effected a division of the property with the adopted son and gave the latter a larger share than he was entitled to receive by law. The father married a second wife and the plaintiffs were the issue of the marriage.

Held that the plaintiffs were not entitled to a partition of any portion of the property which fell to the share of the adopted son.

1869. *April* 26 *S. A. No.* 384 *of* 1868.

THIS was a Special Appeal against the decision of R. Davidson, the Civil Judge of Trichinopoly, in Regular Appeal No. 114 of 1866, modifying the decree of the Court of the District Munsif of Torriore in Original Suit No. 120 of 1865.

Srinivasa Chariyar, for the special appellant, (the 3rd defendant.)

Rama Row, for the special respondents (the plaintiffs.)

Savundranayagam Pillai, for the 1st special respondent (the 1st plaintiff.)

The facts are sufficiently set forth in the following

(*a*) Present : Scotland, C. J, and Collett, J.

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JUDGMENT:—This is a suit by sons against their father and his other sons (one being an adopted son) for a division of ancestral property and possession of their shares of all the property that had been allotted to the father on a division which took place between him and his brothers in 1843. There is no dispute as to the property being ancestral and in the possession of the defendants or as to the members of the family who are co-parceners. The sole question is whether the portion of the property held and enjoyed by the 3rd defendant, the son by adoption, can be brought into the division.

It appears from the findings of the Lower Courts and the admissions in the record that some years before the division took place in 1843 the father (1st defendant), being without issue had adopted the 3rd defendant, the son of one of his brothers, and that after the adoption his wife gave birth to a son, the 2nd defendant. In consequence of his birth the father, at the making of the division, apportioned to the 3rd defendant four pungus of the land allotted to him and transferred the portion to the natural father of the 3rd defendant, he being a minor, for the absolute use and benefit of the 3rd defendant. Not long after the birth of the second defendant his mother died, and his father married a second wife who bore him the plaintiff and two other sons not yet of full age. The four pungus were more than the share to which the 3rd defendant was legally entitled at the time of the division, namely one-fourth of the share of the 2nd defendant, but how much more does not appear; and the 2nd defendant appears never to have objected to the apportionment. The Court of First Instance has upheld the validity of it and decreed to the plaintiffs their proper shares of the property in the possession of their father and the 2nd defendant. But the Civil Court has decided that the 3rd defendant is entitled to retain only so much of the 4 pungus as is equal to one-fourth of a natural son's share and decreed the delivery up of what in excess of that should be found to be in his possession.

The ground of objection to this decision on which the 3rd defendant has relied in the appeal is that the plaintiffs acquired rights only in the property which belonged to their father at the time of their birth, and had therefore no

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legal claim to the land of which a bona fide disposition, effectual as against their father, had been made long before they were born, and we are of opinion that the objection is a valid one.

The Civil Judge seems to have rested his decision mainly on the passage in Chapter I, Section 1, paragraph 27 of the *Mitakshara*, referred to in his Judgment. Now the first observation that may be made is that it obviously relates to alienations by a father of family property away from the family, and we are considering a disposition by which provision was made for an adopted son having a right to a portion of the family property. But even assuming the text to be applicable to such a disposition, it does not, we think, affect the 3rd defendant's right to the portion of land allotted to him. It states the conclusion of a disquisition on proprietary right by birth :— "Therefore it is a settled point that property in the pater- "nal or ancestral estate is by birth," and the context which follows :—"He (the father) is subject to the con- "trol of his sons and the rest in regard to the immoveable "estate whether acquired by himself or inherited from "his father or other predecessor," appears to be but the expression of a consequence of the right by birth. Whether the position is sound to its full extent we are not concerned to say. We have only to consider its fair import, and that is that the consent of sons is necessary to a disposition of immoveable property by reason of the right acquired at their birth. It is true that the text of *Vyasa* quoted at the end of the passage forbids a gift or sale for the sake of the support of sons unborn and even unbegotten, but it is at least very doubtful whether that text would be considered more than a moral precept in any case except in its relation to a gift on division provided for by the law of partition to be presently noticed. If however of any legal force in favor of all after born sons, it is in principle inapplicable to the disposition to the 3rd defendant, for he was entitled to provision as son by adoption, and there is nothing in the case to shew that the father had not abundant means left with which to provide for the support of all his after born sons.

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Then viewing the disposition as it was really made, namely as a disposition to effect a division between the 3rd defendant and his adoptive father, it remains to consider whether the law relating to partition warrants the claim of the plaintiffs; whether the rights of after-born sons to a share of the property divided which no doubt is expressly declared, extends to sons not begotten at the time of the partition. The primary ordinance of *Manu*, Chapter 9 Sl. 216 is "a son born after "a division in the life-time of his father shall alone inherit "the patrimony or shall have a share of it with the divided "brothers, if they return and unite themselves with him." Upon this and the text of *Yajnavulkya* "when the sons "have been separated, one who is afterwards born of a "woman equal in class shares the distribution" and the texts of *Vrihaspati*; "a son born before partition has no "claim on the wealth of his parents nor one begotten "after it on that of his brother—all the wealth which is "acquired by the father who has made a partition with his "sons goes to the son begotten by him after partition. "Those born before it are declared to have no right." It is laid down in the *Mitakshara*, Chapter 1 Section 1 that one born of a wife of equal class, after separation of sons from their father, takes the separate property of his parents or shares the goods with those re-united with the father after partition, and is not "a proprietor of his brother's "allotment." This relates to a division between a father and his sons, and in regard to a partition between brothers after their father's death, it is declared that "one "who is born after a separation of the brethren which took "place subsequent to the death of the father at a time "when the mother's pregnancy was not manifest," has a right to an equal allotment formed by contributions from the shares received by the brethren, and the same is declared to be the rule applicable in the case of a nephew born after the separation, the pregnancy of a brother's widow not having been mainfest at the time of the partition.

The same exposition of the law is given in the *Madhava Commentary on the Law of Inheritance* (See Mr. Burnell's Translation page 13); in the *Smruti Chandrika* by Krist-

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nasawmy Iyer, Chapter 13; and in the *Vyavakara Mayukha*, Chapter 4 Section 4 para 3 seq. It is to be found also in the *Daya Bhaga*, Chapter 7 and seems to be upheld in Bengal even against the rule "Factum valeat" obtaining there. Plainly then the right of an after-born son or nephew to share as a co-parcener divided property depends upon his mother being pregnant with him at the time of the partition. From conception by his mother membership with the family is considered as commencing. Accordingly it is enjoined in the same Section of the *Mitakshara* that if the mother "is evidently pregnant, the distribution "should be made after awaiting her delivery." It might be questioned whether this right of an after born son was not even confined to a posthumous son. It appears to be so treated in 1 *Strange's Hindu Law* 207, but in reason there seems to be no admissible distinction between such a son and one born subsequent to the partition in his father's life time, and at present we consider that if either of the plaintiffs had been begotten when the division took place on which the land in dispute was allotted to the 3rd defendant he would have had a right to a portion of it. As however the fact is that neither of the plaintiffs was begotten until long after the division, we think the 3rd defendant has a valid right to his allotment as against them.

The vakil of the respondent referred in argument to the pundits' opinion quoted in page 11 of *Mr. Macnaghten's Principles of Hindu Law*, and the author's comments upon it, as containing the recognition of a father's incompetency to make a valid disposition of ancestral property to a son while his wife continued to be capable of bearing children, but what appears there is simply a reference to passages which state as a condition of the right to make a division that the wife should be past child-bearing, in support of an opinion against the validity of a disposition by a father in favor of one of two sons living at the time to the detriment of the other. That is no authority for the application of the position referred to to the present case. Further it is a position founded on the duty of caring alike for the support of sons born, and that may be born, inculcated in the texts of *Vyasa* before adverted to and other sages, and there can be no doubt that it has not at

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the present day any legal prohibitory operation on the exercise of the right to make a partition. A division may be made by agreement or be enforced between father and sons as well as between other co-parceners and the express authoritative provisions which we have just considered establish that the legal contingency of an after-born son subject to which the co-parceners take their portions is strictly limited to a son begotten at the time that the division took place.

For these reasons the decree of the Civil Court must be reversed, and that of the District Munsif's Court affirmed. The 3rd defendant's costs in the Civil Court must be paid by the plaintiffs, but the parties should, we think, bear their and his own costs of this appeal.

Appellate Jurisdiction. (a)

Special Appeal No. 487 *of* 1868.

ARUNACHELLUM CHETTY and 3 others.*Special Appellants.*

OLAGAPPAH CHETTY and 3 others.....*Special Respondents.*

Plaintiffs sought to eject the defendants from certain land of which the defendants had wrongfully taken possession and on which they erected a building. The defendants alleged that the land had been exchanged for another piece of land now in the possession of the plaintiff. The facts found were that there was, with the assent of the 1st plaintiff, an agreement to make an exchange, and that in pursuance that agreement the boundaries were marked out and the building commenced and continued with the knowledge of the plaintiff from August 1865 to January 1866 when the plaintiffs first interfered to stop it, but that the plaintiffs were in possession of the land given in exchange. The Lower Courts dismissed the suit.

Held, on special appeal that, there being no evidence to prove that the land sued for had become the property of the defendants, but the plaintiffs having acquiesced in the defendants taking possession and building upon it, and the plaintiffs having retained possession of the adjacent land, the proper decree to make was that the plaintiffs, on giving up the land of which they had taken possession and paying the defendants the value of the buildings, were entitled to the possession of the land sued for.

Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped.

Quaere Whether permission to pay the stamp duty and penalty can be given in the case of a lost instrument.

1869. *April* 28. *S. A. No.* 487 *of* 1868.

THIS was a Special Appeal against the decision of G. R. Sharpe, the Civil Judge of Madura, in Regular Appeal

(a) Present: Bittleston and Innes, J. J.