Appellate Jurisdiction (*a*)

Regular Appeal No. 70 *of* 1867.

RAMASHESHAIYA PANDAY.....*Appellant.*

BHAGAVAT PANDAY.. .....*Respondent.*

Regular Appeal No. 32 *of* 1868.

BHAGAVAT PANDAY.....*Appellant.*

RAMASHESHAIYA PANDAY.....*Respondent.*

In a suit in which the question was whether there had been a division the sole evidence of division was the decision of a panchayat reciting that division ; the question, however, not having been at all material to the point then in dispute. *Held*, that the decision was not sufficient evidence of the division.

Property acquired by a Hindu while drawing an income from his family is liable to partition and the quality of the fund cannot be altered by the mode of its investment.

1868. *February* 21. *R. A. Nos.* 70 *of* 1867 & 32 *of* 1868.

THESE were Regular Appeals against the Decree of H. S. Thomas, the Acting Civil Judge of Chingleput, in Original Suit No. 22 of 1864. The suit was brought for a share in ancestral property. The first defendant pleaded division and relied upon the award of a panchayat made when plaintiff was a minor. The question of division, however, was not in issue in the dispute regarding which the panchayat was convened. The Civil Judge decreed for the plaintiff. The defendant appealed.

Mayne for the appellant, the 1st defendant, in No. 70 of 1867.

G. E. Branson for the respondent, the plaintiff, in No. 70 of 1867.

G. E. Branson for the appellant, pauper plaintiff, in No. 32 of 1868.

Mayne for the respondent, the 1st defendant, in No. 32 of 1868.

The Court delivered the following

(*a*) Present, Scotland, C. J. and Holloway, J.

1868. *February* 21. *R. A. Nos.* 70 *of* 1867 & 32 *of* 1868.

JUDGMENT :—In this case the question is whether there was a division in 1845. The sole evidence of that division is a decision of a panchayat reciting that division in 1845. That panchayat, so far as we are aware, was simply called to determine a dispute between defendant and plaintiff's mother as to a mortgage of what is alleged in the so-called award to have been the self-acquired property of plaintiff's father.

It does not appear that the question of division was at all material to the point then in dispute, and there is nothing whatever to show that the mother's admission ought in any way to bind the plaintiff. Even if it were otherwise No. 1, as well as Nos. 2, 4 and 5, amount simply to admissions, and they are contradicted by the admissions of defendant in 1850, in suits instituted by him in which he calls himself the undivided brother of plaintiff's father. This can only mean that the brothers were undivided at the death of the elder and the effect of the whole evidence is in accordance with the presumption of non-division.

The ground on which the Judge has awarded one-third of the property instead of one-half seems untenable. His own finding is that this property was acquired by defendant while drawing an income from the family property. This rendered all defendant's acquisitions primarily liable to partition, and the distinction taken by the Civil Judge as to so much of the funds as are invested either in land or money seems quite untenable. The quality of the fund clearly could not be altered by the mode of investment. The result therefore is, that the decree will be modified and plaintiff declared entitled to one-half the property found by the Civil Judge to be in defendant's possession. The appeal in 70 will be dismissed with costs and there will be no costs of the pauper appeal *(a)*, but the calculated value of the stamp will be paid by the original defendant to the Government.

(*a*) R. A. 32 of 1868.