1875. *January* 26. *Appeal No.* 2 *of* 1875.

If the making of this order were a mere question of discretion, an Appellate Court would, ordinarily, not interfere; but the ground on which he put his decision was that this was a renewed application on the same grounds as those laid before Mr. Justice Kindersley which he had considered and decided upon.

HOLLOWAY, J., was of the same opinion. When in the Appellate Court one Judge doubted the power of that Court to review a discretionary order, and one Judge thought that there was the power, but that it should be most sparingly exercised, it seemed *à fortiori* that one Judge cannot review the order of another. It seemed clear that these people, in bringing the same application on two occasions before two different Judges, were abusing the process of the Court.

Following the Chief Justice in refusing to say that there was an utter absence of jurisdiction to make the order appealed against, he certainly thought the order should not have been made, and that it should be discharged.

*Appeal allowed and order discharged.*

Attorneys for the appellant: *Messrs. Prichard* and *Barclay.*

Attorney for respondent: *Mr. Smith.*

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## Appellate Jurisdiction.(a)

*Regular Appeal No.* 77 *of* 1875.

KRISTNAPPA CHETTY.....*Appellant* (*Plaintiff.*)

RAMASAWMY IYER and 4 others...*Respondents* (*Defendants.*)

Evidence of some separation in residence, separate transaction of affairs in certain instances, and acquisition of the property in dispute by plaintiff, all occurring in recent years, are not sufficient to prove division.

Where the joint Hindu family derived considerable property from an ancestor after whose death these members of the family lived long together, the purchases of the property in dispute by the plaintiff, could not be treated as his separate acquisitions made from the money which had come to him with his wife, and by means of funds arising from that money.

(a) Present:—Sir W. Morgan, C. J., and Kindersley, J.

1875. *January* 29. *R. A. No.* 77 *of* 1875.

THIS was a Regular Appeal against the decision of Mr. J. C. Hannyngton, District Judge of Salem, in Original Suit No. 4 of 1873.

The suit was brought to set aside the wrongful attachment of the immoveable self-acquired property mentioned in the schedule annexed to the plaint, by the 1st and 2nd defendants on account of a decree that they obtained against the 3rd defendant.

The plaint set out that the plaintiff and the 3rd defendant are plaintiff's divided cousins, and that a partition took place between plaintiff's father and Narappa Chetty, the 3rd defendant's father, 30 years ago, since which time the families have continued to live separate. Plaintiff purchased the property in the plaint mentioned out of his own self-acquired property. The 1st and 2nd defendants having obtained a decree against the 3rd defendant, in Original Suit No. 11 of 1866, on the file of the Principal Sadr Amin's Court, falsely represented in their Petition No. 48 of 1872, that a moiety of the property aforesaid belonged to the 3rd defendant, and thus had it attached. When plaintiff petitioned against this attachment in Petition No. 220 of 1872, an order was passed on the 15th July of the said year, directing him to file a separate suit. Hence the present suit.

After the institution of the suit plaintiff paid the debt of the judgment-debtor, the 3rd defendant, and procured the release of the land. The Civil Judge dismissed the suit when it came on for hearing, because the land had been released from attachment at the period of the decision of the suit.

On appeal, the High Court reversed the order of dismissal, and remitted the case for trial on the ground that the plaintiff was clearly entitled to an enquiry as against the 3rd defendant, whether the land was his self-acquisition, or the property of the 3rd defendant. If found to be his self-acquisition, he was entitled to h ve his title quieted by a declaration that this was so, and to recover the money paid for the release, with interest from the 3rd de-

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fendant, because it will then be money which has been paid to the use of that defendant.

The Civil Judge's judgment, so far as it is material to the present appeal, is as follows:—

"The sole question for determination is, whether the properties mentioned in the plaint are the self-acquisition of plaintiff, or whether they have been purchased by him from family funds, in which case the properties attached would be liable to the extent of the 3rd defendant's title.

"The purchases of the three plaint properties were all made in plaintiff's name.

"From the oral evidence the question of division is left in considerable doubt. There does not appear to have been any regular division of the family property, but the general impression conveyed by the evidence as a whole leads to the conclusion that there has been for some time a partial separation of interest.

"Against this view the defendants urge the tenor of the correspondence (Documents VI to IX), and they also rely on the fact that certain decrees (III and IV) obtained by Venkataram Chetty (3rd defendant) were paid to plaintiff, and that by document No. 2, the plaintiff appointed 5th defendant to act as his agent.

"There is no doubt as to the fact that they did so act, but whether they acted as members of an undivided family, or as mere friendly agents, remains a question to be determined.

"Against the hypothesis that they were acting as undivided members, is the fact that the plaintiff was not the eldest member, but that his brother Surappa was; and in all family matters, appears to have been regarded as the managing member.

"The letters X to XVI, written by the elder brother, Surappa, to 3rd defendant, show that the 3rd defendant was actively engaged in conducting duties for the general interest of the family, and these, in connection with the plaintiff's

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letters to 3rd and 5th defendants, convince me that there must have been a joint interest between the parties. If it had not been so it is incredible that the plaintiff would have permitted the 3rd defendant to conduct suits in his own (3rd defendant's) name on his (plaintiff's) behalf. He would undoubtedly have simply employed, and described him, as his agent.

"Under this impression I am of opinion that the plaintiff has failed to establish a non-community of interest, and consequently has failed to establish the self-acquisition of the plaint property; and I consequently decree that his plaint be dismissed, and that he do bear his costs and those of the defendants."

From this decision the plaintiff appealed on the following grounds:—

I. Document No. 16 is not evidence against plaintiff who was not a party thereto.

II. The Lower Court erred in assuming that a member of an undivided Hindu family could not possess self-acquired property.

III. The issue was as to the self-acquisition of the property in dispute, and the decision thereupon is, that a failure to prove division is a failure to establish the fact of self-acquisition, which is an error.

IV. There is, therefore, no decision upon the only issue in the case.

*Mr. Spring Branson*, for the appellant, the plaintiff.

The evidence shows that the plaintiff and the 3rd to 5th defendants lived and traded apart, and that plaintiff acquired property in his own name. The sole question, as admitted by the Court below, was,—Was that property the self-acquisition of the plaintiff? The chief criterion in such cases is—What was the source whence the purchase money came? *Dhurm Das Pandey* v. *Mussumat Shama Soondri*

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*Dibiah*(1). Though that is not the only criterion. *Dhunookdharee Lall* v. *Gonput Lall* (2).

Mere commensality is insufficient to raise a presumption one way or the other.

Norton's L. C. in Hindu Law, pages 175, 177, 179, 191.

Failure to prove division does not involve failure to prove self-acquisition. The Judgment of the Lower Court appears to be as follows; The plaintiff has failed to prove division—therefore the property in dispute is not his self-acquisition. The questions of division and self-acquisition are separate and distinct. In this case the decision on the second question is simply on illogical inference from a decision on the first. There is, then, no decision upon the merits as to the only question before the Court, and the case should be remanded for an enquiry and decision thereupon.

*Mr. Shephard,* for the 1st and 2nd respondents, the 1st and 2nd defendants.

The decree-holders are entitled to attach the property. The plaintiff and the 3rd defendant were members of an undivided Hindu family of which the 3rd defendant is the managing member and entitled to a share liable to be taken in execution of a decree against him. It is clear from the evidence that he conducted suits in his own name, and not as agent of the plaintiff. The *onus* of proving that the property was self-acquired was upon the plaintiff, and he has failed to rebut the presumption that the gains of a member of a joint Hindu family are obtained by family funds. Cesser of commensality is no proof of division, *Mussumat Anundee Koonwur* v. *Khedoo Lal.* (3)

*Rama Row,* for the 3rd and 5th respondents, the 3rd and 5th defendants.

Evidence of separation as to residence, and food, is not sufficient proof of division, *Mussumat Anundee Koonwur* v.

(1) 3 Moore's I. A., p. 229, (at p. 240.)
(2) 10 Suth. W. R., p. 122.
(3) 14 Moore's I. A., p. 412.

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*Khedoo Lal* (1). The presumption of law is against division and self-acquisition. He who sets up either allegation must prove it. Here, the plaintiff has failed to prove division, and has not shown from what source he obtained his funds. On the other hand there is ample evidence that the 3rd defendant was the managing member of the family and brought suits in his own name, not as the agent of the plaintiff, as alleged, but as such managing member of the undivided family. Plaintiff having failed to prove division, the presumption of law is that property acquired by him was acquired by means of family funds. That presumption he has failed to rebut.

*Mr. Spring Branson* in reply.

The Court delivered the following Judgments:—

KINDERSLEY, J.—Except as to the separate residence of the parties, the testimony as to their living in a state of division of interests is of the most general description. There is no clear trace of partition having taken place and even as to the separate residence of the plaintiff and 3rd defendant the evidence is conflicting, and it is not clear that they lived separately more than three years previous to the suit. There is general testimony as to separate dealings, but separate dealings are not inconsistent with community of interest. There is no evidence of separate celebration of the anniversaries of deceased ancestors. On the other hand the Judge has pointed out circumstances indicating non-division. We must therefore take it that the plaintiff has not proved that he is divided in interest from the 3rd defendant. Then it is in evidence that the plaintiff's father died leaving considerable property; and even if the plaintiff did receive Rupees 1,000 from his father-in-law at his marriage many years ago, it is by no means clear that the property now in question was acquired without the aid of ancestral funds. The decision of the District Judge appears to be correct, and I would dismiss this appeal with costs.

Sir W. MORGAN, C. J.:—I agree. The plaintiff has shown little more than this, viz., some separation in residence, a sepa-

(1) 14 Moore's I. A., p. 412.

1875. *January* 29. *R. A. No.* 77 *of* 1875.

rate transaction of affairs in certain instances, and an acquisition in his own name of the property in dispute, and all these occurring in recent years. On the other side is shown a joint Hindu family deriving considerable property from the ancestor, Virappa, and living long together after his death. As to a partition the Court rightly held that none was proved, such separation as was shown falling far short of this. In this state of things, the purchases in question could not be treated as separate acquisitions made from the 1,000 Rupees, which many years before had come to him with his wife, or by means of funds arising from that money.

*Appeal dismissed with costs.*

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## Appellate Jurisdiction.(a)

*Regular Appeal No.* 90 *of* 1874.

MASHOOK AMEEN SUZZADA.....*Appellant (Plaintiff).*

MAREM REDDY, VENKATA REDDY and two others ... ... ... *Respondents (Defendants.)*

By the terms of an agreement entered into by the plaintiff and defendants, a pending suit was compromised, and payment of an ascertained balance found due by plaintiff was secured by the creditors (defendants) being placed in possession of plaintiff's land for 55 years, with the right of enjoying all the rents and profits thereof, subject to the payment of a fixed rent, part of which was to be paid to the plaintiff, and the remainder to be retained by the creditors towards payment of the debt. *Held,* that the agreement was a mortgage, and, as such, redeemable on the usual terms.

1875. *February* 5. *R. A. No.* 90 *of* 1874.

THIS was a Regular Appeal against the decision of Mr. J. R. Daniel, the Acting District Judge of Nellore, in Original Suit No. 6 of 1874.

On the 10th October 1857 a razinamah was entered into between the plaintiff and the defendants in Original Suit No. 2 of 1852, on the file of the District Court of Nellore. The plaintiff was found indebted to the defendants in the sum of Rupees 6,538, and, in order to secure this sum, and a debt of Rupees 510 due to the defendants by one Jorabibi, the plaintiff's grandmother, defendants were let into possession of the land now sought to be redeemed, on a fixed rent of Rupees 298 for

(a) Present:—Sir W. Morgan, C. J., and Kindersley, J.