

Special Appeal No. 79 of 1863.

1863.
Sept. 1.

SOMANGOUĐA' bin DAJAMANGOUĐA' *Appellant.*

BHARMANGOUĐA', a minor, the son and heir

of KARBASANGOUĐA' *Respondent.*

Hindú Family—Suit for Division of Family Estate—Onus Probandi.

Where plaintiff, a member of a Hindú family, suing for a division of the family estate, admitted on the face of his plaint that he had taken possession of part of the family property, and for sixteen years lived separate, the *onus probandi* lies on him to show that the circumstances under which he became possessed of his portion of the property were consistent with his statement that the family remained undivided.

THIS action was brought by Karbasangouđá, father of the minor respondent, to obtain possession of the half of certain lands, houses, and trees, which he alleged were ancestral property, in which he and defendant (present appellant) were entitled to equal shares. The plaint went on further to state that plaintiff had, about sixteen years previous to suit, got possession of a portion of the property, and had since lived separate from the family, but that a few years before action defendant had got the said property out of his (plaintiff's) hands.

The defendant, Somangouđá, contended that the property had been formally divided; that plaintiff had received his share, and lived separately ever since; that the property from the possession of which, plaintiff averred, defendant had ousted him, consisted of land which plaintiff had voluntarily relinquished, as he could not pay the Government assessment thereon; that defendant had since spent some three hundred rupees in bringing it under cultivation, seeing which, plaintiff had put forward a false claim.

The Šadr Amin of Hubli, Ráv Sáheb Rághavendráv Kánto, found the presumption was that a formal division had taken place; and, as plaintiff had not shown anything to rebut this presumption, he threw out the claim with costs:

Karbasangouđá having died after the passing of the Šadr Amin's decree, his son Bharmangouđá was entered as plaintiff, and he thereupon preferred an appeal against the Šadr Amin's decree to the Court of the District Judge of Dhárwár, and the appeal being heard by F. Lloyd, District Judge, he found that defendant disputed the claim on

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the ground that a division had already taken place in the family, but that he failed in establishing the same. The District Judge, therefore, reversed the decree of the Sadr Amin, and admitted plaintiff's claim with costs on defendant.

A special appeal was thereupon preferred by the original defendant, Somangoudá, to the High Court, on the ground, among others, that plaintiff having admitted that sixteen years previous to action-brought, he, plaintiff, had received a portion of the family property, and lived apart from his brethren, the Judge was in error in not throwing the *onus probandi* on him to prove that the family still continued united in interests.

The Special Appeal was argued before FORBES and TUCKER, JJ.

Dhivajlál Mathurádás for the appellant.

Vináyaleráv Harichand for the respondent.

FORBES, J., delivered judgment:—We find that the plaintiff Karbasangoudá having admitted in his plaint that he took possession of part of the family property and for sixteen years was separated, it was upon him to prove that the circumstances under which he became possessed of his portion of the property were consistent with his statement that the family remained undivided. We, therefore, reverse the Judge's decree, and remand the cause in order that it may be determined—

- (1) What the common ancestral estate was; and
- (2) What portion of it remained undivided in which the plaintiff is now entitled to share.

The burden of proof on the second issue being on the plaintiff Karbasangoudá, the Court below to pass a new decree upon the merits, awarding costs.

Decree reversed.