

XVIII. of 1869) inasmuch as Sec. 4 of that Act subjects to stamp duty only those of the instruments executed out of British India which relate to any property within British India

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“ I am, therefore, of opinion that an instrument executed in a foreign territory, and which is valid by the law of that place, and does not affect any property within British India, can be admitted in evidence in our courts without a British stamp.”

The reference was heard this day before GIBBS and MELVILL, JJ.

PER CURIAM:—The Court agrees with the opinion expressed by the Small Cause Court Judge.

Small Cause Court Judge informed accordingly.

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Special Appeal No. 326 of 1870.

Dec. 6.

SANGA'PPA' bin CHANBASA'PPA' *Appellant.*
 SA'HEBA'NNA' bin KENGEDA'PPA *Respondent.*

Hindú Law—Undivided Family—Manager—Payment to eldest member of Family.

The debtor of an undivided Hindú family is not justified in paying his debt to the eldest member of the family unless such eldest member be also the manager of the undivided family. If there is no manager, the debtor should obtain a release from all the members of the undivided family.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Kalládgi, in Appeal Suit No. 70 of 1869, reversing the decree of the Subordinate Judge of Mudebihál.

The plaintiff, Sangáppá bin Chanbasáppá, instituted this suit to recover the sum of Rs. 8-8-0 due as rent for the year 1868-69 of an *inám* field which he alleged the defendant held as a tenant from him.

The defendant answered that the plaintiff was not the owner of the field, but that it belonged to Basáppá, who was

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a step-brother of the plaintiff, from whom he held as tenant, and to whom he had paid the rent due thereon.

It appeared that the defendant had held the *inám* field from the plaintiff's father, to whom he had paid the rent down to the year 1868-69, when the plaintiff's father died, leaving two sons, the plaintiff and Basáppá, a stepbrother of the plaintiff. The plaintiff was the elder brother, and the family was undivided.

The Subordinate Judge of Mudebihál held upon these facts that the plaintiff, as being the eldest member of an undivided family, was entitled to manage the family estate after his father's death. He, accordingly, decreed in favour of the plaintiff.

The defendant appealed from this decree, and the Senior Assistant Judge, in reversing the decree, delivered the following judgment:—

“It appears that the plaintiff and Basáppá are step-brothers, and that their father died in March 1868. Basáppá admits that while his father was alive he gave the receipts to the ryots. Basáppá's allegation of separate management during his father's life-time is not established by satisfactory proof. The question of previous management cannot, therefore, be raised. The brothers took to disputing immediately after their father's death, and the Subordinate Judge has decided for the plaintiff, on the ground that as the elder brother he is entitled to manage his father's undivided estate. But his title under Hindú law is by no means so certain as the Subordinate Judge seems to have held. From Strange's book on Hindú law it would seem that the management depends rather upon capacity than upon primogeniture, and though the claim to it is with the eldest, it is subject to the character and the general sense of the coparceners, without a concurrence of which no pretension of the kind can have any validity.

“Therefore it is clear that the mere fact of the plaintiff being the elder brother does not necessarily give him the right of exclusive management.

“As it is proved that the defendant has paid Basáppá, who is equally entitled, as co-heir, to receive payment, and I do not think the plaintiff has made out his right to recover from the defendant again, a payment made by the defendant to Basáppá is to all intents and purposes made to the plaintiff, and he and Basáppá must arrange as to the division of the whole of the proceeds between themselves. If they cannot agree together their best plan is to effect a partition. My finding is thus against the plaintiff, and I reverse the decree of the Subordinate Judge. The plaintiff is to bear all costs in both courts.”

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The plaintiff appealed from this decision, and the appeal was argued before GIBBS and MELVILL, JJ., this day.

Vishvanáth Náráyan Mandlik for the appellant.

Shántárám Náráyan for the respondent.

Cur. adv. vult.

GIBBS, J.:—The defendant in this case is the tenant of an undivided Hindú family, which now consists only of the plaintiff and his younger brother, Basáppá, their father having died in the year preceding that for which the rent is in dispute. The defendant paid the rent for the latter year to Basáppá, and the plaintiff now sues to compel him to pay the rent again, on the ground that he (the plaintiff), being the elder brother, is entitled to manage the family estate, and that Basáppá had no right to receive the rents.

The Subordinate Judge awarded the claim on the ground that the plaintiff, being the elder brother, must be considered to be the manager of the family until the contrary be proved. This decision has been reversed by the Senior Assistant Judge, who considered that a payment to Basáppá was to all intents and purposes a payment made to the plaintiff. He held that the mere fact of the plaintiff being the elder brother did not necessarily give him the right of exclusive management, and in support of this view quoted Strange's work on Hindú Law as showing that the right to management depends rather upon capacity than upon primogeniture, and that

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although the claim to it is with the eldest, it is subject to character, and the general sense of the coparceners, without a concurrence of which no pretension of the kind can have any validity.

We cannot accept the Senior Assistant Judge's decision in its entirety, for the effect of it would be to establish the proposition that the debtor of an undivided family may pay his debt to any member of the family to whom he may choose to pay it. Considering that united Hindú families frequently consist of very numerous members distantly related, the result of such a practice would be a scramble for the family income, and continual recriminations and disputes. As Sir Thomas Strange says, in the passage referred to by the Senior Assistant Judge, "In order to avoid confusion, reason and law alike suggest the expediency of adopting some one member of the family to manage its concerns." We think that the debtor of a united Hindú family is bound, like any other debtor, either to obtain a receipt from every member of the family, or to satisfy himself that the single member to whom he makes payment is authorised to act for the rest.

In the present case, the defendant had always dealt with the father of the plaintiff, whose right to the management was undisputed. Upon his death the two sons, as the Assistant Judge has found, took to disputing immediately. Under these circumstances, the defendant's only safety was either to obtain a joint receipt from both the brothers, or to ascertain that the brother to whom he paid the rent was acting with the consent of the other. It is clear that he did nothing of the kind.

Basáppá is not a party to the suit, and we cannot now decide which of the two parties is entitled to the management. But it is certain that when he received the rent from the defendant, Basáppá was not acting with his brother's consent, and that he had not established his title to act without his consent.

Under these circumstances, we must hold the plaintiff entitled to recover, but only to half the extent claimed. He

sues on behalf of the family—that is, of himself and his brother—and they are entitled to share equally in the sum which may be recovered. He cannot be allowed to recover, as agent for his brother, what his brother has already received.

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There will be a decree for the plaintiff for Rs. 4-4-0, being half the amount claimed. But though the plaintiff has to a certain extent succeeded, we do not think that it is a case in which he should be allowed his costs. The payment by the defendant to Basáppá was made incautiously, but there is no reason to suppose that it was made otherwise than in good faith. Instead of making a third party the victim of the family discord, and driving him to the trouble and expense of recovering from Basáppá the amount improperly received, the plaintiff should have settled his dispute with Basáppá, in which case he would have received half the defendant's rent from Basáppá, or should have compelled a partition, in which case also he would have received half the rent upon a settlement of account. Each party must bear his own costs throughout.

Decree amended.