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less than Rs. 500 was cognizable by the Small Causes Court; but entertaining a doubt on the subject, submitted the case to the High Court.

There was no appearance by either party in the High Court.

WEST, J.—The obligation of a father to support his child is one imposed on him by the law of the family in some form or other, either of civil or criminal liability (see *Bazeley* v. *Forder*(1)) under every civilized system. If the father fails to support a child, it is the mother's duty to nurture it if she can. Whether she can recover the amount necessary for this purpose from the father according to the Mahomedan law is a question that the Court will have to try. But the father's obligation to recoup the mother, and to provide money for the future maintenance of his child by a wife whom he has divorced during her pregnancy, is one which, if it subsists, does not arise from contract, but is imposed on the father by the law, without any bargain or assent on his part. The suit, therefore, in this case is not one cognizable by a Small Cause Court, but by the ordinary Civil Court, and the order for returning the plaint made by the Subordinate Judge should be set aside, and the suit dealt with on its merits.

(1) L. R., 3 Q. B., at p. 564.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

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September 6.

RAMLINGA KHANAPURE (ORIGINAL PLAINTIFF), APPELLANT, *v.* VIRUPAKSHI KHANAPURE (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law— Partition—Agreement never to divide—Perpetuity.

An agreement between co-parceners never to divide certain property is invalid by the Hindu law as tending to create a perpetuity.

THIS was a second appeal from the decree of G. Druitt, Assistant Judge of Poona at Sholapur, reversing the decree of the Subordinate Judge of Barsi.

The plaintiff Ramlinga sued his elder brother, Virupakshi, for partition of certain immoveable property. The defendant an-

* Special Appeal, No. 477 of 1882.

swered that, differences having arisen between the parties, they were referred to the settlement of arbitrators, who had decided that the property now sought to be partitioned was ever to remain joint, and that the rest of the family property only was to be divided; and that the plaintiff had mortgaged to him, the defendant, his right to half of the said property for Rs. 200.

The Subordinate Judge held the agreement set up by the defendant not proved, and awarded the plaintiff's claim. The assistant Judge held the agreement to be both genuine and valid, and rejected the claim. During the pendency of the appeal in the District Court the parties produced before that Court deeds of sale dated each 28th of June, 1881. By these, for a consideration of Rs. 500, the parties made an exchange of certain properties. The Assistant Judge held that these documents were executed merely for the purpose of more conveniently using the divided property. The plaintiff appealed to the High Court.

Hon. Rav Saheb *V. N. Mandlik* for the appellant.—The agreement never to divide is opposed to the family law of the parties. It is against public policy. The creation of a perpetual estate defeats the rights of successors to the property. The agreements entered after the decision of the case by the Court of first instance show that the parties never intended to abide by the agreement not to divide.

Khanderav Moroji for the respondent.—The subsequent agreements were entered into merely for convenience' sake. They do not affect the rights of the parties, or avoid the original agreement, which places the parties in the position of joint tenants under the English law.

The judgment of the Court was delivered by—

WEST, J.—The agreement between the brothers Ramlinga and Virupakshi, to the effect that two houses were for ever to be held undivided, was one inconsistent with the Hindu law to which they were subject—*Rajender Dutt* v. *Sham Chund Mitter* (1); *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren*(2); *Ashutosh Dutt* v. *Doorga Churn Chatterjee*(3). That law gives to a member of a

(1) I. L. R., 6 Cal., 106. (2) I. L. R., 4 Mad., 200.
(3) L. R., 6 I. A., 182.

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united family a right to demand partition from his co-members. The division of *sacra* takes place when it is lawfully claimed, and of this division of the *sacra* a division of the property, or of the interests in the property, is a necessary accompaniment. It seems to have been ruled more than once that, by an agreement not to divide, a Hindu family could not tie up their family estate so as to deprive a purchaser of one of the shares of a right to enforce partition—*Anund Chandra Ghose* v. *Prankisto Dutt*(1); *Rajender Dutt* v. *Sham Chunder Mitter*(2). But the purchaser cannot take a greater right than the vendor had to convey to him—*Sreemutty Soorjee Money Dosee* v. *Denobundoo Mullick*(3). If he could, then a sharer bound not to separate could defeat his engagement by merely selling his share, and subjecting his brethren to additional annoyance by introducing a stranger into the family house. The right to demand a partition is in itself superior, as a part of the Hindu's public law in the larger sense, to the conventions of individuals. These conventions may afford a ground for suits for breach of contract, but they cannot be enforced to deprive those who enter into them of a right conferred in the public interest and the religious interest of the Hindu community.

It is urged that the brothers by their general partition became, as to the property retained in common, *joint tenants* like those so called under the English law. A dealing with joint property which implies a severance of the interests constitutes a severance under the English law, whether the dealings be those of joint tenants *inter se*—*Caldwell* v. *Fellowes*(4), or of one with a stranger—*Jackson* v. *Jackson*(5). A joint tenant can sever the joint tenancy forth with by selling his share, even if he should buy it back next day. He may always sue for a partition if he desires it (6). To such a state of legal relations the same remarks apply as to those of the Hindu united family—Privy Council in *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (7). The ownership of a joint tenant cannot be tied up so as to create a perpetuity, any more than a perpetuity for a similar purpose can be created under

(1) 3 Beng. L. R., 14, O. C. J.
(2) I. L. R., 6 Cal., 106.
(3) 6 Moo. I. A., at p. 539.
(4) L. R., 9 Eq., 410.
(5) 9 Ves., 591.
(6) Co. Litt. 175a.
(7) 13 Moo. I. A., 395.

the Hindu law—*Shookmoy Chunder Dass* v. *Monohuri Dassi* (1). The perpetuity here proposed would be "a new form of estate" which, it has been ruled, "a man cannot create for the purpose of carrying out his own wishes or policy"—*Sreemutty Soorjee Money Dossee* v. *Denobundoo Mullick*(2). See, too, *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*(3). Hence, either as a united brother or as a joint tenant, Ramlinga could not, by an agreement with his brother, be deprived of his right to separate, and require a separation of his interest from that of Virupakshi (4).

The case of *Gopalacharya bin Trivangacharya* v. *Keshav Daji Kale* (5) was one of a courtyard retained undivided for the convenience of the adjacent dwellings. The agreement to that effect was enforced without regard to whether the yard remained joint property, or had passed wholly to one of the parceners in partition. An analogous case on this point is that of *Western* v. *Macdermot* (6). Still closer is the case of *Maclean* v. *Mackay* (7). See, too, Sudgen's Vendors and Purchasers (1862), p. 596.

In the present instance there is this additional circumstance, which is really conclusive of the case, that Ramlinga mortgaged to Virupakshi his moiety of the property which was to be retained for ever joint and undivided. It could not remain joint, in any intelligible sense, when one of the parties to the agreement disposed to the other of his interest as a separable and, for the purpose in view, separated share. It is one of the indicia of partition, according to the Hindu law, that the brethren should enter into independent mutual dealings; and certainly that property could not be any longer joint which was the subject of such a transaction as a mortgage between the alleged joint owners. The mortgage implied a new agreement to hold separate interests, and such an agreement really constituted a partition with respect to the property now in question as the complement of the partition previously made of the other parts of the family estate.

(1) I. L. R., 7 Calc., 269. (2) 6 Moo. I. A., 526.
(3) 9 Beng. L. R., at p. 395.
(4) Co. Litt. by Thomas, Bk. II, Ch. XXV, Note E.
(5) Printed Judgments for 1876, p. 244.
(6) L. R. 2 Ch. Ap., 72. (7) L. R. 5 P. C., 327.

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For these reasons we reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on respondent.

Decree of the District Court reversed, and that of the Subordinate Judge confirmed.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Pinhey.

1883 *August* 23.

THE COLLECTOR OF BROACH (ORIGINAL APPLICANT), APPELLANT, *v.* RAJARAM LALDAS AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

Bhagdari (Bombay) Act V of 1862, *Secs.* 1 *and* 2—*Sale of unrecognized portion of a bhag—Application by Collector to set it aside—Limitation Act XV of* 1877, *Sec.* 8.

N. held an unrecognized fourth share in a certain *bhag*. R. obtained a decree against N., and in execution of it sold his right, title and interest in the *bhag* on the 28th February, 1876. It was purchased by B. The sale was subsequently confirmed, and B, was put in possession of a portion of the land. On the 30th September, 1880, the Collector applied to the Court to set aside the sale, on the ground that it was illegal under Bombay Act V of 1862. It appeared that the Collector did not know till November, 1877, that the land sold was an unrecognized portion of the *bhag*, and not the whole of it.

Held that the sale might be set aside under the provisions of section 2 of Act V of 1862 notwithstanding its confirmation and the subsequent delivery of possession.

Held further that the application was not barred, even if the provisions of Act XV of 1877 applied to it, inasmuch as, under section 18, time began to run against the Collector only from November, 1877.

Quære—Whether any provision of limitation applied to such applications under the Bhagdari Act.

THIS was a second appeal from the decision of S. Hammick Senior Assistant Judge at Broach, affirming the decree of Madhuvachram Hora, Second Class Subordinate Judge of Ankleshvar, and dismissing an application by the Collector of Broach to set aside the sale of a certain unrecognized portion of *bhagdari* land. The facts are briefly stated in the head-note, and are fully set out in the judgment of the High Court. Both the lower

* Second Appeal, No. 432 of 1882.