The appeal itself relates to the sale of certain ornaments which have been attached in execution of the decree. The widow, Lakshmibai, asked that they should be sold, not at Belgaum, where they are held in attachment by order of the Subordinate Court, but at Bombay, on the ground that they would probably fetch a higher price there. The application was opposed by the [25] judgment-creditor and refused by the Subordinate Judge. Lakshmibai has now appealed. We are unable to find that the order is in any respect either illegal or improper. The Subordinate Judge, on facts which were before him, came to the conclusion that a fair sale could be had in Belgaum. No materials are before us for a contrary finding. The mere contention that a higher price is likely to be bid in Bombay than at an out-station might be made in the case of almost every sale, and would lead to endless disputes if lightly yielded to. There can be no doubt that the Code intended that a sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise. We do not find any such reasons in the present case; and, therefore, confirm the Subordinate Judge's order, and direct each of the appellants to bear his and her own costs. The appellant Lakshmibai to bear also the costs of the respondent.

Order confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

ANANTA BALACHARYA (*Original Plaintiff*), *Appellant v.* DAMODHAR MAKUND (*Original Defendant*), *Respondent.* *

[13th February, 1888.]

Hindu law—Partition—Effect of agreement to divide—Res judicata—*Suits in respect of different portions of the family estate—Material issue.*

To constitute a partition there need not be an actual partition by mêtes and bounds. An agreement to divide is sufficient to constitute partition.

Two brothers drew up a memorandum of partition, whereby they agreed to divide the family property in equal shares, and provided that, if at any future time their sons did not agree and there were any partition, they should exercise ownership in accordance with this document; neither was to take more than was mentioned in the document.

Held, that this agreement constituted a partition between the brothers, and was binding on their descendants.

In 1876 the plaintiffs, alleging a partition of the family estate in 1864, sued their uncle (father of the present defendants) to recover their share of the rent of a certain piece of land which had formed part of the family estate. The plaintiffs relied in that suit upon a memorandum or agreement of partition executed in 1864. The defendant in that suit, however, [26] contended that the family was still joint and that the plaintiff could not claim a share of any particular piece of land, but must sue for partition of the whole property. At the hearing of that suit an issue was raised as to whether partition had taken place. The Court found in the affirmative and awarded the plaintiff's claim. In the present suit the plaintiff sued the defendants (the sons of the defendant in the former suit), to recover possession of certain property which they alleged formed part of the share awarded to them at the partition of

* Second Appeal, No. 235 of 1885.

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1864, but of which they had been dispossessed by the defendants in 1873. The defendants denied that there had been any partition of the family property.

Held, that the question of partition was *res judicata*, and could not be raised again by the defendants. The question had been directly and substantially in issue in the former suit. No doubt the dispute in that suit was as to a different piece of land, but there was no allegation that that land was held on any different tenure to the land now in suit. The plaintiffs there, as now, alleged that there had been a partition and that they had a separate share. The defendants there contended, as the defendants now contended, that there was no partition, and that the family estate was joint. The decree in that suit depended on that issue, and where the decree depends on an issue the finding in that issue is binding as *res judicata*. The *status* of the family having been thus tried and determined in the former suit was binding on the parties in subsequent suits.

[R., 14 B. 206; 15 M. 111 (118); 9 C. L. J. 597=12 C. W. N. 739=4 Ind. Cas. 81=6 M. L. T. 363; 57 P. R. 1907=66 P. W. R. 1907.]

SECOND appeal from the decision of E. H. Moscardi, Assistant Judge of Thana, in Appeal No. 237 of 1883.

The plaintiffs alleged that their father Ananta and the defendant's father Makund were brothers; that in 1864 the said Ananta and Makund made a memorandum of partition of the family property; that in pursuance thereof all the moveable and some immoveable properties were divided; that certain immoveable property was not divided by metes and bounds, though the income was divided; and that since 1874 the defendants had been illegally and wrongfully appropriating to themselves the entire income of this portion of the property.

The plaintiffs, therefore, filed this suit (1) to recover half of the income of the property in question which the defendants had wrongfully appropriated to themselves from 1874 to 1880, and (2) for a partition of the said property by metes and bounds.

The defendants replied that they knew nothing of the alleged memorandum of partition; that no partition had been made; that the said memorandum was not binding on them; that the property in question had never been divided, nor the income [27] thereof; that they had not received the income, as alleged, since 1874, and they contended that the plaintiffs were not entitled to a partition of the property in suit without bringing into hotchpot all the ancestral property which was in their exclusive possession.

The memorandum of partition referred to in the plaint was in the following terms:—

"*Yadi* of the partition of the moveable and immoveable property of Makund and Anant Balacharya of Mahim and Bombay. *Shake* 1785, *Paush Vad* 13th (February 5th, 1864)." (Here follows a list of the property).

* * *

"In this way we have sat together and agreed. The house at Mahim to be divided equally with the appurtenances thereof.

"Fields in the kasba and elsewhere" (here follows a list) "to be divided in equal shares.

"Fields which one is to take only." (Here follows a list.)

"Debts due to the family to be divided equally." (Here follows a list.)

"Six gardens to be divided equally."

* * * *

"Two *yadis* have been prepared according to this agreement, of which either of us has one; if at any future time our sons do not agree, and

there may be any partition, each of them is to exercise ownership in agreement with these *yadis*. Neither is to take more than is mentioned in these *yadis*.

(Signed) ANANTA BALACHARYA.
(Signed) MAKUND BALACHARYA."

The above memorandum was dated in the year 1864. It appeared that in 1876 the plaintiffs alleging the partition in 1864 had sued the defendants' father, Makund, to recover their half share of the rent of a certain other immoveable property (Survey No. 77) which was not the subject-matter of the present suit.

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The defendants' father had in that suit pleaded substantially the same defence as that now pleaded by the defendants. He contended that there had been no partition, and that the family [28] estate was joint. At the hearing of that suit an issue was raised as to whether the alleged partition was proved, and it was found in the affirmative. A decree was accordingly passed in plaintiffs' favour, awarding them a moiety of the rent of Survey No. 77. This decree was finally confirmed by the High Court on special appeal.

In the present case the Subordinate Judge of Dahanu held that the partition deed of 1864 was genuine; that the executants were managers of the family; that their heirs were bound by the deed; that the plaintiffs were entitled to have a partition made of the property in suit and to hold a moiety thereof; that they were bound to bring into hotchpot whatever family property they had in their exclusive possession; and that their claim to mesne profits was barred by limitation. He, therefore, ordered that, with the exception of the property at Bombay, all the rest of the ancestral immoveable property should be divided, and a moiety thereof awarded to the plaintiffs.

On appeal, the Assistant Judge held that the partition deed of 1864 was not binding on the defendants, and that the decision in the former suit as to the question of partition was not *res judicata*. He, therefore, held that the parties were still living in co-parcenary, and amended the decree of the Subordinate Judge by directing that, in addition to the properties therein ordered to be divided, the family property at Bombay should also be divided between the plaintiffs on the one part and the defendants on the other in equal shares. The following extract from his judgment gives his reasons :—

"This document (*i.e.* the memorandum of partition of 1864) does not purport to make an actual partition at the time, but it professes to bind the descendants of the parties in case they should wish to separate. Such an agreement between two members of an undivided family cannot bind their descendants living at the time. Such descendants have themselves an interest to the extent of their shares in the family property from the moment of their birth, and must assent to every disposal purporting to divide the property amongst themselves to make such partition valid. It is said that this agreement has been acted on by the parties, [29] but I do not think it was so. There are only two cases in evidence showing that this was so, *viz.*, (*a*) one field which has been given to defendant No. 2 as his separate property, he being blind, and (*b*) Survey No. 77 at Devkhop, which, under the decrees in original suit No. 155 of 1876 and regular appeal therefrom No. 237 of 1877, has been divided between plaintiff and defendants according to Ex. 3.

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"The respondents' pleaders urge that because in the suit last quoted it was an issue between the parties whether the land was divided between the parties and whether the plaintiffs (present plaintiff's father) had a right to the moiety of the rent, that the question of partition of the whole of the family property was *res judicata* between the present parties. I am, however, of opinion that it is not so. To see whether a matter is *res judicata*, you must look to the former decree. If the decree does not decide the point in question, it is not *res judicata*—*Per Curiam* in *Devarakonda Narasamma* v. *Devarakonda Kanaya*(1). It is clear, therefore, that the finding of the Courts in suit No. 155 of 1876 and the appeal therefrom bind the present parties only as to the portion of land then in suit, and not as to the rest of the family property."

Against this decision the plaintiffs appealed to the High Court.

Branson (with him *M. C. Apte*), for the appellants :—The agreement of partition in 1864 practically effected a division between the parties. The question of partition is, however, *res judicata*. The question directly at issue in the former suit between the parties was whether the whole family property was divided, and the Court found that it was divided. The decree in the former suit must, therefore, be taken to have finally determined the *status* of the family. Where a decree is based on an issue, the decision on that issue is *res judicata*—*Anusuyabai* v. *Sakharam Pandurang* (2); *Pahlwan Singh* v. *Risal Singh* (3); *Venktesh Tatya* v. *Venktesh Shastri* (4); *Krishna Behari Roy* v. *Brojeswari Chowdranee* (5); *Rajah of Pittapur* v. *Shri Rajah Row Buchi Sittaya Garu* (6). In the former suit the plaintiffs could not have succeeded without proving [30] partition of the family estate. The question of partition was thus the material issue in that suit. The finding on that issue is, therefore, binding and conclusive between the parties. It cannot now be re-opened.

Telang (with him *Daji Abaji Khare*), for the respondent.—The nature of the former litigation between the parties was such that the decree could not operate as *res judicata*. The former suit was of the nature of a small cause. It was a suit for rent or rather for money had and received. In such a suit the decision on an incidental question of title or *status* of the parties cannot be *res judicata*—*Bholabha* v. *Adesang* (7); *Daji Pandurang* v. *Jairam Pandurang* (8); *Govind Visaji* v. *Balkrishna* (9). I cannot rely on the Madras ruling in *Devarakonda Narasamma* v. *Devarakonda Kanaya* (1), as the lower Court has done. But I contend that the former decree affected only particular lands of which rent was claimed. It cannot be *res judicata* as regards all the family lands—*Moro Abaji* v. *Narayan Dhonbhat* (10).

Branson in reply :—It is too late for the respondent to contend that the former suit was of the nature of a small cause. Assuming it was such, he himself filed a special appeal in the High Court. The High Court confirmed the decree of the lower Courts. The respondent cannot now turn round and dispute the jurisdiction of the High Court to make a final decree in the former suit. That decree is, therefore, conclusive on the question of partition. Refers to *Naro Hari* v. *Anpurnabai* (11).

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(1) 4 M. 134. (2) 7 B. 464. (3) 4 A. 55.
(4) Printed Judgments for 1881, p. 281. (5) 2 I. A. 283.
(6) 12 A. 16. (7) 9 B. 75.
(8) Printed Judgments for 1886, p. 34.
(9) Printed Judgments for 1884, p. 308. (10) 11 B. 355.
(11) 11 B, 160 note.

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JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.), was delivered by

BIRDWOOD, J.—It is not easy to understand on what principle the lower Courts have dealt with this case. As brought by the plaintiffs, it was a suit founded on an agreement of partition (Ex. 3), to obtain a specific portion of property thereby granted to them, and which, they alleged, they had enjoyed up to 1873. The Subordinate Judge, for some reason which does not appear either in his judgment or in the proceedings, treated the suit as [31] one for a general partition; and he ordered the property at Mahim, Savre, Varkhunti, Chintuchapada, Devkhop, and Vadhio to be partitioned and the plaintiffs to take possession of a moiety, and this notwithstanding the allegations of the defendants and his own finding that both parties held exclusive possession and were owners of separate parts of the property. The Assistant Judge, on appeal, went still further; for he ordered that the immoveable property of the family, situated in Bombay, be also brought into the suit and divided equally. Thus the final decree has been passed on a totally different cause of action to that set out in the plaint. The prayer there was for possession of certain specific property on the allegation of a partition and separate enjoyment and subsequent ouster; the decree awarded a general division of property on the supposition that the whole was joint.

It is the plaintiffs only who have appealed; and it is conceded in argument that, as the case now presents itself, the decree will stand good if partition is not proved, but that if partition is proved, the decree must be reversed and the case remanded for a new trial on the cause of action alleged by the plaintiffs themselves. The Ex. 3, the memorandum of partition relied on by the plaintiffs, was found to be proved by the Subornate Judge, who further held that the parties were bound by its terms. We do not, therefore, understand the grounds on which he is of opinion that it might be left out of sight in this suit. Still less do we understand why he says that no matter in issue in the present suit has any reference to the *status* of the family at the time at which Ex. No. 3 was executed, *i.e.*, in 1864. The Assistant Judge was of opinion that the document did not purport to make an actual partition at the time, but that it professed only to bind the descendants of the parties in case they should wish to separate. Such an agreement, he says, between two members of an undivided family cannot bind their descendants living at the time. We think that the Assistant Judge has misunderstood the terms and the effect of the document in question. To constitute a partition there need not be an actual partition by metes and bounds. "It is now recognized that all which would be evidence of an assent or expression of will in other cases, would be equally so in a case of [32] partition, and that the expression of will, whether immediate or implied, is the sole criterion of division" (1).

The question, however, appears to us really to be *res judicata*, because we find that in a former suit, between the present parties the document was put in evidence, and it was held that by it a partition was proved to have been effected. The reasons that the Assistant Judge gives for arriving at a contrary conclusion, namely, that what does not appear on the face of the decree in the former suit is not *res judicata*, and that the decree is

(1) West and Buhler (3rd ed.), p. 681.

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binding only as to the portion of land formerly in suit, cannot be accepted as sound. No attempt to support this view of the case on the first ground relied on by the Assistant Judge was made by the learned counsel for the respondents; and it is quite clear that, where the decree depends on an issue, the finding on that issue is binding. "It is the matter in issue, not the subject-matter of the suit, that forms the essential test of *res judicata*"—*Pahlwan Singh* v. *Risal Singh* (1); see also *Nirman Singh* v. *Phulman Singh* (2); and *Venktesh Tatya* v. *Venktesh Shastri* (3). In the former suit (Exs. 38,39, 40,41 and 42), there was a distinct issue raised as to whether partition was proved, and there was an appeal on the question whether this issue had been rightly found in the affirmative. The issue raised in the appellate Court was, it is true, only whether the plaintiff had proved his right to receive a half of the rent of the land in dispute; but that issue was found in the affirmative only and solely because partition was held to be proved. The Joint Judge who disposed of the appeal, said that there was not the cast doubt that the memorandum was genuine, and decided that the property was divided between the two brothers. That indeed was the only ground on which the issue could be found in the affirmative, and it is the only reason given in the judgment for the finding. It is argued that, as the suit was a Small Cause Court suit, the decisions therein are not final; but it is unnecessary to decide that point, for the decrees passed therein were confirmed by the High Court on special appeal made by the present defendants. The defendants cannot, therefore, now question the competency of the High Court to hear and [33] finally decide the matter in issue—*Naro Hari* v. *Anpurnabai* (4). It is true that in those suits the dispute was as to a piece of land other than the land now in suit, but there is no allegation that that land was held on any different tenure to the land now in suit. The plaintiffs there, as now, merely alleged that there had been a partition and that they had a separate share; the defendants there, as now, merely contended that there had been no partition, and that the family estate was joint.

The question as to the *status* of the family thus tried and determined is clearly binding on the parties in subsequent suits: see the case of *Krishna Behari Roy* v. *Brojeswari Chowdranee* (5), where it is said that, where a material issue has been tried and determined between the same parties and in a competent Court as to the *status* of one of them in relation to the other, it cannot be again tried in another suit between them. Again, in *Rajah of Pittapur* v. *Shri Rajahrao Buchi Sittaya Garu* (6), their Lordships of the Privy Council held that, though the subsequent suit related to different property, still the determination in the former suit, as to the fact of an adoption, was binding in the subsequent suit. In the present case it cannot be held that the decision regarding Ex. 3 and on the question of partition affected only the particular piece of land then in dispute, and left the defendants free to urge again in any subsequent suit that the family was joint in all other respects and as to all other property.

Partition then being proved, we reverse the decrees of both the lower Courts, and remand the case to be re-tried on the allegations and the cause of action set out in the plaint. In the fresh decree to be now passed, the costs hitherto incurred in the present suit will be provided for.

Decree reversed.

(1) 4 A. 55. (2) 4 A. 65. (3) Printed Judgments for 1881, p. 281.
(4) 11 B. 160 note. (5) 2 I. A. 283. (6) 12 I. A. 16.