1893
JULY 6.

APPELLATE CIVIL.

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APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

RAMACHARYA (*Original Plaintiff*), *Appellant v.* ANANTACHARYA AND OTHERS (*Original Defendants*), *Respondents.**
[6th July, 1893.]

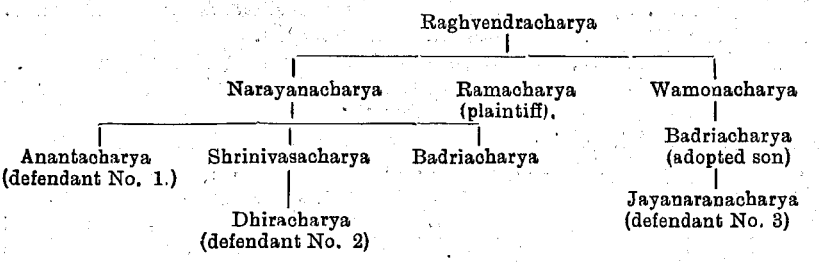
Hindu law—Partition—Partition of joint property situate in British India without taking into account other joint property situate outside British India.

A Court can grant partition of property belonging to a joint Hindu family situated in British India without taking into account other property belonging to the family situated outside British India.

[R., 23 B. 597 (600).]

[390] THIS was an appeal from the decision of Rao Bahadur Jayasatya Bodharao Tirmalrao, First Class Subordinate Judge of Satara, in suit No. 14 of 1885.

Plaintiff sued for a partition of certain family property. The relationship of the parties is shown by the following pedigree:—



The defendants pleaded (*inter alia*) that the plaintiff was in possession of certain ancestral property at Gwalior consisting of houses, &c., which should be brought into hotchpot, and that until this was done, the suit would not lie.

The Subordinate Judge declined to raise any issue as to the property in plaintiff's possession at Gwalior holding that he had no jurisdiction over property situate oustide British India, and that it was not necessary to include such property in the present suit. He passed a decree, declaring that the plaintiff was entitled to a third share in certain of the properties mentioned in the plaint and to a half-share in the remainder.

Against this decree the plaintiff appealed to the High Court.

Jardine (with him *Mahadev Chimnaje Apte*), for respondents (defendants).—This suit cannot be maintained, unless the plaintiff brings into hotchpot the property which he holds at Gwalior. In a partition-suit the plaintiff must bring into hotchpot the whole of the joint property. Even assuming that the Court has jurisdiction to order a partial partition, a Court of Equity will not grant relief until the plaintiff submits to partition the whole estate—*Hari Narayan* v. *Ganpatrav Daji* (1); *Ram Lochun Pattuck* v. *Rughoobur Dyal* (2); *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (3); *Mayne's* Hindu law, s. 452.

* Appeal No. 132 of 1890.

(1) 7 B. 272. (2) 15 W. R. 111. (3) 22 W. R. 333.

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[391] *Lang* (Acting Advocate General) (with him *Vasudev R. Joglekar*), for the appellant.—The lower Court had no jurisdiction to deal with any property situate outside British India. It could not order that property to be divided. It is, therefore, not necessary to include it in the present suit. The defendant cannot complain of any injustice or hardship if the property in suit is divided without taking into account the Gwalior property. It is open to him to demand partition of that property in the Courts at Gwalior.

JUDGMENT.

TELANG, J.—Of the points argued before us, one relates to the adoption of Jayanarain by the widow of Badri. On the evidence I have come to the conclusion that that adoption is proved. It is unnecessary to go in detail into the evidence, as it has been set out by the Subordinate Judge.

The other important point relates to the argument urged on behalf of the defendants before us, to the effect that this suit is not maintainable, as the plaintiff has not brought into hotchpot certain property situated in the Gwalior territories which the defendants alleged to be family property. Now, there can be no doubt that this objection, if in itself sustainable, does not prevent the suit being maintained. It can only lead to a partition being made by the Court on the basis of the property in question being included therein. But the question here arises, whether the Court can make such a partition in the present case. Here the property alleged to be family property lies outside the jurisdiction of this Court and indeed outside British India. It is plain that the Court has no jurisdiction and no machinery for partitioning that property. Such jurisdiction and machinery are wanting in exactly the same way whether the suit is one like Dada Naik's case, whether the plaintiff, in the first instance, claimed partition of property outside the jurisdiction, or whether it is like the present case where the defendant asks that property should be brought into hotchpot for purposes of division although it lies outside the jurisdiction. It must, therefore, be futile to call on the plaintiff to bring that property into hotchpot for purposes of partition.

It may be said, no doubt, that the result of this will be that the plaintiff will have his full share of the property in British India [392] and will at the same time retain the entire property in Gwalior. But the remedy for this is in the hands of the defendants themselves. They must obtain their share of the Gwalior property by resorting to proper proceedings in the tribunals which have local jurisdiction over that property. Again, it may be said that this result is inconsistent with the general rule that partition takes place only once. But I am not aware that that rule has been enforced in such a case as the present, where partition cannot, by any means, be effected in one jurisdiction. In *Hari Narayan* v. *Ganpatrav Daji* (1) the point was left open, and in other cases the property was not outside British India, and, therefore, under the Civil Procedure Code, it has always been possible by resorting to the appropriate procedure to give a single Court jurisdiction over the whole of the family property.

But it is said that although the Court cannot make partition of property in a foreign jurisdiction it may nevertheless take such property into its calculation and award to the plaintiff in possession so much only of the property in British India as will equalize the shares of the plaintiff and

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defendant. In the first place, this is doing indirectly that which the law says may not be done directly. Secondly, it excludes a plaintiff who has property in a Native State, for no fault of his own, from what ordinarily would be his proper share in properties in British territory. And thirdly, in the event of the property in British territories being less than that in the Native State, it will exclude him from all share or benefit out of the former property. It appears to me that these results are much more inequitable than the results of refusing to entertain jurisdiction in any way, direct or indirect, in relation to the property in Native States. In fact, the very principle which underlies the rule that "once is partition of inheritance made," *viz.*, that thus alone can all the mutual rights of the parties be equitably adjusted, also requires that the Court should not attempt to deal with property outside its jurisdiction, because such a complete adjustment is outside its powers.

On the whole, therefore, I have come to the conclusion that the Subordinate Judge was right in refusing to deal with the property [393] in the Gwalior jurisdiction, and that his decree cannot be disturbed on that ground.

FULTON, J. (after referring to the question of adoption, continued :—) The next question to consider is whether the Subordinate Judge was right in refusing to take into account the Gwalior property. It is admittedly in the hands of the plaintiff, who says it is not family property. For the defendants it is contended that, without deciding whether it is family property or not and without taking it into account if it is joint, it is impossible to make an equitable partition of the property in British India.

It was, I think, not disputed that, before granting partition of joint property in the hands of a defendant, account must be taken of any such property in the possession of the plaintiff in British India. *Ballal Krishna* v. *Govinda* (1) and *Parbatsing* v. *Motibhai* (2) may be referred to in support of this proposition, which seems obvious. A plaintiff is entitled to his share in the whole family property, but he is not entitled to a share in any specified portion of the property apart from the rest. See *Nanabhai* v. *Nathabhai* (3). If he has family property in his possession, he cannot insist on a decree which will leave him in possession of more than his share of the whole. When, however, we come to apply this principle to property held by a plaintiff in a Native State, a doubt arises. If it be admitted that such property is joint, it would at first sight seem inequitable to grant partition of the property in British India without taking it into account, for the effect of such a decree would be at once to place the plaintiff in possession of an admittedly larger share of the family estate than he was entitled to, but the point does not appear to have been ever expressly decided in any reported case. In *Ramchandra Dada Naik* v. *Dada Mahadev Naik* (4) the Supreme Court held that it had no jurisdiction to enforce partition of immoveable property in the territories of an independent Chief, but in the subsequent case between the members of the same family—*Lakshman Dada Naik* v. *Ramchandra Dada Naik* (5)—a house in Shahapur in the Sangli State was taken into consideration [394] in a decree for partition. No objection, however, appears to have been taken, and possibly the fact that it was not situated in British territory was not brought to the notice of the Court. In *Hari Narayan* v. *Ganpatrav Daji* (6) Mr. Justice Kemball inclined to the view that property in a Native

(1) P.J. (1877), p. 124.
(2) P.J. (1889), p. 108.
(3) 7 B.H.C.R. A.C.J. 46.
(4) 1 B.H.C.R. App. lxxvi.
(5) 1 B. 561.
(6) 7 B. 272.

State should be considered when granting partition, but the question was not decided. A good deal may be said on both sides, but the arguments used by my learned colleague seem to me conclusive, and I, therefore, concur in the decision at which he has arrived.

As regards the details of the moveable property liable to partition, no sufficient reasons were shown for interfering with the judgment of the Subordinate Judge.

We must, therefore, confirm the decree of the Subordinate Judge, and direct that the costs of this appeal be paid by appellant, excepting the costs of the cross-objections, which must be borne by the respondent.

Decree confirmed.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

RANCHORDAS NATHUBHAI AND OTHERS (*Original Plaintiffs*), *Applicants v.* BHAGUBHAI PARMANANDAS AND OTHERS (*Original Defendants*), *Opponents.** [11th July, 1893.]

Succession Certificate Act (VII of 1889)—Landlord and tenant—Suit for rent.

A certain firm mortgaged with possession its immoveable property to two other firms trading jointly, who let out the property to the mortgagor firm. Afterwards some of the partners of the mortgagee firms having died, the surviving partners and the sons of the deceased brought a suit against the mortgagor firm to recover rent which accrued due after the deaths of the deceased partners. The Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act (VII of 1889).

Held, reversing the order, that as the rent sued upon became due after the deaths of the deceased partners, it formed no part of their estates at the time of their respective deaths, and no certificate was, therefore, necessary under the Succession Certificate Act (VII of 1889).

[R., 36 C. 936 (942) = 16 C.L.J. 180 = 13 C.W.N. 966.]

[395] APPLICATION under the High Court's extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Rao Bahadur M. N. Nanavati, First Class Subordinate Judge of Surat.

Suit to recover arrears of rent.

In 1885 the defendants' firm through its manager mortgaged certain premises to two firms which traded together in partnership. Of these two firms, Chunilal Dwarkadas and Fatechand Hirachand were the proprietors. On the day of the mortgage the mortgagee firms leased the mortgaged property to the mortgagor firm, agreeing to take rent by two instalments per year. Fatechand died on the 5th January, 1888, and Chunilal on the 1st January, 1889. In the year 1892 the plaintiffs, who were then the partners of the mortgagee firm, and the sons of the deceased Chunilal and Fatechand brought a suit against the proprietors of the mortgagor firm to recover rent which was due from April, 1889.

The Subordinate Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act (VII of

* Application No. 224 of 1892 under extraordinary jurisdiction.