

## APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.*

CHANVIRA'PA' (ORIGINAL PLAINTIFF), APPELLANT, *v.* DA'NA'VA'  
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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July 19.

*Hindu law—Partition—Minor—Partition made during minority—Partition by minor's mother as guardian—Fraud—Pleadings—Suit to set aside a partition deed—Limitation Act (XV of 1877), Sch. II, Arts. 91 and 95.*

A partition made by a mother as the guardian of her minor son, a member of an undivided Hindu family, is valid, and if just and legal, will bind the minor. When the minor arrives at full age, he may apply to have the division set aside if it can be shown to be illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity.

Where fraud is charged against the defendant, the plaintiff must set forth the particulars of the fraud which he alleges.

A suit to set aside a deed of partition on the ground of fraud is governed by article 91 or 95, Schedule II of the Limitation Act (XV of 1877), and must be brought within three years after the minor plaintiff has attained majority according to section 7 of the Act.

FIRST appeal from the decision of Ráo Bahádur Káshináth Báلكrishna Maráthe, First Class Subordinate Judge of Dhárwár.

Suit for a declaration that the plaintiff, as the sole surviving male member of his family, was entitled to the whole of the family property, and that a partition, which was alleged to have been effected by his mother during his minority, was invalid and not binding upon him.

The plaintiff was the son of one Malsiddápa, who died eighteen years before suit, leaving the plaintiff, his minor son, him surviving. Malsiddápa had two brothers, *viz.*, Dodmallápa and Revansiddápa, but Revansiddápa separated and took his share of the property in 1872, leaving the other two still joint and undivided.

Dodmallápa having no son, adopted one Basingápa and died in 1887. Basingápa (his adopted son) died childless in 1889, leaving his widow, Dánává (the first defendant), him surviving.

On the 24th August, 1889, the plaintiff brought this suit claiming to be the sole surviving male member of his family and, as such, to be entitled to all the family property. He alleged that he was twenty years of age.

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The first defendant, Dánává, alleged that in 1877 a partition had taken place between Dodmallápa and the mother of the plaintiff who was the plaintiff's guardian, and she contended that the partition had been made in good faith and was valid and binding on the plaintiff. She further pleaded, that on the death of her husband Baslingápa she had adopted Málápa, who was entitled to her husband's share. She also alleged that the plaintiff was twenty-six years of age, and contended that his claim was now barred by limitation.

The Subordinate Judge held that the plaintiff was twenty-six years of age and that the suit was not barred by limitation, and that the adoption of Málápa by Dánává (defendant No. 1) was illegal, as he was the only son of his parents. He, however, also held that the alleged partition between the plaintiff's mother and Dodmallápa was proved and was valid and binding on the plaintiff, who, by his conduct, had ratified it. He, therefore, dismissed the suit.

The plaintiff appealed.

*Inverarity* (with *Shámráv Vithal*) for the appellant (plaintiff):— We say that there was no partition, but if there was, the question is whether it is binding upon us. We contend that it was fraudulent and improper. Having been effected during our minority, the defendants must show that the partition was a fair one. But no attempt has been made to prove that it was fair and legal. The burden of proof lay heavily upon the defendant by reason of our minority, and also because the partition was effected with an illiterate woman. The mere production of the partition-deed would not assist the defendants and would not be an answer to our case—*Dharmáji v. Gurrav* <sup>(1)</sup>. The defendants have not produced books of account. If they had done so, we would have been in a position to show that the partition was not fair. Unless the partition is proved beyond doubt to be fair and legal we are not bound by it—*Kalee Sunkur v. Denendro* <sup>(2)</sup>.

*Lang* (Advocate General with *Máneksháh J. Taleyárkhán*) for respondent No. 1 (defendant No. 1, Dánává):— This suit is to recover certain specified property and not for the rectification or

(1) 10 Bom. H. C. Rep., 311.

(2) 23 W. R., 68.

setting aside of the partition. The plaintiff being a minor at the time of the partition, his mother acted as his guardian. A partition by an infant's guardian has the same effect as a partition by an adult member of the family. In the plaint there are vague allegations of fraud, but such vague allegations cannot entitle the plaintiff to relief. Fraud must be distinctly and specifically stated and proved. There is no allegation in the plaint that the plaintiff did not get a fair share of the property. The partition is binding on the plaintiff until he proves that it was fraudulent and unequal. The fact that the plaintiff was a minor at the time of the partition is by itself not sufficient to set aside the partition—Mayne's Hindu Law (5th Ed.), para. 435; *Deowanti v. Dwárkánáth* <sup>(1)</sup>; *Nállápa Reddi v. Bálammal* <sup>(2)</sup>; *Lakshmidá v. Ganpat Moroba* <sup>(3)</sup>; *Hasan Ali v. Nazo* <sup>(4)</sup>; *Ráo Bahádur Singh v. Jowáhir Kuar* <sup>(5)</sup>. As to limitation, the Judge found that the suit was not time-barred. We contend that it is time-barred. The Judge found that the plaintiff was, at the time of the institution of the suit in 1889, twenty-six years old. Plaintiff then attained majority in 1881, and he ought to have brought the suit within three years from that time—Section 7 of the Limitation Act (XV of 1877).

*Baláji A. Bhágvat* for respondents Nos. 3 and 4 (original defendants Nos. 3 and 4, Mállápa and Kotrapa).

*Inverarity*, in reply :—We do not recognize the alleged partition and, therefore, the suit is not one to set it aside. In fact, we claim the property as the sole surviving male member of the family. Such a suit is governed by twelve years' limitation, and as we attained majority in 1881, the suit is in time. Further, we say in our deposition that we came to know of the partition deed in 1889, and that being so, the suit is within time even if it be held to be one for setting aside the partition, and governed by three years' limitation under article 91, Schedule II of the Limitation Act.

**BAYLEY, C. J. (Acting):**—By the plaint presented on the 24th August, 1889, to the Court of the First Class Subordinate Judge

(1) 8 Beng. L. R., 363 (note).

(2) 2 Mad. H. C. Rep., 182.

(3) 4 Bom. H. C. Rep., O. C. J., 150, at p. 159.

(4) I. L. R., 11 All., 456.

(5) L. R., 11 Ind. App., 75.

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of Dhárwár, the plaintiff, describing himself as by caste Lingáyat, his age at about twenty years, and his occupation money-lending, sues as the sole owner of all undivided family property, which formerly belonged to three brothers, Dodmallápa, Revansiddápa, and Malsiddápa (the plaintiff's father), Revansiddápa having divided the family property with Dodmallápa in 1872 : and after alleging that his father Malsiddápa died about eighteen years ago when the plaintiff was a minor ; that the family estate had not been divided amongst Dodmallápa (the father-in-law of the minor defendant) Basalingápa, who was the adopted son of Dodmallápa (the husband of the first defendant), and the plaintiff, and that Dodmallápa died about two years ago, and Basalingápa in April, 1889, each of such two last mentioned persons having left no issue ; he prayed :

(1) that the Court would declare that he had full right and ownership over all the moveable and immoveable property of the family of the plaintiff that had been in the *wahiwat* of Dodmallápa and Basalingápa ;

(2) that if the defendant should contend that Dodmallápa or Basalingápa had obtained a *fárkhat* from the mother of the plaintiff, the Court would declare that the plaintiff having been a minor at that time, that that transaction was improper and fraudulent, that it did not bind the plaintiff and did not affect his right, claiming to obtain a declaration of the plaintiff's ownership over all the property thereafter mentioned.

The particulars of the property claimed not having been given in the plaint, and it not having been therein mentioned whether or not the property had been in the plaintiff's possession, the Court, on the 24th August, 1889, ordered that his pleader should state whether or not the possession of the property had been with the plaintiff. On a subsequent day the plaintiff's pleader gave the particulars of the property, and on presenting an application praying that the suit should be treated as one for possession, the plaint was ordered to be registered. The property claimed was finally valued in the plaint at Rs. 60,000.

The first defendant in her written statement said that the plaintiff's claim was false, and was barred by limitation. That in

1877 a partition was made between Chanawirapa, mother of the plaintiff, and Dodmallápa, and the document made in respect of it had been registered. That in accordance therewith the plaintiff and his mother had been in possession of the property allotted to their respective shares and had been carrying on the *wahiwat* separately. That the plaintiff was fully aware that the transaction of the partition and the *fárkhat* made in respect thereof were made in good faith, openly, and without any fraud, and that since such partition the plaintiff had no right to bring this suit, and she asked that the plaintiff's claim might be rejected, and costs awarded to her.

Upon issues framed, the Subordinate Judge found that the claim was not barred by limitation; that the plaintiff was twenty-six years old at the institution of the suit; that there was a valid partition between the plaintiff's mother acting on behalf of the plaintiff and Dodmallápa; that the plaintiff ratified it by his conduct or acquiescence, and that it should be held binding as against him; that the plaintiff could not recover the property claimed or obtain the declaration or order he sought, and he rejected the claim with costs.

The plaintiff appealed to the High Court, and among other grounds of objection to the decision of the Subordinate Judge, alleged that the same was contrary to law and against the weight of evidence; that there was no evidence to show that the plaintiff's mother signed the deed with full knowledge of its contents and that she had independent advice at the time she executed it; that the onus ought to have been thrown on defendants to show that the partition was a legal and proper one; and that the Court erred in holding the plaintiff bound by the partition without determining whether such partition was legally and properly made; and that the lower Court had held without any evidence whatever that plaintiff had ratified the alleged partition after he attained his majority.

At the hearing before us it was argued by Mr. Inverarity on behalf of the appellant that the plaintiff did not admit that the partition deed was executed; that he treated it as a nullity; that the onus lay on those who set up the partition; and that defendant must produce materials sufficient to test the validity

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of the partition; that it was not alleged that there was any examination of accounts on behalf of plaintiff's mother, and that the partition was made between a woman of small intelligence, and Dodmallápa, then the manager of the family, and who was described by the Subordinate Judge as an adventurous trader who made a large addition to the family property.

First as to the plaintiff's age. The defendants having alleged that the plaintiff was considerably older than in his plaint he represented himself to be, the Subordinate Judge, when the case first came before him in June, 1890, framed an issue "Is the plaintiff twenty or twenty-eight years old at present?" and when he decided the case in June, 1891, found that the plaintiff was twenty-six at the institution of the suit, *i. e.* that he was born in 1863, so that at the date of the partition in 1877 he was fourteen years old. I see no reason to dissent from that finding, based as it was upon a deposition of the plaintiff taken down by the Mámíatdár of Ránebennur in August, 1887, (Exhibit 71) when the plaintiff stated that he was then twenty-four. He, therefore, completed his eighteenth year and attained his majority in 1881.

I will next consider the frame of the suit. The execution of the deed of partition of the 28th August, 1877, (Exhibit 114), having, in my opinion, been duly proved, one of the attesting witnesses thereof was a brother of the plaintiff's mother, can the plaintiff be allowed for the purposes of this suit to treat that instrument as a nullity, and throw the burden of proving that the partition was a just and fair one upon those who set it up? As stated in Mayne's Treatise on Hindu Law (5th Ed.), section 435: "It is now quite settled that a partition made during the minority of one of the members will be valid, and if just and legal, will bind him, and when he arrives at full age he may apply to have the division set aside as regards himself, if it can be shown to have been illegal or fraudulent, or even if it was made in such an informal manner that there are no means of testing its validity." The evidence shows that the partition was acted on from the time that it was effected, not only by the defendants, but by the plaintiff's mother, and afterwards by him, his mother stating before the Registrar when she admitted execution of the deed that as guardian of the plaintiff she had received the share allot-

ted to him of the value of Rs. 25,700. No issue was raised or asked for in the lower Court as to whether the partition was illegal as regards the plaintiff, and I agree with the Subordinate Judge that there was no proof that it was unfair or unjust as regards him.

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The argument on behalf of the plaintiff is that it is not necessary to set aside the partition, as he seeks to recover possession of the family property on his title as the last surviving male member of the family,—an argument, no doubt, of much dexterity, but in my opinion clearly an unsound one. A similar contention was put forward in *Jagadamba Chōwdhrani v. Dakhina Mohun*<sup>(1)</sup> where an adoption was relied on in answer to a claim made by the plaintiffs as heirs. The Judicial Committee of the Privy Council say (p. 92): “It is ingeniously argued for the plaintiffs that they are suing, not to set aside any adoption, but to recover possession on their *primā facie* title as heirs, that it is the defendants who have to allege and prove adoption, and that on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the defendants are in possession in the character of adopted sons; the *primā facie* title is with them, and until that is displaced they ought to retain possession.....But whatever the mode of pleading, there is but one issue on the merits of the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the defendants hold their property. If the validity is proved, the plaintiffs cannot succeed in their claim.” Their Lordships state (p. 93) that in the earliest case cited at the bar from the Sadar Divāni Adālat Reports for 1850, it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption, Mr. Justice Colvin saying “The plain remedy for the plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement of continued possession of the adopting widow.” Their Lordships, therefore, held that the suit by the reversionary heirs of the husband brought more than twelve years after the adoption

(1) I. L. R., 13 Ind. App., 84.

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was barred by article 129 of Act LX of 1871, the article dealing with suits to establish or set aside an adoption.

The same point came again before the Privy Council in 1892—*Mohesh Narain Munshi v. Taruck Nath Moitra* <sup>(1)</sup>. Their Lordships say (p. 35): "The present is not a suit in which the plaintiff expressly asks for a decree to 'set aside' the defendant's adoption, or to obtain a declaration that the 'adoption was invalid,' " which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question—was the adoption invalid? In the case of *Jagadamba Chowdhrani v. Dakhina Mohun* <sup>(2)</sup>, which was very fully argued and carefully considered, it was settled that a suit to set aside an adoption within the meaning of these words in the Limitation Act need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of validity of an adoption set up in defence, is a suit to set aside an adoption.

In a case decided by the High Court at Allahabad in 1889, *Hasan Ali v. Nazo* <sup>(3)</sup>, a Mahomedan, who in October, 1875, executed a deed of gift of his property to his two daughters, the defendants, under which possession was taken by them, died in 1885, never having taken any steps to have the deed of gift set aside. In 1886 a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was held that as a suit by the donor to set aside the deed would at the time of his death be barred by article 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff, who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested on the plaintiff for

(1) L. R., 20 Ind. App., 30. (2) I. L. R., 13 Ind. App., 84.

(3) I. R., 11 All., 456.

obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. The Court relied upon the case I have already referred to—*Jagadamba Chowdhraji v. Dakhina Mohan* (1).

The present suit must, in my opinion, be regarded as one to set aside the deed of partition executed by the plaintiff's mother on his behalf on the 28th August, 1877 on the ground that it was unfair and fraudulent as against him. In the 2nd para. of his prayer, as already pointed out, the plaintiff asks that if the defendant should contend that a *fárkhat*, i. e. the deed of partition, had been obtained from his mother, the Court will declare that the plaintiff having been a minor at that time, such transaction was improper and fraudulent, and that it does not bind the plaintiff or affect his right. The plaint, however, until the 2nd para. of the prayer is reached, does not charge any fraud, or allude in any manner to the partition effected in 1877. It was, however, held by the Privy Council in *Gunga Náráin Gupta v. Tiluckráam Chowdhry* (2), that where fraud is the ground of action, the particulars thereof must be set forth in the plaint, which otherwise should be ordered under section 53 of the Civil Procedure Code to be amended or rejected. Their Lordships say (p. 121): "When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said in *Wallingford v. Mutual Society* (3): 'With regard to fraud, if there be any principle, which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'" The suit in that case had been brought in the Court of the Subordinate Judge of the zilla Goalpara, in the Bengal Presidency, where efficient legal advice would doubtless be more difficult to procure than it would be in Calcutta. See also a recent decision on the same point in this Court—*Krishnáji v. Wámanáji* (4). The present suit, having regard to its real nature, appears to be defective, disclosing no

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(1) L. L. R., 13 Ind. App., 84.

(3) 5 App. Cas., 697.

(2) L. R., 15 Ind. App., 119.

(4) I. L. R., 18 Bom., 144.

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cause of action, as no particulars of the fraud, which forms the ground of the suit, are set forth in the plaint.

Assuming, however, that the suit is well framed, I am of opinion that it is barred by the law of limitation. The suit being substantially one to set aside the deed of partition of August, 1877, article 95 or 91 of Act XV of 1877 would apply, as it is either a suit for relief on the ground of fraud, or to cancel or set aside an instrument not provided for, which must be brought within three years from the time when the fraud becomes known to the party wronged, or when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. Under section 7 of that Act the plaintiff could institute his suit within the same period after his disability as a minor had ceased as would otherwise have been allowed from the time prescribed therefor, *viz.*, three years. Having attained his majority in 1881, he should, assuming that he had full knowledge of the facts, have brought his suit in or before 1884. Not having brought it until the 24th August, 1889, and having been fully aware of the circumstances entitling him (if at all) to have the instrument cancelled or set aside, and of the fraud and unfairness which he alleges were practised on his mother from the time of his attaining his majority if not before, although he professed his ignorance thereof until shortly before he instituted his suit, his suit was brought five years too late, and is consequently barred by limitation.

Upon the merits of the case I concur in the view taken by the Subordinate Judge.

The plaintiff in his evidence (Exhibit 72) admitted that his mother belonged to a rich family, so that she could doubtless have procured competent advice if she wished for it. He said that she was idiotic. Her evidence in the witness-box created a very unfavourable impression on the Subordinate Judge, who states that she began to dissemble at the very commencement of her examination, denying knowledge even of the most familiar circumstances which it is impossible for women to pass unnoticed. There is nothing to show that the plaintiff's mother was so ignorant as to be unable to secure her son's interests by a partition between Dōdmallāpa and the plaintiff. She was in all

probability assisted by her brother, who attested the deed of partition, which he is not likely to have done, if he had thought that in the partition the interest of his nephew, the plaintiff, had not been duly cared for and protected. In *Nallappa Redi v. Bálammal* <sup>(1)</sup>, it was held that there being no proof of fraud, or that undue advantage was taken of the plaintiff's minority, and in the absence of proof of gross inequality in the distribution of the property, the division was valid and binding upon the plaintiff.

On the 14th October, 1873, when Revansiddapa separated and divided the family property with Dodmallápa (Exhibit 116), the whole property was then valued at Rs. 36,225, of which Revansidda took his one-third share of the value of Rs. 12,075. Dodmallápa, by his successful trading and as manager of the remaining undivided family property, made large additions to it, so that when the partition, which the plaintiff now complains of, was made in 1877, its value had increased to Rs. 51,400, of which the plaintiff's mother acting on his behalf and as his natural guardian took one-half, *viz.*, Rs. 25,700, and she and the plaintiff have had the exclusive use thereof ever since. I think that the evidence clearly shows that from the time that the plaintiff completed his eighteenth year in 1881 until he instituted this suit in 1889 he adopted and ratified many transactions entered into by his mother, and that by his conduct and acquiescence during that period he must be taken to have ratified the partition made on his behalf by his mother in 1877. It is noteworthy, too, that the plaintiff did not bring his suit until two years after the death of Dodmallápa, and until four months after that of Balsingápa, the adopted son of Dodmallápa, although he had for many years known all circumstances on which he now relies in his attempt to get rid of the partition made in 1877. He and his advisers were doubtless aware of the hopeless nature of such a suit had it been brought while those two persons were alive.

For the above reasons, I am of opinion that the plaintiff's claim is an unfounded one, besides being barred by the law of limitation, and that we should, therefore, confirm the decree of the

(1) 2 Mad. H. C. R., 182.

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First Class Subordinate Judge at Dhárwár, and dismiss the appeal with costs.

FULTON, J.:—I concur with the learned Chief Justice in thinking that the decree must be confirmed. The principal argument put forward on behalf of the appellant was that a partition with a minor was not binding unless a fair share were allotted to him, and that in the present case it was impossible to determine that a fair share had been allotted because there were no materials from which to form an opinion. A good deal was said about the burden of proof in a case of this kind, but I think Mr. Inverarity successfully established the proposition that in the first instance it is for the person who alleges a partition with a minor to prove that it was a fair one. Mr. Mayne in dealing with the subject says, para. 435: "It is now quite settled that a partition made during the minority of one of the members will be valid and, if just and legal, will bind him. Of course his interests ought to be represented by his guardian or some one acting on his behalf, though I imagine the fact of his not being so represented would be no ground for opening up the partition if a proper one in other respects." Reference may also be made to West and Bühler's Digest, p. 672, and Dr. Jolly's History of the Hindu Law, pp. 99, 100, 128 and 129. The test of the validity of the partition appears to be its fairness.

Accepting, however, this criterion it seems to me that "fairness of partition" can be established not only by direct evidence of the amount of the family property and the method of its division, but also by proof of circumstances from which it can properly be inferred. In the present case I think such circumstances exist, in the fact that the partition deed was signed by the plaintiff's mother and attested by her brother; that the families have lived and traded apart just as if they were divided; and that the plaintiff, who must have attained the age of eighteen, about eight years before the institution of this suit, and who was about fourteen at the time of the alleged partition, never complained of its unfairness, until after the death of Baslingápa it became his interest to do so in order to obtain the property of the deceased. Our attention was called to the case of *Kalee Sunkur v.*

*Denendro*<sup>(1)</sup>, which is referred to by Mr. Mayne in support of the proposition that a minor, when he arrives at full age, may apply to have a division set aside if it was made in such an informal manner that there are no means of testing its validity. An examination, however, of that case shows that the circumstances were different from those now under consideration, inasmuch as the minor's proper guardian was not a party to the partition, no partition deed was drawn up, and the minor complained as soon as he came of age. On the other hand, reference may be made to the case of *Nallappa Redi v. Ballammal* <sup>(2)</sup>, in which it seems that the fact of the mother of a minor being a party to the partition was accepted as *prima facie* proof of the fairness of the division. In the case of *Deowanti v. Dwarka Nath*<sup>(3)</sup> no question as to the fairness of the partition appears to have arisen, but the Calcutta High Court held that a partition could undoubtedly be effected between one adult coparcener and a minor duly represented by his guardian. I refer to these decisions, but at the same time it must be remembered that the question of fairness of partition is probably one of fact to be determined by the circumstances of each case in regard to which not much assistance can be got from precedents. In the present case the fact that a partition deed was executed in 1877 between Dodmallapa and the plaintiff's mother is clearly proved. So far as the document goes, it seems a fair division which takes into account a substantial increase in the family property since the partition with Revansiddapa in 1873. It was urged, however, that further proof of the fairness of a transaction between an astute man of business and an illiterate woman under his control who now professes to know nothing whatever about it, is required. This may doubtless be conceded. But to my mind the fairness of the division is proved partly by the fact that the brother of the lady was a witness to the document and more conclusively by the conduct of the plaintiff himself, who, though he apparently has been of age since 1881, does not seem ever to have questioned its propriety till after the death of Baslingapa in 1889. The first of these facts appears to be of considerable importance, for though an attesting witness very often knows

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(1) 23 W. R., 68.

(2) 2 Mad. H. C. R., 182.

(3) 8 Beng. L. R., 363.

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nothing of the contents of the document to which he attaches his signature, the circumstance that in a family arrangement of this kind the mother's brother should be called in to attest, indicates that there was no secrecy about it. Such an attestation under the circumstances would probably have some weight in any country, and is, I think, entitled to special consideration in the Mofussil in India, where, as pointed out in West and Bühler's Digest, p. 233, witnesses are usually intended to attest not merely the signature but also the transaction. Unfortunately this brother is dead, so that it is impossible to ascertain with greater certainty what part he took in the matter, but as he was a man of some education—*vide* witness 74—it seems probable that he would ascertain the contents of the deed which his sister was signing. The strongest circumstance, however, against the plaintiff is his own conduct in doing nothing until 1889. It was contended that there was no proof that he knew of the partition deed, and there is certainly no direct proof, but it is highly improbable that he should have been ignorant of it, considering that even when it was executed he was not a very young child, and that it was signed by his mother, and attested by his uncle and four other witnesses who are not shown to have been in league with Dodmallápa or to have had any object at the time in keeping the matter secret. That the plaintiff is really a great deal older than he alleges, seems clear, having regard to Exhibit 71. There is no reason for supposing that in 1887 he misrepresented his age to the Mámlatdár or that the latter did not correctly record what he said. Even supposing it to be possible that he was ignorant of the partition deed, he must have known that he was ostensibly living and trading as a separate member of the family and have also been aware of his uncle's reputed wealth, and on his death he would not have acquiesced in its all being kept by Baslingápa if he thought he had not got his proper share. But in Exhibit 71 we find him going to the Mámlatdár to signify his assent to Baslinga's name being substituted for Dodmallápa's in the revenue accounts. Of course, if the members of the family were living in union, such an assent might be given; but the fact seems that they were not, and if the plaintiff supposed that there had been no partition, and that he was merely trading

with small sums advanced to him by his uncle out of the common stock, I should have expected that on his uncle's death he would at least have ascertained what that common stock was, even if he did not think it necessary to demand his share. But he did nothing at that time in assertion of his rights.

The above circumstances seem to me to afford *prima facie* grounds for the belief that a fair partition was made in 1877. To rebut this presumption the plaintiff has made no serious attempt to show that as a fact he got less than his share. He would, it is true, have a difficulty in showing the real amount of the moveable property, but there was some immoveable property about which evidence might have been given. Mr. Inverarity laid much stress on the non-production of Dodmallápa's accounts, but making due allowance for this circumstance I think it is insufficient to support an inference that the partition was unfair. The plaintiff himself has not produced any books, though as he has had separate transactions it might have been expected that he would have kept some from which to show the capital at his disposal. It is impossible to say what accounts Dodmallápa kept. Exhibit 108 refers to a *bot kháta* or ledger which he kept in 1883 containing accounts with individual debtors, but though it is probable that he kept other accounts it is not proved that he did so. Exhibit 104 shows that Baslinga produced no books when his income-tax was being assessed. Mr. Inverarity urged that whereas according to the partition deed Dodmallápa's capital was only Rs. 25,700 in 1877, the widow of Baslinga had in 1889 to pay duty on Rs. 60,000: but this increase may be due to Dodmallápa's success in business like the increase between 1873 and 1877. He also pointed out that the bonds shown to have been transferred to the plaintiff or his mother were for a very small amount, about Rs. 2,500, but we have no means of knowing how many bonds were really handed over.

Looking to all the circumstances I think, considering the apparent absence of any attempt at secrecy in the partition, the fact that the deed was signed by the mother and attested by her brother and other witnesses, and that for years the plaintiff seems to have acquiesced in the position in which he was placed,

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the only reasonable conclusion to come to is that it was a fair partition and, therefore, binding on the plaintiff.

Under these circumstances there is no necessity to go into the question arising as to the validity of the alleged adoption by Dánává.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.*

1894.

July 6.

ALOO NATHU AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, v. GAGUBHA DIPSANGJI, A MINOR, BY THE ADMINISTRATOR OF HIS ESTATE THE COLLECTOR OF AHMEDABAD (ORIGINAL PLAINTIFF), OPPONENT.\*

*Judge—Bias—Possessory suit in a Mámlatdár's Court—Mámlatdár acting in the management of the property under the orders of the Tálukdári Settlement Officer—Disqualification of the Mámlatdár as a Judge.*

No Judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias.

A Mámlatdár who under the orders of the Tálukdári Settlement Officer had acted in the management of the property in dispute in a possessory suit before him, was held to have such an interest as to disqualify him from trying the case.

Where an officer of Government has in the course of his executive duties formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant in a cause, the law will presume an interest creating a bias sufficient to disqualify him as a Judge.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb G. G. Desái, Mámlatdár of Dhandhuka in the Ahmedabad District, passed in a possessory suit.

The Collector of Ahmedabad as the administrator of the estate of one Gagubha Dipsangji, a minor, instituted a suit against the defendants in the Court of the Mámlatdár of Dhandhuka to recover possession of certain fields under the Mamlatdars Act (Bombay Act III of 1876). The defendants claimed to be permanent tenants.

\* Application No. 20 of 1894 under the extraordinary jurisdiction.