APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BHAURAO *alias* RAMCHANDRA JIWAJI PITRE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RADHABAI *kom* LAXUMAN JIVAJI PITRE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1909: *March* 9.

Arbitration—Award—Suit to file an award—Want of jurisdiction in the arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Partition is effected by the award itself.

When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.

An award is equivalent to a judgment whether it has passed into a decree or not. It is binding upon the parties. In cases where it directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their joint interests.

Muhammad Newaz Khan v. *Alam Khan*(1), and *Laldas* v. *Bai Lala*(2), followed.

APPEAL from the decision of V. V. Phadke, First Class Subordinate Judge at Belgaum.

Laxman and Bhaurao (plaintiff) were two brothers who lived together. Disputes arose between them and they referred their disputes to arbitration. The arbitrators delivered the award which effected a partition between the two brothers.

Bhaurao next applied to the Court for a decree in the terms of the award. Laxmanrao opposed his application. But before it could be adjudicated upon by the Court, Laxmanrao died. Bhaurao then withdrew his application.

Bhaurao filed the present suit wherein he claimed possession of the whole property, alleging that no decree having been taken upon the award, the brothers were not divided in interest, and that the whole property survived to him.

* First Appeal No. 51 of 1908.

(1) (1891) 18 Cal. 414. (2) (1908) 11 Bom. L. R. 20.

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His claim was resisted by the widow of Laxmanrao.

The Subordinate Judge rejected the plaintiff's suit for reasons which he expressed as follows :—

"Whether an award can be said to effect separation as soon as it is passed is a question untouched by any decision, and so far as I am aware there is no Bombay ruling covering the point. In two cases the Madras High Court has decided (I. L. R. 19 Mad. 290; I. L. R. 20 Mad. 490) that an award is a final judgment, that partition is to be deemed as effected on the date of the award and that an award bars any fresh suit for partition. It appears that in the case in Vol. 19 all the parties had objected to the award and still the Court held that the parties must be held to be bound by it. The above authorities govern the present case and I have no hesitation in following them. The award being thus binding on the parties the plaintiff must bring a suit to enforce it. He cannot pretend to ignore it and claim the entire property in contravention of the terms of the award as if he has become the sole owner of the entire property by the death of his brother.

The plaintiff appealed to the High Court.

M. B. Chaubal and *S. S. Patkar*, for the appellant :—The cases of *Krishna Panda* v. *Balaram Panda*[1] and *Subbaraya Chetti* v. *Sadasiva Chetti*[2] cited by the lower Court do not apply to the present case because when the parties referred the matter to the arbitrators each maintained that he was the owner of the whole property—they did not concede that the property was joint. The question which the arbitrators had to decide was whether the property was the self-acquired property of any of the parties to the suit or was joint property and could not go further and decide that the property should be partitioned. The arbitrators had no jurisdiction to go beyond the reference and to bring about a disruption of the joint property without the consent of the parties. Secondly, the award was only an inchoate partition. When the application for filing the award was numbered as a suit, Laxman, the younger brother, thought he would survive the appellant and raised various objections to the award including the objection that the award was not a legal award. But Laxman died and the application was withdrawn by the appellant. Till the award was filed, there could not be said to be a final decree. It has been held that so long as a decree for

(1) (1896) 19 Mad. 290. (2) (1897) 20 Mad. 490.

partition remains under appeal, it does not effect severance: *Sakharam Mahadev Dange* v. *Hari Krishna Dange*[1]. We say that the award was at most an inchoate partition and did not effect severance: *Babaji Parshram* v. *Kashibai*[2].

G. S. Rao, for respondent:—The point as to want of jurisdiction in the arbitrators to effect partition as being beyond the reference was not raised in the Court below. On the second point award is equivalent to a judgment: *Laldas* v. *Bai Lala*[3].

CHANDAVARKAR, J.:—The first point raised on appeal is that the decision of the arbitrators with regard to the partition which they directed to be made by the award was *ultra vires*, because there was no submission upon that point to their judgment and that, therefore, the award so far as the direction as to partition was concerned was invalid and not binding upon the parties. It is no doubt open to the appellant to urge and show that the award is not binding upon him for want of jurisdiction in the arbitrators. But the question of jurisdiction turns in the case on a question of fact, *viz.*, did the submission or reference to arbitration include the question of partition or was it confined only to the dispute whether the property was joint or self-acquired? The former like the latter question depended upon evidence. But the pleadings in the Court below show that that question was not only not raised there but was virtually waived. On the basis that the award was valid what was urged in the Court below was that the award did not effect a partition by metes and bounds or create a severance of interests between the two brothers, and dissolve the co-parcenery between them, but that it merely resulted in an inchoate partition, which could not legally take effect until the award passed into a decree.

It was urged that the award, so long as it did not pass into a decree, could not effect severance of interests between the brothers. But that is not the law. *Muhammad Newaz Khan* v. *Alam Khan*[4] and *Laldas* v. *Bai Lala*[5] are authorities

(1) (1881) 6 Bom. 113.
(2) (1879) 4 Bom. 157.
(3) (1908) 11 Bom. L. R. 20.
(4) (1891) 18 Cal. 414.
(5) (1908) 11 Bom. L. R. 20.

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for the proposition that an award is equivalent to a judgment, whether it has passed into a decree or not. It is binding upon the parties. And where it directs partition to be effected, it dissolves the joint family, and from the moment of its date severs their joint interests. On these grounds we confirm the decree with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *March* 18.

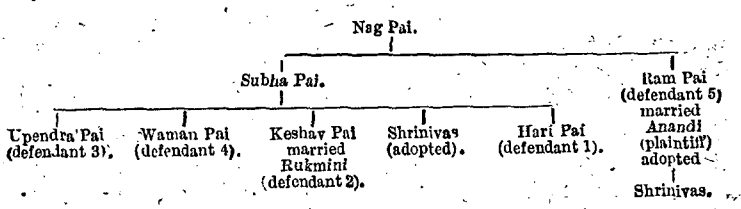
ANANDI *alias* SHITABAI *kom* RAM PAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI SUBA PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Mitakshara—Adopted son—Succession to the adopted son—Adoptive mother entitled to succeed in preference to adoptive father.

Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed, in preference to the adoptive father, to a son taken in adoption.

SECOND appeal from the decision of C. C. Boyd, District Judge of Kánara, confirming the decree passed by K. R. Natu, Subordinate Judge at Kumta.

The relationship between the parties to this suit appears from the following genealogical tree:—



The parties shown in the above genealogical tree were living together as a joint family. A partition took place between

* Second Appeal No. 800 of 1907.