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June 30.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

PRANJIVANDAS SHIVLAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 6 TO 11 AND 13) APPELLANTS v. ICHHARAM VIJBHUKHANDAS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

Hindu Law—Partition—Property to be partitioned should be taken as existing at the date of the suit—Shares taken away by some of the co-parceners before the suit not to be taken into account.

The plaintiff, as representing one branch of the family, sued the defendants who represented the other two branches, to recover by partition his share in the property which he alleged was one-third. The plaintiff had two brothers, one of whom had separated from the family by receiving his share (which then was 1/12th) some years before the suit. The defendants contended that the 1/12th share should go in reduction of the plaintiff's share at the partition, that is, he was entitled to 1/3 minus 1/12 = ¼th share. The lower Court having awarded a ⅓rd share to the plaintiff, some of the defendants appealed :—

Held, the share to which the plaintiff was entitled in the family property was ⅓rd and not ¼th, for partition should be made *rebus sic stantibus* as on the date of the suit.

APPEAL from the decision of N. R. Majumdar, First Class Subordinate Judge at Surat.

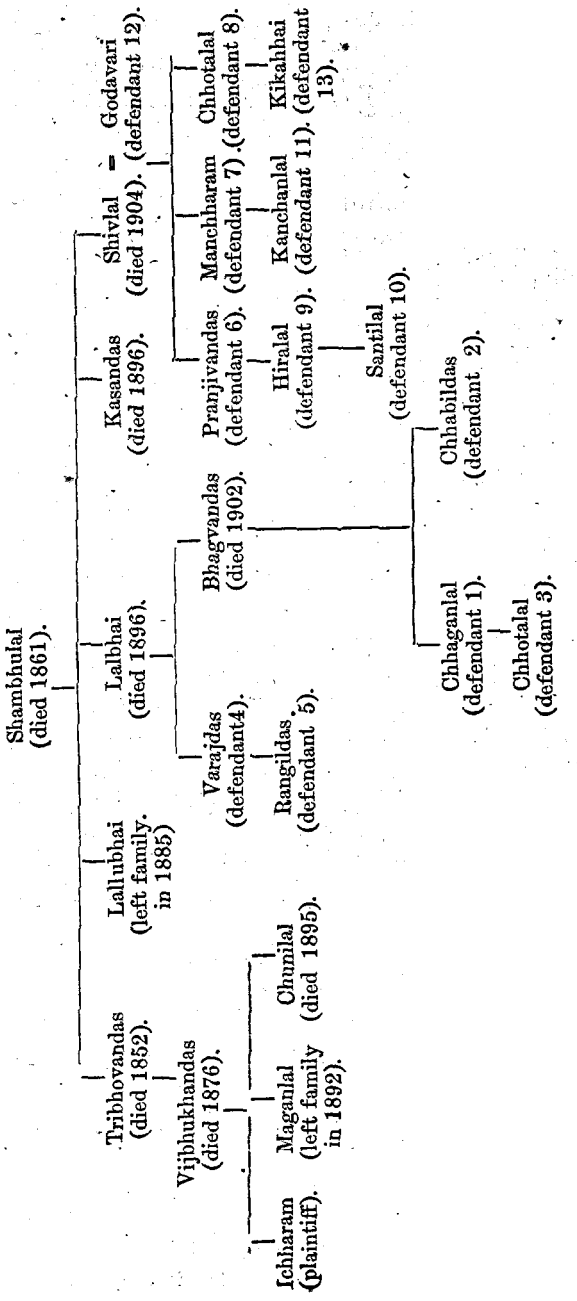
Suit for partition.

The property to be partitioned belonged originally to one Shambhulal, who was the common ancestor of the parties. Shambhulal had five sons : Tribhovandas, Lallubhai, Lalbhai, Kasandas and Shivlal. Of these, Lallubhai separated from the family in 1885. Tribhovandas had three grandsons. Maganlal, one of them, received Rs. 20,575 in lieu of his 1/12th share of the family property and left the family in 1892. Kasandas died issueless in 1896.

In 1911, the plaintiff as representing Tribhovandas' branch of the family sued to recover a ⅓rd share of the family property on partition with the defendants who represented Lalbhai and Shivlal's branches of the family.

* First Appeal No. 184 of 1914.

The relationship of the parties is shown by the following genealogical tree:—



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The defendants contended *inter alia* that the share taken away by Maganlal (1/12) in 1892 should be deducted from the share to be awarded to the plaintiff in the family property, that is, the share of the plaintiff was 1/3 reduced by 1/12, which was 1/4 in the family property.

The Subordinate Judge held that the plaintiff's share in the property was 1/3 and not 1/4, on the following grounds :—

It is next contended that even if this be so, the share of the plaintiff is, nevertheless, less than one-third. It is argued that when Maganlal, the brother of the plaintiff, separated in 1892 the shares of the four branches must be deemed to have been determined, that at that time the plaintiff's branch was entitled to a fourth share, that Maganlal's share was, therefore, one-twelfth, that plaintiff and his other brother, Chunilal, were entitled to two shares between them, that the remaining three branches were entitled to three shares each, that on the death of Kasandas each branch including the plaintiff's branch, got one share more, and that, therefore, the plaintiff is entitled to three shares, and each of the other two branches to four shares, or in other words, that the plaintiff's share is three-elevenths and that of each of the other branches, four-elevenths. For this position reliance has been placed on the case of *Manjanatha* v. *Narayana*, I. L. R. 5 Mad. 362. Had an actual division taken place and a share been allotted to the plaintiff's brother, Maganlal, then undoubtedly this case would have been on all fours with the present case. But here Maganlal took a lump sum and left the family. This circumstance distinguishes the present case from the Madras case above referred to. A release, no doubt, operates, as I have already said, as a partition for some purposes ; but it is not an actual partition. This is evident from the case of *Wasantrao* v. *Anandrao*, 6 Bom. L. R. 925 affirmed in appeal to the Privy Council, 9 Bom. L. R. 595. There one, Vithoba, died leaving behind him surviving a son named Kashinath and two grandsons, Ganpatrao Kashinath and Madhavrao Kashinath Madhavrao passeed a release to his father for consideration. Madhavrao's son, Vasantrao, filed a suit against Ganpatrao's son, Anandrao, after the death of Kashinath and Ganpatrao for partition. It was held that the release by Madhavrao enured for the benefit of the co-parcenary and that the shares must be determined as though Madhavrao was dead. Wasantrao was, therefore, awarded a half share. In the subsequent case of *Shivajirao* v. *Vasantrao*, I. L. R. 33 Bom. 267, Madhavrao was looked upon as a co-parcener, who had elected to take his portion and receded from the family. Had the rule laid down in the Madras case been adopted, it would have been held that

at the time of the retirement of Madhavrao, the property was divisible into six shares, that one share was taken by Madhavrao, and that one share remained with Wasantrao, and two shares with Kashinath and Ganpatrao; that on the death of Kashinath, one of his two shares passed by survivorship to Wasantrao and the other to Ganpatrao, and that, therefore, Wasantrao was entitled to two shares and Ganpatrao to three shares. But as we have seen, Wasantrao was held entitled to an equal share with Anandrao. This case is, therefore, a direct authority for holding that the plaintiff's share is one-third.

Defendants representing Shivlal's branch appealed to the High Court.

G. S. Rao for the appellants.

H. C. Coyaji and *Rangnekar* with *H. V. Divatia*, for respondent No. 1.

N. K. Mehta, for respondent No. 2.

Mulji and Thakordas, for respondents Nos. 3, 5 and 6.

T. R. Desai, for respondent No. 4.

Rao:—The plaintiff's share is one-fourth and not one-third. The share taken by Maganlal from the joint property should be set off against plaintiff's share, that is, his share is one-third reduced by one-twelth which equals one-fourth. See *Manjanatha* v. *Narayana*[1]; Mayne's Hindu Law, section 473; Trevelyan's Hindu Family Law, p. 325; Smriti Chandrika, Chap. XII, section 4; Mitakshara, Chap. I, sections 3, 5; Mayukha, Chap IV, section 4, pl. 17-21.

The case of *Wasantrao* v. *Anandrao*[2] is distinguishable for the release there was proved to be bogus.

Coyaji:—The property to be partitioned should be taken as existing on the date of partition. The shares taken by some of the co-parceners who separated years before the partition cannot be taken into account: *Gavrishankar Parabhuram* v. *Atmaram Rajaram*[3];

(1) (1882) 5 Mad. 362. (2) (1904) 6 Bom. L. R. 925.
(3) (1893) 18 Bom. 611.

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Ram Pershad Singh v. *Lakhpati Koer*[1]; *Balabux* v. *Rukhmabai*[2]; and *Anandibai* v. *Hari Subu Pai*;[3] The case of *Manjanatha* v. *Narayana*[4] must be taken as overruled by *Balabux* v. *Rukhmabai*[2]. It is not referred in late cases: *Sudarsanam Maistri* v. *Narasimhulu Maistri*[5]; *Ranganatha Rao* v. *Narayanasami Naicker*[6]. See also Trevelyan's Hindu Family Law, p. 337.

BATCHELOR, J.:—This is an appeal brought from a preliminary decree made by the learned Subordinate Judge of Surat in a suit for partition. The appeal is brought by the defendants Nos. 6 to 11 and 13 who are represented before us by Diwan Bahadur G. S. Rao.

The genealogical tree of the parties, which is requisite to an understanding of the points involved, is set out at the beginning of the judgment of the lower Court and need not now be repeated. The main argument on behalf of the appellants has been that the plaintiff's share in the family property should be only ¼th and not ⅓rd as the learned Judge below has decided. As there are now existing only three branches descended from the original ancestor, Shambhulal, it is clear, and is admitted, that if partition is to be made having regard only to the present state of the family, the plaintiff is entitled to ⅓rd. But, says Mr. Rao, his claim is reduced to ¼th owing to the circumstance that in 1892 his brother Magan separated from the family, and took away with him a 1/12th share of the family property. The whole question really involved in this argument is, whether partition is now to be enforced in accordance with the existing condition of the family, or whether, in enforcing partition now, regard is to be

(1) (1902) 30 Cal. 231.
(2) (1903) 30 Cal. 725.
(3) (1911) 35 Bom. 293.
(4) (1882) 5 Mad. 362.
(5) (1901) 25 Mad. 149.
(6) (1908) 31 Mad. 482.

had to an allowance made for a share withdrawn by one member of the plaintiff's branch of the family, Magan, when he seceded from the coparcenary in 1892. Mr. Rao contends that allowance must be made for Magan's withdrawal of the 1/12th share, and the argument is that partition is primarily *per stirpes* and is *per capita* only among the members of any particular branch and, therefore, that in allotting now its appropriate share to any one branch the Court should reckon with any portion of the joint property which has already fallen to the share of that branch. In the particular case before us the argument works out in this way, that since the plaintiff's branch in the person of Magan has already received 1/12th of the property, the present twelve shares must be distributed among the three branches with due regard to the 1/12th already acquired by the plaintiff's branch, that is to say, since 1/12th has already gone to the plaintiff's branch, plaintiff is now entitled not to the ⅓rd which he would ordinarily receive, but to the ⅓rd minus the 1/12th, in other words ¼th. In support of this argument reliance is placed upon the decision in *Manjanatha* v. *Narayana*[1]. That case was quoted before the learned Judge below, but he avoided its authority, first, because he regarded it as distinguishable on its facts from our present case, and, secondly, because he was of opinion that in *Wasantrao* v. *Anandrao*[2] a Bench of this Court had adopted the contrary opinion. It seems to me, however, clear that *Wasantrao's case*, has no bearing upon the present question. For, first, the point now before us was never suggested in *Wasantrao's case*, nor was it considered by the Court, and, secondly, the decision of this Court rested on the ratio that Madhav who had released his share must be regarded as having died, so that his share lapsed to the family.

[1] (1882) 5 Mad. 362. [2] (1904) 6 Bom. L. R. 925.

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Wasantrao's case, therefore, being laid out of consideration as of no relevance to our present facts, we are left with *Manjanatha* v. *Narayana*[1] as the only direct authority. I am unable to agree with the learned Subordinate Judge that this case can be fairly distinguished from the case now before us. On the contrary, it seems to me that the facts in the Madras case were essentially the same as those with which we have to deal, and if the Madras decision is accepted as good Hindu Law applicable also to this Presidency, then I have no doubt that the appellants ought to succeed on this point.

The genealogy of the parties and their relative position in the Madras case are set out in the judgment of the lower Court and may also be gathered from the report in the Madras Series. I will not, therefore, encumber this judgment by repeating them. It is enough to say that at a partition made in 1867 seven 1/12th shares were allotted to various members of the family, and there were left five 1/12th shares in the possession of Ramkrishna, Manjanatha and Narayan II. Ramkrishna having died, Manjanatha brought a suit for partition. It was held by the Madras High Court that he was entitled to three of the five 1/12th shares left and that Narayana II was entitled only to the remaining two shares. That decision was arrived at, as I understand the judgment, because the learned Judges held (1) that in 1867 there was no disruption of the joint family, but only a separation by certain members, the others continuing joint after as before this event; (2) that the rule directing division primarily *per stirpes* and secondly *per capita* inside each branch applies only where all the coparceners desire partition at one and the same time; and, (3) that since the two brothers of Manjanatha had in 1867 taken together three 1/12ths shares, each taking 1½ such shares, therefore the plaint-

(1) (1882) 5 Mad. 362.

iff Manjanatha should get three shares, 1½ in his own right and 1½ as representing his deceased father, so that Narayan II could only get two of these 1/12th shares. Narayan II, it should be said, had contended that the distribution should be equal as things stood at the date of suit, so that the plaintiff, Manjanatha, should receive 2½ shares out of the five. But this contention was disallowed, because, as I have explained, the learned Judges decided that regard must be had to the share which had already gone to the plaintiff Manjanatha's branch. Now if we apply this reasoning to the facts before us, we start with this, that in 1892 the present plaintiff's branch in the person of Magan received a 1/12th share. That must remain to the debit of the plaintiff's branch, and consequently the plaintiff's present claim cannot exceed the ⅓rd to which he would ordinarily be entitled minus the 1/12th which his branch had already taken. In other words, upon the reasoning adopted in the Madras judgment the appellants are right in saying that the plaintiff's present claim cannot exceed a ¼th share. The learned Subordinate Judge, I think, was mistaken in supposing that the Madras judgment was based on the view that in 1867 there had been an actual or general division among Manjanatha's ancestors. On the contrary the Court held that the members, who did not separate from the coparcenary in 1867, continued throughout to form a joint family. That is identically the case here where both parties agree, and where the learned Judge below has found, as a fact, that when Magan separated in 1892, the other members did not divide but continued as a joint family both before and after 1892. In view of the Privy Council's judgment in *Balabux* v *Rukhmabai* [1] it is clear that this is the position which must be accepted for the determination of our present

[1] (1903) 30 Cal. 725.

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case. I must not be taken as suggesting that the decision of this appeal would be different even if the other members had to be regarded as reunited coparceners after 1892. I mention that their status continued joint only in order to show that in this respect also the facts in the Madras case were the same as those now before us.

The simple question, therefore, is, whether we should follow the decision in *Manjanatha's case*[1]. It is not binding on us, but it is deserving of all respect both on account of the learned Judges who delivered that judgment and on account of one's natural anxiety to avoid, if possible, any difference of judicial opinion on a question of law affecting rights of property. But with every wish to follow the view which commended itself to the learned Judges in Madras I find myself compelled to prefer the other opinion.

In explaining the grounds upon which my view is based, I desire to say, first, that so far as concerns this Presidency the Madras rule is to be supported only on the grounds of apparent arithmetical equality and depends on no text or specific principle of Hindu Law. For, the Hindu text which the learned Judges in Madras called in aid of their decision was from the Smriti Chandrika, a work of no direct authority in this Presidency; whereas the work which is of authority in this case from Gujarat, viz., the Vyavahara Mayukha, lays down exactly the contrary rule to that which has been prescribed in the Smriti Chandrika. For, the rule of the Mayukha is that in a partition between reunited coparceners the shares are equal, notwithstanding that the portions brought in on reunion are unequal: See West and Buhler, pages 783 and 784. As I have already said, the parties here

(1) (1882) 5 Mad. 362.

are not to be regarded as reunited coparceners, but in so far as any analogy is to be drawn from the position which reunited coparceners would occupy in a similar state of facts, that analogy is clearly adverse to the appellants.

Next I venture to doubt whether the apparent arithmetic equality secured by the Madras rule is a sufficient ground for the promulgation of such a general principle. For, though in one view the rule would work equitably, and did work equitably, in the particular facts of the Madras case, it is not difficult to imagine circumstances in which its working would be inequitable, as for instance, where, after the first separation, the members of the family who remained joint largely increased the wealth of the family by their own industry. I think, therefore, that such a rule as I am considering is hardly an adequate reason to depart from the ordinary rule that partition should be made *rebus sic stantibus* as on the date of suit. There is no direct authority for this opinion in the Bombay reports, but in a somewhat similar case expression was given to similar principle in *Konerrav* v. *Gurrav*.[1] Further, in my opinion, the peculiar legal system of the joint Hindu family should not be invaded or disturbed by unauthorized rules in pursuit of a doubtful equality. It must be remembered that in all such cases where one member separates and the others continue joint, those who continue joint do so at their own risk. Their position may improve or may suffer owing to any one of many chances, and the check on fortune introduced by the adoption of the Madras rule seems to me insignificant when compared with the risks and chances which must inevitably be accepted by those who elect to remain joint. And in this context I would observe that it seems to me a mistake to suppose that financial

[1] (1881) 5 Bom. 589.

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considerations are anything but a subsidiary point in the preservation of the Hindu system of the joint family. If all the members of a Hindu joint family were bent solely or principally each on his own financial betterment, the system could not, I suppose, survive very long. For these reasons I think that there is no general principle or consideration which can be appealed to in support of the rule adopted in Madras; and with unaffected respect I cannot but think that that rule cannot be reconciled with the legal principle which underlies the joint family system. That principle was stated in language now become familiar by the Privy Council in the judgment in *Appovier* v. *Rama Subba Aiyan* [1] in the following words:—"According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share." But the reasoning in the Madras case seems to me to proceed, and necessarily to proceed, upon the footing that the shares mentally ascertained at the first separation have ever since remained fixed and definite, so that throughout the intervening years before institution of the suit for partition, it can be predicated of each member of the joint family that he owned such and such a definite share of the joint family property. That, I respectfully think, is not in accordance with the principle, which rather invites the inference that when once the separating member retires with his share, the retirement becomes an accomplished fact whose influence is spent at the time, so that the joint members and their fortunes are no longer to be influenced by the incident. As I have indicated, that would be the case under the law prevailing in this Presidency, if the family had separated and reunited

[1] (1866) 11 Moo. I. A. 75 at p. 89.

in 1892, and the case in favour of equal shares at the time of suit appears to me to be still stronger where there has never been any general partition of the family, but all except the seceding member have continued joint. On this ground I am of opinion with very great respect that we ought not to give effect to the decision in *Manjanatha's case*[1] and that the appellants, who, upon this point rely wholly upon that decision, ought not to succeed. It may be worth mentioning in concluding this part of the case that it is admitted that in the distribution made of moveable property among these parties in 1898, and at all times up to the time of the institution of the suit, all the parties involved in this litigation have agreed in regarding the plaintiff as entitled to a ⅓rd share and in acting on that belief. I mention this not by way of suggesting that the appellants are in any way estopped by such conduct, but as indicating that the view which we are now taking is the view which naturally commends itself to a well-to-do Hindu family, and that the Madras rule which we are discarding would be novel and unfamiliar to that family.

[His Lordship next dealt with other points arising in the appeal and dismissed the appeal.]

HAYWARD, J.:—The plaintiff representing one branch, viz., Tribhovan's branch, sued defendants representing two other branches, viz.,Lalbhai's and Shivlal's branches, to obtain ⅓rd share in the family estate by partition. The defendants pleaded as to the share claimed (1) an ancestor's will limiting the share to Rs. 25,000 alleged to have already been paid, (2) a previous partition limiting the share to what it would have been at the withdrawal of Lalbhai, the sole representative of another branch, and (3) a previous partition limiting the share to what it would have been at the withdrawal

(1) (1882) 5 Mad. 362

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of Maganlal, another member of Tribhovan's branch. The defendants pleaded as to the property to be divided, (1) that the plaintiff's residential house and certain ornaments should be brought into hotch-potch as belonging to the joint family, and (2) that the moveable and immoveable property of the deceased Kasandas, the sole representative of yet another branch, should not be brought into hotch-potch as it was the separate property of Kasandas and did not belong to the joint family.

The Subordinate Judge held as to the share claimed that the plaintiff was entitled to ⅓rd, and as to the property to be divided that the plaintiff's house and ornaments should not, but that Kasandas' moveable and immoveable property should, be brought into hotch-potch as part of the joint family estate.

This appeal is brought by the representatives of Shivlal's branch contending that the share claimed should be not ⅓rd but ¼th only and that the plaintiff's house should, but the moveables of Kasandas should not, be included in the division as joint family property.

Now as to the share claimed, the first plea based on the ancestor's will and the second plea based on the previous partition and withdrawal of Lalbhai have been dropped and as regards the third plea based on the partition and withdrawal of Maganlal it has been admitted by both parties that after that withdrawal the remaining members of the family continued to be joint and were not in the position of separated parceners who had reunited. It was argued at the trial on this third plea that the plaintiff's branch was entitled to a 3/11ths share, viz., two shares left out of the three shares due to it at the withdrawal of Maganlal plus one share subsequently due to it as one of the surviving branches out of the share of the deceased Kasandas' branch and that

defendants' two branches were each entitled to 4/11ths, that is to say, the three shares each due to them at the withdrawal of Magan plus one share each subsequently due to them as surviving branches out of the share of the deceased Kasandas' branch. Plaintiff's branch was thus argued to be entitled to three shares and each of the defendants' branches to four shares out of the total of eleven shares for division. But in this appeal Mr. Rao who has the support of Lalbhai's branch and represents directly Shivlal's branch has urged that the share should not be 3/11ths but should be ¼th or 3/12ths. He has put it in this way that the share should be ⅓rd as *prima facie* due at the division of the three remaining branches less 1/12th withdrawn by Maganlal, one of the members of the branch now seeking partition, that is to say, ⅓rd minus 1/12th which is ¼th or 3/12th. It is argued that the defendants' branches, that is to say, Lalbhai's and Shivlal's branches, should be allowed to divide between them the remaining ¾ths or 9/12ths. This contention is based on the alleged necessity of preserving equal shares to each of the three branches as explained thus by Muttusami Ayyar J.:—"The rule that, as between different branches, division should be by the stock... is designed to ensure equality of partition in cases of vested interests held in coparcenary, and to carry out in those cases the principle that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares," and again in another passage, "At the first partial division, allotments due to the other coparceners were determined by an act of the mind for the purpose of computing the shares which were allotted to those who desired to separate, and in the same manner the allotments made at the first partition should be taken into account in calculating the shares to be awarded at the second in order that unequal partition, which is forbidden by law, may be avoided. This view is confirmed by the

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Smriti Chandrika, in which it is said with reference to a second partition among reunited parceners, that the shares may be unequal where the common wealth was at the time of reunion made up of disproportionate contributions, and that the inequality must be proportionate to the extent of the contribution made by each parcener at the time of reunion." These passages occur at pages 364 and 365 of the judgment in the case of *Manjanatha* v. *Narayana*[1].

It seems to me necessary to examine the rule here laid down with special care, as though it was laid down a number of years ago, it does not appear to have been since referred to in any subsequent case in Madras, and no similar case has been reported from this Presidency or from any of the other Courts in India. My first observation on this case is this that the rule as laid down for Madras would not ordinarily be necessary in this Presidency It was apparently framed to prevent inequality where sons enforce partition from their father and joint uncles. Such partition might apparently be enforced in Madras, but here it could only occur by common agreement with full knowledge of the consequences. For, it is a well established rule that sons cannot enforce partition against their fathers and joint uncles in this Presidency. My second observation is this: that with due deference to the opinion of the learned Judges who decided the case in Madras, it would not appear that the rule they have laid down would necessarily maintain the desired equality. If, for instance, the 3/11th share argued for in this case at the trial were given, then it is true that the branch would receive its full share as one of the surviving branches to the deceased Kasandas' branch. But if, as now argued here, only ¼th or 3/12ths were given, then not only would the share taken by one member

[1] (1882) 5 Mad. 362.

Magan be deducted, but the branch would also be deprived of its full ⅓rd or 4/12th share as one of the three surviving branches to the share of the deceased Kasandas' branch. It is also not difficult to imagine other cases in which the rule would result in serious inequality. For instance, if one member of a branch withdrew part of the share of the branch and the other member left were subsequently to die, the remainder of the share of the branch would survive to the other branches. The result would be that the branch would not have got its full share. The remainder of that share would have gone to swell the shares of the other branches. Again, if one member of a branch were to withdraw while the family was poor, then that branch would never under the rule be allowed its full share of the subsequently accummulated wealth of the family obtained by the united efforts of all the branches. My third observation is that the learned Judges who decided the Madras case appear to have based their rule in part, at all events, on the equality of spiritual benefits to be conferred by the various branches, whereas little weight can be given to the doctrine of religious efficacy in this Presidency as pointed out by Mayne in his work on Hindu Law in para. 3 at page 2 and para. 509 at page 711 of the 8th Edition. My fourth observation on the Madras judgment is this: that it sought confirmation from the analogy of a partition between reunited brothers, as prescribed by the passage already quoted from the Smriti Chandrika occurring in Chapter XII, para. 4, of that work. But that authority is only an authority in Southern India (see paras. 27 and 28 of Mayne's Hindu Law at pages 28 and 29 of the 8th Edition) and has been expressly dissented from by the Mayukha the authority recognised in Gujarat. This is the passage from the Mayukha: "Here some say that the unequal distribution being negatived by the phrase 'the shares

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must in that case be equal,' the prohibition of the 'eldest son's right' is repeated for the sake of making it clearly understood that although there is to be no inequality in making up the share of the eldest, yet in the distribution the shares may be even unequal, when made up of greater and lesser shares at the time of reuniting the property. But since the term 'eldest son's right' and the like is merely a declaration of the general meaning, therefore, if the contributions to the wealth were greater and less, still the share of each must be equal. And the same is the popular practice. Hence as the foundation of the practice is derived from this text, any supposition of a declaration contrary thereto is at variance with reason. For, another author says: 'The body of the law, like grammar, for the most part, is based on usage'" in Chapter IV, section 9, paras. 2 and 3 of that work. This has also been pointed out by West and Buhler, Volume 2, Book 2, para. 7A (1) (*c*). It seems to me, therefore, that whatever force the rule might have, as laid down by the learned Judges for Madras, it could not properly be applied to this case which comes from Gujarat. And it is significant that the rule was not applied by the parties in the year 1898 when they made a division into three shares of part of the moveable property and again in 1906 when they divided into three shares the sale profits of part of the immoveable property between the three branches of the family. The third share has, in my opinion, therefore, been rightly held to be the share to be given on the division of the remainder of the family property.

It seems to me, indeed, impracticable to frame any rule which would ensure absolute equality for all circumstances and for all branches and no *a priori* reason has been shown for applying the Madras rule to this Presidency. Nor have any texts been found in support of framing any such rule or departing from the general

rule laid dawn by Lord Westbury: "According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share" in *Appovier's case* [1] and further stated thus: "The position of any particular...person will be very important when the time for partition arrives, because it will determine the share to which he is then entitled. But until that time arrives, he can never say, I am entitled to such a definite portion of the property; because next year the ...division might be much smaller, and the year after much larger, as births or deaths supervene" in Mayne's Hindu Law, para 270 at page 340 of the 8th Edition. [The rest of the judgment delivered by his Lordship is not material to this report.]

Appeal dismissed.

R. R.

[1] (1866) 11 Moo. I. A. 75 at p. 89.