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person may be said to 'drive' it. He guides as well as propels it, and may be said to drive it as an engine driver is said to drive an engine."

The decisions of the Magistrate must, therefore, be reversed and the cases must be remanded to him in order that they may be retried and decided in accordance with law.

*Order reversed.*

R. R.

### APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Beaman.*

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January 18.

CHHOTALAL ADITRAM TRAVADI (ORIGINAL PLAINTIFF) APPELLANT v.  
BAI MAHAKORE WIDOW OF GIRDHARLAL SEVAKRAM TRAVADI  
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Indian Evidence Act (I of 1872), section 91—Hindu Law—Partition—Partition evidenced by a writing not registered—Oral evidence admissible to prove the fact of partition.*

The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration.

SECOND appeal against the decision of C. N. Mehta, Joint Judge at Ahmedabad confirming the decree passed by M. I. Kadri, Subordinate Judge at Umreth.

Suit to recover possession.

Three brothers Chaganlal, Girdharlal and Aditram constituted a joint Hindu family. Of these Chaganlal died in 1897 leaving no issue and Girdharlal in 1905 leaving behind his widow Bai Mahakore. The plaintiff, son of Aditram, sued to recover possession of Survey Nos. 535 and 545 from defendant No. 2 and for an injunction restraining the defendant from using a well situated in Survey No. 544 alleging that these properties were a portion of the joint family property of the plaintiff, his brother Amritlal (defendant No. 3) and his deceased

\* Second Appeal No. 660 of 1915.

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uncle Girdharlal ; that on the death of the said Girdharlal it devolved by right of survivorship on himself and his brother (defendant No. 3) to the exclusion of Girdharlal's widow Bai Mahakore (defendant No. 1) who had only a right of maintenance and that accordingly the sale of these properties made by her in favour of defendant No. 2 was invalid.

Defendant No. 1 contended, *inter alia*, that in a partition effected in 1885 between the two brothers the plaintiff field No. 535 fell to her husband's share ; that after the death of Chaganlal reference to arbitration was made by the plaintiff, his brother (defendant No. 3) and her husband to dispose of the property left by deceased Chaganlal ; that under the reference the property Survey Nos. 544 and 545 were assigned to her husband with certain obligations ; that her husband made a will under which she was made sole heir of the property left by him ; that the allegation of the plaintiff about her husband possessing joint property was false.

Defendant No. 2 contended that the plaintiff property had been sold to him by defendant No. 1 at a reasonable price ; that defendant No. 1 was separate from plaintiff's father for many years and that at the date of the sale to him the plaintiff property was in sole enjoyment and possession of defendant No. 1.

Defendant No. 3 did not appear.

The Subordinate Judge found that the reference to arbitration, Girdharlal's will and the other oral evidence in the case was sufficient to prove the fact of separation between Girdharlal and the plaintiff. He, therefore, dismissed the plaintiff's suit holding that the plaintiff property belonged to Girdharlal and the defendant No. 1, Bai Mahakore, was fully competent to deal with it as she had done.

The District Judge, on appeal, confirmed the decree

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Plaintiff appealed to the High Court.

*G. N. Thakor*, for the appellant:—In this case the defendants allege that there was a partition in the family which was recorded in a partition deed, but I submit the deed not being registered is not admissible in evidence nor can any secondary evidence be given as to the nature of the property whether it was joint or separate. Section 91 of the Evidence Act prevents any secondary evidence being given of the terms of a document when the terms are embodied in a document and even the fact of partition would be a term of the document.

[SCOTT, C. J.:—Taylor on Evidence, page 315, para. 405, shows that the fact of partnership may be proved by parol evidence without producing the deed: see also the cases of *Augustien v. Challis*<sup>(1)</sup>; *Burjorji Cursetji Panthaki v. Muncherji Kuverji*<sup>(2)</sup>; *Sakharam Krishnaji v. Madan Krishnaji*<sup>(3)</sup> and *Kedar Nath Joardar v. Shurfoonnissa Bibee*<sup>(4)</sup>].

I submit these cases are distinguishable from the present case inasmuch as they show the fact of the existence of a particular relationship may be proved by parol evidence. But here the defendants want to go beyond the fact of partition and want to rely upon the terms of the partition deed as they claim Survey No. 535 under the terms of the partition deed. This they could not do unless the deed was registered nor could any secondary evidence of the terms be given: *Somu Gurukkal v. Rangammal*<sup>(5)</sup>; *Monmohinee Dossee v. Bishen Moyee Dossee*<sup>(6)</sup>; *Sheikh Rahmatulla v. Sheikh Sariutulla Kagchi*<sup>(7)</sup>; *Varada v. Krishnasami*<sup>(8)</sup>; *Kachubhai bin Gulabchand v. Krishnabai kom Babaji*<sup>(9)</sup>.

(1) (1847) 1 Ex. 279 at p. 280.

(5) (1871) 7 Mad. H. C. R. 13.

(2) (1880) 5 Bom. 143.

(6) (1866) 7 W. R. 112.

(3) (1881) 5 Bom. 232.

(7) (1868) 1 Beng. L. R. 58 (F. B.)

(4) (1875) 24 W. R. 425.

(8) (1882) 6 Mad. 117.

(9) (1877) 2 Bom. 635.

*N. K. Mehta*, for respondents Nos. 1 and 2 not called upon.

*B. D. Mehta*, for respondent No. 2 alone.

SCOTT, C. J.:—The plaintiff sued to recover possession of certain property, Survey Nos. 535 and 545, and to have a perpetual injunction restraining defendant No. 2 from taking possession of Survey No. 544 and from using the water of the well, alleging that his father left two brothers out of whom one Chaganlal died in 1897 leaving no issue, while the other brother died in union with him the plaintiff in 1905, that defendant No. 3 and he were heirs in joint undivided property under Hindu Law, and that defendant No. 1, the widow of Girdharlal, the uncle who died in 1905, had only a right of maintenance, and he sought to set aside a sale which had been made in favour of defendant No. 2 by defendant No. 1, Girdharlal's widow.

The plaintiff's case therefore rested upon an allegation that the property in suit was the property of an undivided Hindu family. Now with regard to Survey No. 535, there is evidence which both the Courts have found to be conclusive, that Girdharlal was in exclusive possession from some date long prior to 1899; therefore apparently Girdharlal was in enjoyment of it as his own separate property.

Then with regard to plots Nos. 545 and 544, there is evidence on the record that arbitration proceedings took place under a reference on the 27th September 1899, the parties being Girdharlal the husband of the 1st defendant, Amratlal Aditram his nephew on behalf of himself and as guardian of his minor brother Chotalal, and Ruxmani as guardian of her minor son Manilal. Chotalal is the present plaintiff. The reference was in these terms:—"We, the undersigned, pass an agreement in writing that we have appointed Pandya Ramchandra

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Parjaram of Dakore and Tarwadi Bhogilal Valavram of Thasra, arbitrators to settle about the partition, movable and immovable property, debts and outstandings, lands, trees, &c., belonging to our brother and uncle Chaganlal Sevakram who is dead and of the joint undivided lands." Chaganlal was the brother of Girdharlal and the uncle of Amratlal and Chotalal. Upon that reference an award was made from which it appears that Survey No. 545 and two Koss' share in the well in Survey No. 544 had belonged to Chaganlal, and these were assigned to Girdharlal. The first defendant claims title both as widow of Girdharlal and as his devisee under his will, and the 2nd defendant claims title as assignee from her both as widow and devisee.

Upon the facts hitherto referred to, it appears to me clear that the conclusion of the lower Courts that the plaintiff had not established his title to the properties in suit as joint undivided Hindu property, was justified because Survey No. 535 was the separate property of Girdharlal, and Survey No. 545 and the rights in 544 belonged exclusively to Chaganlal up to the time of his death, and the award shows that there was other property which was joint family property.

It is, however, contended, and this is practically the only contention now put forward, that there is evidence that there was a partition in the family between Chotalal's father and Girdharlal and Chaganlal which was recorded in a partition deed, and that the lands Nos. 535, 545 and 544 came to the persons who enjoyed them subsequent to 1885 by virtue of the provisions of that partition deed, and it is contended that no other evidence can be referred to as to the nature of the property, that is to say, whether it was separate or joint property under the partition deed, while the partition deed not having been registered cannot be looked at. It is urged that section 91 of the Indian Evidence Act

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prevents the Court from concluding that there was partition at any time which led to a separation in interest of members of this family, because it is known that there was a partition deed in 1885 which cannot be looked at. In my opinion that is an attempt to carry the provisions of section 91 too far. It provides that "when the terms of a contract, or of a grant, or of any other disposition of property, (within one of which categories the partition fell), have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document (which is not the case with regard to transactions in the nature of partition), no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible."

Now we are not concerned with cases in which the matter is required by law to be reduced to the form of a document. Section 91, therefore, with regard to a disposition of property, such as we are now concerned with, prohibits any evidence of its terms other than the document itself, or secondary evidence of its contents where secondary evidence is admissible. It does not appear to me from the record of the proceedings before the Court that there has been any attempt to prove the terms of any partition deed or of any transaction of partition. All that the Court has been concerned with is to find out whether particular properties claimed by the plaintiff to be joint family property were at the date of suit joint or separate.

The argument on behalf of the appellant which has been urged very earnestly is that the relationship of separated Hindus must, in the present case, proceed from an act in the law taking the shape of a partition deed, and therefore, that relationship cannot be proved

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by oral evidence. According to my reading, section 91 does not go to that length, and the English law as indicated in Taylor on Evidence, upon which the Indian Evidence Act is known to have been largely founded, does not support the appellant's contention. In paragraph 405 of Taylor (10th edn.) it is stated:—"The fact of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing;" and again in the same paragraph: "The fact of partnership may be proved by parol evidence of the acts of the parties, without producing the deed." The leading authority in England for those propositions is the statement of Baron Alderson in *Augustien v. Challis*<sup>(1)</sup>, who said that you may prove by parol the relationship of landlord and tenant; but without the lease you cannot tell whether any rent was due. A decision to the same effect is to be found in *Kedar Nath Joardar v. Shurfoonnissa Bibee*<sup>(2)</sup>. That the fact of partnership may be proved without the production of the deed of partnership was established in *Alderson v. Clay*<sup>(3)</sup>; *Cotterill v. Hobby*<sup>(4)</sup> and *Strother v. Barr*<sup>(5)</sup> are good illustrations of the distinction between proof of relationship of landlord and tenant and proof of the terms of the tenancy. In my opinion, therefore, the evidence upon which the lower Court came to the conclusion that the properties in suit were the separate properties of the plaintiff's uncles was rightly admitted. I would dismiss the appeal with costs.

BEAMAN, J.:—Three brothers Chaganlal, Girdharlal and Aditram admittedly constituted a joint Hindu family. The present suit is brought by the son of Aditram to recover certain properties set forth in the

(1) (1847) 1 Exch. 279 at p. 280.

(3) (1816) 1 Stark. 405.

(2) (1875) 24 W. R. 425.

(4) (1825) 4 B &amp; C. 465.

(5) (1828) 2 M. &amp; P. 207.

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plaint alienated by Mahakore, the widow of Girdharlal, and the foundation of the claim is that the family was a joint Hindu family. It has been contended here that although it is virtually admitted that a partition was effected in the year 1885, and evidenced by a writing, inasmuch as that writing was not registered, neither can any proof of its terms be given, nor can the fact that the family from that time forward were separate be proved in any other way. If the fact is provable, it has been convincingly proved, I think, as shown by the Chief Justice *aliunde*. I wish if possible to avoid going over any of the ground covered by that judgment. The Chief Justice has stated with abundant authority a proposition, of the soundness of which I think there can be no doubt. I agree that under section 91 of the Indian Evidence Act, as contended by the appellant here, the Courts were precluded from seeking the terms of the partition in the document which was inadmissible for want of registration. I agree that that document could not be used in any way as affecting the property, the subject matter of this suit. But having regard to the carefully drawn terms of section 91, it appears to me clear beyond all doubt that a fact which does not necessarily constitute a term, in any real sense, of a contract, grant, or other disposition of property, may be proved, although the writing in which the terms of that contract, grant, or disposition of property were embodied cannot be proved for want of registration. It follows, I think, that the plaintiff relying on union, and his claim necessarily depending upon the proof of that relationship, the fact of separation is not a term in any sense of the manner in which the parties distributed the property at the time the separation was made and was embodied in writing, and is therefore a fact *de hors* the document which can be proved independently. The two Courts below, as far as I can see, made no attempt to look at the terms of the document for the

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purposes of this suit. It is certain, I think, that separation in the sense of a change of legal relationship is in no sense a term necessary to be included in a partition deed. A separation ordinarily precedes the distribution of what was formerly joint property. Logically it must always precede it in time. But so far as the terms upon which parties who were formerly joint and have become separate agree thenceforward to distribute and enjoy the property, they are confined to that subject, and the terms have nothing to do with the statement of fact that a change in the relationship of individuals has taken place. For example, suppose that the parties here had never constituted a joint Hindu family at all, but had been merely tenants-in-common, every term in the partition deed might have been exactly the same, and the preliminary statement, if the deed indeed contained such a statement, that the family up to that time had been joint, and thenceforward ceased to be joint, would obviously be a fact standing alone, and not making up any part of the terms of the disposition of the property. I should have thought that this matter would hardly have admitted of any doubt had it not been for the array of authority apparently bearing upon the point which the learned pleader for the appellant was able to adduce. Much of that authority is, I think, easily distinguishable. The principle stated by the Chief Justice is the true principle, and is supported by authority of at least equal weight. I think it unnecessary to go more deeply into the question which has been exhaustively treated, and I should not have said this much, but that I wished to express my own emphatic opinion that the law laid down by the Chief Justice in the judgment just delivered is right and governs this case.

I concur in the order proposed.

*Decree confirmed.*

J. G. R.