

Special Appeal No. 40 of 1864.

1864.
June 27.

RA'M JOSHI bin ANANT JOSHI *Appellant.*
LAKSHMIBA'I KOM MAHA'DEV SHRI'DHAR
JOSHI *Respondent.*

Hindú Law—Partition of Family Property—Widow, Power of to enforce Partition.

It is competent to the childless widow of a Hindú dying without other nearer heirs to enforce the actual division of the family property, in which her husband at his death was entitled to share, where the separation of her husband has taken place and his share been ascertained, though not actually set apart in specie.

THIS was a Special Appeal from the decree of the District Judge of Tháná in Appeal Suit No. 391 of 1862.

The respondent, Lakshmibái, in March 1861, had sued the appellant, Rám Joshi, and two others, in the Court of the Munsif of Máhád, to recover possession of one-third of certain lands which had formed a portion of the joint property of the family of her husband. She alleged that a separation had taken place in her husband's lifetime between him and his co-sharers, and that since this separation her husband and the co-sharers had divided, according to the shares so ascertained, the proceeds and profits of the said lands, and had paid a proportional part of the Government revenue in respect of the same; that since her husband's death, about March 1858, the defendants below had interfered with the share of land and proceeds which had belonged to her husband, and were excluding her from the same. The widow's claim was opposed by the appellant, Rám Joshi, on the ground that the respondent, being a childless widow, was entitled to maintenance only, and not to a division of immoveable joint family property; also that there was no written instrument of separation produced. On the 28th of July 1864 the Munsif decided the case, and found that the appellant, Rám Joshi, admitted that in fact, in the year 1851-52, a memorandum of separation had been passed between the defendant and plaintiff's husband's grandfather; that his (the plaintiff's husband's) share had been settled at one-third; that, although the land had not been divided, the plaintiff's husband had taken his third-share of the produce; that, according to the opinion of the Shástri of the Tháná

Adalat, in cases where a division of joint property had been settled, though not actually carried out, a childless widow would have the right to sue after her husband's death to enforce a division of the property. The Munsif, therefore, decreed in favour of the plaintiff. From this decree Rám Joshi appealed to the District Judge. On the 17th of August 1863 the Acting Judge (Mr. Gonne), after settling the issue for decision in the suit as follows, "whether plaintiff is entitled to her husband's share of the property," gave his decision as follows :—

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"The facts of the case are these. There was a separation of the three shares in the family in Shake 1773. The terms were recorded in a *phárkatpatra*. This is not forthcoming, for want of a stamp, but its presence can be dispensed with by the defendant's admission that such a separation did take place. The plaintiff's husband was settled to be entitled to one-third. In spite of the separation, however, the land itself was not divided; it was cultivated in common, and the produce only was divided.

"Now by Hindú law the childless widow of a member of a joint family has no right to claim a division of the property, in the way that her husband could have done. She can claim only maintenance, and the defendant's argument is that, as the land was not divided, the plaintiff cannot enforce the division, and must be content with maintenance.

"But the Shástri has given a very clear opinion, which recommends itself by common sense and fairness, that if a division has been determined, though not carried out, in a husband's lifetime, his widow can carry it out after his death, and if land has been so divided that, though held in common, the sharers take their several proportions of the produce, it is the same thing as if there had been an actual portioning out of the land itself.

"The plaintiff has, therefore, a right now to claim that her husband's share should be separated and assigned to her.

"The Munsif's decree is affirmed; costs on the appellant."

Against this decision the defendant, Rám Joshi, preferred a special appeal.

The Appeal was argued before ARNOULD, Acting C. J., and NEWTON, J.

Vináyakráv Harichand for the appellant.

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Vishvanáth Náráyán Mandlik and Ganpatráv Bháskar for the respondent.

ARNOULD, Acting C. J., delivered judgment :—In this case we must take it on the Judge's finding that the share of the plaintiff's husband in the joint family property was settled at one-third. The land was not divided, but the produce was, and of this the plaintiff's husband received one-third. Although no actual division of the land took place, the Court upholds the opinion of the District Judge, that "if a division has been determined, though not carried out, in a husband's lifetime, his widow can carry it out after his death. And if land has been so divided that, though held in common, the sharers take their several proportions of the produce, it is the same thing as if there had been a division." The decree of the District Judge is, therefore, confirmed, with costs.

The District Judge appears to have found that a separation took place, and this finding is conclusive.

Decree affirmed.

Special Appeal No. 616 of 1863.

July 7.

SAKHA'RA'M TRIMBAK (original plaintiff) ... *Appellant.*
 RA'NU valad VITHAL A'PA'JI (original defendant) *Respondent.*

Hindú Law—Maintenance—Illegitimate Son entitled to Maintenance.

By Hindú law, an illegitimate son has a claim only to maintenance, and an agreement not appearing to be made on valuable consideration between a nephew who was the legitimate heir of his uncle, and that uncle, giving up the nephew's right to about seventy acres of land in favour of the illegitimate son, of the uncle, was declared void as against the nephew.

THIS was a Special Appeal against the decree of A. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 125 of 1863.

Sakháram instituted this suit on the 20th of February 1862, in the Court of the Munsif of Pimpalgám, against Ránu, to recover possession of certain lands in the *pargána* of Chandvadá. Sakháram alleged that the above land was the *mirás* property of his ancestor; that he used to live in Khándesh