

*Regular Appeal No. 11 of 1861.*1865.
March 8.NARASI'MHARA'V KRISHNARA'V *Appellant.*ANTA'JI VIRU'PA'KSH and others *Respondents.**Evidence, not sufficient for determination of Suit—Further Inquiries directed—Debt of Grandfather—Assets—Interest.*

Where the evidence upon the record is not sufficient to enable the appellate court to pronounce a judgment upon a Regular Appeal, it may require the court against whose decree the appeal is made, to take additional evidence, defining the points to which such evidence is to be confined, in order to enable the appellate court finally to determine the case.

The grandson of a Hindú is bound to pay the debt of his grandfather, independent of assets, but without interest, according to the doctrine of the Maháráshtra school.

[But see now the alteration made in the law by the Hindú Heirs' Relief Act of 1866, printed in the Appendix, *post.*]

THIS was a regular appeal against the decree of F. Lloyd, District Judge of Dhárwár, in Original Suit No. 20 of 1857. The facts are stated in the following judgment, recorded in the District Court on the 24th of July 1861 :—

“ This action is brought by Narasimharáv, averring that Antáji Virúpáksh, Rudro Nágnáth, and Bhavánráv, &c., being members of an undivided family, borrowed from his father, Krishnájiráv, the sum of Rupees 8,000; and Antáji Virúpáksh executed in his father's favour a bond, dated 25th Shabán, Shake 1758 (5th December 1836), mortgaging the inám villages of Rájápúr and Musrivádí for that amount; that in accordance therewith the villages came into his possession; that on a comparison of accounts being made, on the 25th Mohoram, 1255 Faslí (24th January 1846), there was found to be a balance in his favour of Rs. 15,583-4-6, and on the 22nd Saffer of the same year (19th February 1846) Antáji Virúpáksh and Rudro Nágnáth entered into an agreement to pay yearly Rs. 1,000 in produce. This agreement, however, was not acted up to; and he, therefore, sued the defendants for this balance, minus Rs. 600 paid in Faslí 1256 (A.D. 1846), viz., Rs. 14,983-4-6, with interest up to the date of payment.

“ The defendant Raghunáthráv has filed no answer.

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“ The defendants Bhavánráv and Rudro Nágnáth answered that the plaintiff, Narasimharáv, was not alone competent to bring this action, as Krishnájiráv had left many children; that the bond was not stamped until after Krishnáji's death, and, therefore, the claim was inadmissible, under Sec. xiv. of Reg. XVIII. of 1827, Cl. 1, and the ruling in Special Appeal No. 3116; that the claim was, moreover, barred by the Regulation on Limitations; that they knew nothing about the debt; and that the yád (No. 5), being unstamped, was inadmissible as evidence; and also that no claim could be preferred on it, as it contained no promise to pay, and referred to another document to be prepared, and not produced.

“ On the 5th of July 1859, the following points were laid down for decision by the Joint Judge, Mr. Grey:—(1) Whether Narasimharáv can alone bring this suit, there being other members of the undivided family alive; (2) Whether the mortgage bond No. 3 and the yád No. 5 are proved; (3) Whether the yád No. 5, having been stamped after the death of Krishnaráv and Antáji, is valid; (4) Whether the claim is barred by the Law of Limitation; (5) Whether the defendants are liable to the action; (6) Whether the action will lie on the bond No. 3 and yád No. 5; (7) Whether the amount claimed should be awarded.

“ Having read over the papers in this case, and heard the vakíls on behalf of both parties, the Court determines on throwing out the claim.

“ As Narasimharáv is the eldest son of the deceased Krishnáji, and holds from the court a certificate of heirship, it appears that he is competent to bring this action, and, therefore, the first objection raised by the defendants is overruled.

“ With regard to the second issue, the defendants' vakíls do not dispute the authenticity of the bond, exhibit No. 3; and the evidence satisfactorily shows that it was executed by the deceased Antáji Virúpáksh. The Court, therefore, passes on to a consideration of the second point raised in the

second issue, viz., whether the yád No. 5 is proved. The claim is in fact founded on this document; and it is, therefore, essential that it should be proved genuine. To prove it two attesting witnesses have been called; and, though they assert that they attested it at the request of the deceased Antáji, and Rudroji, the Court is bound to disbelieve them, because their signatures bear every appearance of having been added long since the document was written. The very position in which they are placed plainly shows that the yád was not drawn up with a view to its being attested; and it is, moreover, very evident that a 'bund' has been removed, and that Bálappá has written his name over the mark thus left: It is from all this so clear that the yád has been tampered with, that, even supposing it to have been signed by Antáji and Rudro, the Court could not admit it as evidence of the claim; and, if admitted, the Court is of opinion that, as the yád only refers to an agreement which has never been drawn up, and gives no specific claim, an action would not lie on it. Under these circumstances the Court determines on throwing out the claim, and saddling the plaintiff, Narasimharáv, with all costs."

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The grounds of objection set forth in the memorandum of appeal were (amongst others) as follow:—

"That the yád No. 5 having been proved by the evidence of witnesses, and the opposite party not having disproved it, the Judge should not have doubted its genuineness.

"That the Judge should not have thrownd out the claim on the ground that the yád No. 5 set forth that another document would be passed: since no such document was passed by the defendants, according to the indorsement on the yád; and, therefore, there was no objection to allow the claim on the bond No. 3.

"That the bond sued on was passed while its makers were undivided in interest, and, therefore, the family debts should be paid by the family according to the Shástras; and as the defendants have taken possession of the estate, the claim should have been awarded against them all."

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The appeal first came on for hearing on the 17th of August 1863, before SAUSSE, C.J., and NEWTON, J.

Reid (with him *Fakrappá Lingappá*) for the appellant.

Dhirajlál Mathurádás for the respondents.

The Court was of opinion that the evidence upon the record was not sufficient to enable it finally to determine the case; and resolved to call upon the District Judge to take additional evidence: prescribing the manner in which it should be taken, and the points to which it should be confined, as follows:—

“It is ordered that the case be referred to the District Judge, for such inquiries as he may think proper respecting the circumstances under which the signatures of the attesting witnesses were made, in the manner appearing upon the side and the lower part of the yád No. 5. It is further ordered that the District Judge also make inquiry, by comparison of handwriting or otherwise, whether the names of Antáji and Rudro Nágnáth to the yád No. 5 are genuine signatures; and that he also inquire whether the accounts produced, under the darkhást No. 33, are public accounts, and if so, from whose custody they were produced, and certify how far, in the District Judge's opinion, they support the case of the plaintiff; and that the District Judge certify to the Court his opinion upon the evidence taken upon each of the above points.”

The appeal came on for further hearing this day, when the following report by C. H. F. Shaw, Acting Judge of Dhárwár, was read:—

“Witness Bálappá deposes to the circumstances under which the signatures of the attesting witnesses were made, in the manner appearing upon the side and lower part of the yád No. 5; and the witnesses Gurnáth and Báláji Venkaṭesh identify the signatures of Antáji and Rudro Nágnáth attached thereto.

“A commission, summoned without notice, and composed of the Desái and Deshpánde, hereditary district officers, and accustomed to such inquiries, pronounce the signatures

attached to the exhibit No. 5 to be similar to the acknowledged handwriting of Antáji and Rudro Nágnáth.

“The accounts were proved as per Mamlatdár’s report, exhibit No. 54, dated 26th March 1864, as follows: “Govind Rámchandra Deshpánde produced them. * * * Therefore, these accounts can scarcely be called public.”

SAUSSE, C.J. :—We must reverse the decision of the District Judge, and decree for the plaintiff.

Dhiraílál asked that it should be declared in the decree, that the defendant *Bhavánráv*, the grandson of *Antáji Virúpáksh*, was only liable to pay the debt of his grandfather, without interest, independent of assets : citing 1 Strange, H. L., 167.

The decree of the Court was as follows :—

Upon reading the report of the Acting Judge of the district of Dhárwár dated the 29th day of August 1864, and the evidence taken under the order of this court bearing date the 17th of August 1863, the Court finds the yád No. 5 to be a valid instrument, and binding upon the defendants. The Court thereupon reverses the decree of the District Judge, bearing date the 24th day of July 1861 ; and orders that the plaintiff recover Rs. 14,983-4-6 against the defendants, with six years’ simple interest on that sum of Rs. 9 per cent. up to the filing of the plaint ; and the Court further orders that the plaintiff be paid interest upon the sum decreed at the rate of Rs. 9 per cent. per annum until payment ; and, the defendant *Bhavánráv* so desiring it, let reference be had, in levying the amount of this decree, to the fact that *Bhavánráv* is a grandson of *Antáji*, the original debtor : costs on respondents.

Appeal allowed.

NOTE.—“*Brihaspati* declares : ‘The sons must pay the debt of their father, when proved, as if it were their own, [that is] with interest ; the son’s son must pay the debt of his grandfather [but] without interest ; and his son [that is, the great-grandson] shall not be compelled to discharge it, [unless he be heir, and have assets.]’ * * * * *

“The order of those bound to pay the debts (of one deceased) is thus told by *Yádyavalkya* :—‘He who has received the estate must pay the debts of it ; and in like manner, he who takes the wife [of the

1865. deceased] ; or the son, whose [father's] assets are not held by another
 NARASI'MHA- [anar; áshrita] : but of one having no son, the other heirs [rikthinaḥ,
 RA'Y must pay the debts : or may levy them, para. 18.] * * * * *
 KRISHNARA'Y " And first of all, he who has received the estate ; on failure of him,
 V. the person who takes the wife ; and on failure of him, the son, possessed
 ANTA'JI of unalienated wealth [ananyáshrita]. If there be none, it must be paid
 VIRU'PA'KSH. by the grandsons, *but the principal only*. If they be not in existence,
 then the great-grandson, the wife, daughter, or other heirs [rikthinaḥ], if
 they have received the estate, must pay the debt—such is the meaning.
 It is not to be paid by the great-grandson, the wife or the others, if
 they have not taken the estate. But receipt of ever so small a portion of
 the estate, imposes the liability of liquidating the debts, to whatever
 amount. For there is no such law, as [that payment shall follow only
 on receipt of property] equal or more than equal [to the debts to be
 paid.]” *Vyavahára Mayúkha*, Chap. V., Sec. IV., § 12, 16, 17—Stokes,
 H. L. Bks., pp. 122-123.—ED.

June 21.

Special Appeal No. 47 of 1865.

TIMMARSÁ PURÁ'NIK *Appellant.*

BADIYÁ', SON OF KUPPAGOUDA' *Respondent.*

*Forfeiture—Landlord and Tenant—Lease—Rent—Relief—Equity—
 Múlgeni Tenure.*

The acceptance of rent by a landlord, after the institution of a suit to recover possession of the land, is not a waiver of a forfeiture by the tenant under a condition in the lease.

A tenant, upon payment of all costs of the suit, will be relieved from the consequence of such a forfeiture, in accordance with the practice of Courts of Equity in England and America.

THIS was a special appeal from the decision of F. D. Melvill, Acting District Judge of Cánará, in Appeal Suits Nos. 88 and 95 of 1864, against the decree of the Munsif of Bhatkhal in Original Suit No. 110 of 1862.

The facts of the case sufficiently appear from the following judgment recorded in the District Court :—

“ This action was instituted by Timmársá Puránik to recover land yielding a produce of 33½ muḍás of rice, and balance of rent for Durmati (A.D. 1860-61) Rs. 36, and interest thereon Rs. 3. Badiyá admitted the lease ; but pleaded full payment of the rent.

“ The Bhatkhal Munsif decreed that Badiyá should pay the rent claimed for the year Durmati, as the receipt produced