

1868.
Jan. 10.

Special Appeal No. 219 of 1866.

VITHU *et al.*, heirs of Bápu Kámble *Appellants.*

NA'RA'YAN DA'BHULKAR *Respondent.*

Procedure—Splitting up of Claims—Act VIII. of 1859, Secs. 2, 7, and 350—Errors which do not affect merits.

A Hindú whose share in an ancestral estate had been alienated by a co-proprietor, instituted simultaneously three different actions against the co-proprietor, and the persons to whom the alienations had respectively been made, to recover several distinct parcels of land which constituted his share.

Held, that as the plaintiff had but one single cause of action against the co-proprietor, he ought to have brought but one suit against him, and either included all the alienees in this suit, or brought separate actions against the alienees for the several pieces of land in their possession, and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined.

The course of procedure last indicated is the more correct course.

Held, further, that, as the separate suits against the co-proprietor were instituted simultaneously, the error in splitting up the claim against him did not affect the merits; and accordingly the decree was affirmed.

THIS was a Special Appeal against the decision of W. M. Coghlan, Acting Joint Judge of the Koukan at Ratnágirí, in Appeal Suit No. 444 of 1864, confirming the decree of the Munsif of Málván.

The case was heard before TUCKER and WARDEN, JJ.

Bhairavnáth Mangesh for the appellant

Shántáram Náráyan for the respondent.

The facts of the case sufficiently appear from the following judgment of—

TUCKER, J. :—The plaintiff, Náráyan Dábhulkar, sued to recover the moiety of a *thikán*, or parcel of land, at Vengurlá, in the collectorate of Ratnágirí, which *thikán*, he alleged, was the joint property of himself and one Pándurang Dábhulkar, and which had been alienated by the said Pándurang to the deceased Bápu Kámble. The action was brought against Pándurang Dábhulkar, the vendor of the

land, and the heirs of the vendee, and it is these last persons alone who have made the present special appeal.

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Pándurang Dábhulkar denied that the parcel of land, of which a moiety was claimed, had ever been the joint family property of himself and the plaintiff, or that the plaintiff had ever had any interest in the said land; and the special appellants pleaded that they had purchased the land in dispute from Pándurang Dábhulkar in A.D. 1838; and that the plaintiff had no right in it, and that they (the defendants) had spent money upon it.

The Munsif and Joint Judge of Ratnágiri both held that the land in dispute was proved to have been the joint property of the plaintiff and of Pándurang Dábhulkar; and that the plaintiff was entitled to a quarter-share subject to the mortgage made by Pándurang's father, Rámchandra, in A.D. 1834.

In special appeal two objections have been taken to these decisions:—(1) That the present action cannot be maintained under Secs. 2 and 7 of the Civil Procedure Code, as the plaintiff had brought three other suits for partition against Pándurang Rámchandra in 1861; and that if he omitted to include in those suits the portion of the joint property now claimed, he could not now recover it by a separate action. (2) That the present claim is barred by the law of limitation, as Pándurang Rámchandra purchased the field in A.D. 1830, and sold it to the other defendants, and consequently the defendants and Pándurang, under whom they derive their title, have had exclusive and adverse possession for more than thirty years.

On the other hand, it has been contended for the special respondents that the present is not a suit for partition, but for a declaration of the plaintiff's right to redeem a mortgage; that different portions of the joint estate had been mortgaged to several persons, and so several actions to redeem the different parcels of land so mortgaged had become necessary.

I am of opinion that the procedure, which has been allowed by the lower courts in this case, is not in ac-

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cordance with law. It would seem that the plaintiff, who claimed to be entitled by inheritance to a share in certain lands which had been ~~by~~ in the possession of his relative, Pándurang Dábhulkar, brought, in 1861, three separate suits simultaneously, of which this action was one, against the said Pándurang; to have his right declared to his share, and to recover the said share from the different persons into whose possession the said lands had passed either by sale or mortgage. As it is clear that he had but one cause of action against Pándurang Dábhulkar, Sec. 7 of the Civil Procedure Code required that he should prefer the whole of the claim arising out of this cause of action in one suit; and it should have been pointed out to him that under these circumstances he should have sued Pándurang separately, including his whole claim against that person in one action, and should have applied to have the hearing of his suits against the purchasers or mortgagees from Pándurang deferred until his rights with reference to this last-named person were decided upon; or, if he preferred it, he could have brought one general action against Pándurang and all the persons to whom he had assigned the lands, though, as this mode of proceeding would have rendered the assignees liable to larger costs than if they had been sued separately, the course first mentioned would seem to have been the more proper of the two. But allowing that the lower courts have acted erroneously in permitting the plaintiff to split up into portions the claim which he had against Pándurang, and which arose from a single cause of action, I consider that, as the three suits were brought simultaneously, this was an error which did not affect the merits of the case or the jurisdiction of the court; and I am, therefore, of opinion that, under Sec. 350 of the Code of Civil Procedure, it would not be proper to interfere with the decisions of the lower courts on this account.

With regard to the second ground of objection, I may observe that the lower courts have found that the *thikan* in dispute was the joint property of the plaintiff and of Pándurang Dábhulkar; and it is admitted that the defendants

acquired possession as mortgagees in 1834, and that there was no sale till 1838. There is nothing to show that the possession of Pándurang or of his father was exclusive or adverse to the plaintiff prior to the mortgage in 1834, or that there was any possession on the part of Bápu Kámble which can be treated as adverse to the plaintiff till 1838. The maintenance of the suit is, consequently, not barred by adverse possession for more than thirty years on the part of the special appellants, or of those under whom they derive, as has been alleged in special appeal.

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I hold, therefore, that the grounds of special appeal have failed; and the decree of the Senior Assistant Judge must be affirmed: costs on special appellants.

WARDEN, J., concurred.

Decree affirmed.

Referred Case.

Jan. 14.

CHUNILA'L MA'NIKLA'L BHAI'L.....Plaintiff.
 MAHIPATRA'V valad KHANDUDefendant.

Jurisdiction—Cause of Action—Place of Delivery.

The defendant at Parolá agreed to sell and deliver to the plaintiff certain goods, for which the plaintiff then paid in advance. By the terms of the agreement, the goods were to be measured at Mazrod and delivered at Pádshá. In default of delivery it was stipulated that the value of the goods should be paid for at the market rate at Parolá.

The goods were not delivered in pursuance of the agreement.

Held, in an action brought to recover their value at the market rate at Parolá, that the cause of action arose at Pádshá, where the goods ought to have been delivered.

CASE referred for the decision of the High Court, under Sec. 28 of Act XXIII. of 1861, by the Honorable G. A. Hobart, District Judge of Khándesh.

* The plaintiff sued to recover the sum of Rs. 440, as value of certain goods, which was alleged to be due on an agreement between him and the defendant, the agreement being that the goods should be delivered at a certain time at