

In applying Sec. 259 to cases of this description, the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title, and interest which the decree ordered to be sold, *i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage.

1870.
KASANDA'S
LALDA'S
et al.
v.
PRA'NJIVAN
A'SHA'RAM.

The respondent in this case, representing the purchaser at a sale in execution of a decree obtained by the paramount mortgagee, is not liable for the appellant's claim, which is founded on a puisne mortgage.

The decree must be confirmed with costs.

Decree affirmed with costs.

Special Appeal No. 195 of 1870.

Aug. 8.

VITHAL VISHVANA'TH PRABHU.....*Appellant.*
RA'MCHANDRA SADA'SHIV KIRKIRE.....*Respondent.*

Procedure—Objections to Remand Order—Depositary—Trustee.

The court of first instance rejected a claim on the ground that it was barred by limitation. The court of appeal, however, entertaining a contrary opinion, remanded the case for trial on the merits. The case was, accordingly, in both courts, tried upon the merits.

Held that the omission to prefer a special appeal from the order of remand did not preclude the party aggrieved by that order from objecting to it in a special appeal preferred against the final decree of the appellate court.

Where immoveable property was given into the possession of the defendant under an order of a revenue officer which directed the defendant to sell the crops, and, after payment of Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depositary, but a trustee, of the property.

THIS was a special appeal from the decision of A. Lyon, Assistant Judge of Ratnágiri, in Appeal Suit No. 262 of 1868, confirming the decree of the Šadr Amín of Ratnágiri, Dáji Govind.

The plaintiff, Rámchandra, alleged that he was a half-sharer in the *khoti* of the hamlet Gavane, in the village of Harcheri, of which the defendant, Viṭhal Prabhu, is the *khot*. The plaintiff failing to pay all the defendant's dues, his half-share

1870.
 VITHAL V.
 PRABHU
 v.
 RA'MCHANDRA
 S. KIRKIRE.

of the hamlet lapsed to the defendant as *khot* of the entire village. Subsequently the whole village was attached by the Collector on account of the defendant's failure to give in the customary *kabuláyat* (agreement), but was restored to him in 1862-63, under a decree of a civil court. During the Collector's attachment the plaintiff had applied to him to take his *kabuláyat* and let him have the management of his share of the hamlet, but, on the defendant's objection, the Collector refused his application. The plaintiff, therefore, claims to obtain the management of his share on his paying whatever might be found due to the defendant. He also claims damages for certain trees felled by the defendant.

The remaining facts appear from the following judgment:—

LLOYD, J.:—This claim was thrown out by the Şadr Amín of Ratnágirí, who originally tried the suit, on the ground that more than twelve years had elapsed since the cause of action arose, inasmuch as the plaintiff had not had management of the lands sued for for more than thirty years previous to the institution of the suit.

On appeal, Mr. Naylor, then Assistant Judge of Ratnágirí, overruled this objection, holding that the defendant, to whom the plaintiff's share had been made over on the 27th of December 1828 by the revenue authorities, must be looked on in the light of "a depositary," and, therefore, the term of sixty years laid down in cl. 15, Sec. I. of Act XIV. of 1859 was applicable: and he remanded the case for reinvestigation on its merits.

No special appeal was preferred against this remand order, and the case was disposed of by the same Şadr Amín, and a decree passed in the plaintiff's favour.

This decision being appealed against, the case went before Mr. Lyon, Acting Assistant Judge, who declined to enter into the question of limitation, considering himself incompetent to do so, as the issue had been already tried and determined by his predecessor (Mr. Naylor). On the other

issues he concurred with the lower court and confirmed the decree.

1870.
VITHAL V.
PRABHU
v.
RAMCHANDRA
S. KIRKIRE.

The case now comes before us on special appeal, and among the objections raised one is that the suit is barred by the law of limitation. It is, however, argued for the plaintiff that as no special appeal was preferred against the remand order of Mr. Naylor, who decided the question of limitation in the plaintiff's favour, the defendant cannot now dispute the point.

We have, therefore, first to determine whether the omission of the defendant to make a special appeal against Mr. Naylor's interlocutory decree debars him from raising the question now.

I think this question must be decided in the negative.

The former practice of this court was not to admit a special appeal against a remand order; but since the ruling in S. A. No. 85 of 1865 (a) such special appeals have been allowed; it has, however, never been held by this court that the omission to prefer such a special appeal will preclude the aggrieved party from bringing up the whole case in a special appeal against the subsequent decision, and it has been repeatedly decided by the Calcutta High Court that a remand order may be looked on in the light of an interlocutory order in the course of the suit to which objection may be raised in a special appeal against the ultimate decision.

It has also been held by the Privy Council (*vide* 7 Moo. Ind. App. 302 (b), and Sutherland's Privy Council Judgments 627) that such an order of remand is an interlocutory one, inasmuch as it does not purport to dispose of the case, and may be called into question in appeal, even though acquiesced in and submitted to at the time.

We are, therefore, it appears to me, justified in going back to Mr. Naylor's decree, to see whether the question of limitation was properly disposed of.

(a) *Subhana Madanji v. Bakta Jiaanshet*, decided by Couch, C.J., and Tucker and Warden, J.J., on 12th April 1865.

(b) *Maharajah Moheshur Sing v. The Bengal Government*.

1870.
 VITHAL V.
 PRABHU
 v.
 RA'MCHANDRA
 S. KIRKIRE.

Mr. Naylor held that the land was deposited for management during the absence of the plaintiff in the hands of the defendant, who was to give it up on the return of the plaintiff, with any surplus that might have accrued after defraying the costs of management, or to be reimbursed should he have sustained any loss; and as under this arrangement the defendant had become a depositary, the term of sixty years, laid down in cl. 15, Sec. 1. of the Limitation Act, was, he considered, applicable to the suit, and hence it was not barred; this view of the law seems, however, to be erroneous, and is opposed to the ruling of this court in S. A. No. 96 of 1866 (c), wherein it was held that the term "depositary" in this Act does not apply to immoveable property; but it has been argued—and, I think, justly, looking to the terms of the Mámlatdár's order—that the defendant held this property in trust for the eventual benefit of the plaintiff; and hence, under Sec. 2 of the said Act, which provides that "no suit against a trustee in his lifetime shall be barred by any length of time," the claim is not inadmissible on the score of limitation.

The last question for our consideration is whether the defendant has not been put to a disadvantage by the non-reception of certain evidence by the Şadr Amín.

The Assistant Judge has held that the defendant has failed to prove that while in management of the village he sustained any loss; but it appears that the defendant was deprived of the opportunity of producing all his evidence on this point, by irregular and altogether unwarrantable procedure on the part of the Şadr Amín, before whom certain papers were produced by the Collector on the citation of the defendant, but because they were long and could not be copied in the course of one day, the Collector's subordinate was allowed to take them away again, and no copies have been placed on the record.

The Şadr Amín also declined to summon certain witnesses, for whose examination application was made long previous to the decision of the case.

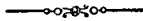
We are, therefore, of opinion that the decree of the lower court should be reversed, and the case remanded in order that the papers referred to may be taken into consideration, and the witnesses named in Darkhást No. 79 may be examined with the view to determine what amount the defendant is entitled to receive on account of any loss he may have sustained during his management of the village.

1870.

 VITHAL V.
 PRABHU
 v.
 RA'MCHANDRA
 S. KIRKIRE.

KEMBALL, J., concurred.

Decree reversed and suit remanded.



Special Appeal No. 231 of 1870.

Oct. 10.

NA'RA'YAN BA'BA'JI, *alias* NA'RA'YAN PURSHOTAM, and
 SUNDRA'BA'I(*Defendants*) *Appellants*.
 NA'NA' MANOHAR *et al.*(*Plaintiffs*) *Respondents*.

Hindú Law—Adoption—Wife's Right to adopt—Sanction' of Husband necessary—Recognised Authorities on Hindú Law—Opinion of Devanda Bhatta—Custom varying general Law—Strict Proof of Custom required—Partition—Joint Property—Burden of Proof.

According to the highest authorities in repute in the Maráthá country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

Comparative weight, as legal authorities on this side of India on the question of adoption, of the Mitákshará, Mayúkha, Dattaká Mímarísá, Dattaká Chandriká, Smṛiti Chandriká, Viramitrodaya, Dharmasindhu, and the Nirṇayasindhu pointed out.

Dictum in the case of *The Collector of Madura v. M. Ramalinga Sethupati* (a) “ that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving” (by the wife in adoption), questioned.

The general rule of Hindú law is that if a man die separate in estate from his kinsmen without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. An alleged custom to the contrary with respect to any particular kind of property must be proved by ample and satisfactory evidence before the courts will admit it as established.

Although Hindú law presumes joint tenancy to be the primary state of a Hindú family, and the general rule is that the burden of proof that

(a) 2 Mad. H. C. Rep. 220.