

1871.  
June 6.

*Special Appeal No. 419 of 1870.*

BA' LKRISHNA' VITHAL *et al.* ..... *Appellants.*  
HARI SHANKAR *et al.* ..... *Respondents.*

*Suit for Partition—Omission of Mortgaged Lands from Claim—  
Subsequent Suit—Civ. Proc. Code, Sec. 7.*

The plaintiffs in 1863 sued the defendants for the plaintiffs' share in certain undivided family property, and did not include in their claim certain lands then in the possession of mortgagees, which lands had been mortgaged by one of the defendants as manager of the family. The defendants subsequently redeemed the mortgaged lands.

The plaintiffs then filed a suit to recover their share of the lands so redeemed.

*Held* that they were entitled to maintain such suit, as the mortgaged lands had not been available for an actual partition at the time of the former suit.

THIS was a special appeal from the decision of R. W. Hunter, Acting District Judge of Ratnágiri, in Appeal Suit No. 500 of 1867, reversing the decree of Vithal Vásudev, the Munsif of Vingorlá.

The facts of the case were briefly these. The plaintiffs, Bálkrishná Vithal, Balvant Raghunáth, and Venkatesh Vishvanáth, sued Hari Shankar, Govind Gopál, and Rámchandra Govind for the recovery of a moiety of five *thikáns* situate in *Mouje Redi*. The plaintiffs alleged in their plaint that these *thikáns* had been parts of the undivided ancestral property of the family, and that the defendants had mortgaged them in the year 1824, and had again redeemed them in or after the year 1863. The defendants pleaded that a partition of the ancestral property had taken place in 1834, and that the *thikáns* in question had been acquired by them after that partition. They also pleaded, as a bar to the plaintiffs' action, that the plaintiffs had not included these *thikáns* in a previous suit (No. 195 of 1863) which they had instituted against the defendants for a partition of the family lands in the possession of the defendants. The court of first instance decided the suit in favour of the plaintiffs, and awarded them a moiety of the *thikáns* claimed, on their paying to the defendants Rs. 443-7-6, the amount of half the expenses incurred in the redemption of the land.

The defendants appealed to the District Judge of Ratnágiri, and urged, among other grounds, that as the claim had not been included in the plaintiff's former suit (No. 195 of 1863) it could not now be maintained. The Judge held the claim barred under the provisions of Sec. 7 of the Civil Procedure Code, and reversed the decree of the Munsif. The following extract from his judgment shows his reasons for the decision:—

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“ Of the above objections, the 4th, as involving a question of jurisdiction, requires immediate notice, and, in my opinion, is a good one.

“ The parties to this suit were precisely the parties in Original Suit No. 195 of 1863 (exhibit No. 31). In that suit the plaintiffs sought to recover their half-share of certain joint *thikáns* which had been mortgaged in 1823-24, and which were held to have been redeemed from mortgage in 1843. In the present suit it is sought to recover a half-share of five other *thikáns*, said to have been also mortgaged in union in 1823-24, but which were not redeemed from mortgage till after the former suit (Original Suit No. 195 of 1863) was instituted. It is now urged that the suit of 1863 was in fact a suit to enforce a share in land on the ground of its being joint family property. I find that such was the case, and that the High Court, in Special Appeal No. 558 of 1865 (dated 27th February 1866), treated it as a suit of that nature in applying Cl. 13, Sec. I., Act XIV. of 1859 as the law of limitation applicable to it (see exhibit 87). This being so, I am of opinion that the suit of 1863 should have included the whole of the joint property that remained to be divided; that none of the joint property can be held exempt from the operation of this rule on the ground of its being held in mortgage at the date of suit; and that, as the plaintiffs omitted to include the *thikáns* now in dispute in the suit of 1863, the present suit is barred by Sec. 7 of Act VIII. of 1859.

“ I, therefore, reverse the Munsif's decision, and throw out the claim with all costs on the plaintiffs.”

The special appeal was heard by WESTROPP, C. J., and WEST, J., on the 6th of June 1871.

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*Bahiravnáth Mangesh*, for the appellants:—The lower court has misconstrued Sec. 7 of Act VIII. of 1859 in holding that the provisions of that section prevented the maintenance of the present suit. As at the date of the former suit the respondents were not in possession of the property now claimed, the cause of action with respect to that property had not then arisen, and the District Judge, therefore, erred in applying Sec. 7 of the Code to this case.

*Dhirajlál Mathurádas*, for the respondents:—The former suit was a suit brought by the plaintiffs for a half-share of the family property in the respondents' possession. It might, therefore, be fairly presumed to be a partition suit. And, as the plaintiffs omitted to include in that suit the lands now claimed by them, the claim is barred by Sec. 7 of the Civil Procedure Code.

WESTROPP, C. J.:—It appears to this court that the suit No. 195 of 1863 does not operate as a bar to the present suit inasmuch as the five *thikáns*, the subject of the present suit, were, when the suit No. 195 of 1863 was instituted, in the possession of mortgagees, and not available at that time for an actual partition, whereas the five *thikáns*, the subject of Suit No. 195 of 1863, had then been redeemed and were in the possession of Hari Shankar, and were then available for partition. The possession of the mortgagees of the five *thikáns*, the subject of the present suit, would not have been such a possession as Hari could treat as a possession adverse to the plaintiffs. When he mortgaged those five *thikáns*, he did so as manager of a united family, of which the plaintiffs were co-members with him. Such a possession by the mortgagees should, in a Court of Equity, be regarded as a possession quite as much under the plaintiffs as under Hari. This court, therefore, reverses the decree of the District Judge, and remands this cause for re-trial on its merits. On such re-trial the following issues should be determined, together with any other issues which to the trying Judge may seem proper and necessary for the final adjudication between the parties:—

1st—Whether the five *thikáns*, the subject of this suit, formed part of the family property.

2ndly—Whether the said five *thikáns*, or any of them, or any part thereof, have ever been the subject of a partition, either by suit or otherwise, amongst the parties to this suit.

3rdly—When were the said five *thikáns*, or any of them, or any part thereof, redeemed by Hari or any of the defendants from the mortgagees thereof; and, incidentally to this third issue,

4thly—Whether this suit is barred by the law of limitation.

5thly—Whether in the event of the trying court being of opinion that the plaintiffs are entitled to recover a share or shares in the five *thikáns*, the subject of this suit, the plaintiffs are bound to compensate the defendant Hari to any and what extent in respect of the redemption of the same five *thikáns*, or any of them, or any part thereof, by him. And it is further directed that the trying court shall be at liberty to take such further evidence in this cause on such re-trial as aforesaid as may be necessary. Costs to abide the final result.

*Decree reversed and case remanded.*

*Special Appeal No. 22 of 1871.*

June 12.

NA'THA'JI KRISHNA'JI.....*Appellant.*  
 HARI JA'GOJI.....*Respondent.*

*Hindú Law—Adoption by Widow—Adoption of Married Man among Shúdrás—Gifts of Ancestral Property previous to Adoption.*

According to the Hindú law obtaining in Western India, the adoption of a *Shúdrá* who is married at the time of his adoption is not invalid if the adopted person be a *sagotra* (of the same family) of the person adopting. A son adopted to her husband by a widow is entitled to set aside a gift of ancestral immoveable property made by his adoptive father's widow previous to his adoption.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the District of Sátará, in Appeal Suit No. 38 of 1870, confirming the decree of the Subordinate Judge of Rahímatpur.

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