

the sufficiency of the first ground, which we have mentioned, viz., that the plaintiff, having taken his mortgage of 1869 during the pendency of Gulábchand's suit against Sahku and Dhondú Tukárám, did so subject to the decree which might be made in that suit, and therefore that the sale under that decree to Gulábchand is completely valid against the plaintiff. We, accordingly, reverse the decrees of the Subordinate Judge and of the Assistant Judge, and direct the plaintiff (special respondent) Dhondi valad Bháu Pátíl to pay the costs of the suit and of both appeals.

1873.

GULÁ'BCHAND
MA'NIKCHAND
v.
DHONDI
VALAD BHÁ'U.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 189 of 1874.

TRIMBAK DIXIT (*Defendant*) *Appellant.*
NÁ'RA'YAN DIXIT (*Plaintiff*) *Respondent.*

1874.
Aug. 26.

Undivided Hindu family—Suit by one co-parcener against the others for a declaration of his right to a Government cash allowance forming part of the undivided estate—Partition.

One member of an undivided family cannot sue his co-parceners for a declaration that he is entitled to recover the whole of a family *Varshásan*. The only mode in which, as between the members of the joint family, a declaration of right to the *Varshásan* can be properly obtained is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners.

THIS was a special appeal from the decision of C. F. Shaw, District Judge of Belgaum, reversing the decree of Váman Parsharám, Subordinate Judge of Chikodi.

The facts of the case, so far as they are material to this report, are these:—

The plaintiff, Náráyan Dixit, and the defendant, Trimbak Dixit, were members of a joint Hindu family, to which a certain *Varshásan* (annual cash allowance) of Rs. 14 was payable every year from the Government treasury of the Gokák Taluka. The *Varshásan* was paid to the family up to 1847-48. In 1850 the Inam Commission commenced an inquiry into the claim of the family to the *Varshásan*, and, as a

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dispute arose between the plaintiff and defendant, each claiming the right to receive it himself exclusively, the Mámlatdár of Gokák, under date the 10th January 1870, issued an order to the plaintiff to the effect that the payment of the *Varshásan* would be withheld till it was decided by a civil suit which of the claimants was entitled to receive it. The plaintiff, therefore, brought this suit for a declaration that he had an exclusive right to the enjoyment of the *Varshásan* as against the defendant.

The Subordinate Judge threw out the plaintiff's claim on the ground that the action was barred by the law of limitation in consequence of the defendant's long enjoyment of the *Varshásan*. In appeal, that decree was reversed by the District Judge, who held the plaintiff entitled to receive payment of the whole *Varshásan*, on the ground that the defendant was not proved ever to have enjoyed adverse possession of it, and the plaintiff appeared to be the person who last received payment. The Judge also declined to declare the defendant entitled to any share in the unpaid arrears of the *Varshásan*, on the ground that such a declaration might compromise the defendant's claim to a formal partition, the family being admittedly undivided.

The special appeal was argued before WESTROPP, C.J., and KEMBALL, J.

Vishnu Ghanashám for the appellant :—It has been repeatedly decided both by the present High Court and by the late Sadar Adawlat that no member of a joint Hindu family can sue for a portion of the family property ; but he must sue for a general partition of the whole estate of the family (a).

Janárdan Sakhárám Gádgil for the respondent :—The present suit must not be considered as a partition suit for a portion of the family property. As Government refused to pay the *Varshásan* in consequence of the dispute between the plaintiff and defendant, the plaintiff was forced to go to the civil court for a declaration of the kind he prays, and seeks to recover the *Varshásan* from Government on behalf of the

(a) Selected cases (Bombay S. D. A.) pp. 151, 190.

family. Otherwise it would remain in the possession of the Government, and the claim to it would be barred. [*Westropp, C.J.*—As the parties are admittedly undivided members of a Hindu family, it cannot be said that either of them has any defined share in the family property till a division actually takes place, and defines the shares of the different co-parceners.]

The judgment of the Court was delivered by

WESTROPP, C. J.:—The parties on both sides are admittedly members of an undivided family, and the *Varshāsan*, the subject of this suit, is part, and part only, of the family estate. Under such circumstances, this suit, which is substantially one seeking a declaration that Nārāyan, the plaintiff (respondent), is entitled, as against the defendant Trimbak, to recover the whole of the *Varshāsan*, is wholly unsustainable. It is opposed to the admitted position and rights of the respective parties to this suit. It may or may not be that the defendant Trimbak, on a partition, would be entitled to a smaller share than the plaintiff, but, howsoever that may be, it cannot render a suit, in which the plaintiff seeks to recover the whole of the *Varshāsan*, sustainable. The only mode in which, as between the members of the family, a declaration of right to this *Varshāsan* (as to which the co-parceners are asserting their respective rights and cannot come to an arrangement that it should be received on behalf of the whole family by a mutual nominee) can be properly obtained, is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshāsan*, and for a declaration of the shares of the respective co-parceners. A suit will not lie for a partition of the *Varshāsan* alone: *Nánābhāi v. Nāthābhāi* (b), *Nārāyan v. Nānā* (c). This Court, on the above grounds only, and without adopting the reasons of the Subordinate Judge, reverses the decree of the District Judge, and rejects the suit of the plaintiff with costs of the same and of both appeals.

~~(a) Selected cases (Bombay S. D. A.) pp. 151, 190.~~

(b) 7 Bom. H. C. Rep. 46 A. C. J.

(c) *Id. Ib.* 153 A. C. J. see p. 178.

1874.

TRIMBAK
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