

1875. judgment in the case of *Sonábháí v. Ahmedbhái*. At page 408
 HIRJI JINA' I am reported as saying that "the effect of the rules made
 " under the 2nd letters Patent is that the Code of Procedure is
 NA'RRAN again incorporated in the letters Patent." It is clear from
 MULJI. the context that the words "so far as the same is applicable"
 have been inadvertently omitted. Having then regard to the
 long-established practice of this Court, if Section 363 of the
 Civil Procedure Code is to be applied, the word "decree" must
 be held to include the decree of reference, in which case the
 order of 19th December 1874, which is now sought to be ap-
 pealed against, having been made after the decree of reference,
 is not one "prior to decree," and being one which decidedly
 affects the merits of the case is, therefore, appealable.

[APPELLATE CIVIL JURISDICTION.]

April 5.

Special Appeal No. 111 of 1874.

MAHA' BALAYA' BIN PAR- } *Plaintiffs and Appellants.*
 MA'YA' and another. }

TIMAYA' BIN APPAYA' } *Defendants and Respondents.*
 and two others. }

Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.

The purchaser at a court's sale of the right, title, and interest of one of the co-parceners in the undivided estate, by his certificate, under Section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family.

Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property, forming only a part of the common estate.

Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him:

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a

definition of the portions in which each party, in future, was to have a sole interest. Such co-parceners, however, are not entitled to eject the purchaser wholly from a defined moiety of any particular portion of the joint property.

1875.

MAHA' BALA-
YA' BIN
PARMA' YA'
v.
TIMAYA' BIN
APPAYA'.

THIS was a special appeal from the decision of A. L. Spens, District Judge of Kanara, affirming the decree of A. M. Canten, First Class Subordinate Judge of Sirsi.

Mahábalayá and his brother Rámayá brought this suit to set aside the sale of certain land and other immoveable property, made in execution of a decree obtained by Timmá bin Ganpayá (defendant No. 3) against Timayá. bin Apayá (defendant No. 1), and to recover possession of a moiety of the said property from the execution-purchaser, Sangar Ganpayá (defendant No. 2). The plaintiff stated that the father of Timayá (defendant No. 1) and his own father Parmayá were full brothers; that the property in dispute was the joint property of the whole family; that Sangar (defendant No. 2), as purchaser of the right, title, and interest of Timayá (defendant No. 1), could only claim the share of the judgment-debtor, and that the debt was not contracted for any common family necessity or benefit. Timayá did not appear. The second and third defendants answered that the debt for which the property in dispute was sold in satisfaction of a decree against Timayá was contracted by him as manager, and for the common use and benefit of the joint family, and that, therefore, the sale was binding on the plaintiffs. Both the lower courts held the debt to have been contracted for the benefit of the joint family, and threw out the plaintiff's claim.

The special appeal was argued before WEST and PINHEY, JJ.

Dhirajlál Mathuráclás (Government Pleader) for the special appellants.

Ganpatráv Bháskar and *Shámráv Vithal* for the special respondents.

WEST, J. :—We are of opinion that the third defendant in this case by a certificate, under Section 259, Civil Procedure Code, conveying to him the right, title, and interest of

1875. Timayá, could take no more than the interest of Timayá
 MAHA'BALA- in the property, thus disposed of, as a member of a united
 YA' BIN family. What that interest was, and how the transaction
 PARMA'YA' could be made good, if at all, for the benefit of the purchaser
 v. of a co-parcener's interest in a particular piece of land, forming
 TIMAYA' BIN but a part of the common property, would have to be
 APPAYA' disposed of, if he were seeking possession, according to the
 principles laid down in the case of *Pándurang v. Bháskar*
 (a). In the present case, however, the purchaser has got
 into possession, which he now holds with such an accom-
 panying right as the judgment-debtor, Timayá, could have
 transferred to him. He is in, therefore, as a tenant in
 common with Timayá's co-parceners, the plaintiffs. They
 are entitled to possession in common with the purchaser,
 and if this is refused, they may enforce their right by a suit
 for a share of the enjoyment or for a definition *in specie* of
 the portions in which each party is to have for the future a
 sole interest; but they are not entitled to eject the purchaser
 wholly from a defined moiety of the land. It may turn out
 on inquiry that, on an equitable adjustment of the several
 rights of the members of the joint family and on a mar-
 shallling of the elements of its estate, so as to give effect,
 so far as may be, to the execution sale of land as included in
 Timayá's share, the whole of the land in dispute or more
 than a moiety of it may be left in the hands of the defend-
 ants. In the meantime, we cannot say that the plaintiffs
 are entitled to separate exclusive possession of any particular
 portion. The District Judge has rejected their claim alto-
 gether. This order we modify so as to declare the plaintiffs
 entitled to possession along with the defendants as tenants
 in common, but no more. Each party to bear his own costs
 throughout.

(a) 11 Bom. H. C. Rep. 72.