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iminal Procedure. It does not seem absolutely necessary that in such a case there should be more than a single sentence, but if a separate sentence be passed on each head, an appeal brings the aggregate of those separate sentences as together constituting the punishment awarded in a single trial, within the jurisdiction of the court which is competent to hear an appeal. In other words, the whole punishment awarded to one person on one trial is to be regarded for the purposes of appeal as one sentence. The High Court could not properly on review deal with the evidence. It, therefore, directs that the Session Judge dispose of the case himself.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

April 19.

Special Appeal No. 280 of 1874.

NA'RAYA'NBA'BA'JIDA' BHOLKAR. *Plaintiff and Appellant.*
PA'NDURANG RA'MCHANDRA } *Defendants and Respon-*
DA' BHOLKAR and another } *dents.*

Suit for partition—Omission of a mortgaged field from claim—Subsequent suit—Civil Procedure Code, Section 7—Limitation—Separation in living and separation by partition:

In 1861 the plaintiff brought a general partition suit (No. 1363) to recover his share of the family property in the possession of the first defendant and did not include in that claim a field then in the possession of a mortgagee. The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then filed the present suit to recover his share in the field. The first court allowed the plaintiff's claim, but the District Judge in appeal threw it out, on the ground that it was barred both by Section 7 of the Civil Procedure Code and by the Law of Limitation. The Judge based the latter finding on certain allegations made by the plaintiff in Suit No. 1363, and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant :

Held in special appeal that the claim was not barred by Section 7 of the Civil Procedure Code, because the mortgaged field was not available for an actual partition at the time of the former suit, No. 1363 of 1861. *Held* also that the suit was not barred by limitation, because the possession of the first defendant, or of his mortgagee, was not adverse to plaintiff, the alleged separation being only a separation in living, as distinguished from a separation by partition.

The true question for consideration in cases of this kind is whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second, and where the former suit is one for an actual division of property, the plaintiff is not bound in it to ask for a declaration defining his right in property not then capable of division.

Balkrishna Withal v. Harishankra (8 Bom. H. C. Rep. 64 A. C. J.) followed.

THIS was a special appeal from the decision of R. W. Hunter, District Judge of Ratnágiri, in Appeals Nos. 302 and 331 of 1873 from the Subordinate Judge of Málwán.

The special appeal was argued before KEMBALL and NA'NA'BHA'I HARIDA's, JJ.

Shántárám Náráyan for the appellant.

Ghanashám Nilkant and *Shámroáv Withal* contra.

The facts of the case and the argument of the pleaders on either side fully appear from the following judgment delivered by

KEMBALL, J. :—The *thikán*, a half share of which the plaintiff now seeks to recover, was alleged to be joint ancestral property, mortgaged by Rámchandra, the father of the first defendant, for Rs. 200, and subsequently redeemed by the first defendant, after his father's death, on the 30th April 1871. The plaintiff, as a half-sharer with Pándurang Rámchandra, the first defendant, thereafter applied to him for possession of his half share, offering to pay half the money advanced, to Rámchandra on the mortgage. This application was refused, and accordingly the present action was brought against Pándurang and the second defendant (who holds under Pándurang) to recover the said half share. Pándurang pleaded, 1st, that the plaintiff had no share in this *thikán* at all, and that, even in the ancestral estate, he had only one-fourth and not half share; 2nd, that the *thikán* in question was purchased by his father and another, after his father and the plaintiff's father had separated, and that his father mortgaged it; 3rd, that he succeeded by inheritance to the entire *thikán*, which he redeemed for Rs. 825, the greater portion of which was advanced by the second defendant upon the security of the *thikán*, which is now held in mortgage by

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him ; and 4th, that the plaintiff's statement, that they were still in union, was false. The second defendant, Sitárám Kámat, generally denied the plaintiff's right, and pleaded that he could not be deprived of his security without the mortgage money being re-paid. The Subordinate Judge having framed fitting issues, held on the evidence, 1st, that the plaintiff was owner of a half share in the *thikán* in question ; 2nd, that he was entitled to redeem that half on payment of Rs. 100 ; and 3rd, that the defendant Pándurang had failed to establish his competency to mortgage the plaintiff's share, and passed a decree in the plaintiff's favour. Both the defendants then appealed to the District Judge on the following grounds :— That the claim was time-barred ; that the *thikán* was acquired by Pándurang's father after separation ; that the *thikán* was the sole property of Pándurang ; that, even if the plaintiff had a right by union, he was bound to pay his share of debts before recovering his half share of the *thikán*, and that the defendant Sitárám was entitled to be paid the whole of the money advanced by him before he could be dispossessed of any portion. The District Judge proceeded at the outset to consider whether the claim was barred, 1st, by Section 7 of Act VIII. of 1859, and 2nd, by the law of limitation ; and finding on these two issues against the plaintiff, he reversed the decree of the Subordinate Judge, and rejected the claim.

Both the courts below have found that the plaintiff and the first defendant are members of the same family, and the District Judge observes that—“The genealogy (23), which is admitted by all the parties for the purposes of this suit, shows them to be second cousins, having one great-grandfather in common.” But before we proceed to consider the grounds on which the District Judge has refused to entertain the plaintiff's claim, we think it necessary to sketch briefly the course which the litigation between these two cousins has taken. It appears that, on the 27th April 1861, the plaintiff Náráyan Bábaji Dábholkar brought four separate suits against the first defendant, Pándurang, numbered respectively 1357, 1363, 1364, and 1375. One of these, 1363, was against Pándurang alone, in respect of such of the joint family pro-

perty as was then in his actual possession, to enforce partition and to obtain delivery to Náráyan of his share in such property, and the remainder were against Pándurang, coupled with others, to enforce a partition and to recover possession of such portions of the joint property as were in the hands of such other persons.

In the general partition suit, as it may be styled, 1363, Náráyan obtained the decree sought, which was apparently not appealed against; but his efforts in the others were attended with varied success.

In 1364, Náráyan sued for partition and possession of a share in a particular field in the possession of Pándurang and other sharers. Pándurang alone defended the suit. He alleged that his father had acquired the field after separation and the plaintiff had no share. However, the Munsif decreed for the plaintiff, and this decree was upheld in the Senior Assistant Judge's Court and again in Special Appeal 710 of 1865, decided on the 16th March 1866.

In 1375, Náráyan sued for partition and possession of a share of a *thikán* as against Pándurang and the heirs of the purchaser from him (Bápu Kámble). Pándurang denied that the *thikán* was joint family property and that the plaintiff had ever any interest in it. Both the Munsif and the Joint Judge held that the land in dispute was proved to have been the joint property of Náráyan and of Pándurang, and that Náráyan was entitled to his share subject to the mortgage made by Pándurang's father, Rámchandra, and the Joint Judge's decree was affirmed in Special Appeal 219 of 1866 on the 10th January 1868, *vide* 5 Bom. H. C. R. A.C.J. 30; and we now come to the fourth suit, 1357, which it will be necessary to give somewhat more in detail. It relates to the identical *thikán*, the subject of the present suit. In that suit Náráyan sought as against Pándurang Rámchandra and Rámchandra Kámat Bhangle to compel partition and to recover possession of half of this *thikán*, which was in Bhangle's possession, as mortgagee from Pándurang's father. The mortgage which Náráyan spoke of was one effect-

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ed in 1840. The defendants, however, put in two further mortgages of 1844 and 1850, saying that they had superseded the first mortgage of 1840. The plaintiff's pleader was questioned by the Munsif as to the mortgages of 1844 and 1850, and he refused to acknowledge them; and as the defendants denied the existence of the mortgage of 1840, and those of 1844 and 1850 only bound Pándurang, the Munsif decreed possession to the plaintiff of his share, free of any encumbrance. In Regular Appeal, the District Court of Ratnágiri reversed the Munsif's decree, on the ground that Náráyan had failed to prove his position in the family, but this ruling again was reversed in special appeal, and the case remanded to be determined on its merits. On remand, the District Court held that Náráyan could not sue to redeem only a portion of the mortgaged property the mortgagee, Bhangle, being entitled to have the whole redeemed. Then Náráyan brought a suit, 341 of 1871, against Pándurang and Bhangle to redeem the whole, but as it then appeared that in the short interval, Pándurang had redeemed the property from Bhangle, Náráyan's suit was thrown out. Pándurang, however, only redeemed the property to again mortgage it to Sitárám Kámat. The present action, therefore, was brought against Pándurang and Sitárám Kámat to recover Náráyan's share in the said *thikán*.

Having thus given an outline of the previous suits between these two parties, it will be sufficient to state shortly the reasons, so far as we understand them, which have impelled the Judge, without going into the merits, to hold that the plaintiff's claim is now barred. He considered first, that the subject-matter of the present claim should have been included in the general partition suit 1363 of 1861 and, therefore, that Section 7 of Act VIII. of 1859 disallowed the present suit, and second, that as Náráyan admitted in his plaint in suit 1363 of 1861 "that he had been separated from the first defendant no less than 28 years before," and also that as his pleader had in suit 1357 of 1861 repudiated the mortgage-bonds of 1844 and 1850, therefore his claim

was, moreover, time-barred ; and he further held that the ruling in 8 Bom. H. C. R. 64 A. C. J. could avail Náráyan nothing “because, from his own plea in Original Suit 1363 of 1861, it is evident that the possession of the first defendant’s mortgagees under instruments executed after the plaintiff’s separation from the first defendant, should have been treated by the plaintiff, when he brought that suit, as a possession under the first defendant, but adverse to himself.” But are these preliminary objections to the maintenance of the present action well founded ? To take first the question of limitation—the Judge rests his decision on certain admissions made by the plaintiff and his pleader respectively. With regard to the allegation contained in the plaint in Original Suit 1363 of 1861, we think that the Judge has placed an interpretation upon it, which it does not necessarily bear. It appears to us that the Judge has confounded separation in living with separation by partition of property. The one does not of necessity involve the other, and it may well be that all the plaintiff intended to say was that he had commenced to live apart from the defendant no less than 28 years before, and that admitted fact would not in itself tend to make the possession, by any one member of the family, or by an encumbrancer under an encumbrance created by the manager for family purposes, adverse to any one member ; and as regards the reply of the plaintiff’s pleader in Original Suit 1357 to the effect that he did not admit the mortgages of 1844 and 1850, it is sufficient to say that that answer, putting upon it a construction most unfavourable to the plaintiff, is not conclusive proof of the accrual to the plaintiff of the cause of action in 1844. It may be that the subsequent mortgages, though made without the knowledge and consent of the plaintiff, were made under circumstances which rendered them binding on all the members of the family, or that the original charge continued notwithstanding further advances were made on the same security. It might be a question whether the plaintiff was responsible, in respect of his share of the land, for the subsequent loans, but it would not necessarily follow that the possession of the

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encumbrancer commenced and continued to be adverse to him from the date of such loans. On the whole, we are of opinion that the facts set forth by the Judge were not such as to justify his determining summarily that the maintenance of the plaintiff's claim was barred by the law of limitation. We will, therefore, proceed to discuss the other question, whether the provisions of Section 7 of the Civil Procedure Code are a bar to the institution of the present suit. The Judge held that the plaintiff was bound to have included this claim in his suit 1363, and he decided, when this Court's judgment in Special Appeal 419 of 1870 (*vide* 8 Bom. H. C. R. 64 A. C. J.) was quoted, that it availed him nothing, because, by reason of the admissions above considered, he should have treated the possession of the particular *thikan* now in dispute as under the defendant Pándurang, but "*adverse to himself.*" We have already decided that the encumbrancer's possession did not necessarily become adverse to the plaintiff in 1844, so that the reason for not applying the ruling in the 8th Volume disappears. But it is argued for the respondents, in opposition to that judgment, that as the cause of action was the right, which the plaintiff possessed as a member of the joint family, to demand a partition, he was bound, by Section 7 of the Civil Procedure Code, to include in one suit all the joint property in respect of which he had a right to, and desired a share and that it was not competent to him in another suit, filed either on the same day or at any subsequent period, to ask for a division of any property omitted from the first: and in support of the contention that the cause of action was the same, our attention has been drawn to the ruling of a Division Bench of this Court in S. A. No. 219 of 1866 in 5 Bom. H. C. R. 30 (noted above when speaking of Original Suit 1375). But this judgment cuts both ways as far as it affects the respondent's case, though, indeed, we are not inclined to attach much weight to it. The fact of the plaintiff having but one cause of action appears to have been accepted without much consideration, and assuming the fact ourselves for a moment we certainly cannot at all assent to the proposition which

follows. On the other hand, we think the judgment in the 8th Volume strictly right in principle. The true question for consideration in cases of this kind appears to us to be whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second suit, and in order to apply that test to the present case, it is necessary to bear in mind the two-fold application of the word "partition." There may be a division of right in joint property, and there may be a division of the property itself, *i.e.*, by metes and bounds. Very probably this distinction may have been in the mind of the plaintiff, at least as regards those portions of the family property in the hands of encumbrancers, when he brought his four suits simultaneously. However that may be, it is abundantly clear that the plaintiff, in his suit 1363, could not have recovered precisely that which he now seeks to recover, for the reason that, in that suit, he sought a division of property, whereas this particular *thikán*, being then in the possession of a mortgagee, was not available for an actual partition. It has been pressed upon us that the plaintiff *might* have asked for "a division of right" in respect of this property in the former suit 1363, but that is not the question. He sought for a division of property as against Pandurang, and, in respect of this property, he had then no such cause of action against him. Section 7 of the Civil Procedure Code did not render it obligatory upon the plaintiff either to include this division of right in his suit for division of property or to abandon for the future all hope of establishing it by an action; and on this point, we would refer to a judgment of the Madras High Court, in the case of *Pattaravy Mudali v. Audimula Mudali (a)*, which discusses in connection with it the meaning of the words "cause of action."

Differing from the District Judge on the two preliminary objections presented to him, the result is that the case must go back to be heard and determined on the merits. As the

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Judge appears to think that the plaintiff is to blame for the complications which have arisen, we must observe that, in our view, the plaintiff has done all that he could be expected to do to obtain his right, and where he has been unsuccessful, his case, whatever may be the merits of his claim, is not undeserving of sympathy.

We reverse the decree of the District Court, and remand the case in order that the appeal from the decree of the Subordinate Judge may be heard and disposed of on its merits. Costs to follow final judgment.

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 27 of 1873.

March 21.

MIR AJMUDDIN KHA'N, heir } (*Plaintiff*) *Appellant.*
of FA'TMA' BEGAM

ZIA'-UN-NISSA' BEGAM and } (*Defendant*) *Respondent.*
another.

Sanction—Act XVIII. of 1848—Slavery—Act V. of 1843.

The permission of Government in 1858 to the Agent for the Governor of Bombay at Surat to pay certain moneys of the widow of the late Nawáb of Surat to whomsoever a certificate of heirship to her might be granted by the civil court is not a sufficient authority under Act XVIII. of 1848 for the institution against her granddaughters of a general civil suit under Regulation IV. of 1827 or Act VIII. of 1859. Nor does permission given in 1871 to institute a suit authorise the continuation of a suit instituted in 1869.

The effect of Act V. of 1843 is to prevent the enforcement of any rights, which would, if that Act had not been passed, have arisen out of the status of slavery; and a suit, brought by the heir of the master of a slave-girl, emancipated by and married to such master, in his lifetime, to recover, as such heir, her property in the hands of persons descended from her, is one the cognizance of which is barred by Section 2 of the Act.

THIS was an appeal from the decision of W. H. Newnham, Judge of the District of Surat.

The original plaintiff, Fátma Begam, who is now dead, and whom Mir Ajmuddin Khán represents in this appeal, sued the defendants to recover certain property, moveable and immoveable, which belonged to Amir-un-nissá Begam, wife of Afzuluddin Khán, the last Nawáb of Surat, alleging that this