1875.

RA'MCHANDRA BALLA'L v. BA'BA' ESGONDA.

for possession in favour of the mortgagee, for further execution thereof, by taking an account of what was due to the mortgagee, and, on payment by the mortgagor of the amount found due, by restoration to him of the mortgaged premises, is, as was held in those cases, the proper mode for the mortgagor to redeem the lands from the mortgagee and to recover possession of them from him. The Full Bench, principally on the ground that the previous decree for possession had been fully executed when the mortgagee was put into possesssion, overruled these cases, and answered the question referred to it in the negative. That decision completely governs the present case.

Orders of the lower courts reversed with costs.

[APPELLATE CIVIL JURISDICTION.]

March 3.

Regular Appeal No. 76 *of* 1872.

KESHAV GOPA'L GINDE and two others..... } *Defendants and Appellants.*

RAYA'PA' and another ...*Plaintiffs and Respondents.*

Partnership—Rights of a deceased partner—Adjustment of a partnership account—Payments by partners—Presumption—Execution—Seizure of partnership property in execution against one partner.

A suit based on the right of a deceased partner cannot be limited to a demand for his share in the proceeds of property alleged to have come into the possession of the partnership during its existence. The agreement on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assests, if any, must all be taken into account, and the suit must demand such a sum, if any, as, on a general account, and an account between the deceased partner and the co-partnership, being taken, shall appear to be due.

Payments made by the different partners of a firm are presumed to have been made out of the funds of the firm where the contrary is not proved by any satisfactory evidence, and when a firm consisting of two members is dissolved by the death of one partner, the presumption is that the deceased was entitled to a moiety of the existing assets.

It is an improper way of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property, to sell that part, and then distribute the proceeds between the executing creditor and the other partners of the firm.

1875.

KESHAV GOPA'L GINDE v. RAYA'PA'.

Principle on which the account of a dissolved partnership should be adjusted, explained.

THIS was a regular appeal from the decision of Dayárám Mayárám, First Class Subordinate Judge of Belgaum.

The plaintiffs (1 Rayápá and 2 Keshav Hari) brought this suit against Keshav Gopál Ginde, 2 Apaná More, and 3 Krishnáji Ginde, and sought to recover from them 805 logs of timber (measuring 1,206 *candies*), or their value, Rs. 34,155. The plaintiffs stated that a partnership was formed between the first plaintiff's brother, Balápá (now deceased), and the first defendant, Keshav Ginde, each having a half share in the profit and loss thereof; that the second plaintiff was a sub-partner under the deceased Bálápá, and similarly the second and third defendants were sub-partners under the first defendant; that on the 11th June 1862 the partners purchased from one Vithal Káshiráv Bhende 2,210 logs of timber, consisting of teak, black-wood, and mutti, and measuring 2,412 *candies*, for Rs. 12,000; that Balápá died shortly after the timber had been collected in the Godhavli forest; that subsequently the defendants sold off the whole timber; that they had in their possession the deed of purchase from Vithal Bhende, and all the papers and books relating to the partnership transaction; that out of the originally purchased 2,210 logs (measuring 2,412 *candies*) the plaintiffs had a right to 1,105 logs (measuring 1,206 *candies*); but that as three hundred logs had been sold in execution of a decree against the deceased Balápá, by which sale Balápá's judgment-creditor had realized Rs. 2,025, the plaintiffs allowed a deduction of 300 logs (or their realized value, Rs. 2,025), and claimed from the defendants 805 logs, or their value as mentioned above. The defendants denied the plaintiffs' claim, and stated that Balápá himself had sold the timber and kept the money and papers belonging to the partnership. The Subordinate Judge found the quantity of timber, that came into the possession of the partnership from Vithal Bhende, to be 1,948 *candies*, there being a short delivery of 464 *candies*, and fixed the measurement of the three hundred logs sold under the decree against Balápá, at 533 *candies*, and gave to the plaintiffs

1875.

KESHAV GOPA'L GINDE v. RAYA'PA'.

a decree for 7,007½ logs, or in default, their value, Rs. 21,225 He fixed 533 *candies* as the quantity sold in execution, solely from the fact that the plaintiff Rayápá himself set the value of the 300 logs at Rs. 16,000 in a petition which Rayápá had presented for the removal of the attachment placed on the 300 logs by the deceased Balápá's execution-creditor. The defendants thereon preferred an appeal to the High Court against the decree of the Subordinate Judge.

The appeal was argued before WEST and NA'NA'BHA'I HARIDA'S, JJ.

Latham (with him *Bahiravnáth Mangesh*) for the appellants.

Farran (with him *Vishnu Ghanashám*) for the respondents.

The Court remanded the case for a fresh finding by the Subordinate Judge, with the following observations as to the manner in which the partnership account was to be made up:—

WEST, J.:—The suit in this case was so erroneously constituted, and has been conducted with so imperfect an appreciation of what was essential for its proper disposal, that the Court must send it back to the court of first instance for a fresh investigation directed to the points that really arise between the parties. A suit based on the rights of a deceased partner cannot properly be limited, as was this one, to a demand for his share of the proceeds of certain property alleged to have come into the possession of the firm or partnership. The agreement, on which the partnership was formed, the amounts advanced and drawn out by the several partners, and the subsisting liabilities and assets, if any, must all be taken into account, and the demand must be for such a sum, if any, as, on a general account and an account between the deceased partner and the co-partnership being taken, shall appear to be due. It was almost futile to go through a long investigation of how many logs of teak and mutti had come into the hands of the partners in this case and of the prices at which they might possibly have sold them, while no

1875.

KESHAV GOPA'L GINDE v. RAYA'PA'.

advertence was had to the equally important questions of the amounts, brought into the partnership and expended for it by the several partners, and of the loss inflicted on the partnership by the forced sale of a quantity of its timber in execution of a decree against Balápá alone. * * *

The total quantity of timber purchased from Government by Vithalráv, the vendor of Balápá, and the defendants, seems to have been 2,412 *candies*. This was re-sold at a profit by Vithalráv to the partnership; but before the timber was delivered by Government, a quantity of it was destroyed in a jungle fire. The allowance made by Government on this account was Rs. 1,000. The suggestion that a larger sum was allowed is not supported by any testimony that can prevail against the Government accounts showing this precise sum, nor do the Court think it likely that Vithalráv accepted an allowance smaller in proportion to the whole price than the quantity destroyed in proportion to the whole quantity purchased. The Subordinate Judge has estimated the quantity destroyed according to this proportion as 463¾ *candies*, and this the Court think the most reasonable determination on the point that he could have arrived at.

After the timber had been collected, 300 logs were attached and eventually sold in execution of a decree against Balápá alone. The defendant Keshav's application to raise the attachment on the allegation that Balápá (now deceased) had had no right to the property was rejected, but one-half of the proceeds was made over to him. It was an improper way of executing the decree against Balápá merely to seize part of the partnership property, to sell that part and then distribute the proceeds between Balápá's partners and his judgment-creditor, but this having been done and being irreversible, Balápá's representatives must account for the loss thus occasioned to the common assets. What this loss was has been variously computed by the parties and by the Subordinate Judge. The latter, taking the value of the whole 300 logs, as set forth by the plaintiff Rayápá, and the price per *candy* as estimated in the plaint, has arrived at the conclusion that the quantity was 533 *candies*, but if, as

Rayápá averred in his petition No. 135, the timber was worth Rs. 16,000, it is hardly possible that it should not have contained more than 533 *candies*. It appears from defendant Krishnáji's agreement with Government (145) that teak could be bought for delivery in Belgav at Rs. 2¾ a cubic foot and mutti at Rs. 2½ a foot. The price that could be realized at Tavargati would probably be some 2 or 3 rupees a *candy* less than these prices. It is probable and almost certain that a judgment-creditor, with an order empowering him to attach and sell 300 logs out of nearly 2,000, would seize the best he could find, and it may be assumed that the logs actually taken in execution were of teak timber and of a large size. The *kulkarni* of the village estimates them as weighing about 350 *candies*, which is but a trifle over the average weight of the 2,210 logs all round. Rayápá's estimate of the value at Rs. 16,000, on the other hand, is probably quite as excessive in the other direction, and to form an estimate of the quantity by dividing this sum by Rs. 30, Rayápá's valuation of a *candy*, was a very unsafe way of proceeding, because, according to the notions of the parties, and indeed of the Subordinate Judge himself, the plaintiffs had nothing to lose by an excessive valuation as to the 300 logs, while they had much to gain if this valuation could be extended to the remainder of the timber. Amongst the other numerous anomalies of the case, it appears that the plaintiffs served the defendants with a notice to produce the accounts relating to the purchase and sale of the timber. Those accounts do not seem to have been produced or called for on the further hearing of the cause. If they can be procured, the Subordinate Judge may learn from them what is the cost of carriage of timber per *candy* from Tavargati to Belgav, which the Court understands to be the nearest mart. Their evidence should be supplemented by independent testimony, and when the Subordinate Judge has thus satisfied himself of the cost of conveying timber from Tavargati to Belgav, he may fairly estimate the proper price at the former place by deducting such cost per *candy* from the selling price of Rs. 2¾ a *candy* at the latter. The same accounts, by

1875.

KESHAV GOPA'L GINDE v. RAYA'PA'.

showing how many *candies* were removed and sold after the attachment, may enable the Subordinate Judge to say with approximate certainty to how many the attachment extended. In the absence of this testimony, the quantity cannot, the Court think, be taken to be more than 450 *candies*, an estimate which allows the logs attached to have been about 50 per cent. more in bulk than the average. The quantity having been ascertained or approximately estimated as thus directed, Balápá's account with the partnership will be made up by debiting him with the proper price at Tavargati of the 450 *candies*, or other more accurately determined quantity of timber, and crediting him with the amount handed to the defendants as their moiety of the proceeds. Keshav's attempt to get the attachment removed by setting up his own sole title, and endeavouring to disprove Balápá's interest, was a fraudulent proceeding, which subsequent events have shown not to have been entered on with a view to the common advantage of the partners. Avábái, the widow of Balápá, appears to have been induced with some difficulty to lend her countenance to the endeavour, but Rayápá cannot fairly be charged with any part of the expenses thus incurred. The defendants must not, therefore, obtain credit for those expenses in making up their account with the partnership.

If, from or through the accounts, the Subordinate Judge can obtain satisfactory evidence as to how the remainder of the timber was disposed of, he must debit the defendants in account with the partnership with the amount actually and in good faith realized by its sale. If the accounts cannot be obtained or cannot be trusted, he must debit them with the fair market price of the timber estimated, as the Court have already indicated. On the other hand, he must credit them with all sums which they may prove that they actually and in good faith expended on behalf of the partnership. If they are willing to undertake the payment of outstanding debts due by the partnership, and the Subordinate Judge is satisfied of their solvency, he may credit them with such sums as are proved to be due, debiting them at the same

time with any assets of the partnership that may appear recoverable, but have not been actually recovered.

Balápá's account with the partnership, of which the items requiring particular consideration have already been dealt with, should be made up on the same principles as that of the defendants. He is to be credited with sums reasonably and properly paid by him on account of the partnership, and debited with those paid to or for him. Rayápá's expenses in relation to the attachment are not to be charged against the partnership.

No written agreement embodying the terms of the partnership has been produced in the case. If such a document can be procured, the Subordinate Judge will procure it and will follow its provisions in finding on the distribution that should be made of the final assets. In its absence, he will follow the usual presumption that the capital was to be furnished in equal shares by each principal partner, and that the final assets are to be distributed in the same proportions. For sums above a moiety of the capital laid out by them, the defendants will be entitled to credit before a distribution. The balances finally found due to the partnership by the defendants on the one hand, and by Balápá on the other, will constitute its assets, which being equally divided, a moiety will be payable to the plaintiffs after deduction of the balance due by them to the firm.

The Subordinate Judge will prepare an account, as thus directed, taking fresh evidence, if tendered or procurable, on such material points as have not been disposed of, and will forward it with the evidence to this Court.

On receipt of the Subordinate Judge's finding, the case again came on for argument and disposal before WEST and NA'NA'BHA'I HARIDA'S, JJ., on the 3rd March 1875.

Lang (with him *Bahiravnáth Mangesh*) for the appellants.

Farran (with him *Vishnu Ghanashám*) for the respondents.

PER CURIAM:—We must, on such materials as are before us, determine that Keshav and the other members representing

1875.

KESHAV GOPA'L GINDE v. RAYA'PA'.

the firm are to pay the plaintiffs Rs. 17,590 as above.* The evidence fails as to who supplied the capital and on what terms the partnership was constituted. The payments made by the different partners for the firm were presumably made out of the funds of the firm, and the contrary is not proved by any satisfactory evidence. Hence we must fall back on the ordinary presumption that at the moment when the firm was dissolved by Balápá's death, he was entitled to a moiety of the existing assets, *i.e.*, Rs. 58,500, minus a debt for cart-hire of Rs. 300. His execution-creditor seized and sold Rs. 13,535 worth of timber, out of the proceeds of which Rs. 2,025 were handed back to Keshav. The account is made up accordingly, and the defendants must pay the balance to plaintiffs. Costs throughout in proportion.

* Balápá in account with Keshav & Co.

Dr.			Cr.	
To Timber attached in execution	Rs. 13,535		By cash paid to Keshav on account of execution	Rs. 2,025
Balance	,, 17,590		A moiety of remaining assets	
			58,500 — 300	
	31,125		———	= 29,100
			2	
				31,125

[APPELLATE CIVIL JURISDICTION.]

March 10.

Regular Appeal No. 65 *of* 1873.

GIRIA'PA' .....*Plaintiff and Appellant.*

JAKANA' and others.....*Defendants and Respondents.*

Hereditary office—Succession—Resumption—Adverse possession—Limitation.

J held the office of *Pátil* more than fifty years ago as representative of two branches descended from a common ancestor, and then united in interest, there being two other branches descended from the same ancestor, but severed in interest from those represented by *J*. *J* having died in 1824, was succeeded by his son *T*, without any opposition from the two other branches. *T* was temporarily displaced from the office by *G*, who represented the two other branches, but recovered it in 1850. In an action brought by the plaintiff, as representative of *G*, in 1873, to establish his claim to the office held by *T*'s sons, it was contended on behalf of plaintiff, in answer to de-