

## [APPELLATE CIVIL JURISDICTION.]

1876.  
February 1.*Special Appeal No. 190 of 1875.*

BA'BA'JI LAKSHMAN AND ANOTHER (DEFENDANTS, APPELLANTS) SPECIAL APPELLANTS v. VA'SUDEV VINA'YAK (PLAINTIFF, RESPONDENT) SPECIAL RESPONDENT.

*Undivided Hindu Family—Ancestral estate—Execution—Sale of a coparcener's interest—Tenancy in common—Partition.*

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his coparcener alone,

*Held* that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as tenant in common. But that if a division in *specie* were desired, a suit should be brought for that purpose. *Máhú-balayá v. Timáyá* (12 Bom. H. C. Rep. 138) followed.

THIS was a special appeal from the decision of A. D. Pollen, Assistant Judge of Ratnágiri, in Appeal No. 222 of 1874, confirming the decree of the 1st Class Subordinate Judge at that town.

The plaintiff Váśudev alleged that he and one Náro Shankar were members of an undivided Hindu family, and that, in execution of a decree against Náro alone, a shop forming part of the family estate was attached and subsequently sold by the Civil Court to Bábáji Lakshman; and prayed that his, the plaintiff's, right might be declared to a half of the shop, and the purchaser evicted from it. The suit was originally brought against Náro and his creditor Govind; and Bábáji, the purchaser, was subsequently joined as a co-defendant.

Náro did not appear to defend the suit.

The other defendants denied the plaintiff's union with Náro, and set up other pleas, which it is unnecessary to notice.

The Subordinate Judge found the plaintiff and Náro to be united, and passed a decree in favour of the plaintiff. The Assistant Judge confirmed his decree, refusing to give effect to a partition deed (Exhibit No. 34) set up by the defendants.

The special appeal was heard by WEST and NA'NA'BHA'I HARI-DA'S, JJ.

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*Shántárám Náráyan* for the defendants.—The shop is the defendant Náro's sole property, as evidenced by Exhibit No. 34, which purports to be a complete partition between the plaintiff and Náro, and yet makes no mention of this shop. It is inconsistent with it that the plaintiff should have a right as united in interest with Náro. The purchaser cannot, even if the plaintiff and Náro be found to be united, be summarily evicted. As held in *Máhábalayá v. Timáyá* (1) the plaintiff is entitled to possession as tenant in common with Náro's vendee, Bábáji.

*Mánekshá Jehángirshá* for the plaintiff.—The finding of the Appellate Court, that this plaintiff and Náro are united, is final. The plaintiff is, therefore, entitled to his share in the shop, which there is evidence to show is in Bábáji's possession.

*Shántárám* in reply.

The judgment of the Court was delivered by

WEST, J.:— In this case, a shop having been attached as the sole property of Náro, and afterwards sold as his to Bábáji; Vásudev, who had failed in an attempt to raise the attachment under Section 246 of the Civil Procedure Code, sued to establish his right to a moiety of the shop as his ancestral property. In the Court of first instance the contest appears to have been chiefly on the ground of whether, in virtue of a partition evidenced by document No. 34, the plaintiff Vásudev was entitled to a portion of the shop, his title to which the Subordinate Judge affirmed. In regular appeal the Assistant Judge shut out the document No. 34 as unstamped, and on the remaining evidence he found that the plaintiff was united in interest with Náro. But on this view of the facts he affirmed the decision of the Subordinate Judge.

It appears to us that this case is substantially identical in principle with *Máhábalayá v. Timáyá* (2) and that, for the reasons there set forth, the plaintiff Vásudev, having been found to be united in interest with Náro, was entitled to recover or to retain possession as tenant in common with Náro's vendee,—that is, with Bábáji. The latter is sued as in possession, but the posses-

sion, by notice to the tenant (No. 37), given to Bábáji as execution purchaser, by the Court, was not meant to deprive Vásudev's suit, in the event of its establishing his right, of any of its efficacy through a temporary defect of possession, while the rights of the parties had still to be brought to final adjudication. Although Vásudev's tenant received a notice not to pay rent to him, this constructive dispossession of Vásudev should not place him at any disadvantage when he had once established that it ought not to have occurred or ought to have been materially qualified. On the other hand, we think that the question of whether the debt, for which Náro's interest was sold, was one binding on the whole of the joint property, is one that we cannot at this stage entertain, as it was not raised in the Courts below.

We shall modify the decree of the District Court by declaring Vásudev entitled to joint possession along with Bábáji as tenant in common. The relative proportions of their interests, if a division in *specie* be desired, must be determined in a suit to ascertain Náro's share.

Each party to bear his own costs throughout.

*Decree accordingly.*

*Note.*—For the converse of this case see *Pándurang v. Bhaskar* (11 Bom. H. C. Rep. 72), which was a suit in ejectment by a purchaser at an execution sale against an undivided member of a mortgagor's family in possession of the mortgaged lands, and the cases referred to in the note at the end of that report.

## [APPELLATE CIVIL JURISDICTION.]

RA'HI, WIFE OF TEJA' KURAD, AND OTHERS (DEFENDANTS AND APPELLANTS)  
v. GOVINDA' VALAD TEJA' (PLAINTIFF AND RESPONDENT.)

1875.  
September 7.

*Hindu law—Effect of illegitimacy on the right of succession—Dásiputra—Pát marriage or remarriage amongst Sudras.*

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, (Brahmans, Kshatriyas, and Vaishyas,) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit. The extent to which this right exists, considered, and the texts of Hindu law books bearing on the point referred to.

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