

1878.

V. K. GUJAR
v.
V. D. BARVE,

ton,⁽¹⁾ *Weeks v. Wray*.⁽²⁾ We must, therefore, reverse the judgment of the lower Court, and direct that the case be disposed of on its merits. Costs to follow the final decision.

Decree reversed, and case remanded.

(1) 18 L. J. Q. B. 250.

(2) L. R. 3 Q. B. 212.

[APPELLATE CIVIL.]

Before Mr. Justice Melvill and Mr. Justice Kimball.

April 24.

KALLA PA' BIN GIRMALLA' PA' (ORIGINAL PLAINTIFF), APPELLANT,
v. VENKATESH VINAYAK (ORIGINAL DEFENDANT), RESPONDENT.*

Code of Civil Procedure (Act VIII. of 1859), Section 269—Undivided Hindu family—Attachment and sale of the interest of one of the co-parceners in an undivided estate—Partition—Possession.

When the defendant is in possession by virtue of an order under section 269 of Act VIII. of 1859, the plaintiff can only succeed on the strength of his own title.

K and R, two out of five undivided Hindu brothers, sued V (a purchaser at an execution sale of the interest of one of the brothers other than K and R) for the recovery of certain land of which V had obtained possession under section 269 of Act VIII. of 1859. The lower Courts awarded two-fifths of the land to K and R as being the amount of their share in the land.

Held by the High Court that the decree could not be maintained, as K and R, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or for a decree declaring them entitled to joint possession with V.

Babaji v. Vasudev (1) followed.

A purchaser at a Court's sale ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only.

THIS was a second appeal from the decision of C. H. Shaw, District Judge of Belgaum, in cross appeals Nos. 168 and 170 of 1876, affirming the decree of A. M. Cantém, First Class Subordinate Judge of the same place, in original suit No. 1051 of 1874.

Kallápá and his brother Racháppá sued to recover possession of a field survey No. 711, which consisted partly of *judi* land and partly of *sirkari* land. They alleged in their plaint that they got the land at a partition of property made between them and their

* Second Appeal No. 11 of 1878.

(1) I. L. R. 1 Bom. 95.

three brothers, Sidlingápá, Shivlingápá, and Dánápá, on the 17th August 1872, and that the defendant, Venkatesh, as a purchaser, at a Court's sale, of the interest of Shivlingápá, obtained possession of the land in dispute by an order of Court under section 269 of Act VIII. of 1859. Venkatesh denied that there had been any partition, and alleged that the land was sold in execution of a decree against Shivlingápá for debts which he had contracted for family purposes. Both the lower Courts found that the plaintiffs had failed to prove the partition alleged by them, and that the execution sale was limited only to the *sirkari* portion of the land, and did not include the *judi* portion. They, therefore, made a decree in the plaintiff's favour for the whole of the *judi* land and for two-fifths of the *sirkari* land, on the ground that they (plaintiffs), as two out of five brothers, were entitled to no greater share in the land. Kállápá alone appeared in the District and High Courts, Racháppá having died.

Ghanashám Nilkanth Nádkarni, for the appellant :—The respondent purchased at the Court's sale only the right, title, and interest of Shivlingápá, one of the five brothers. The lower Courts, therefore, were wrong in allowing him to retain more than one-fifth of the joint property. Again, the land in dispute being undivided family property, as found by the Courts below, the respondent, as purchaser of the interest of one of the co-parceners, ought not to have been allowed to take possession of a particular share before the same was adjudged to him at a partition of the whole property. The appellant, at all events, was entitled to a joint possession of the property with the respondent, as ruled in *Máhábaláya v. Timaya*⁽¹⁾ and *Bábáji v. Vásudev*.⁽²⁾

K. T. Telang (with him *V. M. Pandit*) for the respondent :—The appellant's claim ought to be dismissed, because he did not prove his case as set forth in the *plaint*.

MELVILL, J. :—The defendant is in possession by virtue of an order under section 269 of Act VIII. of 1859, and the plaintiffs, therefore, could only succeed on the strength of their own title. They failed to make out the case stated in their *plaint*, viz., that the property in dispute came to them on partition. The District

1878.

KALLAPA'
BIN
GIRMALLA'PA'.
v.
VENKATESH
VINA'YAK.

(1) 12 Bom. H. C. Rep. 138.

(2) I. L. R. 1 Bom. 95.

1878.

KALLAPA'
BIN
GIMMALLA'PA'
V.
VENKATESH
VINA'YAK.

Judge, however, awarded them two-fifths of the property, on the ground that that constitutes the amount of their share in the family property. This decree cannot be maintained, as the plaintiffs, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for a general partition, or they might have asked for a decree declaring them entitled to joint possession with the defendant. The question is, whether in the present case we should give the appellant, (the other plaintiff being dead), a decree for joint possession, or leave him to his remedy by another suit? Having set up a false case, he is not entitled to much consideration; but, on the other hand, it must be borne in mind that the defendant ought not to have been put in exclusive possession of the whole land by virtue of a decree against one co-parcener, and also that a suit for joint possession would probably now be time-barred. For these reasons we determine to follow the precedent in *Bábáji v. Vásudev*,⁽¹⁾ and to give the appellant a decree for joint possession, leaving the extent of his interest in the property to be determined, if necessary, by a future suit.

The decree of the District Judge is reversed, and in lieu thereof this Court makes a decree, declaring that the plaintiff Kallápá is entitled to sole possession of the *judi* land, (regarding which no appeal has been made), and joint possession with the defendant Venkatesh of the *sirkari* land in the plaint mentioned. The parties to bear their own costs throughout.

Order accordingly.

(1) I. L. R. 1 Bom. 95.