

[222] v. *Gangabai* (1), *Mahantapa v. Nilgangawa* (2), *Kesserbai v. Valab Raoji* (3).

Turning, then, to the decisions of this Court, the following cases cited by West and Buhler (2nd ed.), p. 196, and bearing directly on the question of the daughter-in-law's place in the order of succession, appear to have been decided precisely on the same principles. First, where the contest was between a daughter-in-law and a brother's son, the latter was given precedence—see *Vithal Raghunath v. Haribai* (4). The next case was a dispute with a separated brother, and there the brother was preferred—see *Venkapa v. Holyava* (5). And in the last, *Bai Jetha v. Haribhai* (6), a claim was advanced by separated cousins, when the daughter-in-law was held to have a better title to inherit. Had the paternal grandmother been substituted in each case for the daughter-in-law, the same results would, we may assume, have followed.

We confirm the decrees of the Courts below, with costs on appellant.

Decree affirmed.

4 B. 222=5 Ind. Jur. 86.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

KARIMBHAI (*Original Plaintiff*), *Appellant v. THE CONSERVATOR OF FORESTS, N. D. (Original Defendant), Respondent.**
[22nd September, 1879.]

Partnership property attached in execution of a decree against one partner only—Form of a suit regarding such attached property—Civil Procedure Code (VIII of 1859), s. 246—Amendment of plaint.

Property belonging to a partnership cannot be seized in execution of a decree against one partner only. Accordingly, where a suit was brought against one partner only, and the decree made him alone liable.

[223] *Held*, that only his property could be attached in execution of that decree.

The proper course for a partner seeking to remove an attachment on partnership property in execution of a decree against one partner only, is to sue for a dissolution of the partnership and an account, with a view to ascertain the amount due to the partner, in execution against whom the partnership property is attached.

Where a partner sued to establish his exclusive title to the partnership property attached and seized in execution of a decree against another partner, the High Court, on appeal, allowed the plaintiff to amend his plaint by converting that suit into one for a dissolution of partnership and an account, and remanded the case, with a direction to the lower Court to make the other partners parties to it and to take an account.

[F., 15 M.C.C.R. 112 (114) ; R., U.B.R. 1897—1901, 431 ; D., 13 M. 447.]

THIS was an appeal from the decision of R.F. Mactier, District Judge of Satara, in original suit No. 1 of 1878.

* Regular Appeal No. 12 of 1879.

(1) 3 B. 369.

(2) *Ibid.* 368, note.

(3) *Supra*, 4 B. 188, and see also the cases reported *supra*, pp. 210 and 214.

(4) S. A. No. 41 of 1871, decided on 12th June 1871. Printed Judgments for 1871.

(5) S. A. No. 60 of 1873. Printed Judgments for 1873, No. 10.

(6) S. A. No. 304 of 1871. Printed Judgments for 1872, No. 38.

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The plaintiff filed his suit on the 16th July 1878 in the District Court of Satara, and prayed for a declaration that he was the sole and exclusive owner of certain wood which had been attached on the 21st April 1877 in execution of a decree which the Conservator of Forests, N.D., had obtained against one Esab Ali on the 8th February 1877. The plaintiff had previously applied, under s. 246 of the Civil Procedure Code (Act No. VIII) of 1859, for the removal of the attachment; but his application was rejected. He, therefore, brought the present suit to have his ownership declared, and to obtain a cancellation of the order made by the Court under s. 246.

The defendant answered that the wood in dispute did not belong to the plaintiff, but to his (the defendant's) judgment-debtor Esab Ali, and that it was in his possession when attached and seized.

The District Judge laid down one issue, *viz*, whether the plaintiff, and not Esab Ali, was the sole owner of the wood in dispute. He took evidence on this issue, and found that the plaintiff, together with Esab Ali and three other persons, had formed a partnership for the purpose of dealing in wood; that the partnership business was carried on with funds wholly supplied by the plaintiff; that the other persons were working partners only, contributing their labour, but no capital; that out of the profits of the partnership business the plaintiff was first to receive interest on his money at the rate of 12 per cent. per annum, and the surplus was then [224] to be equally divided among the five partners; that the wood in dispute was the joint-property of the partnership and not the plaintiff's exclusive property. He, accordingly, on the 5th April 1879, dismissed the plaintiff's suit, on the ground that he failed to prove his exclusive ownership, as alleged in the plaint.

On the 4th July 1879 the plaintiff preferred an appeal to the High Court.

Manekshah Jehangirshah, for the appellant.—The District Judge was wrong in holding that property belonging to a partnership could be attached in execution of a money decree against one of its members only. He found that the property in dispute did not belong to Esab Ali alone, but that it was the joint-property of the partnership. He, therefore, ought to have removed the attachment. It is found that the partnership business was carried on with funds wholly and solely supplied by the plaintiff. He is, therefore, entitled to the custody and management of the partnership property. It was attached and taken out of the possession of the firm. The decree obtained by the Conservator of Forests was on a claim for damages against Esab Ali alone. If the plaintiff had been made a party to that suit, he might have shown that he was not liable. He had no opportunity of doing this, and the property is to be sold now as if he were a defendant. The rule is to be found in *Lindley on Partnership*. He says: "The judgment-creditor of a partner has always been at liberty to execute his judgment, not only against the debtor's separate property, but also against the property of any firm in which the debtor may be a partner. But the creditor, in truth, gets only what belongs to his debtor, although it must be confessed that executions of the nature in question put the debtor's partners to no small inconvenience" (1). In *Keshav Gopal v. Rayapa* (2) the High Court held it was an improper way

(1) *Lindley on Partnership*, pp. 687, 692, (4th ed.). See also *Story on Eq. Jur.* Vol. I, p. 673, para. 677 (10th ed.).

(2) 12 B.E.C.B. 165.

of executing a decree obtained personally against one of the several partners of a firm to seize part of the partnership property and to distribute the sale-proceeds between the executing creditor and the partners of the firm. In *Sitaram v. Atmaram Baji* [225] (S. A. No. 453 of 1874) (1) the High Court decided that the judgment-creditor of one partner only could not seize a debt due to the partnership, and that all that the judgment-creditor could seize was the right, title and interest of his judgment-debtor in the partnership, which could not be ascertained until an account was taken of all its dealings and transactions and until all its debts and liabilities were discharged. In *Haribhai Motiram v. Ardesir Ukadji* (R. A. No. 5 of 1875) (2) the High Court ruled that a sale of joint-partnership property in execution of a decree against one partner, does not transfer any part of the joint-property to the purchaser so as to entitle him exclusively to take it or withhold it from the other partners. If the plaintiff has by mistake brought his suit in a wrong form, it is not too late to allow him to amend it and to treat it as a suit for a dissolution of partnership and settlement of accounts. The plaintiff is entitled to such indulgence, as it was his money with which the partnership business was carried on. The learned pleader also referred to *Kallyan Bhai v. Motiram Jannadas* (3).

Nanabhai Haridas (Government Pleader) for the respondent.—The plaintiff's claim was rightly dismissed, because he failed to prove his exclusive right to the property in dispute as alleged by him in the plaint. He must succeed or fail according as he proves or fails to prove the title set up in the plaint. It is now too late for him to shift his ground of action. His suit is not for the winding up of the partnership, but to establish his exclusive right to the property in suit. He cannot now abandon the ground on which he has based his claim, and ask in the present suit for a dissolution of partnership and settlement of the partnership account. He may bring a fresh suit for that purpose, if he is so advised.

The following is the judgment of the Court:—

M. MELVILL, J.—The decree, in execution of which the property in dispute was attached, was against Esab Ali only. It may be that, as the District Judge says, Esab Ali's partners, including the plaintiff, might also have been made liable for the claim against [226] Esab Ali; but, in point of fact, they were not so made liable. The suit by the Conservator of Forests was against Esab Ali only, and the decree made Esab Ali alone liable; and only Esab Ali's property could be attached in execution of that decree. What has been done, is to attach partnership property in execution of the decree against one partner only. The execution appears to have been made by actual seizure, and by taking the property out of the possession of the plaintiff. This was an erroneous procedure; for the officer attaching partnership property in execution of a judgment recovered against one of the partners only, has no business to take such property out of the possession of the solvent partners. But the plaintiff having failed in his application under s. 246 of Act VIII of 1859, is now put to his suit; and what we have to consider is, whether his present suit is properly brought, and, if not, whether he should now be allowed to alter the form of it. We agree with the District Judge that, as the attached property is partnership property, the plaintiff cannot succeed in his present suit, in which he seeks to establish his exclusive

(1) Printed Judgments for 1875, p. 177; see *infra*, Note (1).

(2) Printed Judgments for 1876, p. 125; see *infra*, Note (2).

(3) 10 B.H.C.R. 378.

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title to the whole of that property. His proper course was to sue for a dissolution of partnership; and an account, with a view to ascertain the amount due to Esab Ali in respect of his share. Having regard to all the circumstances of the case, to the fact that the attachment ought not to have been made by depriving the plaintiff of the possession of the wood, and to the difficulty of obtaining, in the Mofussil, proper legal advice regarding a question which has been the subject of much doubt and discussion in the Courts of England and America (we mean the question of the proper mode of procedure in executing judgments obtained against a single partner by attachment of the partnership property), we think that we should allow the plaintiff to amend his plaint by converting the present suit into a suit for an account. We think that, by permitting this amendment, we shall not be converting the suit into one of an inconsistent character. The District Judge has found (and probably rightly), that the plaintiff supplied the whole capital of the partnership, and if, as the plaintiff alleges, (and as is also probable), there have been no profits, the result of the account will be to show that the whole of the wood, or the proceeds of its sale, really belong to the plaintiff, and that he was, [227] therefore, not altogether incorrect in describing himself as the owner of the whole of the wood. We, accordingly, reverse the decree of the District Court, and remand the case, in order that the plaintiff may amend his plaint, and convert his suit into an application to wind up the business of the partnership, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively. Esab Ali must be made a defendant, and the other partners, unless they join as co-plaintiffs, must also be made defendants. The attached property must remain in the hands of the nazir, pending the settlement of the suit; but it may be sold, and the proceeds held in deposit, if all the parties make an application to that effect, or if the nazir is of opinion that the wood is likely seriously to deteriorate, if it is not sold at once. The amount which may be found to be due to Esab Ali should be paid to the Conservator of Forests, if not in excess of the amount due under the decree; any surplus being paid to Esab Ali himself.

The plaintiff must bear all costs which have been incurred by both parties up to the present date.

Decree reversed and case remanded.

4 B. 227 N.=5 Ind. Jur. 88 N=Unrep. P.J.B.H.C. (1874-1875) 474.

Note (1).—In the case of *Sitaram v. Atmaram Baji* (S. A. 453 of 1874) above referred to, the plaintiff Sitaram sued the defendants Atmaram and Vinayak and others for a dissolution of partnership and for an account. He alleged that a partnership had been formed between himself and the defendant Vinayak on the 22nd November 1872; that the partnership had been contracted with the G. I. P. Railway Company to do certain work; that the contract had been taken in the name of Vinayak alone, but that the deed of partnership provided that the plaintiff was to carry on the work with his own funds and pay himself with interest with the money which he was to receive from the Railway Company under a power of attorney, from Vinayak; that, accordingly, he carried on the work and received payments; that Vinayak subsequently cancelled the power and collusively suffered a decree to be passed against him in favour of the defendant Atmaram, who, in execution of it, attached Rs. 466 0-6 due by the Railway Company to the partnership; that he had applied for the removal of the attachment, but his application was rejected. He, therefore, sued for a dissolution of partnership and account.

The defendants admitted the partnership, but answered that the money attached belonged exclusively to Vinayak, and that, therefore, the attachment was good.

The Subordinate Judge awarded the plaintiff's claim.

[228] The District Judge, in appeal, reversed the decree of the first Court, holding that, as the contract with the Railway Company was taken by Vinayak alone, the

money at the time of attachment belonged to him exclusively, the plaintiff being only his (Vinayak's) agent under a power of attorney which, however, had been revoked by Vinayak before the date of the attachment. He, accordingly, dismissed the plaintiff's suit, notwithstanding that he assumed the partnership between him and Vinayak to exist.

The plaintiff thereon preferred a special appeal to the High Court. The appeal was heard by Westropp, C.J., and De H. Larpent, J., on the 15th July 1875.

JUDGMENT.

WESTROPP, C. J.—It is stated in the judgment of the District Judge that the defendant Vinayak took a contract from the G. I. P. Railway Company, and that the plaintiff Sitaram subsequently became his partner in that contract.

Whether the Railway Company knew of that partnership or not, is, for the purposes of the present suit, immaterial. It is, therefore, of no importance in the present suit whether or not they deemed him to be merely an agent of the defendant Vinayak. As a matter of fact, he and the plaintiff were admittedly partners. This was so whether or not there was a revocation of the power of attorney. It is not pretended that the defendant Atmaram, the execution-creditor, was a creditor of the plaintiff. His decree was against the defendant Vinayak alone. It, therefore, could not be executed against any particular asset of the partnership. Putting the debt due by the Railway Company in the point of view most favourable to the defendant Vinayak, it was money due to the partnership. It certainly was not money due to Vinayak alone. If Vinayak had not power as against the plaintiff to revoke the power of attorney, it is possible that, as between the plaintiff and Vinayak, it may have been payable to the plaintiff only. Whether that was so or not, we do not now determine. Issuing, without deciding, that the debt was due by the Company to the partnership consisting of the plaintiff and the defendant Vinayak, the defendant Atmaram, the execution creditor of Vinayak only, could not seize that debt. All that he could seize was the right, title and interest of Vinayak in the partnership, which could not be ascertained until an account was taken of all the partnership dealings and transactions, and until all of its debts and liabilities were discharged. The seizure of this particular debt due by the Railway Company was, therefore, whether it be regarded as payable exclusively to the plaintiff or as payable to the partnership, alike unsustainable. The decree of the District Judge is reversed, and the defendant Atmaram, if he has received the amount of the railway debt, or any part thereof, must bring the full amount which he has received into Court, and whether he has received the sum or not, he must pay to the plaintiff his costs of the suit and of both appeals.

The District Judge should determine as between the plaintiff and the defendant Vinayak, whether the plaintiff is at present entitled, according to the arrangements between them, to receive the railway debt exclusively or not. It would appear that if the circumstances were such as not to warrant the revocation of the power of attorney, the plaintiff would be at present entitled to receive the amount of that debt, but would be bound to account for it in accordance with the terms of the contract of partnership. Should [229] the District Judge come to the conclusion that the revocation of the power of attorney was not rendered justifiable, by any default on the part of the plaintiff, the District Judge should make a declaration of the plaintiff's rights and liability as above mentioned, and should direct the money, if brought into Court, to be paid over to the plaintiff. Should the District Judge be of opinion that the revocation was justifiable, he should direct the money to be paid over to the partnership consisting of the plaintiff and the defendant Vinayak. Under any circumstances the latter should bear his own costs of the suit. The defendant Atmaram, if he seeks execution against the share of Vinayak in the partnership at large, must do so by such other proceedings outside this suit as he may be advised to adopt. [This case is also followed in 4 B. 222 (225).]

4 B. 229 N.—5 Ind. Jur. 89 N.—Unrep. P.J. B.H.C. (1876-77) 114.

Note (2).—In the case of *Haribhai and another v. Ardesir Ukadji* (R. A. No. 5 of 1875) above referred to, the plaintiffs sued for the sale of a ginning factory at Broach and payment to them of half of the sale-proceeds. They alleged that the factory in question had been established in partnership by the defendant Ardesir and one Kuber Bhula; that Kuber's share in it had been sold in execution of a decree against him, and purchased by Wajayram and two others on the 26th August 1868, who sold the same to the plaintiffs by a deed, dated the 26th August 1869; that they, therefore, claimed to have the factory sold and the sale-proceeds distributed in equal shares between the defendant Ardesir and themselves. The suit was instituted in the Court of the Subordinate Judge (First Class) at Broach, and valued at Rs. 37,500.

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The defendant (*inter alia*) answered that the suit was not maintainable until the partnership between Kuber and himself was wound up and an account taken of the partnership transactions, and that Kuber owed money to the partnership.

The Subordinate Judge dismissed the plaintiffs' claim on the ground that the suit was not brought in the proper form. He held that the plaintiffs could not claim any specific amount till the partnership account was adjusted.

The plaintiffs appealed to the High Court. One of the points urged in appeal was that the lower Court ought to have allowed the plaintiffs to amend their plaint and to make it a suit for a dissolution of partnership and account.

The appeal was heard on 10th July 1876 by M. Melvill and Kemball, JJ.

JUDGMENT.

M. MELVILL, J.—What ought to have been sold in execution of the decree against Kuber Bhula, was the right, title and interest of Kuber Bhula in the business of the ginning factory. What was actually sold, was Kuber Bhula's share in certain buildings and implements belonging to the business. The plaintiffs, as purchasers of this share, now sue to have these buildings and implements sold, and a half share of the proceeds paid over to them. The defendant, who was a co-partner with Kuber Bhula in the business, objects to a decree being made as asked for by the plaintiffs, on the ground that Kuber Bhula was indebted to the firm, and that, at all events, his share in the buildings and implements cannot be ascertained until an account has been taken of the debts due by the business. The objection is undoubtedly well founded. The sale of partnership joint-property in execution of a decree against one partner, does not transfer any part of the joint-property to the purchaser so as to entitle him [230] exclusively to take it or withhold it from the other partner. "But it gives him a right to a bill in equity, calling for an account and settlement of the partnership concerns, and thus to entitle himself to that interest in the property which, upon the final adjustment and settlement of the partnership concerns, shall be ascertained to belong to the execution partner, and nothing more"—(Story on Partnership, s. 262). The plaintiffs must amend their plaint, and the Subordinate Judge must then ascertain, after taking all the accounts of the business, whether Kuber Bhula would have been entitled, on the date of the auction-sale, to any and what interest in the buildings and implements sold in execution; and if it be found that Kuber Bhula would have been entitled to such an interest, then a decree should be made, enabling the plaintiffs to realize the value of such interest. We, accordingly, reverse the Subordinate Judge's decree, and remand the case, in order that the plaintiffs may amend their plaint, and that the suit may be disposed of in accordance with the view above expressed. The plaintiffs must bear the costs of this appeal. [This case is also referred to in 4 B. 222.]

4 B. 230=5 Ind. Jur. 90.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

VINAYAK GOVIND AND NARAYAN, (*Original Defendants*),
*Appellants v. BABAJI, (Original Plaintiffs), Respondent.**

[8th October, 1879.]

Promissory note payable on demand—Limitation—Act XIV of 1859—Act IX of 1871.

On the 12th December 1864, the plaintiff sold seven bars of gold to the defendants, and deposited with them the value thereof, to run at interest, and payable on demand. The defendants entered the amount in their own books, and furnished the plaintiff with a pass-book, which contained this entry: "The account of the amount deposited by B (the plaintiff) with V (the defendants) of the city of Poona. The details of it are as follows: We have debited the amount to ourselves, and will return it whenever you demand it, *Shake* 1786 (A. D. 1864)." The defendants adjusted the account in the plaintiff's pass-book in July 1865 in these words: "Balance this day the 1st *Jyest vadya*, *Shake* 1787, Rs. 1,159-2-0. Interest on this sum will run from 1st *Jyest vadya*, *Shake* 1787, (A. D. 1865)." This entry was signed by the defendants. The plaintiff drew several times

* Second Appeal, No. 291 of 1879.