

think, lay stress on the mere terms of the instrument, which follow a certain established usage, but should give effect to the intention of the parties, and recognize the purchaser's right of action. But there is nothing to take the present case out of the operation of the rule laid down by the Judicial Committee; and we, therefore, reply to the Division Bench that the plaintiff cannot maintain his suit against Bai Suraj and her sub-tenants.

On the return of the case by the Full Bench, it came for final disposal before Melvill and Kembal, J.J., who, on the 14th February, 1882, reversed the decree of the Assistant Judge, and restored that of the Subordinate Judge, with all costs on the plaintiff throughout.—(Note; See next case.)

Decree reversed.

APPELLATE CIVIL.

FULL BENCH.

Before Sir M. R. Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

VASUDEV HARI PATYARDHAN (ORIGINAL PLAINTIFF), APPELLANT, v.
TATIA NARAYAN, SON AND HEIR OF NARAYAN HAIBUTRAV,

February 2.

DECEASED, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Vendor and purchaser—Hindu law—Possession—Sale of land by a Hindu—Vendor without possession—Sale of right of entry—Conveyance of right of action—Right of purchaser.

Where a Hindu vendor sold his share in certain land, but expressly stated in the deed of sale that he was out of possession; that the land was in the hands of a third party, to whom it had been mortgaged without the vendor's authority, and that he (vendor) empowered the purchaser to bring a suit against the person in possession in order to recover the vendor's share in the land, with mesne profits.

Held that what the deed contemplated was nothing more than the transfer of the right of entry, although, according to the invariable mode of expression in such documents, the vendor professed, in terms, to convey the property itself.

Held further that the purchaser acquired the same right of action which his vendor possessed, notwithstanding that the vendor was not in possession at the date of the sale.

Bai Suraj v. Dalpatram (1) referred to.

THIS was a special appeal from the decision of W. M. Coghlan, Judge of the District Court of Thána, affirming the decree of Náro Mahádeo, Second Class Subordinate Judge of Mahád.

* Special Appeal, No. 80 of 1877.

(1) See *supra*, p. 380.

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The case first came before Westropp, C. J., and West, J., who referred it to a Full Bench on the 20th August, 1877. The facts are fully stated in the following order of reference:—

WESTROPP, C. J.—The plaintiff brought this suit to obtain possession of three-fifths of a field situated at Birvadi, within the jurisdiction of the Subordinate Judge of Mahad, in the Southern Konkan. He alleged that he had purchased one-third of the field from Ganpatrav Narayan and four-fifths of the same field from Tukaram Haibutrav and other persons, which shares in the field were respectively conveyed to him by deeds of assignment respectively dated the 28th August, 1867, and the 4th September, 1868. The plaintiff also claimed mesne profits for six years. The plaint alleged that Narayan Haibutrav, the father of the first defendant Tatia, though entitled only to a fifteenth of the field, mortgaged the whole of the field to Kaloji Jivba, the father of the second defendant, Dayaram Kaloji.

The first defendant, Tatia Narayan, son of Narayan Haibutrav, in his written statement alleged that the field belonged to him and Bandhu Vithalrav, the third defendant, and had been duly mortgaged by Bandhu Vithalrav and Narayan Haibutrav to Kaloji Jivba on Shake 1783 for Rs. 60, and was further mortgaged by the same mortgagors to the same mortgagee on Shake 1788 for Rs. 46. Kaloji Jivba, the mortgagee, was the father of the second defendant, Dayaram Kaloji, who in his written statement contended that the first and third defendants were the owners of the field; that it had been duly mortgaged as aforesaid, and that the mortgages, upon a partition which had taken place in the family of the mortgagees, had been allotted to the fifth defendant, Sitaram Jivba, uncle of the second defendant, Dayaram Kaloji. This Sitaram Jivba in his written statement relied on the law of limitation, denied the title of the plaintiff, and alleged title in the mortgagors.

Neither the third defendant Bhandhu Vithalrav, nor the fourth defendant Khashaba Narayan appeared.

The plaintiff's vendors not being in possession at the dates of the respective assignments by them to the plaintiff, the Subor-

dinate Judge (who held the suit to be within time) made a decree against the plaintiff on the authority of *Girdhar v. Daji*(1).

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On regular appeal by the plaintiff, the District Judge directed the Subordinate Judge to try, as an issue, the question whether the field in dispute, called Kamath, had been partitioned. That issue the Subordinate Judge found in the negative, and he found also that the family of owners was still undivided.

The District Judge thereupon expressed his opinion to be that the suit should have been constituted a suit for partition against all the members of the undivided family, and that he would have been willing to allow an amendment of the plaint for that purpose and the necessary addition of parties as defendants, were he not of opinion that, the vendors of the plaintiff not having been in *actual* possession at the sales made by them respectively A. D. 1867 and A. D. 1868 or at any subsequent time, the sales to the plaintiff were void by Hindu law, and accordingly he affirmed the decree of the Subordinate Judge.

The question for consideration by the Full Bench is whether, on the ground alone of absence of possession by the plaintiff's vendors at the respective times of sale of the above-mentioned shares in the said field to the plaintiff and their subsequent want of possession, the plaintiff is debarred from maintaining this suit if the mortgages above mentioned were not executed for the benefit or with the authority of the undivided family.

The case was argued before the Full Bench along with the case of *Bai Suraj v. Dalpatram*(2).

Manekshah Jehangirshah appeared for the appellant.

R. S. Tipnis appeared for the respondents.

The following is the judgment of the Full Bench delivered by

MELVILL, J.—In *Bai Suraj v. Dalpatram*(2) we have expressed our opinion that a Hindu vendor cannot by a bill of sale pass corporeal property of which he is not in possession, but that he may convey a right of action, either in express terms or by the use of such language as indicates that that, and nothing else, was the intention of the bill of sale. We think that in the present case the exhibits Nos. 3 and 4, on which the plaintiff's right to sue

(1) 7 Bom. H. C. Rep., 4 A. C. J.

(2) See *supra*, p. 380.

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depends, ought to be construed as conveying a right of action, and nothing more. The vendors expressly state that they are out of possession, and that the property is in the hands of a third party, to whom it has been mortgaged, without their authority; and they thereupon empower the purchaser to bring a suit against the person in possession, in order to recover their shares in the land, with mesne profits. What is contemplated appears to be nothing more than the transfer of the right of entry, although (in accordance with what we believe to be the invariable mode of expression in such documents) the vendor professes, in terms, to convey the property itself.

Our reply, therefore, to the reference is that the plaintiff has acquired the same right of action which his vendors had, notwithstanding that the vendors were not in possession at the date of the sale.

On the return of the case to the Division Bench, Melvill and Pinhey, J J., on the 28th April, 1882, reversed the decrees of the Courts below, and remanded the case for the determination of the shares of the different parties in the land in dispute.

Decrees reversed and case remanded.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

February 23.

ASHABAI AND ANOTHER (PLAINTIFFS) v. HAJI TYEB HAJI
RAHIMTULLA AND OTHERS (DEFENDANTS).*

*Practice—Misjoinder—Cause of action—Civil Procedure Code (Act X of 1877),
Section 44, Rule (b).*

The plaintiffs, who were the widow and daughter of A, sued the executors of the will of A's father (B) for administration and account. There were four distinct subjects of claim in the plaint, viz., (1) the estate of A's great-grandfather, (2) the estate of A's grandfather, (3) the jewels and ornaments which formed the *stridhan* of A's mother which were in A's possession at the time of his death, (4) a sum of Rs. 1,90,000 which it was alleged that B had settled on A at the time of his marriage. Subsequently to the filing of the suit the first plaintiff amended the plaint and claimed the jewels and ornaments, which formed the subject-matter of the third claim, as her own property, alleging that they had been presented to her on the occasion of her marriage. The plaint prayed (1) for a declaration that *

* Suit No. 616 of 1879.