which is exclusively assigned by law to some other authority, provided the legal competence be exercised, in good faith, on matters that may reasonably be understood as within its lawful range.

It seems to us that the question put by the Division Court does not admit of a precise categorical reply; that the Court cannot impose on itself limitations without regard to circumstances; but that it should generally be governed, in the class of cases in question, by the principles contained in the fifth of the propositions just stated.

APPELLATE CIVIL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

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April 17.

JANARDAN VITHAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANANT MAHADEV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, *Sch. II, Art.* 171 *B—Application to sue in formâ pauperis—Death of opponent—Substitution of heirs—Subsequent granting of application—Code of Civil Procedure, Secs.* 48, 368 *and* 410*—Practice—Partition suit—Omission of property in possession of a party—No ground for dismissal.*

Neither article 171 B of Schedule II of Act XV of 1877, nor any other section of the law of limitation, applies to an inquiry into a claim to sue in *formâ pauperis*, and there is no limitation of time within which a mere applicant to sue as a pauper is bound to apply for the substitution of the name of a deceased opponent's heir in place of such opponent. Article 171 B applies to applications made under section 368 of the Code of Civil Procedure, which section only applies to the case of the death of a party to a suit, presupposing therefore the institution of a suit; and, in the case of an application to sue in *formâ pauperis*, no suit is instituted until the application is granted, when by section 410 it is deemed the plaint in the suit.

In a partition suit the fact that the plaintiff has not included, or has relinquished his share in, property liable to division, affords no ground for dismissing the suit where the co-parcener, in whose possession it is, is a party to the suit; for it is competent to the Court, in disposing of the case, to make any order in respect of such property that may to it appear right.

THIS was an appeal against the decision of Khan Bahadur M. N. Nanavati, Subordinate Judge (First Class) of Ratnagiri.

The plaintiff claimed his share of the undivided property of the family from seven defendants, of whom the first five defendants were brothers, the sixth the plaintiff's own brother, and the

* Regular Appeal, No. 47 of 1882.

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seventh a cousin of the others. The plaintiff on the 13th of February, 1880, applied for leave to sue in *formâ pauperis*. In March, 1880, one of the defendants died; and the plaintiff on the 3rd of July, 1880, applied to have the name of his widow Ramabai substituted in place of her husband. This application was granted the same day, but the application to sue as a pauper was not granted till the 20th of November, 1880.

The last two defendants by their written statements admitted the claim: the first five, among other objections, contended that the sixth defendant had property of the family in his exclusive possession, and that until that was brought into hotchpot this suit could not lie. They also contended that, Ramabai having been brought upon the record more than sixty days after the death of her husband, the suit was barred against her by article 171 B, schedule II of Act XV of 1877, and, consequently, against all the other defendants.

The Subordinate Judge on both these points found against the plaintiff. He said: "According to the plaintiff he applied, but some four months after Ramabai's husband's death, that his widow and heiress might be made a defendant in his stead. According to section 368 of the Code of Civil Procedure, the plaintiff having failed to make the application within the period prescribed therefor, the suit must abate. To get out of this difficulty the plaintiff's pleader argued that the real heirs to the deceased were the rest of the parties to the suit, and that his widow was brought upon the record simply because she was entitled to maintenance out of the property. * * * *

But the application that Ramabai might be made a defendant clearly says that she is her husband's heiress, and the suit must abate according to section 368 * * * If the suit must be dismissed as against Ramabai, then it ought to be dismissed as against the other defendants also. For this is a suit for partition, and every member having common interest in every particle of the property, it cannot be said, before ascertainment, that certain of it is Ramabai's, and that the plaintiff's suit as regards it ought to be dismissed, and that he ought to be allowed his share of the remaining property * *

* * * * It is, again,

clear that the suit must fail, since a partial partition cannot be allowed. * * *" The Subordinate Judge accordingly dismissed the suit. The plaintiff appealed to the High Court.

Mánekshah Jehángirshah Taleyarkhan for the appellant.—The Subordinate Judge was wrong in holding that the suit abated simply because Ramábai was not made a party to the suit within sixty days of her husband's death. It was not necessary to make Ramabai a party to the suit in her own right, as she was not a sharer in the joint property, and the failure to add her name within sixty days of Ramabai's husband's death does not materially affect the case. Article 171 B of Act XV of 1877 does not come into play till a suit has already been instituted. The whole of the family property and all the members of the family being before the Court, the fact that the plaintiff has failed to include some of it in his plaint is no bar to the partition suit as brought.

Ghanasham Nilkanth Nadkarni for the respondents.—The plaintiff himself treated Ramabai has the heir of the deceased defendant. She was, therefore, a necessary party to the suit, and having been brought too late on the record the Judge was right in dismissing the suit. A partition suit can be brought only once, and for the whole of the property. A plaintiff has no right to omit to sue for a portion. The decree of the Sudordinate Judge is, therefore, right.

The judgment of the Court was delivered by

PINHEY, J.—We think the Subordinate Judge was quite wrong in dismissing this suit for the reasons given by him. He dismissed the suit for two reasons, *viz.*, first, because the second defendant Ramabai was not made a party to the suit until more than sixty days after the death of her husband Sitaram, as required by article 171 B of schedule II of Act XV of 1877; and, secondly, because the sixth defendant Balkrishna, who is a brother of the plaintiff, possesses property which is liable to partition, and which is not included in the plaint.

Now, as to the first of these reasons, we think the limitation law has no bearing on the case. Article 171B applies to applications made under section 368 of the Code of Civil Procedure,—

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that is, after a suit has been instituted. A suit is instituted by presenting a plaint (section 48). An application to sue in *formâ pauperis* is deemed the plaint in the suit after the Court has granted the application under section 410. What happened in this case was this. On the 13th February, 1880, plaintiff applied for leave to sue in *formâ pauperis*. On the 28th February, 1880, the Court ordered notice to issue to the defendants of the application. In March, 1880, the second defendant Sitaram died. Neither article 171B of the Limitation Act, nor any other provision of law, applying to an enquiry into a claim to sue in *formâ pauperis*, plaintiff was not bound to apply within any particular time for the substitution of the name of Sitaram's heir in place of Sitaram. As a matter of fact, plaintiff applied on the 3rd July, 1880, to have the name of Ramabai substituted for that of her deceased husband Sitaram as his heir, and the Court made an order accordingly the same day. The application to sue in *formâ pauperis* was not disposed of till 20th November, 1880. On that day it was granted, and the application became the plaint in the suit,—Ramabai being at that time a defendant on the record.

It might be sufficient to say this much as a reason for reversing the subordinate Court's order dismissing this suit. But it seems, from the frame of the suit, that it really was not necessary to make any application for the substitution of Ramabai's name for that of her husband Sitaram; and, therefore, even if Sitaram had died after the institution of the suit, it would not have been necessary for the plaintiff to make any application under section 368 of the Code of Civil Procedure. This is a partition suit in which plaintiff claims his share of the undivided property of his family from seven defendants, of whom the original defendants 1 to 5 were own brothers, defendant No. 6 is plaintiff's own brother, and defendant No. 7 is a cousin of the others. In an undivided Hindu family a man's brother would be his heir (if he left no son), and not his widow. Therefore, when defendant No. 2 Sitaram died, defendants 1, 3, 4 and 5 became his heirs, and it was a mistake to call his widow Ramabai his heir, and to apply to have her made a defendant in the case, as such.

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As to the sixth defendant having property liable to division, but not included in that mentioned in the plaint, this fact (if fact it be) affords no ground for dismissing the plaintiff's suit. As the sixth defendant is a party to the suit, the Court in disposing of the case will be competent to make any order in respect of property in his possession that may appear right.

We must reverse the order of the subordinate Court, and remand the case for trial on its merits. Costs to follow the final result.

Order reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

1883
April 17.

BHAU BALAJI (ORIGINAL DEFENDANT), APPELLANT, *v.* HARI NILKANTHRAV (ORIGINAL PLAINTIFF), RESPONDENT.*

Practice—Relinquishment of portion of claim—Res Judicata—Dekkan Agriculturists' Relief Act XVII of 1879—*Mortgagor—Mortgagee—Suit for account merely—Subsequent suit for possession—Code of Civil Procedure, Act XIV of* 1882, *Secs.* 13 *and* 43.

Where there has been a suit between an agriculturist mortgagor and his mortgagee for an account merely, a subsequent suit for possession on payment of the money declared to be due is barred under either section 13 or section 43 of the Code of Civil Procedure.

THIS was a second appeal from the decision of R. F. Mactier, Judge of Satara, confirming the decree of the Subordinate Judge of Tasgaon.

The plaintiff, who was an agriculturist, mortgaged a piece of land to the defendant, and borrowed from him various sums of money. The land, under the agreement between the parties, remained in the possession and management of the defendant. The plaintiff sued the latter for a settlement of accounts, and on the 14th of January, 1881, got a decree which declared that the plaintiff owed the defendant Rs. 72-12-0. The plaintiff paid this sum into the Court, and by the present action sued the defendant to recover possession from him of the land mortgaged.

* Second Appeal, No. 207 of 1882.