

1893

AUG. 19.

APPEL-
LATE
CIVIL.

18 B. 449.

JUDGMENT.

SARGENT, C. J.—In this case the Mamlatdar passed a decree in favour of the opponent directing possession to be given to him by one Gulab. The patil kulkarni having reported that in proceeding to execute the decree he found that the applicant Nathekba had been occupying the place on behalf of the defendant Gulab, the Mamlatdar ordered that if the applicant "did not vacate the place and make over the place by persuasion, he should be forced to vacate the same." The applicant complains of this order as being beyond the jurisdiction of the Mamlatdar.

The Division Court in *Kasam Saheb v. Maruti* (1) remarks that "The Mamlatdars' Act does not seem to contemplate the case of a third party being ousted in the execution of an order for possession, for such order is only made on finding that the defendant himself is in possession." We agree in this view of the Act. It is to be remarked that the language in cl. (a), (sub-cl. 1) of s. 15 of the Act with respect to the "plaintiff's possession" differs materially from that used in sub-cl. (2) with regard to "defendant's possession," which standing alone, without any additional words to enlarge its meaning, must be understood as "actual" possession. Moreover, s. 18 shows that the only person who is contemplated as being affected by the Mamlatdar's giving possession to the plaintiff is the person against whom the decree is passed. This view of the Act may lead to a practical difficulty in the working of [452] it which it would be perhaps advisable to remove by legislation, but which is quite beyond the power of a Government Resolution to remedy, as was apparently attempted to be done by Resolution No. 1673 of 11th March, 1882. We think, therefore, that the Mamlatdar's order was, strictly speaking, beyond his authority, as the exercise of our extraordinary jurisdiction is one of discretion, and as the applicant's petition contains no distinct denial that he was occupying merely on behalf of Gulab, we must refuse to interfere in the matter. The applicant is not without his remedy by suit. See *Kasam Saheb v. Maruti* (1).

Rule discharged with costs.

18 B. 452.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

YELLAWA AND OTHERS (*Original Defendants*), *Appellants v.*
BHIMANGAVDA (*Original Plaintiff*), *Respondent.**

[21st August, 1893.]

Hindu law—Widow—Maintenance—Suit by heir to recover family property from widow—Provision for widow.

The Court will not allow the heir to recover family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her.

Jamnabai v. Raychand (2) followed.

[R., 29 A.W.N. (1900) 135 (136); 11 C.P.L.R. 43 (44).]

* Second Appeal No. 142 of 1892.

(1) 13 B. 552.

(2) P. J. (1883), p. 48.

SECOND appeal from the decision of T. Hamilton, District Judge of Dharwar.

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The plaintiff sued to recover certain land from the defendant. He alleged that his deceased father was the undivided brother of Ratnapa, whose son was the husband (deceased) of Yellawa, the first defendant, and that on Ratnapa's death Yellawa had taken wrongful possession of the lands and got her name registered as owner in the revenue records. He also claimed Rs. 100 as mesne profits.

Yellawa (defendant No. 1) pleaded (*inter alia*) that a partition had been effected between her father-in-law Ratnapa and his [453] brother Paydapa, the father of the plaintiff; that she was the heir of her father-in-law, and that she had sold one of the fields in question and mortgaged two of them to defendant No. 2.

Defendant No. 2, Maharudrapa bin Basapa, answered to the same effect.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiff the Judge held that though there had been a partition between Paydapa and Ratnapa, the plaintiff's claim to inherit Ratnapa's property was preferable to that of defendant Yellawa; that the suit with respect to the transfer of the lands to the plaintiff's name was maintainable in the Civil Court, and that the plaintiff was entitled to recover possession of the lands in dispute and also mesne profits, which the Judge found amounted to about Rs. 50 a year. He, therefore, reversed the decree and allowed the claim.

The defendants filed a second appeal.

Manekshah J. Taleyarkhan, for the appellants (defendants):—The Judge was wrong in making no provision for the maintenance of the defendant Yellawa who is a Hindu widow and is entitled to be maintained out of family property. This application for maintenance is no doubt made now for the first time in second appeal, but that can be done—*Jamnabai v. Raychand* (1). The order with respect to mesne profits is wrong. The Judge found the mesne profits amount to Rs. 50 per year, and that sum is barely sufficient for our maintenance.

Balaji Abaji Bhagavant, for the respondent (plaintiff):—We are at least entitled to recover mesne profits from the second defendant Maharudrapa, who is the alienee of the first defendant. The first defendant had no authority to make the alienations.

JUDGMENT.

SARGENT, C.J.—The decision in *Jamnabai v. Raychand* (1) shows that it is the settled practice of the Court not to allow the heir to recover the family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her out of the property or by such other means as may be [454] deemed sufficient. The order for payment of mesne profits as against the widow, the amount of which did not exceed what was required for her maintenance, cannot, therefore, stand, and the decree must, therefore, be varied by reversing the order for mesne profits as against defendant No. 1, and a declaration must be added to the decree as was done in the above case to the effect that "the plaintiff takes the property awarded to him, subject to the obligation to provide a sufficient maintenance for the defendant; and we direct that when executing the

(1) P. J. (1883), p. 48.

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decree in the plaintiff's favour, the Subordinate Judge do determine what is a proper and sufficient maintenance for the defendant, and do secure the same, either by directing an investment of a sufficient part of the estate in trust for that purpose or by such other means as he may deem sufficient."

The appellants to pay the cost of this appeal.

Decree varied.

18 B. 454.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

COLLECTOR OF KANARA (*Applicant*) v. RAMBHAT BIN GANESHBHAT (*Opponent*).* [23rd August, 1893.]

Pauper—Suit in forma pauperis—Costs of plaintiff—Court fees payable by plaintiff—Decree omitting to order plaintiff to pay Court fees when suit dismissed—Application by the Collector under the extraordinary jurisdiction of High Court—Practice—Procedure.

The plaintiff's suit *in forma pauperis* was rejected by the Subordinate Judge. The decree, however, omitted to order the recovery from the plaintiff of the Court fees payable in the plaint. The Collector applied to the High Court under its extraordinary jurisdiction for the rectification of the decree. It was contended that, as the omission might have been remedied by an appeal or on review, the Collector could not apply under the extraordinary jurisdiction of the Court.

Held, on the authority of *The Collector of Ratnagiri v. Janardan* (1), that no appeal by Government would lie in the case, and that in the exercise of its extraordinary jurisdiction the High Court would rectify the decree by directing the plaintiff to pay the costs of Government.

[R., 27 B. 140 (143) = 4 Bom. L.R. 974.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) [455] against the decision of the Subordinate Judge of Sirsi in the Kanara District.

The plaintiff brought a suit *in forma pauperis* against Shrinivas Subhaya and three others to set aside a certain deed. The suit was valued at Rs. 4,450, and was, therefore, liable to a Court-fee of Rs. 250, which the plaintiff would have had to pay if he had not sued as pauper. The Subordinate Judge rejected the suit and ordered the parties to bear their own costs. The decree under the head of "Plaintiff's costs" set forth a sum of Rs. 250 as the amount of Court-fees payable on the plaint, but it contained no order for the recovery of that sum from the plaintiff permitted to sue as a pauper. The Collector of Kanara applied to the High Court under its extraordinary jurisdiction, alleging that the decree was imperfect and contrary to the provisions of the Civil Procedure Code, and he prayed that the decree might be rectified.

A *rule nisi* was issued calling on the plaintiff to show cause why the Collector's prayer should not be granted.

Narayan Ganesh Chandavarkar appeared for the plaintiff to show cause.—The Collector cannot apply under the extraordinary jurisdiction. He is not a party to the suit. The non-insertion of the provision in the decree as to the payment of the Court-fees by us was an omission which

* Application No. 6 of 1893 under extraordinary jurisdiction.

(1) 6 B. 590.