

the property, the subject-matter of the suit, and it would be wrong for me to pass an order that the plaintiffs were absolutely entitled to any portion of it without the presence of all the parties to the suit. In the second place, this is not an application in execution of a decree, nor is the matter I am asked to decide upon, a question between the parties to the suit arising in the course of the execution of the decree; but the decree being incapable of execution, I am asked to decide what are the rights of the parties in consequence of its non-execution. I think that if I made an order as asked, and a suit was brought to set it aside, the case would be [504] very similar to that of *Chowdhry Wahed Ali v. Mussamut Jumae* (1), wherein at p. 157 their Lordships say: "Their Lordships cannot find, after the incongruous proceedings above described, that there exists any decree authorising an execution against the respondent's estate, and consequently the question in the present suit is one not properly relating to the execution of a decree, but to a sale under orders which have not the support of any decree." There is no decree in this suit which would authorize the order I am asked to make; it would, in fact, amount to an alteration in the decree or the making of a new decree. In my opinion, the only way in which the plaintiffs can obtain what they seek is by filing a fresh suit setting out the decree herein, and the circumstances which have transpired since the passing of that decree, and asking for a declaration of their rights under all the circumstances of the case.

As to the third alternative, the matters in issue in this suit have been finally heard and determined and the rights of all parties have been settled by the decree; consequently there is nothing further to be tried. The Court cannot in this suit after passing a decree proceed to ascertain the rights of the parties under a state of facts quite different from those which appear in the pleadings herein and arising subsequent to the decree. Under these circumstances I must dismiss the summons with costs. Counsel certified for.

*Summons dismissed.*

Attorneys for plaintiffs:—Messrs. *Little, Smith and Nicholson.*  
Attorneys for defendants:—Messrs. *Payne, Gilbert and Burder.*

18 B. 505,

[505] APPELLATE CIVIL.

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

KRISHNAJI BIN MALJI (*Original Plaintiff*), Appellant v. VITHU AND OTHERS (*Original Defendants*), Respondents.\* [3rd August, 1893.]

*Hindu law—Joint ownership—Decree against joint owner—Execution sale—Right of purchaser—Co-sharers made parties after period of limitation—Limitation.*

The interest of Vithu, as co-sharer in certain land, was sold in execution of a decree against him. It was purchased by one Sakharam, who sold it to the plaintiff. The plaintiff sued for possession, and the other co-sharers were made party defendants to the suit, which, however, was held, as against them, to be barred by limitation.

*Held*, that the plaintiff was entitled to be put into joint possession of the land with them although the suit as against them was barred.

\* Second Appeal No. 198 of 1892.

(1) 11 B.L.R. 149.

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18 B. 505.

THIS was a second appeal from the decision of the First Class Subordinate Judge of Satara with appellate powers.

The plaintiff sued for possession of certain land which he purchased from one Sakharan bin Vithoji on the 11th June, 1883. Sakharan had purchased it on the 12th June, 1876, at a Court-sale in execution of a decree against the defendant Vithu.

In June, 1888, the plaintiff applied to the conciliator appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879) to settle the dispute with regard to the land. The conciliator gave his certificate on the 31st May, 1889, and the plaintiff filed this suit on the 5th June, 1889, on which day the Court opened after the summer vacation.

The defendant alleged that the land was in possession of one Gangai, the widow of Ganu. On the 29th August, 1889, Gangai and her minor son were made defendants Nos. 2 and 3. They alleged that they were in exclusive possession of the land, and pleaded that as against them the suit was barred by limitation.

At the hearing the plaintiff admitted that Vithu and Ganu and their widows had held joint possession of the land since before the auction-sale in 1876.

The lower Court held that "excluding that conciliation period" the suit was not barred as against the first defendant, but that [506] whether the conciliation period was excluded or not, it was barred by limitation as against defendants Nos. 2 and 3. The Court, however, dismissed the suit as against all the defendants with the following observations:—"The defendants' case is that their possession was exclusive of the title of Vithu. If the defendants' story is believed, it is fatal to the plaintiff's claim. If the plaintiff's story is credited, the same is none the less fatal, since the possession of Vithu and Ganu or of their wives has been joint, and the claim was barred long before the heirs of Ganu were made parties to this suit; and so it must be held to be barred against the defendant No. 1 too."

The plaintiff preferred a second appeal.

*Ghanasham N. Nadkarni* for the appellant (plaintiff):—"We purchased Vithu's interest in the land, and claim it in this suit which the Judge held is not barred. If that interest is a joint interest, we are entitled to it. Our claim was, no doubt, to eject the heirs of both Vithu and Ganu as we believed that the property belonged to Vithu alone. But if the Court found that Vithu's representative was in joint possession with other persons, we should have been given the relief to which we are entitled according to law. It was wrong to dismiss the suit *in toto*.

There was no appearance for the respondents (defendants).

#### JUDGMENT.

SARGENT, C. J.—As the Court has found that the plaintiff's title is proved as against defendant No. 1, and that his suit is not barred against him, the circumstance that his suit is barred as against Ganu's heirs affords no reason why he should not be put into joint possession of the land with them if Vithu had joint possession with Ganu and his widow Gangai after the sale in 1876. We must, therefore, send back the case for a finding on the following issue:—

Had Ganu and his widow Gangai exclusive possession of the properties in suit since the date of the sale in 1876?

The finding to be sent to this Court in two months.

*Issue sent down.*