

therefore, right in holding that the suit was instituted on the day the plaint was amended.

SARGENT, C. J.:—We think that the Joint Judge was in error in holding that the plaintiff could not establish his title under the will without producing a certificate under Regulation VIII of 1827. The decision in *Mulchand v. Motichand*<sup>(1)</sup> was in a case in which the plaintiff was suing to recover *debts* due to the estate of the deceased, and is not applicable to the present case.

We are also of opinion that the Joint Judge was wrong in holding that for purposes of limitation the suit commenced from the date of the amendment of the plaint and not from the date on which the plaint was originally presented. Taking the latter date as the one on which the suit was instituted, it is clear that it was within time under article 144 of Schedule II of the Limitation Act.

We are unable to accept as a sufficient finding the Joint Judge's statement that there is no doubt, on the evidence, that the defendant is in possession of the building site in respect of which an injunction is sought. The fact is disputed, and the Joint Judge should have given the reasons which led him to the conclusion at which he has arrived.

We must now reverse the decree of the lower appellate Court and remand the appeal for a fresh decision, having regard to the above remarks. Costs of this appeal to follow the result.

*Decree reversed and case sent back.*

(1) 9 Bom. H. C. Rep., at p. 38.

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Rånade.*

NINGA'PPA' AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v.  
SHIVA'PPA' AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Practice—Procedure—Plaint—Alternative reliefs—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Second appeal.*

The plaintiff sued to recover possession of the northern half of a certain plot of land, alleging that it had fallen to his share at a partition made in 1837, and

\* Second Appeal, No. 666 of 1892.

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MAFATTA'L  
NA'RANDA'S  
v.  
BA'I  
PARSON.

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that he was illegally dispossessed thereof by the defendant in 1890. He also prayed, in the alternative, that if the alleged partition were not proved, the land should be partitioned, and his share awarded to him. The suit was dismissed by the lower Courts on the ground that the alleged partition was not proved, and that no order for partition could be made in the face of the plaintiff's distinct allegation that it had already taken place.

*Held*, that the plaintiff's allegation of partition did not preclude him from seeking the alternative relief on the strength of his general title.

*Held*, also, that where no reasons are given by a lower appellate Court for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal.

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum, in Appeal No. 61 of 1891.

The plaintiffs sued to recover possession of the northern half of certain land (Survey No. 42), alleging that this northern half had fallen to their share at a partition between them and defendants' father in 1887, and that they had been dispossessed in 1890 in execution of a Mámlatdár's decree in a possessory suit. The plaintiffs also prayed, in the alternative, that if the alleged partition were not proved, the land should be partitioned, and a moiety thereof awarded to the plaintiffs.

The Court of first instance rejected the plaintiffs' claim, holding that the alleged partition of 1887 was not proved, and that the land, being service vatan land, was not liable to partition.

This decision was confirmed, on appeal, by the District Judge, whose judgment was as follows:—

“The points for determination appear to be—

(a) Have plaintiffs proved that the land in dispute fell to them on a partition?

(b) If not, should a partition be ordered?

(c) Apart from the alleged partition, have plaintiffs proved a title to the land in dispute?

“My finding on all the three points is in the negative.

“Exhibit A, the partition-deed relied on by plaintiff, is unregistered, and there can be no doubt that the property to which it refers is worth upwards of Rs. 100. .... This being so, it follows that the deed, which may or may can be genuine, is inadmissible for want of registration, and oral evidence of its terms is likewise inadmissible. Plaintiff, therefore, cannot prove partition.

“As regards point (b), a Court could not order partition in the face of plaintiff's distinct allegation that it had already taken place.

“As regards point (c), there is no satisfactory evidence that plaintiff was ever in possession of the land in dispute, or that he has any title to it.”

Against this decision the plaintiffs preferred a second appeal to the High Court.

*Mahádev Bháskar Chaubal* for appellants:—Our allegation of partition does not estop us from claiming partition in the alternative. We put forward the alternative case from the beginning. Having failed to establish the alleged partition, we are entitled to fall back on our general title, and claim the alternative relief—*Lakshmiibái v. Hari bin Rávjí*<sup>(1)</sup>; *Maidin Sáiba v. Nagápá*<sup>(2)</sup>; *Ráj Kishore Bhuddur v. Huree Mohun*<sup>(3)</sup>; *Shivrám v. Náráyan*<sup>(4)</sup>. The lower Court's finding on the question of possession is not accompanied by any reasons. It is, therefore, not conclusive in second appeal—*Kamat v. Kamat*<sup>(5)</sup>.

*Mahádev Chimnáji Apte* for respondents:—Plaintiff alleges that a partition took place in 1887. If this be true, then he is not entitled to demand a fresh partition except on the ground of mistake or fraud. He does not rest his case on this ground. Nor does he say that the land in dispute was left undivided at the time of the alleged partition. His case is that he got possession of his share, and was then ousted. Such ouster does not entitle him to claim a fresh partition. If he were allowed to say that there was no partition, then the present suit is defective. He must seek partition of all the joint property, and not merely of the land in dispute. He must bring into hotchpot the family property which is in his possession. The plaint contains two inconsistent reliefs neither of which can be granted—*Mahomed Buksh Khán v. Husseiní Bibí*<sup>(6)</sup>; see O'Kinealy's Notes on Civil Procedure Code, p. 97, 4th edition.

RÁNÁDE, J.:—In this case, the appellants (original plaintiffs) brought this suit to recover possession of the northern half of Survey No. 42, which was admittedly *shetsanadi* service land and which plaintiffs claimed had fallen to their share in a partition effected in 1887 between plaintiffs and defendants' father. The defendants dispossessed the plaintiffs in execution of a Mám-latdár's decree in a possessory suit in 1890. Plaintiffs claimed Rs. 100 as profits of their share of the land for three years, and the

(1) 9 Bom. H. C. Rep., 1.

(2) I. L. R., 7 Bom., 96.

(3) 19 Calc. W. R., 195.

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(4) I. L. R., 5 Bom., 27.

(5) I. L. R., 8 Bom., 368.

(6) L. R., 15 I. A., 81.

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plaint contained an alternative prayer that, in case the partition alleged were not proved, the claim might be treated as one seeking a partition of the land. Defendant No. 1 denied the alleged partition of 1887, and contended that separation had taken place twenty-five years ago. Plaintiffs obtained no share in the land in dispute, which was, moreover, service land, and as this service was rendered by the defendant No. 1, he alone was entitled to the possession of the land. The Court of first instance held that the partition deed of 1887 was inadmissible in evidence, as it was not registered. It further held that as the land was service land, it was not subject to partition. This decree was confirmed, in appeal, by the District Court, which held that the partition deed was inadmissible in evidence, and that no oral evidence could be received also on the point. It further held that as plaintiffs admitted a previous partition, no fresh partition could be ordered; and, finally, that plaintiff had failed to prove his title or his alleged possession of the land.

In the appeal before us, the appellants' pleader contended that the partition-deed was improperly held to be inadmissible in evidence, and that it could be at least used to prove plaintiffs' alleged possession. It was further contended that as plaintiffs' plaint had contained an alternative prayer, the lower Court of appeal was in error in holding that partition could not be ordered in this suit. Lastly, it was urged that as the lower Court had summarily disposed of the last two points, the judgment was defective.

To take up the last point first, there can be no doubt that it would have been far more satisfactory if the lower Court of appeal had decided the points (b) and (c) in a less summary manner, and had given reasons for its conclusions. This Court has laid down in *Kamat v. Kamat* <sup>(1)</sup> and *Raghunath v. Nilu* <sup>(2)</sup> that when no reasons are given for the conclusions arrived at, such conclusions cannot be accepted as legal findings of fact in second appeal. In the present case, plaintiff's allegation of a partition effected in 1887 was held by the lower Court to preclude him from seeking an order for partition under the alternative prayer contained in his plaint. We do not think plaintiff's

(1) I. L. R., 8 Bom., at p. 370.

(2) I. L. R., 9 Bom., 472 at p. 454.

allegation of partition was necessarily attended by any such consequence. In a similar case, *viz. Ráj Kishore v. Huree Mohun*<sup>(1)</sup>, where plaintiff alleged that a partition had been effected of his third share, and failed to prove it, the Courts allowed him to recover joint possession as before. In the present case, defendant No. 1 expressly admitted the fact of the double partition in his deposition, Exhibit 34. He stated therein that plaintiffs had separated twenty-five years ago, and that afterwards there was a reunion, and as plaintiffs were minors, defendants' father managed the shares both of plaintiffs and defendants; and that finally there was a division of house and lands about four years ago. Defendant No. 1 thus virtually admitted the statements in the plaint in respect of all the other property, and his contention was limited solely to the land in dispute, which he stated had never been divided, but had been held by his family in lieu of service, as representing the eldest branch. It was, therefore, necessary for the lower Court of appeal to discuss the evidence about plaintiff's alleged possession and general title to the land, and it erred in disposing of the case on the ground that the plaintiff's admission of partition precluded him from seeking the alternative relief on the strength of his general title.

That relief, it may be mentioned, is not inconsistent with the prayer for recovery of possession. In Story's Equity Pleadings (sec. 41, p. 37) the rule has been stated as follows:—"It has been said that a prayer of general relief, without a special prayer of the particular relief, to which the plaintiff thinks himself entitled, will be sufficient, and that the particular relief which the case requires may at the hearing be prayed at the bar. This as a general rule may be true; but it is not universal. Thus, for example, an injunction will not ordinarily be granted under a prayer for general relief; but it must be expressly prayed, because the defendant might, by his answer, make a different case under the general prayer from what he would, if an injunction were specifically prayed. So a writ of *ne exeat regno* will not ordinarily be granted unless expressly prayed for in the bill." It has been accordingly ruled that inconsistent assertions of fact cannot be permitted either in the plaint or in the pleadings, but that

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(1) 19 Cal. W. R., 195.

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on the same basis of facts, two distinct titles may be put forth— See *Chová Kará v. Isa bin Khalifa*<sup>(1)</sup> and *Mahomed Buksh Khán v. Husseini Bibi*<sup>(2)</sup>. Plaintiff's principal claim was for a share of the land, a definite northern share if the alleged partition was held proved, or an equal share if no such partition was admitted. In the present case the fact of the second partition is not denied by the defendant. His contention relates solely to the impartible character of the land in dispute by reason of its being service land. There was, therefore, no inconsistency in plaintiffs' claim.

The partition-deed on which plaintiffs relied, was very properly held to be inadmissible in evidence, as both the value of the entire property and of plaintiffs' share in it exceeded 100 rupees. The questions of plaintiffs' alleged title to the land independently of the partition of 1887, and the impartibility of the land as being service land (on which latter point the Court of first instance rejected plaintiffs' claim), were not at all considered by the lower Court of appeal. It virtually disposed of the case on a preliminary point which did not cover the whole of plaintiffs' claim. Under these circumstances we think that the ends of justice will be best served by a remand of the case back to the lower Court of appeal under section 566, with directions that it should record its findings with reasons on the question of possession and title, and the impartibility or otherwise of the land in dispute. It should return these findings in the course of three months.

*Case remanded.*

(1) I. L. R., 1 Bom., 209.

(2) L. R., 15 I. A., 81.

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

TRIMBAK RA'MRA'O DESHPA'NDE (ORIGINAL PLAINTIFF), APPELLANT,  
 v. GOVINDA (ORIGINAL DEFENDANT), RESPONDENT.\*

*Civil Procedure Code (Act XIV of 1882), Sec. 244 (c)—Claim to attached property—Order in execution proceedings—Separate suit—Execution of decree.*

In execution of a decree passed against the plaintiff certain property in his possession was attached. Thereupon he laid claim to the property, on the ground

\* Second Appeal, No. 718 of 1892.

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