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hands of a stranger. In the present case no special custom or circumstances have been put forward to establish such exemption. The agreement of the mortgagor to be responsible for the revenue while tending to show that the land was not considered exempt, came to an end, as explained by the Subordinate Judge, with the extinction of the equity of redemption by the Court sale which transferred to the purchaser both the personal rights and liabilities of the judgment-debtor.

We must, therefore, confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894. *July 2.*

BHIVRA'V (ORIGINAL DEFENDANT), APPELLANT, *v.* SITA'RA'M (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Joint family—Partition—Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition, how recoverable—Civil Procedure Code (Act XIV of 1882), *Secs.* 13, 244.

Although, as a general rule, no member of an undivided Hindu family can have any claim to mesne profits previous to partition, yet mesne profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and, therefore, exclusively his own.

Where a decree for partition is silent about mesne profits subsequent to the institution of the suit, a party is at liberty to assert his right to such profits by a separate suit. Section 244, para. 2 of the Code of Civil Procedure (Act XIV of 1882) expressly reserves such a right of suit.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, in Appeal No. 88 of 1892.

The plaintiff, Sitárám Balvant Potnis, sued to recover Rs. 1,288-11-10 on account of his share in certain cash allowances payable to the defendant Bhivráo Mádhavráo from the Government treasuries at Poona, Ahmednagar, Shrigonda, Sholápur, Bársi, Mangi, and Dadegaon.

* Second Appeal, No. 741 of 1892.

The parties to the present suit belonged to the Potnis family. Defendant was the representative of the eldest branch.

In 1881 one Átmárám Keshav, a member of the Potnis family, filed a suit for partition of the family estate consisting (*inter alia*) of the cash allowances in dispute in the present case.

The present defendant was defendant No. 1 in the partition suit, while the present plaintiff was defendant No. 5 in that suit.

The present defendant contended in that suit that the bulk of the property was saranjám and, therefore, not liable to partition according to the custom of the country.

The partition suit was ultimately decided by the High Court on 2nd December, 1890 (see I. L. R., 15 Bom., 519).

The High Court held that the property in dispute was partible, and ordered a partition among all the co-sharers according to their respective shares. The present plaintiff (who was defendant No. 5 in that suit) was declared along with his two brothers to be entitled to a third share. But no order was made in regard to mesne profits.

In 1891 the plaintiff filed the present suit to recover his share of the cash allowances received by the defendant from Government during the years 1887, 1888 and 1889, *i. e.* during the three years preceding the decision of the High Court in the partition suit.

Defendant pleaded (*inter alia*) that as no order for mesne profits had been made in the partition suit, the present suit was barred by sections 13 and 244 of the Code of Civil Procedure (XIV of 1882).

The Court of first instance overruled this objection and awarded the plaintiff's claim.

This decision was upheld on appeal by the District Judge.

The defendant thereupon prefered a second appeal to the High Court.

Mahádev Chimnáji A'pte for appellant.

Mánekshán Jahángirshán for respondent.

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The following authorities were cited in argument:—*Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[1], *Konerráv* v. *Gurráv*[2], *Sakhárám* v. *Hari*[3], *Jugmohandás* v. *Sir Mangaldás*[4], *Madan Mohan Lál* v. *Lálá Sheo Sanker*[5], *Venkobá* v. *Subbánná*[6], *Ranganmani Dási* v. *Káshináth Dutt*[7], *Rájá Venkatá* v. *Rájá Rájagopálá*[8], *Mon Mohun Sirkár* v. *The Secretary of State for India in Council*[9], *Dámodardás* v. *Uttamrám Máneklál*[10].

RÁNADE, J.:—The main contentions urged by the appellant have direct reference to the proceedings in the partition suit No. 458 of 1881, which came up in appeal before this Court, and was finally decided on 2nd December, 1890. This partition suit was brought by one A'tmárám Keshav, a sub-sharer of the Potnis family, to which the parties in the suit before us belong, for a partition of his shares in certain properties including saranjám cash allowance, together with the mesne profits of the same. The present defendant was defendant No. 1 in the partition suit, and the present plaintiff was defendant No. 5, and he filed a written statement, in which he urged that he had himself a $\frac{1}{9}$th share, which had not been separated by the present defendant No. 1's father, and that if his share were separated, he had no objection to allow partition of Atmárám's $\frac{1}{27}$th share. In the partition suit, the Court of first instance awarded Atmárám the shares and the amounts claimed by him, subject to certain deductions and conditions. The present defendant appealed from that decree, and so also the present plaintiff with some of the other defendants preferred a separate appeal, and one of the grounds urged in this latter appeal was that the lower Court had erred in not directing a partition of the whole property between all the sharers, according to their respective shares. The High Court reversed the decree of the lower Court, and declared the respective shares of Atmárám, and of the defendant and plaintiff in the present suit, as also of the other sharers in the Potnis family. The present plaintiff, who was, as stated above, defend-

(1) I. L. R., 1 Bom., 561.
(2) I. L. R., 5 Bom., 589.
(3) I. L. R., 6 Bom., 113.
(4) I. L. R., 10 Bom., 528.
(5) I. L. R., 12 Calc., 482.
(6) I. L. R., 11 Mad., 151.
(7) 3 B. L. R., 1 (O. C. J.)
(8) L. R., 9 I. A., 125.
(9) I. L. R., 17 Calc., 968.
(10) I. L. R., 17 Bom., 271.

ant No. 5 in the partition suit, was declared, along with his two brothers, defendants Nos. 6, 7 in that suit, to be owner of a $\frac{1}{3}$rd share. No order was made in regard to mesne profits.

The present suit was brought by defendant No. 5 in the partition suit in 1891 to recover from defendant, who represents the eldest branch, the amount due for plaintiff's $\frac{1}{5}$th share of the saranjám cash allowances paid to the defendant from the Government treasuries of Poona, Ahmednagar and Sholápur, and the claim was made for the three years preceding the decision of the partition suit in the High Court, namely (1887-1889). Defendant, among other objections, urged that as no order about mesne profits had been made in the partition suit, plaintiff's claim for the same was not maintainable under sections 13 and 244 of the Code of Civil Procedure. The Court of first instance overruled this objection, and allowed plaintiff's claim in part, and this decree was affirmed in appeal.

Before us, the appellant's pleader mainly rested his contention on the third and fourth grounds set forth in the memorandum of appeal. He urged that the Potnis family must be regarded as having remained joint till the decision of the partition suit in December, 1890, and as the final decree only declared the shares, and did not allow mesne profits, plaintiff's present claim could not be maintained. It was contended before us that all the parties in a partition suit are both plaintiffs and defendants as against one another, and that it has been settled by a long course of decisions that, as a rule, the sharers are not liable to be called upon to account for past receipts or disbursements, and that the present plaintiff had no right to claim his share of the receipts for the three years preceding the final partition decree of 1890, since it was really a claim for mesne profits, and that claim was not reserved or allowed by the decree. In support of these contentions, the following authorities were cited:—*Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[1], *Konerráv* v. *Gurráv*[2], *Sakhárám* v. *Hari*[3], *Jugmohandás* v. *Sir Mangaldás*[4], *Madan*

(1) I. L. R., 1 Bom., 561; I. L. R., 5 Bom., 48, in Ap. (P. C.)
(2) I. L. R., 5 Bom., 589. (3) I. L. R., 6 Bom., 113.
(4) I. L. R., 10 Bom., 528.

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Mohan v. *Lálá Sheo Sanker*(1), *Venkobá* v. *Subbánná*(2). On behalf of the respondent Mr. Mánekshâh cited the following rulings:—*Ranganmani Dási* v. *Kásináth Dutt*(3), *Rájá Venkata* v. *Rájáh Rájagopálá*(4), *Mon Mohun Sirkár* v. *The Secretary of State for India in Council*(5), *Dámodardás* v. *Uttamrám Máneklál*(6).

On a careful consideration of these authorities, we feel satisfied that (1) while, as a general rule, it is true in the words of Mr. Mayne (5th ed., para. 429) that "no member" of an undivided Hindu family "can have any claim to mesne profits previous to partition, because it is assumed that all surplus profits have, from time to time, been applied for the benefit" of the family, yet (2), that this is only a presumption, and that "mesne profits may be allowed on partition when one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member of the family who claimed a right to treat it as impartible, and therefore exclusively his own." This latter condition is fulfilled by the defendant in this case, for he has all along contended that the saranjám property is impartible, and in his written statement he urged that even the High Court's decree was not final, as he intended to prefer an appeal to the Privy Council. Mr. Mayne cites in his text as authorities for his second statement *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik* (7), and *Konerráv* v. *Gurráv* (8). In the first case this Court only decided that the defendant, who was a brother of the plaintiff seeking partition, was not liable to account for monies received by him from his father while living in commensality with him and his brother, unless the circumstances suggested fraud. In the second case, the Court held that in the case of joint enjoyment, or enjoyment by different members of different portions of the family property, the Court will not, except under special circumstances, order an account to be taken of past transactions, but will make division of the property actually existing at the date of partition. Melvill, J., remarked (p. 595) in the course of the judgment delivered by

(1) I. L. R., 12 Calc., 482.
(2) I. L. R., 11 Mad., 151.
(3) 3 Beng. L. R., 1 (O. C. J.).
(4) L. R., 9 I. A., 125.
(5) I. L. R., 17 Calc., 968.
(6) I. L. R., 17 Bom., 271.
(7) I. L. R., 1 Bom., 561.
(8) I. L. R., 5 Bom., 589.

him, that "the ordinary rule, no doubt, is that the members of an undivided Hindu family are not entitled to an account of past transactions," yet "where one member of the family has been entirely excluded, there might be good grounds for ordering an account." The decision in *Sakhárám* v. *Hári*(1) only ruled that the Court of appeal could vary the decree of the lower Court in a partition suit, if such variation was rendered necessary by the death of one of the sharers before the appeal was finally decided. This ruling does not conflict with the decision in *Jugmohandás* v. *Sir Mangaldás*(2), where it was held that the partition must be made of the property as it exists at the date of the partition suit. None of the authorities cited by the appellant's pleader thus supports the extreme position taken up by him. The proposition he contends for is only true as a general rule, but it is based on a presumption which may be rebutted.

The whole question of a manager's liability to account was considered in the judgment of Sargent, C. J., in *Dámodardás* v. *Uttamrám Máneklál*(3). It was there held, after a review of all the previous decisions, that, besides the two cases noted by Melvill, J., in *Konerráv* v. *Gurráv*(4), a manager may be called upon to render an account if any of the plaintiffs were minors, and he had obtained a certificate of administration. This last exception has no bearing in the present case, but the Chief Justice laid down the much larger proposition that there was nothing "in the custom of the Hindu family which would justify the manager in refusing to give any account whatever of his management on the occasion of a partition." In a Calcutta case —*Ranganmani Dási* v. *Kásináth Dutt*(5)—such an account was ordered where the property was a banking business, the profits of which were divided in certain proportions among the undivided members. Mesne profits were similarly allowed by their Lordships of the Privy Council in the partition of a Zamindári, where the defendant claimed that the Zamindári was impartible—*Rájá Venkata* v. *Ráján Rájagopála*(6). This is exactly

(1) I. L. R., 6 Bom., 113.
(2) I. L. R., 10 Bom., 561.
(3) I. L. R., 17 Bom., 271.
(4) I. L. R., 5 Bom., 589.
(5) 3 Beng. L. R., 1 (O. C. J.).
(6) L. R., 9 I. A., 125.

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the case in the present instance. It may, therefore, be safely held that the general rule has no application in the present case, which falls naturally within one or other of the exceptions noted above, more especially in the extract from the judgment of Melvill, J., in *Konerráv* v. *Gurráv*[1].

It was, however, contended that though defendant might have been liable to account in the partition suit, yet as no such order was made by this Court in 1890, plaintiff has no right to claim his share of the profits for the preceding three years. It appears to us that this contention also is not well founded. In the partition suit, the present plaintiff was only a co-defendant, and though in his written statement filed in 1881, and in his appeal in 1884, the present plaintiff claimed a separation of his share, he made no claim for mesne profits. The plaintiff could not well be expected to make a claim in 1881 and 1884 for his share of the profits of 1887-89. The decision in *Venkoba* v. *Subbánná*[2] relates only to a claim for mesne profits prior to the date of the suit, and it was there held that if a plaintiff omitted to claim mesne profits or rent for such prior years, he could not under section 43 bring a separate suit for them. The ruling of the Privy Council in *Madan Mohun* v. *Lálá Sheo Sanker*[3], also had reference to the profits which had already accrued due at the institution of the suit. The reason assigned for disallowing such a claim is that the plaintiff could have joined the claim for profits along with his claim for the property. This reason does not hold good in respect of subsequent profits. All doubts, however, are removed by the latest ruling of the Calcutta High Court in *Mon Mohun Sirkár* v. *The Secretary of State for India in Council*[4], where it was expressly held that "where a decree for possession is silent as to the mesne profits between the date of the institution of the suit and the delivery of possession, a separate suit will lie for such subsequent mesne profits, and sections 13 and 244 of the Code are no bar to such a suit." The Privy Council decision in *Sadásiva Pillái* v. *Rámalingá Pillái*[5], was to the same effect, as it laid down that where the decree

(1) I. L. R., 5 Bom., 589.
(2) I. L. R., 11 Mad., 151.
(3) I. L. R., 12 Calc., 482.
(4) I. L. R., 17 Calc., 968.
(5) L. R., 2 I. A., 219.

was silent about mesne profits subsequent to the institution of the suit, plaintiff was at liberty to assert his right to such profits in a separate suit. See also *Mussummat Bebea Sahodra* v. *Roy Jung Bahádur*[1]. There is in fact no room for a difference of opinion on this point, as para. 2 of section 244 expressly reserves such a right of suit. We must, therefore, overrule this contention of the appellant.

There was only one other contention urged by the appellant, and that related to the *vadilki* allowance. The defendant claimed a right to deduct 1,200 Rupees reserved to him by the partition decree out of the monies received by him, and contended that no deduction should have been made in respect of the proportion chargeable to the allowance received from the Sátára Treasury, which was not included in the plaintiff's claim. We are not disposed to hold that the defendant has a first charge of the sort contended for by him. The *vadilki* allowance must be rateably apportioned. We accordingly reject the appeal, and confirm the decree of the lower Court with costs on appellant.

Appeal rejected.

(1) L. R., 8 I. A., 213.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

ANDA'NA'PA (PURCHASER), APPLICANT, *v.* BHIMRA'O A'NNA'JI AND ANOTHER (DECREE-HOLDERS), OPPONENTS.*

1894. *July 3.*

Execution—Decree—Decrees of different Courts against same judgment-debtor—Leave given by both Courts to judgment-debtor to raise amount by private sale—Civil Procedure Code (Act XIV of 1882,) Sec. 305—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court—Practice—Procedure.

Panchlingápa Baslingápa obtained a decree against Venubái in the Court of the Second Class Subordinate Judge at Saundatti. He applied (darkhást of 1892) for execution, but Venubái, on 19th April, 1893, obtained permission, under section 305 of the Civil Procedure Code (Act XIV of 1882), to raise the amount of the decree by private sale on or before the 6th June, 1893, the day fixed for the sale. She obtained a certificate of leave under section 305.

* Application, No. 8 of 1894, under extraordinary jurisdiction.