APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

BHATT MULJIBHAI NARBHERAM AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PATEL LAKHMIDAS DADABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

1911. *August* 25.

Suit by a widow to recover possession of her husband's share in divided family lands after partition by metes and bounds—Alleged partition of a house—Dismissal of suit, family lands being found not divided—Subsequent suit by a reversioner to recover possession of the house—No res judicata.

There were two brothers, Kisborbhai and Desaibhai. Kishorbhai died leaving him surviving his widow Bai Kanku, a daughter Bai Divali, and brother Desaibhai. Subsequently Desaibhai died leaving behind him his daughter's son Muljibhai. In 1884 Bai Kanku brought a suit against Muljibhai to recover possession of her husband's share in divided family lands after partition by metes and bounds. She alleged that the house in which she lived had fallen to her husband's share at partition. It was found that the family lands were not divided and the suit was dismissed. Bai Kanku died in 1907. In the year 1908 the plaintiff, who was the nearest heir of Kishorbhai, brought the present suit against Muljibhai to recover possession of the house. A question having arisen as to whether the finding in the suit of 1884 with respect to family lands operated as *res judicata* with respect to the house,

Held, that the decision in the suit of 1884 did not bar the present suit.

SECOND appeal against the decision of D. G. Medhekar, Additional First Class Subordinate Judge of Ahmedabad with appellate powers, reversing the decree of J. N. Bhat, Subordinate Judge of Borsad.

Suit to recover possession of a house.

There were two brothers, Kishorbhai and Desaibhai. Kishorbhai died leaving him surviving his widow Bai Kanku, a daughter Bai Divali and brother Desaibhai. Subsequently Desaibhai died in or about the year 1883 leaving behind his daughter's son Muljibhai. In the year 1884 Bai Kanku and her daughter Bai Divali filed a suit, No. 1151 of 1884, in the Court of the First Class Subordinate Judge of Ahmedabad against Muljibhai to recover possession of her husband's share in family lands after division by metes and bounds. She alleged that at a partition between the two brothers, Kishor-

* Second Appeal No. 542 of 1910.

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bhai and Desaibhai, the income of the family lands was divided and that the house in which she lived had fallen to her husband's share. One of the issues raised in that suit was, "Was there a division between Kishorbhai and Desaibhai and was the family land allowed to remain joint on condition that the income should be received according to the respective shares as alleged by the plaintiff?" The finding on the said issue was in the negative and the suit was accordingly dismissed. Bai Kanku having died in the year 1907, the plaintiff, who was the nearest heir of Kishorbhai, brought the present suit against Muljibhai and his tenant in the year 1908 to recover possession of the house alleging that defendant Muljibhai had taken wrongful possession.

Defendant 1, Muljibhai, answered *inter alia* that Kishorbhai and Desaibhai were joint and undivided members of a Hindu family, that Kishorbhai having died without any male issue, Desaibhai became the absolute owner of all joint property including the house in suit, that he was the heir of Desaibhai and that the suit was barred by section 13 of the Civil Procedure Code (Act XIV of 1882) by virtue of the finding in Suit No. 1151 of 1884.

Defendant 2, who was the tenant of defendant 1, was absent.

The Subordinate Judge found that the question whether there was or was not a division between Kishorbhai and Desaibhai was not *res judicata* by reason of the decision in Suit No. 1151 of 1884 and that the plaintiff was not entitled to claim the house in preference to defendant 1. He, therefore, dismissed the suit.

With respect to the question of *res judicata* the Subordinate Judge observed :—

It will appear from above that though there was allegation in the plaint that there was a division of the dwelling houses and a denial of division by defendant 1 and though the issue as to division was framed in so general a manner as to cover the pleadings both as regards the houses and lands, the finding on the issue was confined expressly to the family land. The Court refrained, and in my opinion intentionally refrained, from deciding the question as to the division of the dwelling houses * * For, the subject-matter before the Court, in that suit was land only * * * A perusal of the whole judgment (exhibit 21) shows that the

Court did not address itself to the question as to the division of the dwelling houses notwithstanding the fact that some of the witnesses have been put questions as regards the division of the houses too (exhibits 90 and 91). It is true that the Court has at one place remarked as follows :—

"I am of opinion that the severance of interests and payment of the share as alleged, are not proved, and that the property has always remained undivided, and Kankuba, who lived in a separate house, was maintained by Desaibhai as a widow of the joint family until his death which took place in Vaisakh Samvat 1939."

But this remark is not tantamount to deciding that there was no division of the family houses. There may be a division of houses between brothers and yet the widow of one of them may be maintained by the other, out of the income of joint family lands, in which case it can be said that the widow was maintained as a widow of the joint family. I, therefore, hold that though the question of the division of houses was raised in the pleadings and though a general issue as to division was framed, the question of division of lands only was decided and not of the houses, the same not being necessary for the purposes of that suit.

On appeal by the plaintiff, the appellate Court found that the house in suit was in the possession of Bai Kanku as her husband's separate property. The decree of the first Court was, therefore, reversed and the claim was allowed.

Defendant 1 along with his wife, Bai Jhaver, preferred a second appeal.

L. A. Shah for the appellants (defendant 1 and his wife).

Branson with *G. K. Parekh* for the respondent (plaintiff).

BEAMAN, J. :—There were two brothers Kishorbhai and Desaibhai. The plaintiff is admitted to be the nearest heir of Kishorbhai, and the defendant of Desaibhai. Kishorbhai left a widow Bai Kanku, who resided in the house, which is the subject-matter of this suit, until her death. The plaintiff's case is that during the life-time of Kishorbhai and Desaibhai they effected a partition of their house property, as a result of which, the house in suit fell to the share of Kishorbhai and became his exclusive property. This was held to be so, as a fact, in the lower appellate Court. But the appellant contends that the present suit is *res judicata* by reason of a suit brought by Bai Kanku in 1884, for her share of the lands, which had constituted part of the joint property of the brothers Kishorbhai and Desaibhai. That point was taken in the Court of

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first instance and elaborately discussed. The learned Judge there came to the conclusion that the suit of 1884 did not bar the present suit; and the present appellant did not raise the point again before the learned Judge of first appeal, so that we have not had the benefit of his opinion upon it.

The appellants' case is that since Bai Kanku sued to recover her deceased husband's share in the landed property, exclusive of the houses, on the footing of Kishorbhai and Desaibhai having separated, and since the decision in that suit was against her, it must be regarded as *res judicata* on the whole question of partition or union. We think, however, after carefully considering all the facts of that suit, and the arguments addressed to us on behalf of the appellants, that this would be carrying the principle of *res judicata* too far. In that suit Bai Kanku asked for possession, after partition by metes and bounds, of her late husband's share in the fields, which had constituted part of the joint family property. She had alleged then, as the plaintiff alleges now, that there had been an actual partition of the house property, to which effect had been given; and though no doubt it is an implication of law that where there is a partition of some part of the property carried out by metes and bounds, the interest of the divided members of the family are severed, they are thenceforward in respect of the property which is not partitioned by metes and bounds tenants-in-common; in practice it is quite usual to find Courts implying reunion from the mere fact of joint use and occupation of the property not actually partitioned for a long period after the alleged partition.

Having regard to what was actually found by the learned Judge who tried Bai Kanku's suit, to the frame of the issues and the carefully guarded language he has used in disposing of them, it appears to us that what is now substantially in issue between the parties did not necessarily then call for decision and was not in fact decided. It is quite true that there are some observations in the judgment in that suit which strongly support the appellants' allegation that had the learned Judge thought it necessary to do so, he would have held definitely

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that there never had been actual partition of the house property. But it appears to us that even had he held that the house property had been partitioned, and that each brother had thenceforward held his share in severalty, that need not necessarily have precluded him from coming to the decision he did upon the only question he was asked to decide. What, therefore, was not directly and substantially in issue in that suit and was not necessary to be decided, cannot now, we think, fairly be held to be *res judicata* against the plaintiff.

As this was the only point taken in appeal, we must, therefore, dismiss the appeal with all costs and confirm the decree of the Court below.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

PARWATIBAI KOM BHAGIRATH (ORIGINAL PLAINTIFF), APPELLANT, *v.* CHATRU LIMBAJI (ORIGINAL DEFENDANT 2), RESPONDENT.*

1911. *August* 25.

Hindu Law—Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose.

Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal.

A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere, unless she leaves the house for an improper purpose.

Ambabai kom Balaji Vinayak Kale v. *Ramchandra Balaji Kale*(1), followed.

Girianna Murkundi Naik v. *Honama*(2), referred to.

SECOND appeal against the decision of C. C. Boyd, District Judge of Ahmednagar, confirming the decree of M. K. Nadershah, Joint Subordinate Judge.

* Second Appeal No. 328 of 1910.

(1) (1895) P. J., p. 44. (2) (1890) 15 Bom. 236.