

been taken in the Madras High Court in several reported cases and also by the Calcutta High Court.

In the present case, however, as we have stated, the real question is which person was entitled to a grant of the certificate.

The question has been argued as to the rights of the respective parties to the grant of a certificate, and the certificate has been granted after a consideration of those rights. That order granting the certificate was, in our opinion, appealable under section 26. The grant of the certificate does not under the Act finally determine the rights of the parties. Section 25 of the Succession Certificate Act (VII of 1889) provides: "No decision under this Act upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties." We, therefore, do not think it necessary or desirable to express the opinion that we have formed as to the rights of the respective parties under the will of the testator.

We discharge the rule with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

GOVIND ANNAJI BODHANI (ORIGINAL PLAINTIFF), APPELLANT, v. TRIMBAK
GOVIND DHANESHWAR (ORIGINAL DEFENDANT), RESPONDENT.*

*Hindu Law—Rights to well and water—Indivisible rights—Presumption—
Partition of property which is joint.*

Under Hindu Law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal; and, after partition these must be enjoyed by the separated co-parceners by turns.

SECOND appeal from the decision of C. Fawcett, District Judge of Ahmednagar, reversing the decree passed by H. A. Mohile, Subordinate Judge of Ahmednagar.

* Second Appeal No. 332 of 1909.

1911.

BAT
NANDKORR
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Suit for a declaration that a certain well was the joint property of the plaintiff and the defendant. The well in question was situated between the properties belonging to the plaintiff and the defendant, which properties were contiguous to each other, and which originally formed one *wada* and belonged to a single owner. The defendant contended *inter alia* that the well was not the joint property and that he alone was entitled to use it.

The Subordinate Judge held that the well in question was the joint property of the plaintiff and the defendant and granted the declaration sought. This decree was, on appeal, reversed by the District Judge who held that the plaintiff had not established his right to the joint ownership of the well. In dealing with this question he remarked as follows:—"The Subordinate Judge says . . . it is extremely likely that the well was kept joint at the time of the partition. This is no doubt a consideration which is to be taken into account, but it is at best a surmise which is unsupported by any reliable evidence."

The plaintiff appealed to the High Court.

M. R. Bodas for the appellant.

K. H. Kelkar for the respondent.

CHANDAVARKAR, J. :—This was a suit brought by the appellant for a declaration of his right to use the water of a well jointly with the respondent and for an injunction to restrain the latter from obstructing the appellant in the exercise of his right. The respondent in his written statement denied the appellant's claim and asserted his exclusive right to the well. The Subordinate Judge, who tried the cause, found upon the evidence that the well had at one time been attached to two houses owned by two brothers constituting a joint Hindu family and that they effected a partition of the houses: that, some time after that, one brother sold the house allotted to him at the partition to the appellant and the other sold his to the respondent. These facts are admitted by both parties before us and have also been found by the District Judge, from whose decree this second appeal is preferred. As the two brothers had only one well, that is, the one now in dispute, which they jointly used as owners

before the partition, the Subordinate Judge thought that it was "likely" that at the partition they had reserved it as joint. Accordingly he awarded the appellant's claim. On appeal by the respondent, the District Judge held that what the Subordinate Judge had treated as a matter of likelihood was "a mere surmise" not supported by any evidence in the case. He, therefore, reversed the Subordinate Judge's decree and disallowed the appellant's claim.

Both the Courts below have not borne in mind the rule of Hindu Law applicable to the present case. What the Subordinate Judge treated as a matter of probability and the District Judge as a mere surmise is dealt with by that law as a matter of legal presumption. The rule is that rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal, and that after a partition these must be enjoyed by the separated co-parceners by turns. "Water, or a reservoir of it, as a well or the like, being unequal (to the allotment of shares) must not be distributed by means of the value; but is to be used (by the co-heirs) by turns." (The Mitakshara, Ch. I, sec. IV., plac. 21; Stokes' Hindu Law-Books.) The Vyavahara-Mayukha is also to the same effect. "Water from wells which have flights of steps, and wells from which it is drawn by buckets &c. is (to be) enjoyed according to need." (Mandlik's Hindu Law, page 71, lines 34 to 36.) The Viramitrodaya says that "water, that is, a reservoir of water, such as a well, shall be used by all accordingly as they" (*i. e.*) (the co-parceners after partition) "require." (Golapchandra Sarkar's Edition, page 249.) When it is laid down that a well is "indivisible" (*avibhajyam*) what is meant is that "it cannot be distributed like land or money. But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns." (West and Buhler, 3rd Edition, pages 831 and 832.)

The appellant in the present case starts with this rule of Hindu Law in his favour on the facts which are common ground; and his claim must be awarded unless the respondent is able to prove by affirmative evidence that the right to own

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and use the well jointly has been lost by the appellant, either because of an express agreement at the partition whereby his predecessor-in-title relinquished that right in favour of his brother, or because of his or the appellant's exclusion to his knowledge by the latter or the respondent for such a period as in law is necessary to give the latter a right to the well by adverse possession. No plea based on adverse possession was set up by the respondent in the Court of first instance. Therefore the only question is whether the respondent's predecessor-in-title acquired by express agreement an exclusive right to the well at the partition. We must ask the lower appellate Court to find on the following issue:—

Whether the well in dispute was allotted at the partition to the person from whom the defendant derived his title.

The *onus* of this issue will lie in the first instance on the defendant. The lower appellate Court should record its finding on the evidence on the record and parties are not to be allowed to adduce fresh evidence. Finding to be remitted within two months.

[On the 27th June 1910 the lower Court certified its finding on the above issue in the negative.

The High Court (Chandavarkar and Heaton, JJ.) accepted, on the 22nd August 1910, the finding of the lower Court on the issue sent and reversed the decree passed by the lower appellate Court and restored that of the Subordinate Judge.]

Decree reversed.

R. R.
