APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.

NATHUBHAI DHIRAJRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI HANSGAVRI (ORIGINAL DEFENDANT), RESPONDENT.* 1912. *January* 25.

Hindu Law—Right of way—Impartible property—Presumption of law—Implied reservation of right of way on partition of estate—Mitakshara—Mayukha.

Under Hindu Law, in the absence of anything to show that at a partition a passage was allotted to either one party or the other exclusively, the presumption is that it continued joint and undivided even after the partition. That presumption must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share.

According to the Mitakshara and the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are indivisible: and if there is no evidence that at the partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Broach, reversing the decree passed by P. C. Desai, Subordinate Judge at Broach.

Suit to establish a right of way.

The plaintiff and the defendant owned contiguous houses in front of which lay an open piece of ground. Those houses originally belonged to a common ancestor of the parties, one Vasantrai Dayaram. Vasantrai had two sons, Dhirajram (the father of plaintiff) and Harinath (the father of defendant's husband). In the year 1858, Dhirajram and Harinath divided the property between themselves, each one taking a house. In the deed which recorded the partition no mention was made as to any right of way.

The plaintiff claimed that he had a right to pass upon the open piece of ground that lay in front of the defendant's house, (1) to reach another house of the plaintiff which lay beyond; (2) to use a privy which was at the other end of the defendant's land; and (3) to pass upon the land as an easement of necessity.

* Second Appeal No. 763 of 1910.

1912.

NATHUBHAI DHIRAJRAM v. BAI HANSGAVRI.

It was shown that the plaintiff had no easement of necessity to pass upon the land, inasmuch as he had already two other ways for egress and ingress. It also appeared that the privy had been closed up at least as far ago as the year 1880.

The Subordinate Judge, however, decreed the plaintiff's right, on the ground "that the way in dispute passed to the plaintiff's father, by the doctrine of implied reservation, as being necessary, for enjoying the share of the property in the way in which it was enjoyed at the time of partition."

On appeal, the District Judge did not go into the question of implied reservation; but reversed the decree on the ground that the plaintiff had not established his right to go over the land in question.

The plaintiff appealed to the High Court.

L. A. Shah for the appellant.

Ratanlal Ranchhoddas for the respondent.

CHANDAVARKAR, J.:—The suit was brought by the present appellant for a perpetual injunction to restrain the respondent from interfering with his right of way over a certain passage.

The Subordinate Judge who tried the suit looked at the question of the plaintiff's right in two aspects, first, as a right by way of implied reservation, secondly, as a right by way either of easement or prescription. On both these points he came to the conclusion that the plaintiff had established his right to the passage in question. Accordingly a decree as prayed for was made.

But in appeal the learned District Judge has held that the appellant-plaintiff has failed to prove that he has used as of right the passage in dispute for the statutory period required for an easement or prescriptive right.

It is contended in support of this second appeal that the learned District Judge has not applied himself to the question of implied reservation to which the learned Subordinate Judge had very carefully addressed himself. That contention of the appellant's pleader must be allowed.

It is urged by Mr. Ratanlal for the respondent, that the plaint and the pleadings did not raise a title based on implied reservation. The plaint and the pleadings show it is not so. The plaintiff's case all along has been that at one time the plaintiff's and defendant's houses were commonly enjoyed by them; that this passage which is now in dispute was also a common way for the members of the family. It was upon that basis that the Subordinate Judge dealt with the case. And if the case of a right by way of implied reservation was distinctly raised by the parties, and dealt with by the Court of first instance, the appellate Court was bound to consider it and dispose of it, unless the plaintiff had at the hearing of the appeal abandoned it, expressly or impliedly. There is nothing on the record of the lower appeal Court to show that it was abandoned.

No doubt from the fact that the District Judge has dealt with the plaintiff's case as it concerned the right of easement or prescription, it may be inferred that that was the only case relied upon by the appellant in resisting the appeal in the lower Court. But that inference would be obviously out of place here, because the main facts found by the learned District Judge of themselves are sufficient in law to raise the question of a right by way of implied reservation. And those facts must be presumed to have been found by the Judge on argument by both or either of the parties.

Now, what are those facts found by the Judge on the evidence?

He finds that the plaintiff's and defendant's houses belonged originally to a common owner, their grandfather Vasantrai, whose sons divided the properties; that the plaintiff admits that the right of way was not expressly reserved by his father, when the partition was effected; and that the partition took place in Samvat 1914, *i.e.*, A.D. 1858.

These facts are sufficient in law to raise the presumption that the passage in dispute was reserved as the common or joint property of the parties at the time of partition. That is a presumption of Hindu Law. In the absence of anything to

1912.

NATHUBHAI DHIRAJRAM v. BAI HANSGAVRI.

show that at the partition the passage was allotted to either one party or the other exclusively, the presumption is, that it continued joint and undivided even after the partition. That presumption of Hindu Law must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share. This presumption of law has not been borne in mind by the learned District Judge in the Court below. Whether according to the Mitakshara or the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are *indivisible*; and if there is no evidence that at a partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law, having regard to the nature of the rights in question (Vyavahara Mayukha: Mandlik's Edition, page 70, lines 13 to 15, and page 71, lines 11 and 12).

If that is so, then the burden of proof lay upon the respondent to show that the plaintiff did not possess the right claimed, or having possessed at one time, *i.e.*, at the time of partition, he has since lost it, either by the adverse possession of the respondent or in some other way recognized by law. So also under the Easements Act the appellant's right is clear. If these two houses were common, and the right of way belonged to the parties, and the passage was common, then it must be presumed in the absence of any express agreement between the parties, that at the partition the passage was reserved for common enjoyment.

Therefore, from whichever point of view we look at the question, whether from the point of view of Hindu Law, or of the law as laid down in the Easements Act, the plaintiff's right is *primâ facie* established. And the question is whether the respondent has discharged the onus which lay upon him. Now, under the new Code of Civil Procedure, where the appellate Court has omitted to decide any question of fact, which arises upon the appeal, and which is necessary for the settlement of the dispute between the parties, this Court sitting in second appeal has jurisdiction to dispose of the

question of fact for itself. Dealing with this question of fact, we think, the Subordinate Judge's conclusion must be accepted. He has pointed out circumstances which show that this passage has been used as a way and that both the defendant and the plaintiff have been enjoying the right. It is unnecessary to go into the reasons which the learned Subordinate Judge has given after considering the evidence upon the record, but it is sufficient to say that this Court accepts his appreciation of the evidence.

The District Judge's decree must be reversed and the Subordinate Judge's decree restored with costs both of this second appeal and of the appeal in the lower Court on the respondent.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Russell.

1912.
January 10.

RANGUBAI *bhratar* KRISHNAJI RAMCHANDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SUBAJI RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), RESPONDENTS, AND SUBAJI RAMCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 2 AND 3), APPELLANTS, *v.* RANGUBAI *bhratar* KRISHNAJI RAMCHANDRA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 1), RESPONDENTS.*

Hindu Common Law—Widow—Right to maintenance—Grant of arrears—Exigencies of the case.

By Hindu Common Law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies.

The grant of arrears of maintenance depends on the wants and exigencies of the widow as proved in each particular case.

CROSS SECOND appeals against the decision of E. Clements, District Judge of Belgaum, modifying the decree of E. H. Waterfield, Assistant Judge.

* Cross Second Appeals Nos. 476 and 477 of 1910.