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which had been brought by the mortgagee for interest due on the principal amount for certain years. The present suit is brought on the mortgage contract, and the plaintiff prays for relief by way of sale of the mortgaged property. Being therefore a suit for sale, it falls within section 3, clause (y); and section 12 of the Dekkhan Agriculturists' Relief Act directs the Court in such a suit to go into the history of the transaction between the parties from the date of the transaction, notwithstanding any admission that may have been made by either party. The Act is in relief of a certain class of His Majesty's subjects, and therefore, the finding in the previous suit could not affect and be *res judicata* in the present suit, which is of a different character given to it by a special law, unless the previous suit also could fall within the class of suits to which that law applies.

For these reasons the decree must be confirmed with costs.

*Decree confirmed.*

R. R.

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## APPELLATE CIVIL.

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*Before Mr. Justice Batchelor.*

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March 15.

MAHADEV LAXMAN WAGLE AND OTHERS (ORIGINAL DEFENDANTS),  
APPELLANTS, v. GOVIND PARASHRAM WAGLE, DECEASED, BY HIS HEIRS  
AND DAUGHTERS SAKHUBAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

*Suit for partition—Decree awarding shares—Appeal—Death of a sharer leaving daughters—Decree for partition final—Severance effected by the decree can be displaced only by a legal decree in appeal.*

In a suit for partition the first Court passed a decree awarding to the sharers their respective shares. While an appeal against the decree was pending, one of the sharers died leaving two daughters. Thereupon a question having arisen as to whether the shares of the surviving sharers were liable to be increased owing to the death of the sharer pending the appeal,

\* Second Appeal No. 228 of 1910

*Held* that the pendency of the undecided appeal did not detract anything from the vitality or the force of the existing decree. Although the decree was under appeal, it was not the less a final decree of a competent Court. The decree, once made, there and then determined the legal status or relation of the parties and the severance of interest so effected by the decree at the moment it was pronounced could be displaced only by a legal decision in appeal.

*Sakharam Mahadev Dange v. Hari Krishna Dange*(1), explained.

SECOND appeal from the decision of S. S. Wagle, First Class Subordinate Judge of Thana, with appellate powers, amending the decree passed by N. G. Chapekar, Subordinate Judge of Roha.

This action was instituted by the plaintiff to obtain by partition a third share in the property in suit. He alleged that the property belonged to the joint family consisting of himself, his brother, defendant 1, and his nephews, defendants 2—5, the sons of his deceased brother.

The defendants answered that the plaintiff being a lunatic was not entitled to a share but only to maintenance, that the property was not joint family property but the separate and self-acquired property of the defendants and that the claim was time-barred.

The Subordinate Judge found that the plaintiff was not a lunatic, that a part of the property in suit belonged to the joint family and the rest was acquired by the defendants and that the plaintiff's claim for partition of the joint family property was not barred by the defendants' adverse possession. He, therefore, passed a decree giving to the plaintiff a third share in the property found to be joint.

Both the parties appealed and while the appeals were pending the plaintiff died leaving him surviving two daughters, who were brought on the record as his legal representatives. The defendants objected to the deceased being represented by his two daughters on the grounds that (1) the plaintiff having died a member of a joint Hindu family, the right to appeal did not survive and the appeal abated, and (2) the plaintiff's interest in the joint family property devolved, on his death,

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on the defendants by right of survivorship, therefore, the daughters had no right to continue the appeal. In support of their contention the defendants relied upon *Babaji Parshram v. Kashibai*<sup>(1)</sup>, *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(2)</sup>, *Ahmadji v. Mahamadji*<sup>(3)</sup>, and *Rajnarain Singh v. Heeralal*<sup>(4)</sup>. But the appellate Court overruled the defendants' contention having regard to *Lakshman v. Narayan*<sup>(5)</sup>, *Bhaurao v. Radhabai*<sup>(6)</sup>, *Krishna Panda v. Balaram Panda*<sup>(7)</sup>, *Subbaraya Chetti v. Sadasiva Chetti*<sup>(8)</sup>, and Mayne's Hindu Law, 7th Ed., p. 672. On the merits the appellate Court found that the plaintiff and the defendants were not divided in interest, that the whole property in suit was joint and no part of it was the separate or self-acquired property of the defendants, that the defendants had not held the property adversely to the plaintiff for more than twelve years and that the plaintiff was entitled to a third share in the whole immoveable property in suit. The appellate Court, therefore, in the appeal filed by the plaintiff, amended the decree of the first Court by directing that the plaintiff was entitled to obtain by partition a third share in all the immoveable properties set out in the plaint. The appeal presented by the defendants was dismissed with costs.

The defendants preferred a second appeal.

*S. S. Patkar*, for the appellants (defendants) :—The first question is whether so long as a decree is under appeal, it effects a severance. The ruling in *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(9)</sup> is an authority for the proposition that it does not effect a severance. The cases relied on by the lower Court do not relate to decrees which are under appeal. The ruling in *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(9)</sup> is followed in *Ahmadji v. Mahamadji*<sup>(10)</sup>. The decision in *Rustomji v. Sheth Purshotamdas*<sup>(11)</sup> is an authority

(1) (1879) 4 Bom. 157.

(2) (1881) 6 Bom. 113.

(3) (1899) 1 Bom. L. R. 218.

(4) (1878) 5 Cal. 142.

(5) (1899) 24 Bom. 182 at p. 187.

(6) (1909) 33 Bom. 401.

(7) (1896) 19 Mad. 290.

(8) (1897) 20 Mad. 490.

(9) (1881) 6 Bom. 113.

(10) (1899) 1 Bom. L. R. 218.

(11) (1901) 25 Bom. 606 at pp. 613, 614.

for the proposition that it is open to the Court to vary a decree under appeal not only for errors but also on grounds which have come into existence since it was passed. We submit that if a share in a joint family property can be increased or decreased in appeal according to the happening of events after the decree of the lower Court, such share for like reasons can be extinguished. In the present case on the death of the plaintiff, his share devolved by survivorship on the defendants, and plaintiff's daughters have no right to continue the appeal. The second point is with regard to property marked C which was purchased by defendant 1 in his own name in 1888. The lower Court was wrong in throwing the burden of proof upon us, having regard to the decision in *Vinayak Narsinh v. Datto Govind*<sup>(1)</sup>.

*N. A. Shiveshvarkar*, for the respondents (heirs of the deceased plaintiff) :—We rely on Golapchandra Sarkar's Hindu Law, Edition of 1910, p. 235 ; Edition of 1911, p. 260. The decree effects a severance : Stoke's Hindu Law Books, p. 47 ; Ghose's Hindu Law, p. 476 (2nd Edn.) ; *Joy Narain Giri v. Girish Chunder Myti*<sup>(2)</sup>, *Chidambaram Chettiar v. Gauri Nachiar*<sup>(3)</sup>. The intention to divide is tantamount to partition. The decision in *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(4)</sup> can be distinguished on the ground that the share there was increased in appeal. The ruling in *Vinayak Narsinh v. Datto Govind*<sup>(1)</sup> is not applicable because there was a previous partition.

*Patkar*, in reply :—A decree for partition does effect severance. The question is whether a decree for partition, so long as it is under appeal, does or does not effect severance and whether an appellate Court cannot vary the decree and hold that the plaintiff's right went by survivorship to the defendants owing to his death having occurred after the decree.

BACHELOR, J. :—The relation of the parties concerned in this appeal is shown in the following genealogical tree :—

(1) (1900) 25 Bom. 367.

(2) (1878) 4 Cal. 434.

(3) (1879) 2 Mad. 83.

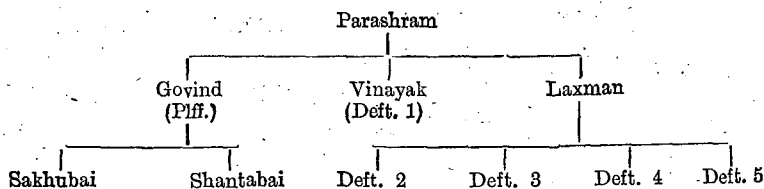
(4) (1881) 6 Bom. 113.

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Plaintiff sued for partition alleging that he was entitled to a one-third share, and that the plaintiff and defendant 1 and Laxman were in union. Various defences were raised, including the defence that the property in suit was not joint property but had been separately acquired.

The Subordinate Judge in the Court of trial gave the plaintiff a one-third share in a certain portion of the properties. On appeal the District Court has allowed the plaintiff partition in all the immoveable properties, awarding him the third share which was claimed.

The present appeal is brought by the defendants, and the first point taken on their behalf by their learned pleader arises in consequence of the accident that between the decision of the trial Court and the decision of the District Court the original plaintiff Govind died. He left, as has been said, no male issue, but only two daughters, Sakhubai and Shantabai.

Mr. Patkar contends that so long as the trial Court's decree was under appeal before the District Court, that decree could not effect a severance between the plaintiff and his relatives. In support of that proposition he relies upon the decision in *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(1)</sup>. It follows, says the learned pleader, that upon the death of Govind, the defendants became entitled to the property by right of survivorship, and that the daughters of Govind never became entitled to take by inheritance. It appears to me that this argument ought not to succeed. I think it is based upon a misapprehension of certain passages occurring in Sir Michael Westropp's judgment, the misapprehension arising from the reading of particular passages in an isolated manner and without reference to the whole case which was then before the Court.

(1) (1881) 6 Bom. 113.

That was a case instituted for a partition of certain family property in the possession of the defendants, and the plaintiff claimed one-eighth share in that property. The Subordinate Judge allowed the plaintiff's claim to the one-eighth share, and that decree was affirmed by the District Judge on appeal. When the case came before the High Court in the second appeal Mr. Shamrao Vithal, who appeared for the plaintiff-respondent, read an affidavit to the effect that one of the defendants had died subsequent to the filing of the second appeal. He submitted that in consequence of this defendant's death, the plaintiff's share in the family property must be increased from one-eighth to one-sixth. Mr. Kirloskar, who was for the defendants, admitted the fact of the death of one of the defendants, but he urged that in conformity with the decision in *Joy Narain Giri v. Girish Chunder Myti*<sup>(1)</sup> the plaintiff's claim for a larger share than that allowed by the District Court could not be entertained.

It is clear, therefore, what was the question which Sir Michael Westropp and Mr. Justice Pinhey had before them for decision. The question was simply whether owing to the death of one of the defendants, subsequent to the District Court's decree, the increase in the plaintiff's share, which in Hindu Law must necessarily have followed upon the defendant's death, ought to be allowed in second appeal. The Bench answered that question in the affirmative. And if the judgment be read as a whole, it seems to me manifest that that question and that alone was prominently before the minds of the Judges. It is quite true that in one part of the judgment Sir Michael Westropp says:— "We cannot hold that the Subordinate Judge's decree operated as a severance so long as it remained under appeal." And if this passage could be detached from its context, I agree that it would furnish plausibility to Mr. Patkar's argument. When, however, it is read in its context, and with reference to the particular question which alone occupied the minds of the Judges, I do not think that the sentence affords any assistance to the appellants' argument. All that was decided there was that where a

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plaintiff's share in family property has under Hindu Law been increased owing to the death of a defendant after the District Court's decree it is open to the High Court to take notice of that death, and the consequent devolution of the larger share. That is what was decided in *Sakharam Mahadev Dange v. Hari Krishna Dange*<sup>(1)</sup>. What is it that I am asked to decide in this case? It is that owing to the death of Govind, after the decision of the First Court, that decision must be set aside. In my opinion, however, the mere pendency of an undecided appeal does not detract anything from the vitality or the force of an existing decree. And although the decree now in question was under appeal, I am of opinion, that it was not the less a final decree of a competent Court. The decree once made did, I think, there and then determine the legal status or relation of the parties, and the severance of interests so effected by the decree at the moment it was pronounced could be displaced, it seems to me, only by a legal decision in appeal.

Mr. Patkar has urged that if a share in joint family property can be increased or decreased according to the happening of events after the District Court's decree, such share can for like reasons be extinguished. But I cannot concede that. To increase or decrease a plaintiff's share in consequence of events subsequent to the District Court's decree may be regarded merely as a means of bringing that decree into conformity with existing facts, in other words as a means of affirming that decree. It would be a totally different thing to upset that decree, not for any legal reason, but on account of a supervening fact which so long as the decree stands is of no consequence.

For these reasons I am of opinion that there is nothing in this appeal which justifies the present argument on behalf of the appellants.

The only other point taken by Mr. Patkar was with reference to the property falling in the sub-division marked (c) in the lower appellate Court's judgment, that is to say, the

(1) (1881) 6 Bom. 113.

lands purchased in the name of Vinayak in the year 1888. Mr. Patkar complains that the learned Judge was wrong in throwing the burden of proof upon his clients. And he quotes in support of his argument the decision in *Vinayak Narsinh v. Datto Govind*<sup>(1)</sup>. That case, however, was decided on very different facts from those which are now before us. What we have here is that the learned Judge below having regard to all the evidence including the fact that there was a substantial nucleus of joint family property, found that this particular property had been purchased for the coparcenary. That, I think, is not a finding which can be successfully challenged now in second appeal.

No other point was taken, and for these reasons I dismiss the appeal with costs.

*Appeal dismissed.*

G. B. R.

(1) (1900) 25 Bom. 367.

## APPELLATE CIVIL.

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

S. R. B. MOTILAL CHUNILAL (ORIGINAL OPPONENT), APPELLANT, *v.* THAKORLAL CHIMANLAL AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.\*

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March 28.

*Indian Companies' Act (VI of 1882), sections 28, 45, 61—Indian Contract Act (IX of 1872), sections 2 (a), (b), 3, 10—Company—Shareholder—Inducement by the agent of the Company to take shares—Winding up—Recovery of calls on shares—Agreement that shares were not to be paid unless dividend was given—Agreement not registered—Payment of shares in cash—Condition precedent—Condition subsequent—"Bogus" shareholder.*

The question as to whether a particular person became a member of a Company is a question of fact.

Where the Agent of a Company induces a person to sign an application for the shares of the Company and that person's name is accordingly entered in the register of members as a shareholder, there is a complete contract between that person and the Company's agent under sections 2 (a), (b), 3 and 10 of the Indian Contract Act (IX of 1872).

\* First Appeal No. 104 of 1911.