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fendant had sold the house to the second defendant for Rs. 98 under a deed of sale dated 15th July 1879.

The Subordinate Judge of Gadag found that under the Court sale only the share of plaintiff No. 1 had been sold and that the execution proceedings were of no effect against the second plaintiff, the latter not having been a party to the decree or to the execution proceedings. He awarded to plaintiff No. 2 a half share and possession of the three fields and the house.

The defendants appealed and the District Judge of Dhárwár rejected the plaintiffs' claim. Plaintiff No. 2 appealed to the High Court. The following is the judgment of the Court (*Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Justice*).

NA'NA'BHA'I HARIDA'S, J.—Having regard to the case of *Bábáji Suttu* v. *Duri* we think what the purchaser at the auction sale really bought was only the right, title, and interest of the appellant's father in the property in dispute, namely, his share in it. The Subordinate Judge thinks the appellant's brother Basapa's share also passed by such sale, inasmuch as Basapa was made a party to the suit and the execution proceedings after his father's death as his legal representative. It is unnecessary in this case for us to express any opinion as to whether the Subordinate Judge was right or not in that view, Basapa not having appealed against that decision. The property in dispute, it is admitted on both sides, is the only property of the joint family. The appellant's one-third share should, therefore, be separated from the rest and made over to him. This should be done in execution of our decree.

The decree of the District Judge is reversed, and that of the Subordinate Judge modified as above. The appellant to have his costs of this appeal from the respondents. The parties to pay their own costs in the Courts below.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

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February 19.

KA'JI AHMAD AND OTHERS (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* KA'JI MAHAMAD AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

Civil Procedure Code, Act XIV of 1882, Secs. 159 and 167—Practice —Procedure—Witnesses—Delay in serving Summonses—Adjournment.

Under section 159 of the Code of Civil Procedure (Act XIV of 1882), parties are entitled to summonses for their witnesses at any time before the final hearing, but if there has been delay and want of diligence in consequence of which, witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing.

THIS was an application, under the Court's extraordinary jurisdiction, for the reversal of the decree of Khán Bahádur M. N.

* Extraordinary Application No. 143 of 1883.

Nánávati, First Class Subordinate Judge with appellate powers, at Thána.

The plaintiffs in the original suit sought to recover Rs. 90, alleged to have been drawn by the defendants from the Collectorate on 4th May 1874. The plaint was presented on 5th June 1877. On 7th April 1879 issues were settled, and the suit was set down for final hearing, under Chapter XV of the Code of Civil Procedure, on 23rd June 1879. In the meantime documentary evidence was filed, and on 16th April the plaintiffs applied for summonses to their witnesses. Similarly the defendants applied for summonses to their own witnesses on 21st April. Plaintiffs' application was granted, and some of their witnesses were examined. On 22nd January 1880, however, the suit was dismissed, neither party being present. The order of dismissal was set aside, and the suit restored to the file on 19th February 1880, and after several adjournments, the issues that had already been settled in the case were confirmed on 10th February 1882, and the suit was set down for final hearing under Chapter XV of the Code on 15th March following. On 25th February 1882 the defendants applied for summonses to their witnesses, and plaintiffs applied for summonses to their witnesses on 7th March 1882. Some witnesses plaintiffs undertook to produce without the Court's assistance. Plaintiffs' application was rejected by the Subordinate Judge, on the ground that it was not made a reasonable time before the day appointed for final hearing, and that the witnesses were residents of distant villages. Plaintiffs were, however, asked to produce their witnesses on the said day. On that day no witnesses for the plaintiffs were present, and they repeated their application for summonses to them. That application was also rejected by the Subordinate Judge, who said that he did not see any special reason to alter his order made on the last application as the plaintiffs did not produce any witnesses whom they had undertaken to produce or whom they were asked to produce. The next day the Subordinate Judge decided the suit on the evidence already on the record, and rejected the claim. The First Class Subordinate Judge at Thána, with appellate powers, confirmed, on appeal, the decree of the Subordinate Judge.

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Upon the motion of Mr. Mánekshâh Jehángirshâh for the applicants the High Court granted a *rule nisi*.

Mádhávdev Chimnáji Apte for the opponents showed cause:—Section 159 of the Code of Civil Procedure (XIV of 1882) should be so construed as to give to the Court reasonable time to bring witnesses before itself. Section 167 shows service shall in all cases be made a sufficient time before the time specified in the summons for the appearance of a witness. Where the parties ask for summonses without giving such time the Court is bound to refuse to issue its process.

Mánekshâh Jehángirshâh:—The Court cannot anticipate the facilities of a party to produce his witnesses, and must grant summonses if asked for at any time before the final hearing. Section 159 leaves no option to the Court. If witnesses are not ready at the hearing it may refuse to grant an adjournment of the case.

WEST, J.—The plaintiffs, under section 159 of the Code of Civil Procedure, were entitled to summonses for such witnesses as they desired if they were ready to pay the required fees and subsistence allowance. The provision in section 167 is one in favour of the witness, and for enforcing diligence on the party: it does not give to the Courts any discretion as to granting or refusing summonses in consideration of their being applied for at a late period. The proper function of the Court in this respect comes into play at the hearing for which the witnesses have been summoned. If there has been delay and want of diligence through which witnesses not having been served in good time are not present, the Court will properly refuse to adjourn the hearing for their attendance, even though they have been summoned. A judge cannot beforehand tell what means a party may have for facilitating the attendance of his witnesses.

As the plaintiffs were refused the summonses that they sought, we must set aside the decrees, and direct that the cause be tried after allowing the parties to produce the evidence they desire.

Costs to follow the final decision.

Rule made absolute.