APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892. *January* 19.

SADU BIN RAGHU, (ORIGINAL PLAINTIFF), APPLICANT, *v.* RA'M BIN GOVIND AND OTHERS, (ORIGINAL DEFENDANTS), OPPONENTS.*

Practice—Civil Procedure Code (Act XIV of 1882), Sec. 283—Scope of the section—Parties—Parties to a suit for partition—Purchaser or mortgagee of a co-parcener's share a proper party to a partition suit—Joinder of parties—Joinder of causes of action.

In a partition suit all persons interested in the property to be divided must be brought before the Court.

A purchaser or mortgagee of a co-parcener's share in the joint property is a proper, and even necessary, party to a suit for partition.

There is nothing in the words of section 283 of the Code of Civil Procedure Act XIV of 1882) to limit the party unsuccessful in the attachment proceedings to a suit for a mere declaration of his alleged right. He is at liberty to pray, in the same suit, for consequential relief to which he may be entitled.

A., B. and C. were members of a joint Hindu family. In execution of a decree against B., a portion of the family property was attached. Thereupon A. intervened, and objected to the attachment so far as his own share was concerned. The objection was disallowed, and the property was brought to sale and purchased by D. A. then filed a suit (1) to set aside the order in the miscellaneous proceedings disallowing his objection to the attachment, and (2) for a partition of the whole family property. In this suit he impleaded not only his co-sharers B. and C., but also D., the auction-purchaser, and E., a mortgagee of B.'s share in the joint property. The Subordinate Judge, holding that the suit was bad for misjoinder of parties as well as of causes of action, returned the plaint for amendment by striking out the prayers for partition. On appeal, this order was confirmed by the District Judge. On A.'s application to the High Court, under section 622 of the Code of Civil Procedure,

Held, that the suit was not bad either for misjoinder of parties or for misjoinder of causes of action. Treating the suit as one for partition, the auction-purchaser D. and the mortgagee E. were proper, and even necessary, parties. If A. established his right to partition, he would be entitled to have the order in the miscellaneous proceedings set aside in the same suit.

Held, also, that section 283 of the Code of Civil Procedure (Act XIV of 1882) did not prevent A. from claiming partition in the present suit.

Held, further, that even if the Subordinate Judge's view were right that the two prayers could not be joined in one suit, his proper course was to have left it to the plaintiff to elect which of the two prayers he wished should be adjudicated upon by the Court.

* Application No. 178 of 1891.

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THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The facts of the case were as follow:—Plaintiff and defendants Nos. 1, 2, 4 and 5 were members of a joint Hindu family. In 1889 a portion of the family property was attached in execution of a decree passed against defendant No. 1. The plaintiff intervened, and objected to the attachment so far as it affected his own share and interest in the property attached. The objection was disallowed on the 8th July, 1889, and the property was brought to sale and purchased by defendant No. 3. On the 8th July, 1890, the plaintiff filed the present suit, praying *(inter alia)* (1) that the order of the 8th July, 1889, passed in the summary proceedings should be set aside, and (2) that a partition should be made of the whole family property. In this suit he impleaded not only all his co-sharers, but also the auction-purchaser (defendant No. 3) and a mortgagee of the defendant No. 1's share in the joint estate.

The Court of first instance being of opinion that there was a misjoinder of causes of action, under section 44 of the Civil Procedure Code, returned the plaint for amendment by striking out the prayer for partition.

This order was confirmed, on appeal, by the District Court.

The plaintiff thereupon, preferred this application to the High Court under its revisional jurisdiction.

A rule *nisi* was issued calling upon the defendants to show cause why the lower Court's order should not be set aside.

Ráo Sáheb *Vásudev J. Kirtikar* showed cause:—The suit is open to the objection of misjoinder of parties, as well as misjoinder of causes of action. With regard to the order in the miscellaneous proceedings, the defendant No. 1 alone is concerned. The other defendants have nothing to do with it. As regards the claim for partition, the auction-purchaser and the mortgagee are complete strangers, and are not necessary parties to the suit. In *Kachar Bhoj Váija* v. *Bái Rathore*[1] it was held that a reversioner cannot claim in one suit to set aside various alienations

(1) I. L. R., 7 Bom., 289.

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made by a Hindu widow, on the ground that there was a misjoinder of causes of action as against the respective alienees. The principle laid down in that case applies to the present one. I contend that the suit contemplated by section 283 of the Code of Civil Procedure is a suit limited to the establishment of the right set up, and disallowed in the execution proceedings. In other words, the object of such a suit should be solely to set aside the order passed under section 280, 281, or 282 of the Code.

Ganesh K. Deshmukh, contra :—There is nothing in section 283 which prevents the unsuccessful party claiming anything more than a mere declaration of his alleged right. He may sue, if he likes, for further consequential relief. If the scope of the section were so restricted, the unsuccessful party would be obliged to file two suits, instead of one: first to establish his title, and then to seek consequential relief. That would lead to a multiplicity of suits. See *Rango Vithal* v. *Rikhivadás*(1) and *Nilo Pándurang* v. *Ráma Patloji*(2). This suit is not, therefore, bad for misjoinder of causes of action. Nor is there any misjoinder of parties. In a partition suit a purchaser, or mortgagee, of a coparcener's share in the joint estate is a necessary party to ensure a final and complete adjudication of the rights of the several co-sharers. Moreover, the lower Court's order compelling us to strike out our prayer for partition is bad. If the two prayers could not be joined together in one suit, the lower Court should have left it to the plaintiff to strike out which prayer he chose.

TELANG, J. :—The plaintiff and some of the defendants in this case are members of an undivided Hindu family. In the year 1889, one of the creditors of the first defendant attached a part of the family property in execution of a decree obtained by him against that defendant. The plaintiff applied to have the attachment raised in so far as it affected his share and interest in the property attached, but his application was on the 8th of July, 1889, rejected by the Subordinate Judge of Dápoli. In the month of July, 1890, he presented his plaint in the Court of the Subordinate Judge of Dápoli, praying, among other things, that the

(1) 11 Bom. H. C. Rep., 174. (2) I. L. R., 9 Bom., 35.

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order of the 8th of July, 1889, should be set aside, and that the whole of the family property should be divided among the parties respectively entitled thereto. He made all his co-parceners defendants in the suit, and also two other persons, one of them the purchaser at the sale which followed the attachment already mentioned, and the other a mortgagee of the share and interest of the first defendant in the family property. The Subordinate Judge, to whom this plaint was presented, made an order, apparently under section 53 of the Code of Civil Procedure, directing that the plaint should be returned to the plaintiff for the purpose of amendment by striking out all the prayers other than the prayer for setting aside the order of the 8th of July, 1889. The District Judge, on appeal, upheld the order of the Subordinate Judge, and the plaintiff now applies to this Court for a revision of the order of the District Judge.

The first question raised before us in argument was one of misjoinder of defendants. Ráo Sáheb Vásudev Jagannáth Kirtikar for the defendants contended, that this case fell within the principle laid down in *Kachar Bhoj Vaija* v. *Bái Rathore*[1], and that the Courts below were right in rejecting the plaint, as they practically did. The decision in *Kachar Bhoj Vaija* v. *Bái Rathore* has, it appears, been doubted in Madras[2], but it is unnecessary for the purposes of the present case to consider how far, if at all, the doubts are well founded. It is enough here to say that the rule laid down in the case of *Kachar Bhoj Vaija* v. *Bái Rathore* has no application to the present case. There the Court held that a reversioner, seeking for a declaration that certain alienations made by a Hindu widow of different properties belonging to the estate of her deceased husband were invalid, could not sue all the different alienees of the different properties in one and the same suit. That is certainly good sense, and may, for the present at least, be admitted to be also good law. But it has no application in a partition suit. In such a suit, it is both good sense and established law, that all parties interested in the property to be divided must be brought before the Court in one

(1) I. L. R., 7 Bom., 289.

(2) See *Mahomed* v. *Krishnan*, I. L. R., 11 Mad., 106.

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proceeding; for, as Manu's text expresses it, "once is partition of inheritance made." In the cases of *Pándurang* v. *Bháskar*(1) and *Udárám* v. *Rámu*(2), to which I drew Mr. Vásudev's attention during the argument, the rule is laid down in effect as we have now stated it. In the latter of these cases, Westropp, C. J., with the concurrence of West, J., observed, (p. 82): "When a share in the undivided ancestral estate of a Hindu family is mortgaged or sold, either by the parcener himself, or by way of execution, the mortgagee or purchaser takes such share subject to such *prior* charges or incumbrances as may affect the family estate, or as may affect that particular share. If the mortgage or sale be of a special portion only of the family property, it may not always be possible, consistently with prior existing rights, for the Court, making the partition, to give possession of that portion to the mortgagee or purchaser. But generally it would be possible to do so, either wholly or partially, and, therefore, if without doing injustice either to prior incumbrancers or co-parceners, such possession can on partition be given, it would be the duty of the Court, making the partition, to endeavour to give effect to the mortgage or sale, and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much thereof as may be just, to the mortgagee or purchaser. Such was the view expressed, as we think correctly, in *Pándurang A'nandráo* v. *Bháskar Sadáshiv* decided 18th August, 1874, and in which a review was refused on the 9th December 1874"(3). It is obvious that, if such a "marshalling" as is there spoken of is to be carried out, the mortgagee or purchaser, in whose favour it is to be carried out, is a proper, and even necessary, party to a partition suit, which is the proper means for carrying it out. In the present case, the only persons other than the members of the family whom the plaintiff has joined as defendants are the mortgagee and purchaser of portions of the share and interest of the first defendant in the family property. It seems to us, therefore, that there can be no objection to the constitution of this suit as regards parties, and

(1) 11 Bom. H. C. Rep., 72. (2) 11 Bom. H. C. Rep., 76.

(3) 11 Bom. H. C. Rep., 72. Compare also *Subramanya* v. *Sadásiva*, I. L. R., 8 Ma ., 75; and *Vásudev* v. *Venkatesh*, 10 Bom. H. C. Rep., at pp. 157-8.

that it is clearly distinguishable from the case of a widow's alienations, in which no such questions of "marshalling" necessarily arise, and in which, therefore, the reason of the rule as regards partition does not apply.

It was next argued on the part of the defendants, that the cause of action for setting aside the order of the 8th of July, 1889, was one in which only some of the defendants were interested, and that it was wrong to join together in one suit two causes of action, in one of which all the defendants are interested, while in the other only some of them are so. It is to be observed, however, that if the suit is treated as primarily a suit for partition of the whole of the family property, all the defendants, as already pointed out, are certainly proper and even necessary parties to it. And if the plaintiff succeeds in making out his case for a partition, the prayer for setting aside the aforesaid order, if it may be granted in a suit limited strictly to that relief, must also in all probability be awarded in such a suit as the present, without any special ground in support of it having to be separately made out. That being so, the argument based upon that separate prayer does not appear to us to be entitled to any weight[1].

It was, however, further argued, that this suit must be treated as one instituted in accordance with the provisions of section 283 of the Code of Civil Procedure; that such a suit must be limited to the purpose indicated in that section, namely, the establishment of the right denied in execution proceedings; and that it is only after such right has been established, that a suit becomes maintainable for partition of property or other relief in relation to it. If this argument is correct, it will follow that in every case of a claim to attached property being unsuccessful, the claimant, in order to obtain his full rights, must first have a suit for a declaratory decree, and afterwards another and a separate suit for whatever consequential relief he may be entitled to. In our opinion, the Court ought to lean very strongly against requiring such a multiplicity of suits, unless the Legislature has distinctly so

(1) Compare *Coates* v. *Legard*, L. R., 19 Eq., 56 per Jessel, M. R.; and *Earl Vane* v. *Rigden*, L. R., 5 Ch. Ap., 663; both administration suits, which probably afford the closest parallels in English practice to our partition suits.

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ordered. Again, if such a rule as is here contended for were laid down, some very anomalous results might follow in partition suits, and other suits in which, for the purposes of consequential relief, more parties may have to be brought before the Court than were concerned in the original proceedings in execution upon the intervenor's claim. For instance, suppose in this very case a suit had been filed against the execution-creditor, or the purchaser, or both, for a declaration merely, and a certain share declared to belong to the plaintiff without any of his co-parceners being heard—for even the execution-debtor is not a necessary party to such a suit. Such a declaration is by the hypothesis essential for the maintenance of a partition suit. And nevertheless that declaration would be of no avail in that partition suit when instituted, if the co-parceners alleged, as they would be fully entitled to do, that the share was not correctly declared, or was subject to charges, or deductions, which the Court making the declaration had not considered. Such considerations afford, we think, a further reason for not accepting the contention put forward by Mr. Vásudev, unless the provisions of the Code of Civil Procedure compel us to accept it.

What, then, are the provisions of the Code? The only section on which Mr. Vásudev relies is section 283. We see nothing in the words of that section which requires the Court to hold that two suits, of the nature above referred to, are necessary. All that that section provides is, in our opinion, that the order referred to in it is unappealable, and that the way to get rid of the operation of that order is by a regular suit distinct from the execution proceeding in which the order is made. It does not provide anything about the frame of such regular suit, and certainly does not embrace any provision, as I pointed out in the course of Mr. Vásudev's argument, excluding any particular prayers out of the scope of such a suit. The words of the section are, in the first place, permissive only—the unsuccessful party "may" sue. Secondly, he "may sue," according to the section, "to establish his right." If he sues to obtain a declaration of his right, and *also* the consequential relief to which he may be entitled, he does still "sue to establish his right,"

even construing that phrase in its narrowest sense. He does not do that any the less, because he also seeks to do something more. But if the phrase is more largely construed, as it may well be, then it is plain that his right by law being a right to obtain partition and separate possession of his share in the family property whensoever he pleases, a suit praying for such partition and separate possession may not inaptly be described as a suit "to establish his right." The conclusion to which these remarks lead appears to us to be opposed to no authority. Mr. Vásudev has not cited any case, and we have not been able to find any, which is inconsistent with the view we have now expressed. The opinion expressed by Jackson, J., in the case of *Colvin* v. *Elias*[1], when looked into, does not appear to be in any way really adverse to that view. And, on the contrary, there are several decisions which may not unfairly be treated as lending considerable support to it.

In *Bank of Hindustan* v. *Premchand*[2], which was a suit similar in circumstances to the present one, brought when Act VIII of 1859 was in force, and in conformity with the provisions of section 246 of that Act, which corresponds to section 283 of the present Code, and contains the identical phrase "establish his right," Sir R. Couch, C. J., considered that "the proper decree to be made is that the sale should be set aside." And he went on to say that "it may be that, under section 258, in a properly constituted suit, the Court ought to direct the money to be restored." It is true he gave no opinion on this latter point, but the difficulty which apparently presented itself to Sir R. Couch's mind in regard to it was not one connected with the frame of the suit, under the terms of section 246, but one connected with the right to restoration of the purchase-money, in view of section 258. The other learned Judge who sat in that case, Sir C. Sargent, observed that the plaintiffs "ask for a declaration of right to the property and then follows a prayer for general relief, which would include the setting the sale aside." It is plain, therefore, that both the eminent Judges who decided that case were of opinion that a suit "to establish his right" need not be merely confined to a prayer

(1) 2 B. L. R., (A. C. J.), 212. (2) 5 Bom. H. C. Rep., (O. C. J.) 83, at p. 93.

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for a declaration of right, but might properly include an additional prayer, or prayers, for some sort of consequential relief. In that particular case, the consequential relief was the setting aside of the sale. In the present it is partition.

In *Jetti* v. *Sayad Husein*(1), Melvill, J., speaks of an unsuccessful intervenor under section 246 as being entitled to bring a suit "to recover the attached property from the purchaser." That is manifestly something more than "establishing his right" in the narrower sense of the word "establish" which Mr. Vásudev contends for. In *Dayáchand* v. *Hemchand*(2), Westropp, C.J., delivering the judgment of a Full Bench consisting of himself and M. Melvill and F. D. Melvill, JJ., spoke in the following terms of a suit instituted in pursuance of the last words of section 246:—"It appears to us that a suit to set aside or restore an attachment seeks not only a declaration of the plaintiff's right, but also substantial consequential relief in the setting aside or restoration of the attachment." This agrees very closely with the decision in *Bank of Hindustan* v. *Premchand*. And, again, in *Náráyánráv* v. *Bálkrishna*(3) the same Full Bench evidently considered that section 283 did not limit the unsuccessful party to a suit merely for a declaratory decree, for they actually dealt with the question whether the plaintiff, under the circumstances existing in that case, could have asked for any consequential relief, specifically mentioning relief, not only by way of cancelling the attachment, but also of replacing the plaintiff in possession of the property in question.

Having regard to these various decisions in this Court, it is unnecessary to go into details in respect to other authorities. But we may point out that in *Kolasherri Illath Náráinan* v. *Kolasherri Illath Nilakandan*(4), *Rámprasád* v. *Sukh Dai*(5) and *Shiboo Náráin* v. *Mudden Ally*(6), the other High Courts have all pronounced decisions touching this point in a sense quite contrary to the argument of Mr. Vásudev. In the Allahabad case Sir R. Stuart, C. J., said that, in his opinion, "the plaintiff

(1) I. L. R., 4 Bom., 23, note.
(2) I. L. R., 4 Bom., 515, at p. 521.
(3) I. L. R., 4 Bom., 529. See also *Dhondo* v. *Govind*, I. L. R., 9 Bom., 20.
(4) I. L. R., 4 Mad., 131.
(5) I. L. R., 2 All., 720, at p. 722.
(6) I. L. R., 7 Calc., 608, at p. 612.

was quite entitled to frame her suit in this form" (that is to say, in a form praying both for a declaration and consequential relief), "and was in no way bound to await the eventualities of a mere declaration of right." And in the Calcutta case Sir R. Garth, C. J., said that a person whose goods are illegally sold in execution "may follow them into the hands of the purchaser, or any other person, and sue for them, or their value, *without reference to anything which has taken place in the* execution proceedings, except that under article 11 of the Limitation Act he must bring his suit within a year from the time when the adverse order in the execution-proceedings was made."

The conclusion, therefore, at which we have arrived is that, treating this suit as of the nature contemplated by section 283, there is nothing in the words of the section, or in the decided cases which elucidate its meaning, to prevent the plaintiff from maintaining such a suit as the present[1]. It, therefore, follows that, in our opinion, the Subordinate Judge was wrong in rejecting the plaint as he practically did.

We may add one word upon another point. Even if the Subordinate Judge had been right in the view which he appears to have taken, that the two prayers contained in the present plaint could not be joined in one suit, he could not, we think, have properly made an order in the form in which he made his order in the present case. He ought to have left it to the plaintiff to elect which of the two prayers he would wish to be adjudicated on by the Court in this proceeding. This is the usual practice at the Original Side of this Court[2], and it is both convenient, and in harmony with the provisions of sections 43—47 of the Code of Civil Procedure, and the decisions upon those sections.

It is true, no doubt, that giving such an opportunity for election to the plaintiff would have been futile, if, as argued by Mr. Vásudev, the plaintiff could not maintain his suit for partition without first getting the order of 8th July, 1889, set

(1) Compare also Art. 11 in the Second Schedule to the Limitation Act of 1877.

(2) See *Ashábái* v. *Haji Tyeb*, I. L. R., 6 Bom., 390; and compare *Hurro Mónee Dossea* v. *Onookool Chunder*, 8 W. R., 461.

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aside. But there is nothing in section 283 which affords support to this argument, And, on the other hand, the High Court of Madras has in *Kolasherri Illath Nárâinan* v. *Kolasherri Illath Nilakandan*(1) held that the order cannot properly be set aside at all; while the High Court of Calcutta has decided, as we have already pointed out, that, except as regards limitation, the plaintiff may proceed to enforce his rights as if the proceedings in execution had never been taken.

On the whole, therefore, we have come to the conclusion that this rule should be made absolute, and the orders of the Courts below discharged. The costs must be costs in the cause, as the original rejection of the plaint was the act of the Court itself, without the defendant being heard.

Rule made absolute.

(1) I. L. R., 4 Mad., 131.

ORIGINAL CIVIL.

1891.
August 14.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Farran.

BANK OF BENGAL, PLAINTIFFS, *v.* WYA'BHOY GA'NGJI, DEFENDANT.*

Small Cause Courts Act (XV of 1882) Sec. 69—Requisition for reference must be made before judgment delivered—Civil Procedure Code (XIV of 1882), Sec. 257 A—Agreement to give time for the satisfaction of a judgment debt—Agreement void if not sanctioned by the Court—"Void", i.e. not enforceable—Agreement not illegal.

A party requiring a Judge of the Small Cause Court to make a reference to the High Court under Section 69 of the Small Cause Courts Act (XV of 1882) must do so before the Judge has delivered his judgment.

Section 257 A of the Civil Procedure Code, when it provides that "every agreement to give time for the satisfaction of a judgment debt shall be void" unless made for consideration and with the sanction of the Court, &c., does not make such agreements illegal, in the sense of prohibited by law. It only prevents such agreements being enforced in a Court of law.

Where such an agreement to give time, never sanctioned by the Court as required by section 257 A, formed part of the consideration for a bond, and had actually been enjoyed by the obligee of the bond,

* Small Cause Court Suit No. 7843 of 1891.