APPELLATE CIVIL.

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Parsons.

PARASHRA'M VALAD BA'PU (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* MIRA'JI VALAD SUBHA'NA AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1895. *July* 15.

Practice—Possession—Suit for exclusive possession—Joint ownership proved at hearing—Procedure.

Exclusive possession can only be awarded on proof of exclusive title.

If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it and the defendant is given an opportunity of meeting it.

SECOND appeal from the decision of Ráo Bahádur N. G. Phadke, Joint First Class Subordinate Judge with appellate powers, at Sholápur.

Suit for possession of land. The plaintiffs claimed exclusive possession at the hearing, and gave evidence that the land had been allowed to them on partition. They alleged that it had actually been in their possession previously to 1879, but that on leaving their village in that year they had entrusted the land to defendants Nos. 1 and 2 who were their relations.

Defendants Nos. 1 and 2 admitted the claim.

Defendant No. 3 alleged that the land was his and pleaded limitation.

The Subordinate Judge dismissed the suit, holding that the suit was barred.

On appeal the District Judge reversed the decree and awarded the plaintiffs' claim. He found, however, that the alleged partition had not been proved, and that the land was joint; that it belonged to three brothers, *viz.*, Miráji (plaintiff No. 1), Bábáji (the father of plaintiff No. 2), and Ráyáji (father of defendants Nos. 1 and 2), and that defendant No 3 (appellant) had purchased it from Ráyáji.

Defendant No. 3 appealed to the High Court.

* Second Appeal, No. 784 of 1893.

1895.

PARASHRA'M v. MIRA'JI.

Mánekshák J. Taleyárkhán for the appellant (defendant No. 3) :—The Judge has given the plaintiffs a decree for exclusive possession although he holds the property to be joint. That decree is wrong—*Eshan Chunder Singh* v. *Shámá Churn Bhutto*(1) ; *Mohummud Zahoor Ali Khán* v. *Mussumat Thakooránee Rutta Koer*(2) ; *Lakshmibái* v. *Hari bin Rávji*(3).

Mahádeo V. Bhat for the respondents (plaintiffs) :—The Judge found that the property was not divided. We are, therefore, entitled to it along with the defendants.

FARRAN, C. J. :—The decree in this suit cannot, we think, be supported in its present form. The plaintiffs asked for exclusive possession of the property in suit, alleging in their evidence that it had been allotted to them on a partition. The Judge of the lower appellate Court found that the partition was not proved and that the property was joint. Nevertheless he passed a decree in favour of the plaintiffs, awarding them the exclusive possession claimed. This was illegal. He could only give exclusive possession if he found exclusive title proved.

In point of fact the Judge has not specifically found upon the case set up by the plaintiffs. He has come to the conclusion that the plaintiffs and defendants Nos. 1 and 2, the sons of Ráyáji, [from whom the appellant (original defendant No. 3) has purchased] were owners in co-parcenery of the property. This, however, the plaintiffs did not allege, and it was a state of things on which the parties did not go to trial in the Court of first instance. When the Judge found that the evidence tended to show joint ownership, it was open to him, we think, having regard to the cases of *Wahid Alam* v. *Safat Alam*(4), *Bábáji* v. *Vásudev*(5) and *Kállápa* v. *Venkatesh*(6) to have allowed the plaintiffs to set up that case ; but if he did so, he should have raised a specific issue on the point, and given the defendant Parashrám an opportunity of meeting it.

We, therefore, reverse the decree of the lower appellate Court, and remand the case for re-trial on the merits. Should the Judge

(1) 11 Moore's I. App., 7.
(2) *Ibid.* 463.
(3) H. C. Rep., 1.
(4) I. L. R., 12 All., 556.
(5) I. L. R., 1 Bom., 95.
(6) I. L. R., 2 Bom., 676.

consider it necessary in the interests of justice to raise the point of joint ownership, he should do so by a distinct issue and allow the parties an opportunity of adducing evidence. The lower appellate Court can deal with all the costs including the costs of this appeal.

1895.

PARASHRA'M v. MIRA'JI.

Decree reversed and case remanded.

ORIGINAL CIVIL.

Before the Honourable Chief Justice Farran and Mr. Justice Strachey.

KRISHNARA'O RA'MCHANDRA AND ANOTHER (ORIGINAL DEFENDANTS 1-2), APPELLANTS, *v.* BENA'BA'I (ORIGINAL PLAINTIFF) AND OTHERS, RESPONDENTS.*

1895. *December* 3.

Will—Construction—Bequest to children—Meaning of the expression "children"—Unexpected bequests — How Court treats—Gift to a class—Rule in Tágore case—Executors—Right of executors to have sums lent to the estate allowed them in account—Limitation—Legacy—Gift of income as required with trust for accumulation of balance—No right to arrears once accumulated.

Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the Court to refuse to give effect to the plain language he has employed, *e. g.* to read a bequest to "children" as a bequest to "sons" only.

A bequest to "the children of R, living at his decease" where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator.

The right of executors, who have used their own monies for the purposes of the estate to be allowed them in their accounts, cannot be affected by limitation before such accounts are taken.

A direction in a will to trustees to pay to a Hindu lady so much of certain dividends as she might from time to time require for her own use and support, &c., and to accumulate the surplus not required by her upon certain trusts specified, entitles the legatee to receive, if she requires it, the whole interest as it falls due, but not to claim afterwards amounts which she did not require as they fell due and which have been accumulated, and this is so whether the trust for which accumulation is directed is valid or invalid.

SUIT for the construction of a will.

The plaintiff was the grand-daughter of one Sakhárám Luxumonji who died in October, 1865, leaving him surviving a son

* Suit No. 221 of 1893; Appeal No. 874.