APPELLATE CIVIL

Before Mr. Justice Jardine and Mr. Justice Ránade.

RA'MCHANDRA KA'SHI PA'TKAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DA'MODHAR TRIMBAK PA'TKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1895. *March* 25.

Hindu law—Joint Hindu family—Possession—Joint possession—Co-parcener's right to sue for joint possession of the whole or any part of the joint estate—Co-parcener not bound to sue for partition.

A co-parcener in a joint Hindu family is entitled to claim joint possession of a portion, and need not sue for a partition.

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Maráthe, First Class Subordinate Judge with appellate powers of Ratnágiri, in Appeal No. 487 of 1892.

Suit for possession. The plaintiffs sued to recover exclusive possession of certain land, complaining that they had been dispossessed by the defendants under a Mámlatdár's order. In the alternative they prayed to be put into joint possession with the defendant, and they asked for a declaration they they were so entitled, the land being the joint ancestral property of the parties.

The defendants denied (*inter alia*) that the land was joint property, but contended that, even if it were joint, the plaintiffs' proper remedy was a partition suit, and that the claim was time-barred.

The Subordinate Judge dismissed the suit. He held that the property was joint, but that the plaintiffs could not obtain the relief prayed for.

This decision was upheld, on appeal, by the Subordinate Judge A. P., who held that the plaintiffs' remedy was a suit for partition.

The plaintiffs thereupon preferred a second appeal to the High Court.

Vásudev Gopál Bhandárkar for appellants (plaintiffs):—The land in dispute is joint family property. The plaintiffs, as part owners of the whole and every part of the joint estate, are entitled to be

* Second Appeal, No. 473 of 1893.

1895.

RA'MCHANDRA v. DÁMODHAR.

put into joint possession with the defendants—*Malhár Dhondev* v. *Ramakant*[1]; *Kallápa* v. *Venkatesh*[2]; *Dugáppa* v. *Venkatrámnaya*[3]. The Court cannot force partition on the parties against their will.

Mánekshah Jehángirshah for respondents :—The parties to this suit are each in exclusive possession of parcels of the family property. In this state of things, one co-sharer cannot claim to be put into joint possession of the other's parcel.

JARDINE, J. :—The case has been argued on the assumption that the parties are co-parceners in an undivided Hindu family. It appears that they each hold parcels of the undivided family property in exclusive possession. How that state of things arose, is not found.

The plaintiffs having failed to prove exclusive possession of the parcel in suit, that ground of claim fails. But, in the alternative, they claimed to be put in joint possession with the defendants, and for a declaration to that effect. The lower Court of appeal decided in the negative a preliminary issue, "Whether the plaintiffs' claim for joint possession of the land in dispute can lie without a claim for partition of all common property?" No authority for holding that an undivided co-parcener cannot make such a claim, has been shown. *Primâ facie*, such a co-parcener is entitled to a joint benefit in every part of the undivided estate: and it lies on the other co-parceners to plead and prove some reason for withholding that benefit in the parcel. A case may be conceived where two co-parceners A and B agree, as a temporary arrangement, each to hold $\frac{1}{3}$ in exclusive possession and the remaining $\frac{1}{3}$ in joint possession. If B excludes A from the last $\frac{1}{3}$, A has a right to be restored to joint possession thereof. Again, if A sued B for joint possession of the $\frac{1}{3}$ agreed to be given into B's exclusive possession, B might plead the agreement. Where neither party desires to litigate anything except the right to joint or exclusive possession of a parcel, and where they admittedly retained their original status as undivided brethren, and, therefore, joint sharers and not tenants-in-common (see *Appovier's Case*[4]), neither Hindu

(1) P. J. for 1889, p. 20.
(2) I. L. R., 2 Bom., 676.
(3) I. L. R., 5 Bom., 495.
(4) 11 M. I. A., 75.

law nor any rule of equity insists on a general partition either of possession or of the property itself. We are unable to deal with the question of limitation on the merits, as the lower Court of appeal only dealt with the preliminary issue of law. We, therefore, reverse its decree and remand the appeal for a re-hearing: costs on the respondents.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

LALUCHAND (ORIGINAL DEFENDANT), APPELLANT, *v.* GIRJA'PPA (ORIGINAL PLAINTIFF), RESPONDENT.*

1895. *March* 28.

Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 15 D—Suit for account—Such suit no bar to subsequent suit for redemption—Civil Procedure Code (Act XIV of 1882), Sec. 43.

Under section 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) as amended by Act XXII of 1882, an agriculturist mortgagor can sue for an account upon a mortgage, without at the same time asking for redemption. Such a suit will not bar a subsequent suit for redemption. The section was expressly intended to remove the bar created by section 43 of the Code of Civil Procedure (Act XIV of 1882).

APPEAL from an order of remand passed by Ráo Bahádur C. N. Bhat, Joint First Class Subordinate Judge A. P. at Sátára.

The plaintiff filed a suit (No. 278 of 1884) under section 15 D of the Dekkhan Agriculturists' Relief Act (XVII of 1879) [1] for an account of the principal and interest remaining unpaid on a certain mortgage.

*Appeal No. 1 of 1895 from order.

(1) The following are the sections referred to:—

15 B. (1) The Court may in its discretion in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in section three, clause (*y*) or clause (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, on such dates and on such terms as to the payment of interest, and, where the mortgagee is in possession, as to the appropriation of the profits and accounting therefor, as it thinks fit.