APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *September* 13.

LAKSHMAN DARKU (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARAYAN LAKSHMAN (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Partition—Decree for partition—Decree awarding plaintiff's share, but postponing possession thereof till plaintiff attained majority—Effect of such decree.

On the 21st February, 1894, a decree in a partition suit provided as follows :—

"Plaintiff is a minor twelve years old; until he attains twenty-one years, Narayan (defendant) should for the next nine years annually deliver to him twenty maunds of paddy, and for this year ten maunds; after that plaintiff should be given one-sixth of the family lands; until then defendant is not to alienate the lands.

The minor died and in 1897 his widow, Sundri, as his heir, applied for execution of the decree, claiming seventy maunds of paddy, being the amount due at the rate specified in the decree. It was objected that she was not entitled to execute, inasmuch as the decree had not effected a partition and that the property at his death still remained joint family property, which passed to the male survivors of the family, and that she was only entitled to maintenance.

Held, that the effect of the decree was to make the applicant's husband a divided member of his family. It awarded him a one-sixth share of the family estate and assigned to him a separate allowance. The mere fact that it postponed the actual possession of the share until he had attained the age of twenty-one years made no difference. The share vested in him from the date of the decree and descended to his heirs.

Held, also, that in execution of the decree she was only entitled to recover the arrears of the allowance up to the date of her husband's death. When he died he was still a minor, and the allowance ceased, and the share went to his heirs by right of inheritance, and was recoverable only by a separate suit and not in execution.

SECOND appeal from the decision of M. B. Tyabji, District Judge of Thána.

One Lakshman Darku, a minor, sued by his next friend for partition of certain joint ancestral property and for possession of his one-sixth share. This suit was compromised and a decree was passed in terms of the compromise, which provided (*inter alia*) as follows :—

* Second Appeal, No. 460 of 1899.

"Plaintiff is a minor twelve years old ; until he attains twenty-one years, Narayan (defendant) should for the next nine years annually deliver to him twenty maunds of paddy and for this year ten maunds ; after that plaintiff should be given one-sixth of the family lands ; until then the defendant is not to alienate the lands."

This decree was passed on 21st February, 1894.

The minor plaintiff died shortly afterwards, leaving a childless widow named Sundri.

In 1897 Sundri, as his heir, applied for execution of the decree to recover seventy maunds of paddy, being the amount due for three and a half years at the rate awarded by the decree.

The opponent resisted the application and contended that Sundri was not the minor's heir and was not entitled to execute the decree ; that no partition had been effected by the decree, and that, consequently, the property still remained joint family property, which, at the minor's death, passed to the surviving members of his family, his widow Sundri being only entitled to maintenance.

The Court of first instance overruled the objection and granted the application, and ordered that the decree should be executed.

On appeal the District Judge reversed the order, holding that the decree had not effected partition, and that, therefore, the widow was not entitled to the execution prayed for. His judgment was as follows :—

"If (the decree) merely contained an expression of intention on the part of the members of the family to divide their estate at a future date, it was not more than an inchoate partition. It did not define the portion of property which appellant's husband was to hold as a separated member of a previously joint family, and it could not, therefore, be executed as a decree directing partition. This view of the decree is supported by the ruling in I. L. R., 4 Bom., 157. The arrangement made by the decree is one of those special arrangements for enjoyment of joint family property referred to in section 273 of Mayne's Hindu Law and Usage, by which a member may hold a portion of the property separately without altering his status as member of an undivided family. Respondent can, therefore, claim maintenance only and cannot claim anything under the decree in question."

Against this decision a second appeal was preferred to the High Court.

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G. S. Mulgaokar, for appellant.

N. M. Samarth and *M. B. Chaubal* for respondent.

PARSONS, J.:—Lakshman Darku, a minor, sued the members of his family for a partition and the possession of his one-sixth share. A decree based on a compromise was passed on the 21st February, 1894, by which it was provided as follows :—

"Plaintiff is a minor twelve years old ; until he attains twenty-one years, Narayan, defendant, should for the next nine years annually deliver to him twenty maunds of paddy and for this year ten maunds ; after that plaintiff should be given one-sixth of the family lands ; until then defendant is not to alienate the land."

Lakshman died after the decree, and his widow seeks in execution to recover seventy maunds of paddy, being the amount deliverable under the decree from its date to the date of application.

The District Judge rejected the application, holding that the decree had not converted the family into a divided one. He cited the case of *Babaji* v. *Kashibai*[1] in support of his view. We are unable to agree with him.

The effect of the decree was clearly to make Lakshman a divided member of the family. It awarded to him a one-sixth share of the family estate and it assigned to him a separate allowance, presumably the income arising from that share. The mere fact that it postponed the actual possession of the share until he had attained the age of twenty-one years, can make no real difference. In the case of *Joy Narain Giri* v. *Girish Chunder Myti*[2], their Lordships of the Privy Council say : "The decree which has been read is, in effect, to give to Shibpershad Giri a separate share of the property of the grandfather. It gives him, in terms, possession of the eight annas which he claimed of the real estate ; it gives him mesne profits from the day of the alleged separation,—that is, from the time when he left the house in which he had been living with his cousin,—and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually, in terms, for partition, yet that the decree does effect a partition, at all events, of rights,

(1) (1879) 4 Bom., 157.

(2) (1878) 4 Cal., 434.

which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appovier* v. *Rama Subba Aiyan*[1]." So in the earlier case of *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu*[2], where an agreement had been entered into that the sons were to be equally entitled in moieties of an estate, but the division was not to be made until the youngest son was of age, their Lordships held that its effect was to constitute the two brothers a divided family, and that the widows were entitled on the death of their husbands each to a moiety of the estate. See also the case of *Tej Protap Singh* v. *Champa Kalee Koer*[3]. The decision of this Court in *Babaji* v. *Kashibai*[4] is distinguishable, for there it was found that there was no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family. In the present case, there is immediately such an appropriation, for the decree gave the minor a distinctly separate allowance of paddy which he was to enjoy to himself, and it gave him possession of the one-sixth share of the estate when he attained majority. That share became vested in him from the date of the decree and would descend to his heirs.

We do not, however, think that his heirs would be entitled to claim, in execution, either the share or the allowance as awarded in the decree. They could only recover the arrears of the allowance up to the death of the minor, for that is all that the minor himself would be entitled to. When he died, being still a minor, the allowance would cease and the share would go to his heirs by right of inheritance, and would be recoverable only by separate suit. So far, therefore, as the application seeks to recover the arrears of the allowance due at the death of the minor, we think that it ought to have been granted, but that it has been properly rejected as to anything else asked for in it.

We cannot dispose of the case ourselves, as there is nothing on the record to show when Lakshman died. We, therefore, reverse

(1) (1866) 11 M. I. A., 75; 8 Cal. W. R. 1 (P. C.)
(2) (1870) 13 M. I. A., 497; 14 Cal. W. R. 33 (P. C.) (3) (1885) 12 Cal., 96
(4) (1879) 4 Bom., 157.

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the order of the District Judge, and remand the application for disposal with reference to the above remarks. We make costs costs in the cause.

RANADE, J.:—In this case the appellant's minor husband by his guardian obtained a partition decree against the respondent, which directed that the minor should receive during his minority twenty maunds of paddy every year, and when he became major, he should recover a one-sixth share of the land from the respondent, who should not alienate the land till then. This decree was obtained in February 1894. The minor died, and the present darkhást was filed by his minor wife through her guardian to recover seventy maunds of paddy for three and a half years. The respondent objected to the minor appellant's right to execute the decree. This objection was over-ruled by the Court of first instance, but the District Judge, in appeal, held that, as there had been no partition of the land, the minor widow could not execute the decree for partition, and was entitled only to maintenance. The darkhást was accordingly disallowed

The chief point for consideration is whether the status of the previously joint property was converted into separate property by reason of the decree. The District Judge has held, chiefly on the authority of *Babaji* v. *Kashibai*[1], that the status of the property was not changed by the decree. The partition was held to be inchoate in that case, and the decree was construed as declaring an intention to divide at a future date, and thus it did not effect a separation of the property. It appears to me that this view of the lower Court was based on a misconception of the real point decided in *Babaji* v. *Kashibai*, and is inconsistent with numerous decisions of this Court and of the Privy Council. The ruling relied upon has no application in the present case, for in that suit, while part of the property was divided, there was a portion left undivided, as it was in mortgage with third parties. The decree only affirmed the right to share this mortgaged property equally when redeemed. One of the sharers subsequently redeemed the whole of the property. The other sharer died, and his heir sought to recover his half share from the brother who

(1) (1879) 4 Bom., 157.

had redeemed the whole. It was held in second appeal that there was no conversion of the status of the mortgaged property which was subsequently redeemed. This Court held in accordance with the principle laid down in *Appovier* v. *Rama Subba Aiyan*[1] that the proper test to apply is not whether the property is actually divided or not divided, but whether there had been a division of title so as to give to each member a certain and definite share to receive and enjoy in severalty. In the case of *Babaji* v. *Kashibai* (*supra*) there was no such division of title and no conversion of the character of undivided property. In the present case, the decree expressly made this conversion, and effected severance of one-sixth share. This share was adjudged to belong to the minor appellant's husband, though, by reason of his minority, the actual division was postponed, and the respondent was required to pay instead the profits of the one-sixth share, and prohibited from alienating the same.

The leading case on this part of the law is no doubt that of *Chidambaram Chettiar* v. *Gauri Nachiar*[2]. In that case there was a partition decree which settled that particular property was partible, and fixed the shares of the parties. A reference was made to the commissioner to effect the division. Before this division could take place, the plaintiff died, and an objection was raised that the partition suit failed. The Privy Council, however, held that on the death of the plaintiff, his own heirs succeeded in preference to the defendants, who were separated co-parceners. In *Joy Narain Giri* v. *Girish Chunder Myti*[3] it was held that where the intention of the plaintiff was to obtain a share on separation, and that share was decreed to him, the decree effects a partition of rights, and converts the joint estate into a separate property. Their Lordships of the Privy Council distinguished this ruling from the decision of *Debee Pershad* v. *Phool Koeree*[4] in which last case only a declaration was sought of a right to a share, which declaration was quite consistent with a right to a share in joint estate.

Where, as in the present case, the intention to separate is distinct, and effect is given to it by the decree, the decree converts the

(1) (1866) 11 Moore's I. A., 75 ; 8 Cal, W. R., 1.
(2) (1879) 6 I.A., 177 ; 2 Mad., 83.
(3) (1878) 4 Cal., 434.
(4) (1869) 12 Cal. W. R., 510.

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character of the estate. Where such an intention is quite distinct, even an agreement to divide extinguishes the right of survivorship. The ruling in *Babaji* v. *Kashibai* noticed above was thus distinguished in *Tej Protap Singh* v. *Champa Kalee Koer*(1) on the ground that the decree did not contemplate a present separation. An agreement to partition, even when it is not carried out by actual separation, entitles the widow of a deceased brother to succeed to his share in preference to the surviving co-sharer—*Rakhmabai* v. *Joterao*(2), *Suraneni Venkata Gopala Narasimha* v. *Suraneni Lakshmi Venkama*(3), *Sitaram* v. *Ganpat*(4) and *Maharajah Ram Kissen Sing* v. *Rajah Sheonundun Sing*(5). The present case falls under this same category, and is clearly distinguished from those other cases where property was advisedly left undivided. In such cases the widow is held to have no claim to divide the same even where a share in the rest of the property has been assigned to her. The ruling in *Babaji* v. *Kashibai* (*supra*), on which the District Judge relied, belongs to this last class of cases—*Timmi Reddy* v. *Achamma*(6); *Ramabai* v. *Joyan Soarybhan*(7). The appellant-plaintiff is, therefore, entitled to prosecute her darkhást. She can, however, only claim to recover arrears due up to the death of her husband. For the period subsequent to that date, she can only bring a suit in her right as heir. I accordingly agree with Mr. Justice Parsons in his final order in the present case.

(1) (1885) 12 Cal., 96.
(2) P. J. for 1872, No. 22.
(3) (1869) 3 Ben. L. R., 41 P. C.; 12 Cal. W. R. 40, (P.C.).
(4) P. J., 1892, p. 261.
(5) (1875) 23 W.R., 412.
(6) (1865) 2 Mad. H. C. R., 325.
(7) P. J. for 1872, No. 35.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.

1899. *September* 14.

DESAI BHAOORAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* DESAI CHUNILAL AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Easement—Easements Act (V of 1882)*—Right of way—Right of way enjoyed for agricultural purposes—Change of use—Increase of servitude—Injunction.*

The defendants had a right of way to their field through an adjoining field of the plaintiff. Until shortly before suit the defendants' field had only been used

* Second Appeal, No. 75 of 1899.