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the latter part unnecessary. Still more unnecessary was it to go into the question of the validity of the mortgage of the whole 8-pies' share by the defendants Nos. 3 and 4 to the defendants Nos. 16 and 17.

While, therefore, we confirm the decree, we must reverse the finding as to a 4-pies' and not an 8-pies' share being with the defendants Nos. 16 and 17 in right of mortgage and leave the parties to their civil rights, unfettered by any finding or order of possession in respect of the mortgage. We order each party to bear his own costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

ABDUL KADAR (ORIGINAL DEFENDANT) v. BAPUBHAI AND OTHERS
(ORIGINAL PLAINTIFFS, &C.) RESPONDENTS.*

Mahomedan law—Joint property—Partition—Suit for share of such property—Share allotted to defendant in same suit on payment of court-fees—Practice—Procedure.

In the Presidency of Bombay a suit for partition of an inheritance by Mahomedans is hardly distinguishable from a partition suit by Hindus. In such a suit, if a defendant asks at the proper time to have his share divided off and allotted to him, such relief should be granted to him on payment of the necessary court-fees.

SECOND appeal from decision of G. C. Whitworth, District Judge of Ahmednagar.

The parties to the suit were Mahomedans. Their common ancestor was one Mahomed Shafi. He had four sons—Kadar, Sale, Fazal and Futte Mahomed.

The plaintiffs were the grandsons of the third son Fazal. Defendant No. 1 was the grandson of the fourth son Futte Mahomed and defendants Nos. 2 and 3 were the great-grandsons of the second son Sale. The first son Kadar left no issue.

The lands in dispute were inam lands, which had been acquired by the family during the period of Mahomedan rule.

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Plaintiffs alleged that a third share of the lands belonged to them, a third to defendant No. 1 and a third to defendants Nos. 2 and 3, and that until 1883 the income had been divided between them according to their respective shares.

In 1893 the plaintiffs filed the present suit to recover their share of the lands by partition together with mesne profits for three years preceding suit.

The plaintiffs valued the suit and paid court-fees sufficient to cover their one-third share in the property.

The first defendant prayed that he too should be given his third share, and contended that, unless that was done, the plaintiffs were not entitled to their third share.

The Subordinate Judge passed a decree awarding the plaintiffs their third share, but he refused in this suit to give the first defendant his share, on the ground that the court-fees which had been paid only covered the plaintiffs' share. He held that the suit was not one for partition, but for separation of the plaintiffs' share which had been already ascertained and that the first defendant should bring a separate suit to recover his share. In his judgment he said :—

“The suit is valued and court-fee paid only sufficient to cover plaintiffs' one-third share of the property. The suit is not for partition of joint family property. The shares have been ascertained since a long time before, and the parties have been receiving income of their shares accordingly, though no division by metes and bounds is yet made. Plaintiffs claim such separation of their share, and that is awarded to them. If defendant No. 1 wishes to have his share also given in his possession separately, he may bring a separate suit for that purpose.”

This decision was confirmed, on appeal, by the District Judge. His reasons were as follow :—

“This is not a suit for partition of joint family property as known to the Hindu law, but a suit by Mussalmans for their share of an inheritance. It was not, I think, incumbent on the Subordinate Judge in such a case to direct separation of any defendant's share.”

Against this decision defendant No. 1 preferred a second appeal to the High Court.

N. G. Chandavarkar, for appellant.

Shripad Khanderao, for respondent.

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PARSONS, J.:—This is the converse of the case *Murarrao v. Sitaram*⁽¹⁾ we decided yesterday, because in this suit for partition of joint property the Courts have refused to give the first defendant his share, which was found and is now admitted to be one-third, though he asked for it. The reason assigned for the refusal by the Subordinate Judge is that the court-fee paid is only sufficient to cover plaintiffs' one-third share in the property. No more, however, is ever paid in any suit for partition, and we think that it was quite in the power of the Judge to have ordered the defendant to pay the necessary court-fee on his share as a condition precedent to his obtaining his share.

The District Judge refused because this was not a suit for partition of joint family property as known to the Hindu law, but a suit by Musalmans for their share of an inheritance. In this Presidency, however, a suit for partition of an inheritance by Musalmans is hardly distinguishable from a partition suit by Hindus, and the Subordinate Judge has declared the property to be the joint property of the parties, so that the principles of an ordinary administration suit ought, at any rate, to be applied to it. It is obviously most undesirable that parties should be driven to further litigation to obtain a relief which they are entitled to, and ask for at a proper time, and which can be given to them in an existing suit.

We vary the decree by awarding the appellant his one-third share to be ascertained and divided off and given to him in execution on payment of the necessary court-fees, *viz.*, Rs. 47-4-0, being made by him into Court within such time as the Court of first instance directs. We make no order as to any costs in this Court.

(1) See *ante* p. 184.