1906.

KRISHNABAI v. HARI GOVIND.

declared, with a forfeiture clause added, and when the defendant prays for the ordinary relief against that forfeiture, the Court is not precluded from treating the decree as no more than the contract between the parties, subject to the incidents of such a contract. Amongst those incidents equitable relief against a forfeiture is not the least important and is well established.

A party to a contract embodied in a consent decree cannot, I think, be held to have renounced any incidental advantages or equitable reliefs of which, upon the face of the contract itself as presented in the decree, he might ordinarily have claimed the benefit.

HEATON, J. :—I concur.

Order accordingly.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *September* 12.

FRANCIS GHOSAL *bin* CONSTANCE GHOSAL AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT 2), APPELLANTS, *v.* GABRI GHOSAL *bin* LALU GHOSAL AND OTHERS (ORIGINAL DEFENDANTS 1 AND 4 TO 15), RESPONDENTS.*

Native Christians—Converts from Hindu Religion—Joint family—Co-parcenership—Inheritance—Indian Succession Act (X of 1865), section 93—Intestate and testamentary succession.

Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion.

Tellis v. Saldanha(1) disapproved.

The Indian Succession Act (X of 1865) does not affect rights of co-parcenership as between those to whom it applies. The purpose of that Act was to amend and define the rules of law applicable to intestate and testamentary succession. It is with the *devolution* of rights on intestacy that the Act deals. It does not purport to enlarge the category of heritable property. Section 93 of the Act actually recognizes a joint tenancy with the right of survivorship.

Navroji Manockji Wadia v. Perozbai(2) referred to.

* Appeal No. 78 of 1905.

(1) (1886) 10 Mad. 69.

(2) (1898) 23 Bom. 80.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

The distinction between co-parcenership and inheritance is that in the case of inheritance property devolves on death, it survives in the case of co-parcenership; on inheritance new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers.

APPEAL from the decision of R. R. Gangolli, First Class Subordinate Judge of Kárwár, in original suit No. 174 of 1902.

The plaintiff sued to recover by partition his one-third share in the properties in suit, alleging that some portion thereof was ancestral property and the rest joint property of the family consisting of himself and defendants 1 and 2. The plaint averred that one Lalu Ghosal *alias* Juvav Ghosal was the common ancestor of the parties. He died about forty years ago leaving three sons, namely, Constance (plaintiff's father), Gabriel, otherwise called Gabri, and Jaki. The three brothers lived in commensality with each other since the death of their father. Constance being the eldest of the brothers was the manager of the family. He acquired some of the properties in suit and improved the condition of the family by carrying on trade till about thirty-five years ago, when he died. Since then plaintiff and defendant 2 were under the protection of defendant 1 as they were minors. Defendant 1 then became the manager of the family. With the co-operation of the plaintiff and defendant 2 defendant 1 acquired some property with money obtained from family trade. The acquisitions were made for the benefit of the common family. Defendant 1 subsequently turned the plaintiff and defendant 2 out of the family house and usurped the whole property, hence the plaintiff was compelled to bring the present suit. Though the parties were Roman Catholic Christians, their remote ancestors were Hindus and the Hindu Law was applicable to their family and the class to which they belonged. They had not abandoned Hindu usages and customs. As the parties had been born long before the introduction of the Indian Succession Act (X of 1865), they were not subject to the provisions of that Act. Succession and inheritance in the family of the parties should, therefore, be regulated according to the principles of Hindu Law.

Defendant 1 denied the plaintiff's right to claim a share in several of the properties in suit which he alleged were acquired

by himself and his sons, and contended that neither the family of the parties, nor the class of Christians to which it belonged, followed the principles of Hindu Law; that the family was governed by the provisions of the Indian Succession Act (X of 1865); that there was no ground to infer that the remote ancestors of the parties were Hindus and that they did not recognize the system of undivided family or managership of such family.

Defendant 2 supported the plaintiff in the matter of the applicability of Hindu Law to the family and in all his other allegations and claimed a third share for himself.

The other defendants (Nos. 3—16) contended *inter alia* that the family was governed by the Indian Succession Act (X of 1865) and not by the principles of Hindu Law.

At the hearing eleven issues were framed and out of them issues Nos. 2, 3, 5 and 6 were as follows:—

(2) To what law are the litigants subject?

(3) Whether the property in suit is the joint family estate of the plaintiff and the defendants; and are the plaintiff and second defendant entitled to share, and to what share in the whole or any part of that property?

(5) What part of the property in suit was acquired, by whom and when, and what are its accretions?

(6) Does the suit include any self-acquisitions of the defendants? If so, which are they and whose?

The findings on the said issues were:—

(2) The law that should be applied to the property left by the deceased Lalu Ghosal *alias* Juvav Ghosal, the common ancestor of the parties, is the Hindu Law, the Indian Succession Act X of 1865 governing the devolution of the other property specified in the plaint.

(3) The property left by the said Lalu Ghosal *alias* Juvav Ghosal was treated by the sons of the deceased and by the plaintiff and defendant 2 as joint family estate, and the plaintiff and the defendants 1 and 2 are each entitled to an equal one-third share in that property by partition.

(5) (The first part of the finding on this issue specified the properties acquired by defendants 1, 11, 13, 14, 15 and 16). All these acquisitions were made after the Indian Succession Act (X of 1865) came into force. It is not necessary to determine what are subsequent accretions to each of these properties.

(6) The finding on the 5th issue covers the finding on the 6th issue.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

The Subordinate Judge therefore passed a decree directing that plaintiff and defendant 2 should each obtain by partition separate possession of an equal one-third share in the properties specified in the decree.

Against the said decree plaintiff and defendant 2 appealed.

G. S. Rao (with *S. M. Hattiangadi*) appeared for the appellants (plaintiff and defendant 2):—The Judge was wrong in his view of the Indian Succession Act. He was of opinion that it applies to the property acquired by defendant 1 since the death of Lalu and his two sons. We contend that the Act cannot apply because there was no question of intestate or testamentary succession. All the members having lived together as a joint family according to Hindu Law with defendant 1 as manager, the same consideration ought to apply to the property acquired by defendant 1 in his own name and in the names of his sons as would apply to Hindus.

Setalvad (with *N. A. Shiveshvarkar*) appeared for respondent 1 (defendant 1):—The family being Native Christian, the Hindu Law of co-parcenery cannot apply to it: *Abraham* v. *Abraham*[1] and there can be no right of survivorship: *Tellis* v. *Saldanha*[2]. The right of survivorship comes in conflict with the course of devolution prescribed by the Indian Succession Act. It would be, therefore, going against express legislation to hold that the Hindu Law of co-parcenery with its incident of survivorship can be retained by native converts in spite of the Indian Succession Act. The same inference arises from a comparison of section 4 of the Probate and Administration Act with section 179 of the Indian Succession Act. Moreover, there is no evidence that the law of co-parcenery was retained by the class to which the parties belong. The finding of the Judge is confined merely to matters of inheritance and succession.

Branson (with *H. C. Coyaji*) appeared for respondent 9 (defendant 11).

S. V. Palekar appeared for respondents 11—13 (defendants 13—15).

(1) (1863) 9 Moo. I. A. 199 at pp. 236-8.

(2) (1886) 10 Mad. 69.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

JENKINS, C. J.:—The contesting litigants before us are Native Christians, members of a family whose ancestors were converted from the Hindu religion.

The question in controversy is whether the appellants are entitled to share in certain properties, acquired after the death of a common ancestor, Lalu Ghosal, whose name appears at the head of the genealogical table contained in the judgment of the Subordinate Judge. In advancing this claim the appellants contend that the family, notwithstanding the conversion of its members to Christianity, continued to be joint in the sense in which a Hindu family may be so described, and retained the legal status and incidents which belonged to it prior to the conversion.

It is on this contention and the legal consequences it involves that the appellants mainly rest their claim to the after-acquired property.

The status of the family, therefore, is a matter of prime importance and essential to the right decision of the suit, but unfortunately the lower Court has omitted to frame a specific issue on the point.

It is therefore necessary for us to proceed under section 566 of the Civil Procedure Code.

But before defining the terms of the issue, which we propose to send down to the lower Court, it will be convenient to indicate the principles that appear to us pertinent to the question under consideration.

They are for the most part to be found in the leading case of *Abraham* v. *Abraham*[1], and though that case is cited by the Judge of the lower Court, he appears to us to have missed the distinction on which their Lordships there insist between parcenership and heirship. It may be, and we think probably is the case, that this was due to his adherence to what was laid down in *Tellis* v. *Saldanha*[2], but for reasons which we will later set forth we believe the decision in that case to be erroneous so far as it is thereby determined that the condition of co-parcenership is disturbed by the Succession Act.

(1) (1863) 9 Moo. I. A. 195. (2) (1886) 10 Mad. 69.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

But to return to the distinction between co-parcenership and inheritance; the difference is radical, though as applied to the change of legal rights that arise on death there is an apparent resemblance in consequence, which often tends to blur the distinction between them.

In the case of inheritance property devolves on death, it survives in the case of co-parcenership; on inheritance new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers.

That there is a distinction is indicated at page 241 of the report in 9 Moore's I. A., where it is said: "The true question at issue in this case is, not who was the heir of the late Matthew Abraham, but whether he and the respondent formed an undivided family in the sense which those words bear in the Hindoo Law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship."

And so it is in this case on the consequences that flow from the doctrine of parcenership—for parcenership does not only influence the rights that arise on death—and not on inheritance or its results that the appellants rest.

First then we must see whether parcenership can be a part of the law governing the rights of the members of this family. That it can is, we think, established by the Privy Council. Thus in *Abraham* v. *Abraham*(1) at p. 241 it is said: "Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, *he may abide by the old law, notwithstanding he has renounced the old religion.*"*

And at p. 243 their Lordships say: "The profession of Christianity releases the convert from the trammels of the Hindoo Law, but it does not of necessity involve any change of the rights or

(1) (1863) 9 Moo. I. A. 199.

* These words are not in italics in the Judgment quoted from. [Editor.]

relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo Law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters."

At p. 245 we find the following passage: "Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the respondent descended was of that class of Native Christians which commonly retains Native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom."

In *Sri Gajapathi Radhika* v. *Sri Gajapathi Nilamani*(1) it was said by their Lordships that the case of *Abraham* v. *Abraham*(2) shows that a family ceasing to be Hindus in religion may still enjoy their property under Hindu Law.

It is needless to multiply authorities on this point, and we will, therefore, confine ourselves to a reference to what was said by Wilson, J., in *Lopez* v. *Lopez*(3).

These cases, in our opinion, warrant the view that parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion. And we hold this view notwithstanding the decision in *Tellis* v. *Saldanha*(4).

It was in that case determined that co-parcenership and the right of survivorship are incidents peculiar to Hindu Law, which law so far as it affected Native Christians was repealed by the Succession Act. But by what part of the Succession Act was this repeal affected? No section is cited in the judgment, nor in the argument before us could any such section be pointed out.

The purpose of the Succession Act is to amend and define the rules of law applicable to intestate and testamentary succession

(1) (1870) 14 W. R. (P. C.) 33.
(2) (1863) 9 Moo. I. A. 199.
(3) (1885) 12 Cal. 706 at p. 722.
(4) (1886) 10 Mad. 69.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

in British India, and Intestacy is the subject of Part IV of the Act. Section 25, the 1st section in this part of the Act, provides that a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect. But this does not destroy the rule of survivorship any more than it extends rights on intestacy to property in which the intestate had but a life estate.

Indeed it is pointed out in *Navroji Manockji Wadia* v. *Perozbai*[1] that section 93 of the Succession Act actually recognizes a joint tenancy with the right of survivorship.

The reasoning in *Tellis* v. *Saldanha*[2] leads to results that cannot have been intended. Thus section 25 can only refer to property of the intestate, and reading sections 25 and 46 together heritable and testable property are apparently identical. But if by virtue of section 25 heritable property includes property in respect of which co-parcenery rights would otherwise exist, then by parity of reasoning the same property would be included in section 46. But inasmuch as section 46 is incorporated in the Hindu Wills Act it might be argued from *Tellis* v. *Saldanha*[2] that a Hindu co-parcener has a power of testamentary disposition. This, however, no one would contend.

It is with the *devolution* of rights on intestacy that the Act deals; it does not, in our opinion, purport to enlarge the category of heritable property.

We therefore hold that the Succession Act does not affect rights of co-parcenership as between those to whom it applies.

To return then to the facts of this case, it is necessary to determine whether parcenership is a part of the law governing this family. This is a question of evidence and it is because the attention of the parties was not directed to this precise point that we must send down the issues in these terms:—

1. From what religion was the family converted to Christianity?

2. Notwithstanding the conversion to Christianity, did the family continue or become an undivided joint family with

(1) (1898) 23 Bom. 80. (2) (1886) 10 Mad. 89.

reference to the acquisition, improvement and enjoyment of property in co-parcenership ?

The form of these issues is not intended to preclude the respondents from advancing any legal argument they may deem relevant.

The parties will be at liberty to adduce evidence, and if the 2nd issue be answered in the affirmative, then we must ask for a fresh finding on the 3rd, 5th and 6th issues.

Return in three months.

Issues sent down.

G. B. R.

1906.

FRANCIS GHOSAL v. GABRI GHOSAL.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Heaton.

BHIMRAO RAMRAO DESAI (ORIGINAL APPLICANT), APPELLANT, *v.* AYYAPPA YELLAPPA AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.*

1906. *September* 18.

Limitation Act (XV of 1877), section 5—Appeal—Presentment of an appeal after the prescribed period—Delay—Excuse of delay—Discretion of the Court in not excusing the delay—Appeal against the exercise of the discretion.

An order in execution proceedings was passed on the 25th February 1899. An appeal lay against the order; but the aggrieved party notwithstanding filed a suit on the 24th February 1900 in a separate proceeding. It was decided in the first appeal in that suit on the 30th September 1903 by the District Judge that the suit was barred by section 244 of the Civil Procedure Code. The party concerned again waited till the 4th January 1904, when he filed in the District Court his appeal against the order dated the 25th February 1899. The District Judge decided that there was no sufficient reason for not presenting the appeal in time, and dismissed the appeal as being barred by limitation.

Held, that having regard to the delay which occurred in presenting the appeal between the 30th September 1903 to 4th January 1904, it was not open to the appellant to contend that the District Judge had exercised his discretion, under section 5 of the Limitation Act, in a capricious or arbitrary manner.

SECOND appeal from the decision of L. C. Crump, District Judge of Dhárwár.

* Second Appeal No. 171 of 1905.