ORIGINAL CIVIL.

Before Mr. Justice Davar.

1913.
March 14, 27.

JANKIBAI, WIDOW (PLAINTIFF) *v.* SHRINIVAS GANESH VALSHANKAR AND OTHERS (DEFENDANTS).*

Civil Procedure Code (Act V of 1908), Order II, Rule 5—Misjoinder of causes of action—Hindu family, position of surviving members of joint and undivided, not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a co-parcener at the date of his death with claims against the surviving co-parceners for her stridhan *ornaments.*

Members of a joint and undivided Hindu family hold the family estate jointly and are seized of it "*per my et per tout.*" On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co-owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death. The claim of the widow of such a deceased co-parcener for maintenance is clearly not against "the estate of the deceased" husband but is against the property of which he was a co-parcener at the time of his death. Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his life-time her husband was a member.

THE facts of this case are set forth in sufficient detail in the judgment of the learned Judge.

Pradhan, with *Kirtikar*, for the plaintiff.

Bhandarkar, with him *Mirza*, for the defendants.

DAVAR, J. :—The plaintiff Jankibai is the widow of Vithal Valsankar, who died in 1907. He left him surviving his widow, the plaintiff herein, and his five brothers who are all defendants in this suit. The six brothers were members of a joint and undivided Hindu

* Suit No, 313 of 1910.

family and it is admitted that they were owners of joint ancestral properties, consisting of houses and lands, which are in Akalkote in the Sholapur District. These properties are now in the possession of the defendants.

The plaintiff has filed this suit to recover from the defendants her *stridhan* ornaments which, she says, she left with her husband's brothers when she left their house, and she claims maintenance and arrears of maintenance out of the joint ancestral property now in the possession of the defendants. These claims are resisted on various grounds which for the present purposes it is unnecessary to set out.

The defendants contend that this suit as framed is bad for misjoinder of causes of action.

The first issue raised by the learned counsel for the defendants is :—

"Whether the suit is not bad for misjoinder of causes of action."

It was argued in support of the contention that the claim for ornaments is against the defendants personally and could not be joined with the claim for maintenance which is against the defendants as the heirs of the plaintiff's husband, and reliance was placed on the provisions of Order II, Rule 5, of the Civil Procedure Code.

At the hearing, it was agreed that the issue as to misjoinder should be tried in the first instance.

Order II, Rule 5, re-enacts Rule (*b*) of section 44 of the old Civil Procedure Code. It says that no claim by or against an executor, administrator or heir as such shall be joined with claims by or against him personally. Although this question has repeatedly arisen, there is no reported case except one where it was specifically raised and decided. In *Gokibai* v. *Lakhmidas Khimji*[1],

[1] (1890) 14 Bom. 490.

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wherein a Hindu widow sued her father-in-law for maintenance, this question was raised before the late Mr. Justice Scott and he held that the suit was bad by reason of misjoinder of causes of action and the plaintiff was put upon her election to proceed upon one or the other of the two claims made by her in the suit. Though the case itself is of some importance on the other questions arising in the suit, the report is exceedingly meagre on this particular point. As I am not prepared to follow the conclusion arrived at by the learned Judge in that case, I think it is desirable to set out here all that the report says on the subject. It says (p. 492) :—

"On behalf of the defendant an issue was raised as to whether the plaintiff had not improperly joined her claim for maintenance and her claim for ornaments and clothes in this suit and was not bound to elect which claim she would prosecute. The learned Judge held that under section 44 of the Civil Procedure Code (Act XIV of 1882) there was a misjoinder of causes of action, the claim for maintenance being against the estate of the deceased, and the claim for ornaments and clothes being against the defendant personally."

Unfortunately it does not appear from the report what arguments were addressed to the Court, nor is there any judgment setting out the reasons for the decision beyond what is stated by the Reporter in the extract I have quoted above. It seems to me that the conclusion of the Court in the case in question is based on the fallacies involved in the assumption that there was, at the time the widow made the claim, any estate which can be rightly called the estate of her deceased husband, and also in the assumption that the surviving co-parceners of a joint and undivided Hindu family can be properly called the heirs of a deceased co-parcener. Members of a joint and undivided Hindu family hold family estate jointly and are seized of it "*per my et per tout.*" The joint tenants have each of them the entire possession as well of every parcel as of the whole,

On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased. They inherit by survivorship. They become the owners of the interest of the deceased in the family estate not as heirs of the deceased but as co-owners in their own right and merely by the legal extinction of the interest of the deceased co-parcener by reason of his death. The widow's claim for maintenance is clearly not against "the estate of the deceased" husband but is against the property in which he was a co-parcener at the time of his death. When a husband who is a member of a joint Hindu family possessing only joint ancestral property dies, he leaves no estate and the co-parceners do not inherit any estate as his heirs.

In this case the defendants are not in any sense the heirs of the plaintiff's husband. The plaintiff's husband has left no estate. The plaintiff's claim for maintenance is not against her husband's estate nor is it against the defendants as the heirs of her husband *as such*.

As I have observed above, the identical question I am now discussing has frequently arisen in our Court and *Gokibai's case*[1] has always been cited and discussed but the results have been in most of these cases unsatisfactory and inconclusive. Some Judges have followed the ruling of Scott, J., but in many instances the Judges have refused to follow it either dissenting from it or distinguishing the case before them from this particular case. After much anxious consideration, I have come to the conclusion that there is no misjoiner of causes of action if a Hindu widow sues in one suit the co-parceners of her deceased husband to recover her

[1] (1890) 14 Bom. 490.

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stridhan property improperly or illegally detained by them and also to enforce her right of maintenance out of the estate of the joint family of which during his life-time her husband was a member.

It has not been argued before me that the suit is bad for misjoinder of causes of action on any ground other than the prohibition enacted in Order II, Rule 5. Order I, Rule 3, provides for joinder of parties and Order II, Rule 3, provides for joinder of causes of action and both these questions have been fully considered and discussed by me in my previous judgments in *Monji Monji* v. *Kuverji Nanaji*[1] and in *Umabai* v. *Bhau Balwant*[2].

I find the first issue in the negative and hold that the suit as framed is not bad by reason of misjoinder of causes of action.

The suit will be put down on board for further hearing subject to a part heard suit. I will deal with the question of costs of the trial of this issue when I deal with the costs of the suit.

Attorneys for the plaintiff: *Messrs. Nanu, Hormusji & Co.*

Attorneys for the defendants: *Messrs. Subnis and Goregaonkar.*

H. S. C.

[1] (1907) 31 Bom. 516. [2] (1908) 34 Bom. 358.