the power of reference contained in section 113 and Order XLVI of the Code is conferred as part of the procedure prescribed for a Court of first instance by the Code of Civil Procedure under section 48. A further consideration is that, although section 37 does not in terms apply to an order under section 43, because that is an order not in a suit but in a proceeding, yet the whole tenor of the Act is in favour of finality, and the Court should, therefore, be slow to hold that section 48 was intended by the Legislature to contravene that principle, unless its plain wording shows that such a construction should be put upon its provisions. I think there is no such necessity in this case, and that the expression 'proceedings' under this Chapter should be construed as referring simply to the proceedings for the actual hearing of the case on its merits which are terminated by an order either refusing the application or granting possession. It is a further stage, and in reality a separate proceeding, when the Court after passing such an order is asked to review that order. I think, therefore, that the rule should be discharged with costs.

Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.
October 1.

VISHNU NARHAR SAPRE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 5), APPELLANTS *v.* SHRIRAM RAGHUNATH KARKARE AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 to 4 AND 6 TO 11), RESPONDENTS*.

Partition suit—Plaintiff a purchaser from minor co-parcener—Fresh sale-deed subsequently obtained after attainment of majority—Whether defect in title cured—Practice and procedure.

* Second Appeal No. 633 of 1919.

1920.

VISHNU NARHAR v. SHRIRAM RAGHUNATH.

The plaintiff, who was a purchaser from a minor co-parcener, sued for partition of the family property. The minor co-parcener, who was made a party defendant, after the attainment of his majority, passed a fresh sale-deed in plaintiff's favour during the progress of the suit. It was contended that the plaintiff, being a purchaser from a minor, had no right to sue and that the defect in title was not cured by the new sale-deed obtained :—

Held, the suit was maintainable.

PER MACLEOD, C. J. :—"It seems to me, therefore, this is purely a matter of form which could have been cured equally well by the trial Judge by making Waman [Sc. the minor] a party plaintiff instead of continuing him as a defendant, and by then directing partition of the property."

SECOND appeal from the decision of C. C. Dutt, District Judge of Ratnagiri, reversing the decree passed by M. H. Limaye, Subordinate Judge at Deorukh.

Suit for partition.

Two brothers Visaji and Gopal originally owned the property in dispute.

Visaji sold his share in the property to defendant No. 1 in 1910. Gopal's grandson Waman (defendant No. 5) sold his share to plaintiff on the 27th August 1915. At the date of the sale Waman was a minor but this fact was not known to the plaintiff.

In 1915, the plaintiff sued to recover his half share in the property by partition from defendant No. 1. Waman was joined as a party defendant.

After the evidence in the case was heard and while the case stood adjourned for judgment, it came to the knowledge of the plaintiff that at the date of his sale-deed Waman was a minor though he had since then attained majority. He, therefore, obtained a fresh sale-deed from Waman in the course of the suit.

The plaintiff produced the new deed in Court and claimed whatever defect in his title there originally was was cured by the new sale-deed.

The trial Judge accepted the contention and decreed the suit on its merits.

On appeal, the District Judge agreed with the first Court in his view of merits of the case; but dismissed it on the ground that the plaintiff had no right to sue at the date of the suit, and that nothing that transpired since could give him that right.

The plaintiff appealed to the High Court.

A. G. Desai, for the appellants.

G. N. Thakor, for respondents Nos. 1 and 2.

S. C. Joshi, for respondent No. 2.

MACLEOD, C. J. :—The plaintiff sued to get a half share of the plaint property by a fair and equitable partition. A decree was passed in his favour by the trial Court, although before judgment was delivered it had been discovered that the plaintiff, who derived title from Waman, the fifth defendant, grandson of Gopal in the pedigree at page 11, was a minor at the time he purported to transfer his share to the plaintiff. The first defendant, the main contesting party, derived title from Visaji, the brother of Gopal. It was the plaintiff's contention that Visaji and Gopal were brothers. The fifth defendant in his written statement said that he had no objection to the plaintiff's suit, and also consented to his being made a co-plaintiff with him if it was necessary. When it was discovered that the plaintiff, owing to Waman's minority when he passed the sale-deed, had no title, Waman having attained majority executed another sale-deed in favour of the plaintiff. The learned Judge considered that it cured the original defect in the title and passed a decree for partition.

In first appeal all the issues on the merits were found in favour of the plaintiff, but the learned Judge

1920.

VISHNU NARHAR v. SHRIRAM RAGHUNATH.

was of opinion that the defect in the plaintiff's title could not be cured by the sale-deed effected during the suit. It seems to me that the learned Judge has not placed sufficient importance upon the particular nature of this suit which is one for partition. It is quite true that if a plaintiff's title is discovered to be defective, in many cases that defect cannot be cured. But in a partition suit all parties are in the same position, and the obvious course for the trial Judge to pursue on discovering that Waman was a minor at the time he passed a sale-deed to the plaintiff, was to make Waman a plaintiff. Waman and plaintiff were acting in concert. That is shown by Exhibit 188, and even if the plaintiff had disappeared entirely from the case, a decree for partition could have been made between the co-defendants provided that all the persons entitled to the property were before the Court. It seems to me, therefore, this is purely a matter of form, which could have been cured equally well by the trial Judge by making Waman a party plaintiff instead of continuing him as a defendant, and by then directing partition of the property. If this course could not be pursued, it could only mean that the plaintiff would have to file another suit on the basis of the second sale-deed. As a matter of fact the important issues in the case are quite distinct from the issue whether Waman as a matter of fact transferred his share to the plaintiff. Those issues all went to the root of the dispute between Gopal's branch and Visaji's and had been decided in favour of the plaintiff.

It was suggested that both Courts were wrong in finding that Gopal's branch had not been excluded from the family property within twelve years of suit. But the evidence on that issue has been very carefully considered by the Judges in both the Courts, and I see no reason to think that they were wrong in coming to

the conclusion from the evidence that Waman had not been excluded. The result must be that this appeal is allowed and the decree of the trial Court restored. The plaintiff will be entitled to his costs of this appeal and in the appellate Court.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

JETHABHAI GOKALDAS PATEL AND OTHERS (ORIGINAL PETITIONERS), APPELLANTS *v.* PARSHOTAM HAVSA KUMBHAR AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS*.

1920. *October* 4.

Probate—Joint will—Will by two persons.

Two persons can make a joint will.

FIRST appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad.

Probate proceedings.

Two persons, Lallu and his wife Shiv, made a joint will a few days before their deaths, Shiv dying first, and Lallu three days later.

The petitioners applied for a probate of the will.

The District Judge held that the will was properly executed, but refused to issue probate on the ground that a will made jointly by two persons was invalid.

The petitioners appealed to the High Court.

G. N. Thakor, for the appellants.

H. V. Divatia, for respondent No. 1.

S. S. Patkar, Government Pleader, for respondent No. 2.

* First Appeal No. 3 of 1920.