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Agriculturists' Relief Act. That involves considerable confusion of thought; and, as already pointed out, both the lower Courts have been led into treating the present plaintiff as if he actually was an agriculturist. We think, for these reasons, that it was not open to him to ask the Court to hold that the sale deed of 1885 was a mortgage.

In our opinion, therefore, when the original plaintiff died the suit could only continue on the same basis, provided the legal representative was an agriculturist. But once it was proved that the present plaintiff was not an agriculturist the suit was bound to fail. The appeal is allowed and the plaintiff's suit dismissed.

The present appellant to have his costs in this Court, in the District Court, and the costs of the hearing before Mr. Taskar. All costs prior to that, subject to any order that may have been made with regard to particular costs, will be borne by each party.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Crump and Mr. Justice Coyajee.

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TUKARAM MAHADU TANDEL (ORIGINAL PLAINTIFF), APPELLANT *v.* RAMCHANDRA MAHADU TANDEL AND OTHERS (ORIGINAL DEFENDANTS NOS. 2 TO 8), RESPONDENTS [*].

Civil Procedure Code (Act V of 1908), Order XXIII, Rules 1 and 3—Suit for partition—Compromise—Subsequent withdrawal of suit barred—Hindu law—Partition—Rights of adopted and after-born sons—Sudras.

During the pendency of a partition suit, the plaintiff agreed to compromise a portion of the claim; but later, he resiled from the agreement and applied to

[*] Appeal No. 323 of 1923 from Original Decree.

withdraw the suit. The defendants produced the agreement in Court and applied for a decree in terms of the compromise and for trial of the remaining issues in the case :—

Held, that, in the circumstances, the plaintiff was not at liberty to withdraw the case, and that the defendants were entitled to demand trial of the remaining issues, and also to a decree in terms of the compromise.

Satyabhamabai v. *Ganesh Balkrishna*[1], followed.

In the Bombay Presidency under Hindu law an adopted son is entitled on partition to a one-fourth of the share of the after-born son, and no distinction is drawn in the case of Sudras.

Giriapa v. *Ningapa*[2], followed.

Perrazu v. *Subbarayadu*[3], distinguished.

THIS was an appeal against the decision of J. N. Bhatt, First Class Subordinate Judge at Thana.

Suit for partition.

The suit property originally belonged to defendant No. 1. He had three wives, defendants Nos. 3, 4 and 5. Defendant No. 1 having no natural born son took the plaintiff in adoption sometime in February 1911. Subsequent to the adoption defendant No. 5 bore him a son (defendant No. 2). On defendant No. 1 asserting that he was in exclusive possession of the joint property, the plaintiff filed a suit against the defendants for partition and separate possession of his one-half share in the joint property. Defendant No. 1 died on May 22, 1922, during the pendency of the suit.

The plaintiff, on February 5, 1923, applied for and obtained an adjournment for the purpose of negotiating an amicable settlement. The case was accordingly adjourned to March 13, 1923. On the latter date a compromise was arrived at between the parties and a draft agreement was signed. A fair copy of the agreement was prepared: but the plaintiff changed his mind and refused to sign it.

(1) (1904) 29 Bom. 13.

(2) (1892) 17 Bom. 100.

(3) (1921) L. R. 48 I. A. 280 : 44 Mad. 656

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On March 16, 1923, the plaintiff applied for the withdrawal of the suit and stated that he had resiled from the agreement as it was not acceptable to him. On the same day the defendants submitted to the Court the fair copy with the application that the adjustment arrived at between the parties as evidenced by the rough draft should be recorded and a decree passed in accordance therewith.

The trial Court on the evidence adduced before it held that the adjustment was proved and ordered the agreement to be recorded and given effect to.

The plaintiff appealed to the High Court.

CRUMP, J.:—The plaintiff filed this suit as the adopted son of Mahadu Dharmaji who was defendant No. 1 in the suit. Defendant No. 1 who died during the pendency of the suit had three wives, defendants Nos. 3, 4 and 5. Defendant No. 2 is the son of the deceased defendant No. 1 by defendant No. 5. Defendants Nos. 6, 7 and 8 are the daughters of defendant No. 1 by defendant No. 5. The suit was one for partition. Plaintiff claimed a share of one-half.

Defendant No. 4 alone filed a written statement. The main defence raised was that the adoption of plaintiff was not proved but it was also urged that plaintiff's share on the basis of the adoption would be 1/21 and not 1/2. Certain minor points were raised as to the details of the proposed partition.

The suit so far is in no way unusual but certain points have arisen in consequence of the course followed in the lower Court. Further it is conceded that defendant No. 2 was born after the date of the alleged adoption, and this circumstance has given rise to some argument as to the proper division of the property in such a case.

The first point is in substance a question of procedure. On February 5, 1923, plaintiff and some of the defendants moved for an adjournment with a view to a compromise: the case stood over till March 13 and on that date the following entry appears in the Roznama:

"The case is adjourned as there is a likelihood of a compromise being made between the parties."

On March 14 there is the following note:

"Compromise has not been effected up till now and so the case is adjourned to 16/3."

On March 16 plaintiff put in an application stating that he desired to withdraw the suit. Defendants' pleader objected to the proposed withdrawal on the ground that there had been an adjustment of the suit.

The trial Court held that the adjustment was proved; that plaintiff could withdraw if he wished, but that his withdrawal would not deprive the Court of jurisdiction to enquire into and record the compromise, and to determine the other issues in the suit.

The first question is one of facts: "Was there any concluded agreement between the parties". That there is a document embodying certain terms is not disputed. It is Exhibit 48 in the suit. Nor is it disputed that it is signed by the parties. It is dated March 13. There was an enquiry by the Court as to this document. Mr. Patel, the defendants' pleader, gave evidence. He stated that the parties consented to the terms contained in this document on March 13 and that it was signed by them in token of their consent. There is nothing whatever on the other side, except the argument which is sought to be based on the entry in the Roznama of March 14 which is set out above. That entry means no more than that the parties then before the Court were not at that time at one as to the compromise.

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It does not mean that there was no compromise on March 13. Upon this question of fact the decision of the trial Court is correct.

The facts therefore stand thus. On March 13, plaintiff agreed to the terms contained in Exhibit 48. He then changed his mind, and endeavoured to withdraw the suit on March 16. It is argued that a plaintiff can at any time withdraw a suit and Order XXIII, Rule 1, clause (1) is relied upon. As a general proposition that is so, but is it so in the special circumstances of this case? It would clearly be most inequitable that a party should be allowed to defeat a compromise by such a device as this, and apart from the compromise I should be prepared to hold that in the special circumstances of this case defendants' claim cannot in this manner be frustrated.

The terms of Order XXIII, Rule 3, are imperative. The Court if satisfied that the suit has been compromised is bound to pass a decree in accordance with the terms of the compromise. The special procedure there laid down is not affected by the general provisions of Order XXIII, Rule 1. But it is argued here that the terms embodied in Exhibit 48 are not such as to adjust the suit wholly or in part. Therefore no decree could be passed on those terms. That is the test laid down in *Muhammad Zahur* v. *Cheda Lal*[1] as to section 375 of the Code of 1882, and on the words of Rule 3, which to this extent is identical with section 375, I agree with deference that the test is correctly stated. But if it is applied here is it correct to say that no decree could have been made in terms of Exhibit 48? There could at least have been a decree that plaintiff was the validly adopted son of defendant No. 1. But after the compromise was recorded by the Court plaintiff again withdrew from the suit (see Exhibit 50). His first intimation (Exhibit 42) was

[1] (1891) 14 All. 141.

apparently no more than a threat for he continued to take part in the proceedings up to April 13 on which date the compromise was recorded by the Court. The Court clearly could not have passed a complete decree on that date and it would be difficult to hold that anything in Order XXIII, Rule (3), could deprive plaintiff of his right to withdraw after all the proceedings required by that rule were at an end.

But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another [Order XXIII, Rule 1 (4)]. Were procedure by counter-claim in force outside Bombay the position would be clear enough. There would be a counter-claim by defendant No. 4 for her share, and the defendant in a counter-claim is a plaintiff, and a counter-claim cannot be defeated by the withdrawal of the plaintiff in the suit. That is the true position though it is obscured by technical differences in procedure. And it would have been open to the Court to make defendant No. 4 a plaintiff in which case plaintiff's withdrawal would have been without significance. Upon this point reference may be made to *Edulji Muncherji Wacha* v. *Vullebhoy Khanbhoy*[1]. That was a suit by the plaintiff against twelve persons who were his partners. Plaintiff settled with most of these persons, and desired to withdraw. Two of the defendants objected, and the Court made them plaintiffs and proceeded with the suit. Were it necessary it would be within our powers to make defendant No. 4 a plaintiff now. But that a plaintiff cannot always and in all circumstances withdraw is a proposition which is not

[1] (1883) 7 Bom. 167.

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without authority. In *Satyabhamabai* v. *Ganesh Balkrishna*[1] the facts were shortly as follows: Plaintiff sued for partition; defendants Nos. 7, 8 and 9 were widows of deceased co-parceners. It was agreed between plaintiff and these defendants that they should receive the shares to which their deceased husbands were entitled. Plaintiff then applied for leave to withdraw with liberty to bring a fresh suit. This was refused and a decree was made in accordance with the agreement. In first appeal plaintiff again applied for leave to withdraw and again leave was refused. Plaintiff thereupon withdrew unconditionally, the Court held that the result was that the decree of the trial Court must be set aside. In dealing with this point in second appeal Jenkins C. J. said (p. 18):

"It appears to us clear that when in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession, afterwards to annul its effect by withdrawing the suit in the appellate Court."

In this case defendants Nos. 3, 4 and 5 have no independent right to claim a share. Under Hindu law a wife can claim a share only on a partition between her husband and her son. These defendants have by this suit acquired that right and the terms of the compromise (Exhibit 48, para. 6) plainly concede it. Therefore, though the circumstances are not identical, this case falls within the principle enunciated by Jenkins C. J. in *Satyabhamabai* v. *Ganesh Balkrishna*[1].

Upon these grounds I am of opinion that the technical objection raised by plaintiff should not be allowed to prevail, and the further points arising in the appeal must be considered.

The points which thus arise for decision are?

(*a*) What share should plaintiff get on a partition?

[1] (1904) 29 Bom. 13.

(*b*) What share should defendants Nos. 3, 4 and 5 get?

(*c*) How is the share of the deceased defendant No. 1 to be distributed?

Upon the first point it is argued that the parties are Sudras, and that in the case of Sudras the adopted son and the after-born son take equal shares. Reliance is placed upon the decision of the Privy Council in *Perrazu* v. *Subbarayadu*[1]. No doubt this case is an authority for holding that in Madras and in Bengal among Sudras the rule is that for which the appellant's counsel contends. But the question of fact here has not been determined. The parties are "Agris" by caste, and it cannot be assumed that Agris are Sudras. The point was never taken in the lower Court. The parties were content to leave the determination of their shares in the hands of the Court, without any information upon this point. We could no doubt raise an issue and remand it to the lower Court for determination but in the view of the law which commends itself to me it is unnecessary to do so. Assuming that the parties here are Sudras ought we to apply to this Presidency the rule which their Lordships of the Privy Council have laid down as prevailing in the Madras and Bengal Presidencies? No doubt Hindu law as interpreted in this Presidency recognizes that in certain cases the rule varies according as the parties belong to the twice born classes, or to the Sudra class. But upon the point before us no such distinction has ever yet been suggested, much less recognized. The leading case on this side of India is *Giriapa* v. *Ningapa*[2]. In that case the parties were apparently Lingayats who are classed as Sudras by the decisions of this Court. It was held there that the share of the adopted son is one-fourth of the share of the after-born son. That has always been the rule. Indeed it is stated in Steele's work on Hindu

(1) (1921) L. R. 48 I. A. 280: 44 Mad. 656. (2) (1892) 17 Bom. 100.

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Law and Customs as far back as 1868 that there is no exception to the rule in the case of Sudras (p. 47). Now the *ratio decidendi* in the case of *Perrazu* v. *Subbarayadu*[1] was stated as follows at pp. 299-300 of the report :—

"The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras.....It also appears to their Lordships that the rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara."

In this Presidency where the rule of the Dattaka Chandrika upon the question at issue has never been followed, for no case, and no kind of judicial or other pronouncement is forthcoming, (and as I have said the leading case is against it), ought we to accept the rule upon the authority of the Dattaka Chandrika alone? In my opinion we should err if we did so. The authority of the Dattaka Chandrika has never been placed so high in Western India as in Bengal and Madras. [*Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma*[2]; *Waman* v. *Krishnaji*.[3]] The case is one where the principle of *stare decisis* should be maintained.

The remaining points present no difficulty. Three wives take equal shares with the father and the son and the adopted son gets a share equivalent to one-fourth of the son's share. The arithemetical result is that plaintiff gets 1/21 and each of the other sharers 4/21. The inheritance as regards the share of the deceased must be in the same proportion. No other result is logically possible.

[1] (1921) L. R. 48 I. A. 280; 44 Mad. 656.
[2] (1899) L. R. 26 I. A. 113 : 22 Mad. 398.
[3] (1889) 14 Bom. 249.

I would therefore confirm the decree and dismiss the appeal with costs. The cross-objections were not pressed and must also be dismissed with costs.

COYAJEE, J.:—I am of the same opinion.

The facts of this case are sufficiently set out in the judgment of my learned colleague. The plaintiff claiming to be the adopted son of Mahadu (defendant No. 1) has brought this suit to obtain by partition his share in the joint family properties. The effect of such partition would be to break up the joint family estate out of which Mahadu's wives (defendants Nos. 3, 4 and 5) had a right to be maintained. And therefore one result of this action is that each of them becomes entitled to claim a share equal to that of a son, and to enjoy that share separately. On that footing, the 4th defendant Mahadibai contended that plaintiff was entitled only to a 1/21st part of the family estate. At the date of the institution of the suit the bulk of the estate was, it would seem, in Mahadu's possession. While the suit was in progress Mahadu died. Plaintiff, who was the sole surviving adult male member of the family, took possession of the immoveable properties; and on March 16, 1923, he applied to the Court in these terms:—"Almost all the ornaments on the person of my wife as well as ornaments on the person of the defendant's wife and cash in this suit have been secured possession of by the defendant.....but immoveable property, i.e., lands and houses have come into the plaintiff's possession on the death of the plaintiff's adoptive father. Under such circumstances the plaintiff does not think it desirable to proceed with the partition suit. Therefore the plaintiff makes this application to withdraw this suit" (Exhibit 42). The defendants protested that the suit had already been adjusted by a lawful agreement and that therefore it was no longer open to the plaintiff to withdraw it. On these contentions the

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trial Judge framed appropriate issues, and on the evidence adduced before him held that the suit had been adjusted on March 13. He accordingly directed that the agreement should be recorded and given effect to. In my opinion his conclusions and also his procedure were correct. Here was a suit for partition; the defendants disputed the plaintiff's adoption and they further contended that certain properties which were in the plaintiff's possession belonged to their family; on March 13 the parties settled their differences by making mutual concessions; the settlement was evidenced by a writing (Exhibit 48) signed by the parties in token of their consent; the document contained certain terms relating to the subject-matter of the suit; and the terms were such as could be embodied in a declaratory decree—although not in such a decree as might completely dispose of the suit. The Court had therefore jurisdiction to give effect to the agreement (Order XXIII, Rule 3). A plaintiff denying such agreement or seeking to recede from it cannot deprive the Court of such power by claiming to withdraw the suit.

By this agreement, Exhibit 48, which was in the form of an applica ion to the Court, the parties settled all their disputes and agreed that the determination of their respective shares in accordance with law should be made by the Court and then a decree should be obtained in terms of that document. On behalf of the appellant (plaintiff) it was contended before us that as the agreement itself did not specify the extent of the shares but left its determination in accordance with law to the Court, there was no adjustment of the suit within the provisions of Order XXIII, Rule 3, and that therefore it was competent to him to withdraw the suit. I am unable to accept this contention. In the first place, this was a suit of a special nature. "It is the right of every defendant in a partition suit to ask to have his

own share divided off and given to him.....A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and...is clearly entitled to have his own share ascertained and partitioned". (*Shivmurteppa* v. *Virappa*[1].) That being so, the plaintiff cannot withdraw a suit of that character as a matter of course. If he desires to withdraw, the defendant claiming a share may be made a plaintiff and he might apply to have the plaint amended so as to make the former plaintiff a defendant (*Edulji Muncherji Wacha* v. *Vullebhoy Khanbhoy*[2]). Moreover, this particular case falls within the principle enunciated by Jenkins C. J. in *Satyabhamabai* v. *Ganesh Balkrishna*[3] and referred to in the judgment of my learned colleague. In my opinion the right of a plaintiff to withdraw his suit, as affirmed in Order XXIII, Rule 1 sub-rule (1), is not absolute in all cases and may be controlled by rights existing in other parties to the suit.

As regards the extent of the shares to which the different parties to this suit are entitled, the decision of the lower Court is right. It is contended before us that the parties are Sudras and that therefore the plaintiff is entitled to a share equal to that of the 2nd defendant. This argument is based on the assumption that the parties are Sudras. No such contention was raised before the trial Court and the materials necessary for a determination of the question are therefore wanting. The parties are admittedly "Agris"; and there is reason to believe that "Agris" claim to be Kshatriyas. But however that may be, the accepted rule in this Presidency is that both in the districts governed by the Mitakshara and in those specially under the authority of the Mayukha, the right of the adopted son when there is

[1] (1899) 24 Bom. 128 at p. 130. [2] (1883) 7 Bom. 167.

[3] (1904) 29 Bom. 13 at p. 18.

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an after-born son, extends to a fifth of the father's estate. It was so held by Telang J., on a review of the authorities, in *Giriapa* v. *Ningapa*[1], and it is not shown that this Court has applied a different rule where the parties are Sudras. Reliance was, however, placed on the decision of the Privy Council in *Perrazu* v. *Subbarayadu*[2]. The question there was whether in the Sudra caste in the Madras Presidency an adopted son shares equally with an after-born son on partition of the family property. "The question", their Lordships observe (p. 288), "is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text". Their Lordships examined the reported cases in that Presidency on the subject and concluded thus (p. 299): "The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras". We have no reason to believe that the rule propounded in paras. 29 and 32 of section V of the Dattaka Chandrika has been so accepted and acted upon in this Presidency; and there is therefore no justification for holding that the decision in *Giriappa's case*[1] is not applicable to the parties to this suit even if they were Sudras.

For these reasons I agree in confirming the decree of the lower Court.

Decree confirmed.

R. R.

[1] (1892) 17 Bom. 100. [2] (1921) L. R. 48 I. A. 280 : 44 Mad. 656.