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settled, and no qualification of the natural inference that, whoever is the creditor shall be paid, when the condition is performed by the ascertainment of a balance in favour of the claimant."

If, then, the acknowledgment, which in this case was made before the limitation period expired, implies an unconditional promise to pay, I can see no reason why it should not form the basis of a suit. In any event the only penalty which could fall on the plaintiff would be to have to amend his plaint so as to implead the previous transactions. It is clear, therefore, that the decision in *Shankar v. Mukta*⁽¹⁾ having been overruled in effect by the decision in *Maniram Seth v. Seth Rupchand*⁽²⁾, the plaintiff in this case must be entitled to a decree for Rs. 90 with interest at six per cent. from the 29th June 1917 to 29th June 1920, and the costs of the suit. The amount to be paid in two annual instalments, the first to be paid within three months from the date these proceedings are returned to the lower Court. The defendant to pay the costs of the Rule.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

⁽¹⁾ (1896) 22 Bom. 513.

⁽²⁾ (1906) 33 Cal. 1047.

APPELLATE CIVIL.

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

March 31.

DHULABHAI DABHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS
v. LALA DHULA AND ANOTHER, HEIRS OF THE DECEASED DHULA
RAMA (ORIGINAL DEFENDANTS), RESPONDENTS*.

*Hindu law—Joint family—Co-parceners—Sale of his share by a co-parcener
—Suit for partition by the purchaser—Maintainability of suit.*

* Second Appeal No. 158 of 1920.

(With Second Appeal No. 862 of 1920.)

When a stranger purchases a particular portion of joint family property from one of the co-parceners in a joint family, he is entitled to file a suit against the other members of the family for partition, and on partition, if possible, the property which he has purchased as belonging to a certain co-parcener should be given to him as his share.

Panchurang Anandram v. Bhaskar Shadashiv⁽¹⁾ and *Udaram Sitaram v. Kanu Panduji*⁽²⁾, followed.

SECOND Appeal against the decision of R. S. Broomfield, District Judge of Ahmedabad, confirming the decree passed by R. D. Pandya, Subordinate Judge at Borsad.

The facts are fully stated in the judgment.

G. N. Thakor, for the appellants.

A. G. Desai, for respondent No. 1.

MACLEOD, C. J.:—One Gema was the owner of certain property which he had mortgaged to one Babashahi. Gema died leaving three sons Dabhai, Gokul and Hemta. Dabhai died leaving two sons Dhula and Desai. One Dhula Rama paid off the two mortgages created by Gema, and in consideration of this Gokul and Hemta sold to him a certain plot of land which in these proceedings is referred to as lot A. That was in 1908. Then in 1914 the sons of Dabhai filed Suit No. 239 of 1914 to recover by partition separate or joint possession of $\frac{1}{3}$ rd share in lot A. Subsequently Dhula Rama filed Suit No. 386 of 1914 to recover his share of the whole of the family property by partition. It will not be necessary to refer to the course which the trial of these two suits took. But on the 4th August 1919 judgment was passed by the District Judge in two First Appeals from the judgments of the lower Court in these two original suits. The result of that judgment was that Suit No. 239 of 1914 was dismissed, and in Suit No. 386 of 1914 partition was decreed,

(1) (1874) 11 Bom. H. C. 72.

(2) (1875) 11 Bom. H. C. 76.

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lot A which was estimated in value at $\frac{2}{3}$ rds of the family property being allotted to the plaintiff in that suit, the remainder of the property being given to Dhula and Desai Dabhai as their $\frac{1}{3}$ rd share.

It has been urged that Dhula Rama as the purchaser of lot A from two of the co-parceners had no right to file a suit for partition of the whole property. But that question was decided by two decisions of this Court in *Pandurang Anandray v. Bhaskar Shadashiv*⁽¹⁾ and in *Udaram Sitaram v. Ranu Panduji*⁽²⁾. It appears certain from those two decisions that if an outsider purchases a particular portion of joint family property from one of the co-parceners, he is entitled to file a suit against the other members of the family for partition, and, on partition, if possible, the property which he has purchased as belonging to a certain co-parcener should be given to him as his share. Therefore it is quite clear that Dhula Rama's suit was a perfectly good suit to partition the family property, while the suit of Dhula and Desai Dabhai to recover by partition from the heirs of Dhula Rama either separate or joint possession of $\frac{1}{3}$ rd share of lot A was entirely misconceived. Really the only question which arises is whether the partition which was effected by the District Judge was a fair and equitable partition. He has valued lot A at $\frac{2}{3}$ rds of the whole of the family property and awarded it to the sons of Dhula Rama.

It was contended that there was a well in lot A, and that a well in joint family property was indivisible, therefore in some way the sons of Dabhai should be allowed a share in the well. But whatever the law may be, this question was never taken in the lower Courts. The only ground upon which the sons of Dabhai objected to the valuation and the method of partition was that the land in lot A was not properly

⁽¹⁾ (1874) 11 Bom. H. C. 72.

⁽²⁾ (1875) 11 Bom. H. C. 76.

valued at Rs. 992. The land of that lot was worth Rs. 2,000 as it was the best land and had a well in the field, and therefore in some way they should be given a share in the well. The result then is, as very often happens, that a question of law is raised in Second Appeal, although the evidence upon which alone that question of law could be decided has not been led in the lower Court. We do not know the comparative situations of the various items of the family property, and it is not possible to say whether it would be any use to give the plaintiffs, the sons of Dabhai, the rights of taking water from the well in lot A; nor can it be said that we have the materials to satisfy us that they should be given $\frac{1}{3}$ rd of lot A, as that would involve partition of each item of the joint family property amongst the claimants. It seems to us really that they are seeking in Second Appeal to set aside the partition which has been made by the District Judge on a ground which cannot be sustained. The District Judge has partitioned the family property in the only way in which it could be partitioned. He has taken the value of each lot, and he has increased the value of lot A by Rs. 500, the value of the trees, which Dhula Rama had sold, and finds the value of lot A to be Rs. 1,492, which is practically $\frac{1}{3}$ rd of the whole of the family property, and awards the rest of the property to the sons of Dabhai. That seems to be a perfectly fair decision. These appeals are dismissed with costs.

Decrees confirmed.

J. G. R.

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