the place of the former judgment of the Lower Appellate Court, this being equivalent to a withdrawal of the first judgment. It was true that the High Court could not have overruled the former judgment on the facts, nor could they have substituted a judgment of their own. But, as the second finding stood exactly on the same footing as a finding in the District Judge's first judgment, no other objection could be taken to it than such as could be taken under Chapter XLII of the Code, on a second appeal, under sections 584 and 585.

Their Lordships intimated that the power of the High Court to remand for further consideration of the evidence was limited to, and defined by, the Code; that the second or revised judgment of the District Judge had been irregularly obtained, and had not been obtained upon an order authorized by any one of the sections 562 to 567 of the Code; and that the High Court had done right at last in rejecting it.

The petition must be rejected on that ground. On a further objection that the matter could hardly be considered the subject of a civil suit, it was observed that there was a question of emoluments, which could be preceded by a question of ritual without being barred by it.

Petition rejected.

Solicitors for the petitioners :—Messrs. *Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

RAJARAM (PLAINTIFF), APPELLANT,

v.

KRISHNASAMI AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

1892. October 3.

Transfer of Property Act—Act IV of 1882, *s.* 3—*Constructive notice—Notice of a deed, notice of its contents—Right of pre-emption reserved in family partition deed—Covenant by guardian of infant coparcener—Tender of price.*

The plaintiff and his step-mother, as guardian of her son, defendant No. 1, then an infant, made a division of the family property under a deed of partition by which

* Second Appeal No. 1820 of 1891.

RAJARAM v. KRISHNASAMI.

inter alia a house was divided: the deed contained a covenant that if either coparcener should desire to sell his share of the house, the other should have the right of pre-emption. Defendant No. 1, without the knowledge of the plaintiff, sold his share of the house to defendant No. 3 for Rs. 130 under a sale-deed which referred to the deed of partition. The plaintiff now sued to enforce his right of partition and in the course of the suit offered to pay Rs. 130:

Held, (1) that the purchaser had constructive notice of the covenant in the deed of partition;

(2) that the covenant was not invalid and that it was unnecessary for the plaintiff to prove tender by him of the purchase-money before suit.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 105 of 1891, reversing the decree of G. Ramaswami Ayyar, District Munsif of Tanjore, in original suit No. 394 of 1889.

Suit to enforce the plaintiff's right of pre-emption. Plaintiff and defendant No. 1 were half-brothers. In 1878 a partition of the family property was made between the plaintiff and the mother and guardian of defendant No. 1 who acted on his behalf. The deed of partition contained the following provision:

"If either of us were to mortgage, hypothecate, sell or other-"wise dispose of the said house including the nanjah land, such a "disposition shall be made only between us two; or one of us "may, with the consent of the other, make it to a stranger."

Defendant No. 1 sold part of a house, forming a portion of the family property which fell to his share on the above partition, to defendant No. 3 under a sale-deed, dated 22nd August 1889, which recited the fact that the house was comprised in the deed of partition. The plaintiff now sued as above praying for a decree that possession of the house be delivered to him on his paying such price as the Court might fix. In the course of the suit the plaintiff offered to pay Rs. 130 which was the consideration paid by defendant No. 3 on the sale.

The District Munsif passed a decree as prayed adopting the valuation of Rs. 130. The Subordinate Judge reversed his decree, holding that the plaintiff had purchased *bonâ fide* without notice of the covenant in the deed of partition.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Ramachandra Ayyar for respondent No. 2.

JUDGMENT.—The only question for determination is whether the defendant No. 3 took with notice of the plaintiff's right of

pre-emption and of the necessity of his consent. The partition deed was the first defendant's deed of title. By the partition he obtained a right to the specific portion of the house which he conveyed to the defendant No. 3. As remarked by Jessel, Master of the Rolls, in *Patman* v. *Harland*(1), constructive notice of a deed is constructive notice of its contents, provided that the deed is a deed relating to the title and forming part of the chain of title. *Jones* v. *Smith*(2), which is relied on by the respondent, was referred to and it was held that that class of cases has no bearing at all on a case where the vendee knows that the deed of which he has notice is a deed affecting the land, and the question as to the extent to which it does affect the land can be ascertained only by looking at the deed itself. The third defendant's attention was drawn by the sale-deed to the deed of partition, and his omission to ascertain its contents must, with reference to the principle indicated in the remarks of the Master of the Rolls in the above case, be construed as wilful abstention from an inquiry which he ought to have made.

With reference to the question of tender, we observe that the plaintiff expressed his readiness to pay the price fixed by the Court and that he offered to pay the Rs. 130 paid by third defendant to first defendant. We cannot, therefore, concur with the opinion of the Subordinate Judge that the absence of tender deprived appellant of his right of pre-emption.

As for the contention of the respondents' pleader that the Subordinate Judge recorded no finding on the first issue,* we observe that this point was not pressed upon him, although it was taken in the memorandum of appeal. Both Courts found that the covenant was beneficial to both parties, and we cannot, therefore, allow the contention that the covenant was not binding on first defendant because concluded by his guardian. We cannot adopt the suggestion that the covenant is binding only on the guardian, and it is clearly not in contravention of the rule against perpetuity.

The decree of the Lower Appellate Court is reversed and that of the District Munsif restored with costs in this and the Lower Appellate Court.

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(1) L.R., 17 Ch. D., 353. (2) 1 Hare, 43.

* "Whether the alienation made by defendant No. 1 to defendant No. 3 was made with the plaintiff's consent within the meaning of the terms alluded to in the pleadings?"