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Per Curiam.—At the date when the plaintiff brought this suit he had no registered certificate of sale, and, therefore, no right of action. The suit should, therefore, have been dismissed. The plaintiff subsequently obtained a certificate, and registered it. This certificate may, perhaps, enable him to bring another action, but we think that the Assistant Judge has rightly held that it could not be admitted in evidence in the present suit, which was brought before the certificate came into existence. On this ground the decree is confirmed with costs.

Decree affirmed.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

BA'BA'JI PARSHRAM (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'SHIBA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

November 18.

Hindu law—Partition—Effect of an unexecuted decree for partition—Agreement to divide.

Where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is not of itself sufficient to effect a partition. Nor is a direction to divide in a decree—which in principle is not distinguishable from a material agreement to divide—more than an inchoate partition insufficient to change the character of the property, which continues a joint estate until there has been an actual partition by metes and bounds, or a division of title so as to give to each member thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty.

THIS was a second appeal from the decision of A. C. Watt, Judge of Ratnágiri, confirming the decree of Ráo Sáheb A. K. Kothâre, Subordinate Judge of Rájápur.

Shántárám Náráyan for the appellant.

Yashvant V. Athale for the respondent.

The facts of the case and arguments as well as the authorities are fully set forth in the following judgment of the Court delivered by

KEMBALL, J.—The facts connected with this case are somewhat peculiar: before coming, therefore, to the main question between the parties here, it may be well to set them forth.

* Second Appeal, No. 262 of 1879.

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In the year 1866 the present defendant brought a suit against his uncle Rámchandra Ananta, the father of the present plaintiff Káshibái, and a person who was stated to be a mortgagee, to obtain, as against the uncle, partition of an estate, which, as far as we can gather, consisted of the two *dharas* now in dispute, including a house and a shed, and, as against the second defendant, to redeem the plaintiff's share, after partition, in the said two *dharas*, on payment of half the mortgage-debt. The Subordinate Judge gave the plaintiff a decree as prayed for, but in appeal the Assistant Judge of Ratnágiri varied the decree in the following words :—

"I amend the decree, and direct that the estate be divided, and the plaintiff be declared entitled to the equity of redemption of one of the halves, and the defendant Rámchandra to the other. (2.) That either the plaintiff or defendant is entitled to redeem the whole mortgage on payment of Rs. 70. Whoever pays first, will be entitled to redeem and take the place of the mortgagee ; that is, the other may redeem from him on payment of the balance of the mortgage-debt unpaid (*i. e.* Rs. 35). If the mortgage is already redeemed by the defendant, then the plaintiff shall be entitled to redeem on paying Rs. 35 only to the defendant." This last sentence in the decree is explained apparently by a passage in the judgment immediately preceding the decree, as follows :—" I see it is stated that the defendant has redeemed the original mortgage, but this will make no difference in the decision."

The decree of the Assistant Judge was upheld in special appeal.

It appears, however, that the then defendant Rámchandra had not, in fact, redeemed the two *dharas* either before the institution or during the pendency of the suit, and it appears, moreover, that he died after the decree of the Court of first instance but before the decree of the first Appellate Court, the appeal having been preferred to the High Court by the mortgagee alone, on grounds which it is unnecessary to consider here. Eventually the plaintiff paid up the whole mortgage-debt, viz., Rs. 70, and took possession of both the *dharas*, and after this was done it is apparently admitted that the present plaintiff Káshibái, as heir and legal represen-

tative of her deceased father Rámchandra, applied to the Court to be permitted to pay to the mortgagee either the whole or half of the mortgage-debt, and then to take possession of either the whole or half of the estate. Why this application was absolutely rejected, we are not informed; but Káshibái, having failed to disturb the order of rejection in appeal, brought the present suit to compel the present defendant, Bábáji, the plaintiff in the former suit, to receive Rs. 35, and to make restitution to her of her late father's moiety in the said *dhara* lands. Bábáji contested the right of the plaintiff to have possession, on the ground that, no partition having been effected, the family continued joint, and that, consequently, on the death of plaintiff's father Rámchandra, he, Bábáji, had acquired, by right of survivorship, the entire interest in the property.

Both the lower Courts found in the plaintiff's favour, holding that the decree on the former suit effected a partition, and that, from the date of its being made, Rámchandra and Bábáji became divided co-parceners.

Two points have been urged before us on behalf of the appellant Bábáji, viz., that the decree in the suit of 1866 was not a decree for partition, and that even if it were, a decree directing a partition could not of itself alter the nature of the family property. After hearing the decrees of the Subordinate Judge and of the Assistant Judge already noted, we concurred in the view, taken in this case by the lower Courts, of the nature of the decree: the learned pleader for the appellant, therefore, proceeded to address himself to the second question, which is one of considerable importance and of some difficulty. This part of the appellant's case, which was very ably argued by Mr. Shántárám, put shortly, amounted to this, that as the decree itself did not confer on either the plaintiff or the first defendant (in the suit of 1866) a right to recover and enjoy any particular portion of the *dharas*, it could not be said to have (to use the language of their Lordships of the Privy Council in *Appovier* v. *Rámá Subha Ayan*[1]) "operated in law as a conversion of the character of the property and an alteration of the title of the family converting it from joint to separate ownership."

(1) 11 Moore's Ind. App. 75.

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It was contended that a decree for partition can be put upon no higher ground than a private agreement to divide, and that in considering the effect of either a decree or an agreement on the character of undivided property and joint enjoyment, the real question is one of intention, there being a clear distinction between a bare direction or agreement to divide joint and undivided property and a direction or agreement to divide and hold henceforth such property in certain defined shares.

We are unable to see any distinction in principle between a decree and an agreement for partition; the operation in law must be the same in either case, and we, consequently, come, though with considerable reluctance, to the conclusion that the plaintiff must of necessity fail in the present case.

The famous case of *Appovier* v. *Rámá*, noted above, is the great authority for the doctrine that where there is an agreement among members of an undivided family with regard to particular property to enjoy thenceforth such property in certain defined shares, such agreement operates to convert the joint tenancy of the undivided family into a tenancy in common, albeit there has been no actual division of the subject-matter, such division being claimable at any time by virtue of the separate right. And it was on this principle that the case of *Rám Joshi* v. *Lakshmibái*[1] had been decided by this Court some two years previously. But we know of no authority for the broader proposition of law that, where there is no indication of an intention to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to divide without more is of itself sufficient to effect a separation. Indeed, in the case of an agreement by mutual consent to a division, there is, we believe, in all the High Courts of India a complete unanimity of opinion to the contrary, though the only cases directly in point which have been cited to us are *Mt. Phooljhuree Kooer* v. *Rám Purshun Singh*[2] and *Ambika Dat* v. *Sukhmani Kuar*[3].

(1) 1 Bom. H. C. Rep. 189. (2) 17 Calc. W. R. 102.

(3) I. L. R. 1 All. 437.

With regard to the effect of a decree for partition generally on the *status* of a Hindu family, only one decision, strangely enough, bearing on the question could be pointed out to us at the bar, and we have since been able to discover but one other. Both of these cases are noticed, though in different parts of the work, in the learned digest edited by West and Bühler. The first is to be found in the volume of Madras Sadr Diváni Adálat decisions for 1855, appeal No. 66 of 1855, decided on the 5th September 1855. There the suit was instituted by a lady on behalf of her minor son for a share of family property. The Court of original jurisdiction decreed in the plaintiff's favour. Before, however, the appeal, which was preferred from the said decree, came on for hearing, the minor son died, and the defendant urged in support of his appeal that the child being dead the plaintiff was only entitled to maintenance. The Civil Judge upheld the decree of the Court of first instance in appeal, being further of opinion that the passing of the original decree constituted the minor son of the plaintiff a divided member, and that on his demise his mother, the plaintiff, was, as his heir, entitled to the share of the property originally sought to be recovered. The Sadr Court, in special appeal, passed the following judgment:—"The pandits of the Court of Sadr Adálat being present at the hearing of this appeal, have declared that as the decree of the Sadr Amín had not been carried into effect at the time of the demise of the plaintiff's son, he is to be considered, in accordance with the Hindu law, to have died as an undivided member." The other case is that of *Prawnkissen Mitter* v. *Srimutty Ramsundree Dossi*[1], decided on the 28th October 1842. The complainant's father had died, leaving two sons and a widow him surviving. A bill for a partition was filed, and it was decreed that the widow and her two sons were severally entitled to a third part of the ancestral property. The partition was never, in fact, made, and the family notwithstanding the decree continued to live jointly. The elder son died, leaving a son who succeeded to his third. This son died shortly after his father, and left a childless widow, the defendant, him surviving. This widow succeeded to her husband's third of the ancestral property. Upon the death of his mother the complainant

(1) 1 Fulton's Reports 110.

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filed a bill against his nephew's widow, and laid claim to the whole of his mother's third. Peel, C.J., (Grant and Seton, JJ., concurring) held that "no partition having been, in fact, made, the decree directing a partition has not altered the nature of the property, and it must be looked upon as undivided in its nature. We are inclined to think that the heirship must stand as at the time of the grandfather's death, and that the son and grandson's widow in this case are equally entitled."

The principle laid down in the leading case of *Appovier* v. *Rámá*[1] seems to have been applied to these earlier cases. The test being, not whether the property was actually divided or undivided property, but whether the character of undivided property and joint enjoyment has been taken away from the particular property intended to be dealt with: in other words, whether there has been a division of title so as to give to each member thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty.

Applying this principle to the present case, there is, we feel, nothing to support the conclusion arrived at by the lower Courts that the decree operated to change the character of the property. The direction that "the estate be divided" was, at best, but an inchoate partition which remained to become legal by an appropriation in execution of the respective shares.

We must, therefore, hold that Rámchandra Ananta died undivided; that being so, it follows, as a matter of course, that the present defendant is entitled to the whole estate by right of survivorship, and that plaintiff's claim to possession is bad.

It has been unnecessary for us to consider whether the mortgagee was rightly included in the suit of 1866, and we declined to entertain the objection raised at the eleventh hour that the subject of the present suit was *res judicata*.

We reverse the decrees of the Courts below; but, under the circumstances, direct that each party bear his or her own costs throughout.

Decree reversed.

(1) 11 Moo. I. A, 75.