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result from the discovery that the person in possession was entitled to equities against the vendor. The result, therefore, must be that the appeal must be allowed. The plaintiff will be entitled to a conveyance of the suit property from the 2nd defendant who has a registered sale deed from the 1st defendant. The plaintiff will be entitled to his costs throughout.

FAWCETT, J.:—I concur. I would also refer to the 3rd illustration to clause (*b*) of section 27 of the Specific Relief Act, which authoritatively declares the law in accordance with the case of *Daniels* v. *Davison*[a]:

"A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no enquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C."

Therefore the lower Courts were not justified in making the distinction upon which they dismissed the plaintiff's suit.

Decree reversed.

J. G. R.

[a] (1809) 16 Ves. (Jun.) 249.

APPELLATE CIVIL.

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

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September 20.

RAMCHANDRA AVADHUTRAO PATIL (ORIGINAL DEFENDANT NO. 3), APPELLANT *v.* TUKARAM BABAJI CHAUGULA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 1), RESPONDENTS*.

Hindu Law—Partition—Property left undivided at the time of partition—Presumption that there has been a complete partition both as to parties and property—Members hold the family property as tenants-in-common—Fact that a portion of family property is held by them as joint tenants must be proved like any other fact.

* Second Appeal No. 153 of 1919.

When once anything has occurred which effects a separation of the members of a joint Hindu family, they are to be considered as holding the joint family property as tenants-in-common ; and if it is sought to show that any portion of the family property is to be held by the members of the family as joint tenants and not tenants-in-common that fact must be proved like any other fact.

Gavrishankar Parabhuram v. *Atmaram Rajaram* [1], discussed.

Anandibai v. *Hari Suba Pai* [2] ; *Balabux Ladhuram* v. *Rukhmabai* [3], relied on.

SECOND appeal against the decision of J. H. Betigiri First Class Subordinate Judge, A. P., at Satara, reversing the decree passed by P. C. Divanji, Subordinate Judge at Tasgaon.

Suit for redemption.

The property in suit originally belonged to one Joti, who mortgaged it with possession with the defendants' ancestors in 1862.

On Joti's death his four sons, Keru, Babaji, Daji and Maruti divided the joint family property amongst themselves some forty years before ; the suit property, however, could not be divided as it remained in possession of the mortgagee.

In 1911-12, Maruti the youngest son of Joti died leaving him surviving his widow Kasa. The plaintiffs who were the grandsons of Joti sued on the 11th August 1915 to redeem and to recover possession of the plaint property alleging that it was a joint family property and that Kasa, Maruti's widow, had no interest in it.

Defendant No. 2 Kasa contended that the property in suit fell to her husband's share ; that the suit could not be maintained as she had paid the mortgage-debt on the 21st May 1915 and got the property into her possession.

(1) (1893) 18 Bom. 611.

(2) (1911) 35 Bom. 293. (3) (1903) L. R. 30 I. A. 130.

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On the 4th September 1915, defendant No. 2 sold the property to defendant No. 3.

The Subordinate Judge dismissed the suit holding that the property fell to the share of Maruti and that the plaintiffs had no interest in it except as reversioners.

On appeal the Subordinate Judge, A. P., reversed the decree on the ground that the property had remained joint and undivided at the time of the partition and that therefore the plaintiffs, after the death of Maruti, became sole owners of it under the ruling in *Gavrishankar Parabhuram* v. *Atmaram Rajaram* [1].

Defendant No. 3 appealed to the High Court.

K. H. Kelkar, for the appellants.

K. N. Koyaji, for respondents Nos. 1, 2, 4 to 6.

MACLEOD, C. J.:—Some forty years ago four brothers, sons of one Joti, who were at that time joint, partitioned their family property. One item in the family property had been mortgaged with possession, and, therefore, was not divided. Maruti was the surviving brother of the four, and he died about 1911-12 leaving a widow Kasa. The plaintiffs claiming as heirs of Maruti have filed this suit to redeem the mortgage. In their plaint they stated that Maruti separated during his father's life-time after taking his share of the family property, and his widow Kasa had, therefore, no interest in the suit property. It has been proved that the plaintiffs deposited Rs. 340 with the 1st defendant mortgagee, but as he insisted upon Kasa being a party to the redemption, the negotiations fell through, and the plaintiffs recovered their Rs. 340.

Then defendant No. 1 allowed Kasa to redeem the property, which no doubt was most reprehensible,

(1) (1893) 18 Bom. 611.

considering the attitude he had taken up when the plaintiffs wanted to redeem. That was on the 21st May 1915. The plaintiffs filed this suit on the 11th August 1915, and, on the 4th September 1915, defendant No. 2 sold the property to defendant No. 3 who admitted that he knew that the plaintiffs had deposited the mortgage money with the 1st defendant. In this curious state of affairs the trial Court dismissed the suit. But in appeal this decree was set aside, and it was held that the plaintiffs were the owners of the plaint property; that they were already in possession of the plaint house; and that they should recover possession of the plaint land without paying anything to any of the defendants for the mortgage debt in Exhibit 34, which was the deed of mortgage.

The learned Judge was of opinion that the sons of Joti remained joint with regard to this mortgage property. He thought he was following the ruling in *Gavrishankar Parabhuram* v. *Atmaram Rajaram* [1]. In that case the plaintiffs sued to recover their half share of the produce of a certain field which they alleged was left undivided at the time of partition. It was held that the suit could not lie to recover a portion of the produce, as the suit was not for partition of the field. But the learned Judge relies upon the dictum of Sir Charles Sargent, which does not appear to be supported by any authority, and was also, with all due respect, obiter in the case before him. The learned Chief Justice said: "The circumstance that there had been a partition in 1876-77 would not, in the absence of any special agreement between the parties, alter their rights as to the property still undivided, as to which they would continue to stand to one another in the relation of members of an undivided Hindu family, and no such agreement amounting to a partition of the

[1] (1893) 18 Bom. 611.

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fields in question is alleged by the plaintiffs." But it does not appear whether the learned Judges considered how the title to the property would be affected by a death amongst members of the family before partition; and whether the members of the family after the partition held the property in that suit as tenants-in-common or as joint tenants, it would equally be the case that one of them could not sue for half the produce of the property, but could only sue for partition.

But the real principle seems to be as laid down in *Anandibai* v. *Hari Suba Pai*[1], that if it is proved that there has been a breach in the state of union amongst the members of a Hindu joint family, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, and the case of *Balabux Ladhuram* v. *Rukhmabai*[2] was referred to where it was held by the Privy Council that there was no presumption, when one coparcener separated from the others that the latter remained united, but that the agreement to remain united or to reunite "must be proved like any other fact." Although that dictum only refers to the disunion of members of a joint family, it applies equally well to the partition of joint family property which will result from such disunion. So that when once anything has occurred which effects a separation of the members of a joint family, they are to be considered as holding the joint family property as tenants-in-common; and if it is sought to show that any portion of the joint family property is to be held by the members of the family as joint tenants and not as tenants-in-common, that must be proved like any other fact.

(1) (1911) 35 Bom. 293. (2) (1903) L. R. 30 I. A. 130.

Therefore it would have to be proved in this case that when the partition took place forty years ago, the members of the family agreed that they should be joint with regard to this mortgaged property. There is no evidence whatever of that fact. Therefore the only presumption is that the members of the family at that time held this mortgaged property as tenants-in-common. The result would be that Kasa on Maruti's death had a widow's interest in her husband's share, and she would be entitled to redeem the whole mortgage, and then have a lien on the property to the extent of three-fourth of the mortgage money appertaining to the shares of the other members; and when the third defendant purchased the 2nd defendant's interest after the suit commenced, he could only purchase what the 2nd defendant possessed at that time. Therefore he is not entitled to consider himself as owner of the freehold free of all claims of the other members of the family to redeem with regard to their shares. I think, therefore, that the learned Judge was wrong in directing that the plaintiffs should recover possession of the plaint land without paying anything to any of the defendants. The defendant No. 3, however reprehensible his conduct may be, is entitled to stand in the shoes of the second defendant, and to recover Rs. 340 which admittedly was paid to redeem the mortgage. Therefore we alter the decree of the lower Court by directing that the plaintiffs should recover possession of the plaint land on paying Rs. 340 to the 3rd defendant within six months from the time the proceedings reach the lower Court and the plaintiffs are informed thereof. Each party to pay his own costs up to this Court and the appellant to get his costs of the appeal from the plaintiffs

Decree altered.

J. G. R.