notice of motion was filed on August 25 more than a month before the period of limitation expired, and it was not suggested in correspondence that time was of importance, or that it was necessary to appear in Court before September 30, 1922, if the application was not to be time-barred. However that may be, I am prepared to hold that when an application is to be made to the Court, it commences to be made when a notice of motion is first filed in the proper office of the Court.

The appeal, therefore, succeeds, and the application must go back to the trial Court to be decided on the merits.

The appellant should get his costs of the appeal.

Costs in the lower Court to be costs in the application.

Solicitors for appellant: Messrs. *Judah and Solomon.*

Solicitors for respondent: Messrs. *Payne & Co.*

Appeal allowed.

G. G. N.

APPELLATE CIVIL.

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

1923. *February 23.*

DAGADU GOVIND BODAKE AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* SAKHUBAI NANA BODAKE (ORIGINAL PLAINTIFF), RESPONDENT*.

Hindu law—Partition—Division of joint property—A portion of property left undivided—Co-parceners are tenants-in-common with respect to property left undivided.

* Second Appeal No. 229 of 1922.

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Where co-parceners in a joint Hindu family come to partition and divide the joint property with the exception of a portion of it, they are, in absence of indication to the contrary, tenants-in-common with reference to the excepted property.

Gavrishankar Parabhuram v. *Atmaram Rajaram* [1] is overruled by *Girja Bai* v. *Sadashiv Dhundiraj* [2].

SECOND appeal from the decision of M. H. Wagle, First Class Subordinate Judge at Nasik, reversing the decree passed by L. C. Sheth, Second Class Subordinate Judge at Sinnar.

Suit to recover possession of property.

There was a joint Hindu family which consisted of three brothers, Nana (plaintiff's husband) and defendants Nos. 1 and 2. In or about the year 1906, the three brothers began to live and mess separately and divided a large portion of the joint property. At the partition three fields fell to Nana's share. Two fields Nos. 2 and 113 were left undivided. Nana died in 1914.

In 1920, the plaintiff sued to recover possession of Nana's three fields as also a third share in the two undivided fields.

The trial Court dismissed the suit on the ground that no partition was proved between the three brothers.

On appeal, the lower appellate Court held the partition proved. It, therefore, awarded the separate possession of Nana's three fields to the plaintiff and held that she was entitled to a third share in the two undivided fields.

Defendants appealed to the High Court.

D. A. Tuljapurkar, for the appellants.

D. R. Patwardhan, for the respondent.

(1) (1894) 18 Bom. 611. (2) (1916) L. R. 43 I. A. 151.

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DAGADU GOVIND *v.* SAKHUBAI.

MACLEOD, C. J. :—The plaintiff sued to obtain possession of the properties described in para. 1 of the plaint and for an injunction against the defendants, alleging that the lands were the ancestral property of her deceased husband Nana and his brothers, defendants Nos. 1 and 2; that they were divided after the family became separate and enjoyed separately by each member. The defendants contended that the lands were ancestral and jointly acquired; that they were in possession, and that there had been no partition as alleged by the plaintiff. It has been proved that there was a division of the greater part of the family property, and also that the three brothers commenced to live separate. That would indicate an intention of the members of the family to sever in interest. In *Ramalinga Annavi* v. *Narayana Annavi*[1], their Lordships said, after expressing disapproval of the argument that the joint family status was not dissevered until a decree for partition was passed, "this view is opposed to the law laid down in *Girja Bai* v. *Sadashiv Dhundiraj*[2] where it was held expressly, that under the law of the Mitakshara, to which the parties ... are subject, an unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness. This intention was clearly intimated to the co parceners when the plaintiff Narayana served on them the notice on July 30th, 1909. That notice effected a separation so far as his branch of the family was concerned, and no obligation rested on the joint family in respect of his sons' marriages".

If then a mere notice served upon the rest of the family by one of the members is sufficient to create a severance of interest, it is obvious, in this case, that the

[1] (1922) 45 Mad. 489 at p. 495. [2] (1916) L. R. 43 I. A. 151.

1923.

DAGADU GOVIND v. SAKHUBAI.

evidence which is referred to by the learned appellate Judge was sufficient to put an end to the joint family status. The fact, then, that two lands were left undivided would not affect the interests of the parties in these lands which would thenceforth be held by them as tenants-in-common and not as joint tenants.

We have been referred to the decision in *Gavrishankar Parabhuram* v. *Atmaram Rajaram*[1], where the Chief Justice said: "The circumstances 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 fields in question is alleged by the plaintiffs". With all respect I should say that the effect of the decision in that case was undoubtedly undermined by the decision of the Privy Council to which I have just referred. Once there is evidence sufficient to satisfy the Court that the parties intended to sever, then the joint family status is put an end to, and with regard to any of the property which had hitherto been joint and has not been divided by metes and bounds, there will have to be an express agreement between the parties that they should treat that property as belonging to them as joint tenants. They will then be joint tenants, not as members of the joint family which no longer exists but under a special agreement made after the severance. There is no evidence here of any such special agreement. The learned Judge thought the reasons given by the plaintiff for saying that these lands had been kept undivided were substantially correct. It would certainly require very strong evidence that properties held by the parties

(1) (1893) 18 Bom. 611.

as tenants-in-common at the date of the severance as the result of the severance were thereafter held as joint tenants. My opinion is that if that was attempted to be done, it would amount to a transfer of an interest in immoveable property. I think the decision of the First Class Subordinate Judge was right and the appeal must be dismissed with costs.

CRUMP, J.:—I agree that in the present case the decision of the First Class Subordinate Judge should be upheld. It has been found by him as a question of fact that there was a division of the family property, and that certain specific lands were allotted to the share of the plaintiff's husband. The only doubt which can be suggested is as to those lands which were left joint at this partition, and upon that point the decision in *Gavrishankar Parabhuram* v. *Atmaram Rajaram*[1] has been relied upon as showing that, in the absence of any special agreement, the members of the family would stand to one another as members of an undivided family after the date of partition. As to that I agree with the view expressed by my Lord the Chief Justice that the decision in the Privy Council in *Girja Bai* v. *Sadashiv Dhundiraj*[2] makes it difficult to accept the previous decision of this Court in its entirety. Once it is held that there has been partition, I should myself be inclined to hold that the presumption must be that as regards that portion of the estate which remained undivided, the members of the family would hold as tenants-in-common unless and until a special agreement to hold as joint tenants is proved. I agree, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

R. R.

[1] (1893) 18 Bom. 611.

[2] (1916) L. R. 43 I. A. 151