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NAVROJI PESTANJI v. MANSUKH JAYACHAND.

be paid by instalments the first of which has not yet become due." The Judge was of opinion that the defendant should not be required at once to pay the amount for which the decree had been passed.

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The circumstance of the debt having been ordered to be paid by instalments does not except the case from the operation of the proviso in Sec. 21 of Act XI. of 1865; and, if the application for a review of judgment be in the nature of an application for a new trial, the amount of the decree must be deposited.

NOTE.—"In suits tried under this act all decisions and orders of the Court shall be final ***** Provided also that it shall be competent to the Court, if it shall think fit, in any case not falling within the proviso last aforesaid, to grant a new trial, if notice of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision, and if the same be applied for at the next sitting of the Court; but no such new trial shall be granted where the party applying for the same is the defendant, or one of the defendants, unless he shall, with his notice of application, deposit in court the amount for which a decree shall have been passed against him, including the costs (if any) of the opposite party." Act XI. of 1865, Sec. 21.

Special Appeal No. 727 *of* 1867.

Feb. 10.

BA'BA'SHET bin GOVINDSHET *et al.* .....*Appellants.*

JIRSHET bin YESSHET *et al.* .....*Respondents.*

Suit for Partition—Onus Probandi—Khoti *estate.*

Where the plaintiffs sued for the partition of a *khoti* estate, alleging that they and the defendants were joint proprietors thereof, and where the defendants admitted that the estate was originally joint, but set up that a partition had taken place more than a hundred and fifty years ago :—

Held that the burden of proving that a partition had been made lay on the defendants; and that the mere distribution of lands and tenants, such as is usual in the South Konkan, while a *khoti* estate continues to be held in coparcenary, in no way established a formal partition.

THIS was a Special Appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge of the Konkan at Ratnágirí, in Appeal Suit No. 762 of 1866, confirming the decree of Raghunáth Ganesh, Munsif of Chiplun.

The plaintiffs sued to obtain partition of the *khoti* village

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BA'BA'SHET GOVINDSHET *et al.* *v.* JIRSHET YESSHET *et al.*

of Musalandi, in Táluká Anjanvel of the Ratnágirí collectorate, alleging that they and the defendants were descendants of the same common ancestor, and that, although the several sharers had each a certain portion of the village lands in dispute in their occupation, yet that no formal partition had taken place between them.

Some of the defendants put in no appearance. Those, who did, admitted that the estate was originally joint property, but pleaded that a partition had taken place more than a hundred and fifty years ago.

The Munsif of Chiplun held that the plaintiffs had not proved that the village was held in coparcenary; and he, therefore, rejected their claim.

The Acting Senior Assistant Judge took the same view in appeal. He recorded as follows:—"The defendant No. 3 states that a division of the property has already taken place; and the burden of proving such division would appear at first sight to be upon the defendants, because the plaintiffs cannot very well be expected to prove a negative. But the fact is, that if the plaintiffs had proved that the whole village is still held in common, they would have established a positive fact, and not merely a negative one, and when they had made out a *primâ facie* case as to the property being held in common, the Court might have properly called upon the defendants to produce their proof of the alleged partition. Therefore, the burden of proof is divided, but it rested with the plaintiffs in the first instance to show that the village was held in common. This they have not done." The Acting Senior Assistant Judge, therefore, confirmed the Munsif's decree, rejecting the plaintiff's claim.

The Appeal came on for hearing before TUCKER and WARDEN, JJ.

Shántárám Náráyaṇ, for the special appellants:—Both the lower courts have erroneously thrown the burden of proof upon the plaintiffs. They have proceeded to investigate the case upon a principle which is fundamentally erroneous. The plaintiffs alleged a joint holding—the normal state of a Hindú

family; while the defendants set up a division. The burden of proving an exceptional state of things lay on the party who set it up. A distribution of village lands and tenants among the shareholders is usual, and not at all inconsistent with a state of union.

PER CURIAM:—We think that the Assistant Judge and the Munsif have improperly cast on the plaintiffs the *onus* of proving that the village was held in common at the time the suit was instituted. The defendants admit that the *khoti* estate was originally joint, and that they and the plaintiffs originally held that estate in coparcenary; but they allege a partition more than one hundred and fifty years ago, and it was for them to have proved that partition. The fact that the plaintiffs and defendants have each a certain portion of the village lands in occupation, and that there has been a certain distribution of tenants among them, in no way proves that any formal partition of the *khoti* estate in the village has ever been actually made. It is the normal condition of a *khoti* estate held in coparcenary in the South Konkan that the parceners should be in occupation of particular portions: and this circumstance alone will not establish that any division of the land intended to be permanent has been made; and if it be shown in this case that there has been nothing more than a temporary allotment of lands and tenants, such as is usual while a *khoti* estate continues to be held in coparcenary, the plaintiffs will be entitled to the formal partition which they sue for.

We reverse the decrees of the Assistant Judge and the Munsif, and remand the suit to the court of first instance, in order that the defendants may be called upon to establish the partition which they allege, and that, if they fail to do so, a decree for partition may be made, in which the plaintiffs shall be assigned such shares as they may be shown to be entitled to.

Costs, including the costs of this Special Appeal, to be apportioned at the final decision.

Decree reversed and suit remanded.