pute. The Magistrate of the District, T. C. Hope, having doubted the legality of the Mámlatdar's procedure, referred the case for the consideration of the High Court.

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PER CURIAM (NEWTON and TUCKER, JJ.) :—The Court is of opinion that a Court authorised, under Bombay Act V. of 1864, to give immediate possession of lands and premises, has the power to direct the breaking open of a door of a house, when it may be necessary for the purpose of giving effect to its order.

Special Appeal No. 622 *of* 1867.

Oct. 9.

BA'LA'JI NA'RJI.....*Appellant.*
BA'BU DEVLI .....*Respondent.*

Mortgage—Redemption Suit—Failure to prove Sale—Proof—Presumption.

In a suit for redemption, in the absence of any proof of a mortgage by the plaintiff, the existence of such a transaction between the parties cannot be assumed, in consequence of the failure of the defendant to establish an alleged sale.

Very slight *primâ facie* proof on the part of the plaintiff would suffice to shift the entire burden of proof on the defendant, but in its absence a plaintiff seeking to redeem cannot be relieved of the burden.

THIS was a Special Appeal from the decision of C. B. Izon, Joint Judge of the Konkaṇ at Ratnágirí, in Appeal No. 615 of 1866, reversing the decree of the Munsif of Vengurlá.

The Special Appeal was heard before TUCKER and WARDEN, JJ.

Gaṇesh Hari Paṭvardhan and *Vishvanáth Govind Cholkar* for the special appellant.

Dhirajlál Mathurádás for the special respondent.

The facts sufficiently appear from the following judgment of the Court, delivered by

TUCKER, J. :—This was a suit by the plaintiff for the redemption of a particular field, which it was alleged had been mortgaged by the father of the plaintiff to the defendant for Rs. 5 in the year 1848.

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The defendant pleaded that the field had been absolutely sold to him by the plaintiff's father in 1847-48 for Rs. 15-8-0, but that the deed of sale had been stolen.

The Munsif held that, as there was no proof of the sale, the mortgage must be presumed, although there was no proof of it; and he decreed that the plaintiff should redeem on payment of Rs. 15-8-0.

The Joint Judge considered that there was no proof of either sale or mortgage, but that it was shown that the defendant had been in possession of the field between twenty and thirty years. He held, however, that the mortgage could not be presumed in the absence of any proof of it; and he, therefore, reversed the Munsif's decree, and awarded in favour of the defendant, throwing all costs on the plaintiff.

In special appeal it has been urged that, under the circumstances, the Joint Judge should have presumed the mortgage; and it was pointed out to us that in a similar case WARDEN and GIBBS, JJ., had ruled to this effect (*vide* S. A. 241 of 1867).

We may remark, with respect to the precedent which has been cited, that the Judges who made that decision have reviewed the judgment which they first delivered in the cause, and have come to the same conclusion which we have arrived at in the present case, namely, that in a suit for redemption, in the absence of any proof of a mortgage by a plaintiff, the existence of such a transaction between the parties cannot be assumed in consequence of the failure of a defendant to establish an alleged sale. It being the ordinary custom in this part of India that deeds creating mortgages should remain in the custody of the mortgagee alone, no counterpart being taken by the mortgagor, very slight *primâ facie* proof that a mortgage had been originally made would serve to shift the entire burden of proof on the defendant in cases of this character; but this *primâ facie* proof must be forthcoming, and in its absence a plaintiff seeking redemption cannot be relieved of the burden, which

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is imposed on all plaintiffs, of establishing the fact or facts out of which their claim to relief arises. The lower courts having found there was no proof of a mortgage, in this instance, the Joint Judge's decree must be affirmed, with costs on the special appellant.

Decree affirmed.

Oct. 12.

Regular Appeal No. 15 *of* 1867.

BHUJANGRA'V bin DAVALATRA'V GHORPADE, and ANNA' SA'HEB bin DAVALATRA'V GHORPADE .....*Appellants.*

MA'LOJIRA'V bin DAVALATRA'V GHORPADE...*Respondent.*

*Hindú Law—Family Custom—*Jáhágir*—Partibility of* Jáhágir*—Primogeniture—Rights of the Children of different Wives of the same Caste to inherit Ancestral Property.*

Where there is a plurality of wives equal in caste, the sons of each wife (not being the first wife) take precedence according to the dates of their respective births, and without reference to the dates of the marriages of their respective mothers.

Succession in consequence of primogeniture amongst Hindús in India seems to be the rule only in the case of large *zamindáris*, and estates which partake of the nature of principalities.

In estates to which the ordinary Hindú Law of inheritance administered in Western India applies, it is not competent to a father to dispose of their ancestral property to one son to the prejudice of the others.

THIS was an appeal from the decision of Arthur Bosanquet, Acting Judge of the District of Kaládgi, in Original Suit No. 2 of 1866.

The plaintiff, Bhujangráv, sued his half-brother, Málojiráv, for possession of the *jáhágir* of Gajendragad and certain moveable property left by their father, Davalatráv Ghorpade, who died on the 24th of July 1864, on the ground that he, the eldest-born son of his father, was entitled by Hindú Law, and the custom both of the country and the family, to succeed to the "*gádi*."

The defendant, Málojiráv, answered that, his mother having been married earlier than the mother of the plaintiff, he should