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 v.
 THE COLLEC-
 TOR OF
 RATNA'GIRI'.

The Bombay Act I. of 1865 was relied upon for him, but that does not appear to have made any difference in his rights. It may be that a *khot* is not, with reference to lands in his own occupation, a tenant within the definition (l) in Sec. 3, and probably the power in Sec. 38 does not extend to such land. There is no necessity that it should. The exercise of the power is not imperative, and if the rate of *khot's* profits has not been fixed for the lands in the *khot's* own occupation, it must be what was customary before the Survey, and may be realized under Reg. XVII. of 1827.

As to the objection that there was an agreement entered into by the *khot*, which ought to have been respected for the first year, we agree with the court below in thinking that it was not proved that there was such an agreement. The witnesses relied on for this were Nos. 38, 51, 52. No. 38 is the brother of the appellant, and one of the sharers in this *khot*-ship, and Nos. 51 and 52 are both *khots*. And all they say is that sharers never pay each other the profits on land in their private occupation. This may well be without there being any agreement, the land being occupied in such proportion that the result is the same as if each paid the profit, and it was then divided between them. We, therefore, think no ground has been shown for altering the decree of the court below, and that it should be confirmed with costs.

Decree confirmed with costs.

Feb. 2.

Special Appeal No. 514 of 1869.

NA'NA'BHA'I VALLABDHA'S *Appellant.*

NA'THA'BHA'I HARIBHA'I *Respondent.*

Partition—Suit not including whole of Claim of Plaintiff—Civ. Proc. Code, Sec. 7.

A member of an undivided family cannot sue his co-sharers for his share in a single undivided field, portion of the family property. He must sue for a general partition of all the property liable to partition.

THIS was a special appeal from the decision of M. H. Scott, Acting Assistant Judge at Ahmedâbâd, in Appeal Suit No. 72 of 1869, reversing the decree of the Munsif of Neriad.

The plaintiff, Nánábhái Vallabhdás, sued the respondent above named and six other defendants for possession of an eighth-share of an undivided ancestral field at Neriad, and for mesne profits thereof for three years.

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Náthábhái Haribhái answered that the suit did not include the whole of the claim, and that the plaintiff, as he was a member of the family to which the defendants belonged, and was in possession of other ancestral land in which he had not allowed the defendants their proper shares, could not sue for his share in the field in question except in a general partition suit.

The other defendants replied that they did not obstruct the plaintiff's claim, and were not liable to be sued, as their shares had been either mortgaged to the defendant, Náthábhái, or were managed by him on their account.

The Munsif of Neriad held that the plaintiff could in this suit claim partition of his share in the field sued for. As to the objection that the present suit did not include the whole claim, the Munsif held that it could not affect the present suit; but in case the plaintiff brought another suit for his share in other land upon this same title, the objection might be urged with effect, as he would be held to have relinquished his claim to all other land by suing for his portion in the land which was the subject of the suit. He, accordingly, awarded possession of $\frac{3}{4}$ ths of a *bighá* and $2\frac{1}{2}$ *vassás* in the field, and also a part of the mesne profits claimed.

Náthábhái appealed to the District Court, and the Acting Assistant Judge, in reversing the decree of the Munsif, gave the following judgment:—

“The agreement No. 7, after reciting the whole of the property of the plaintiff and defendants as coheirs, states that when partition is required by any or all of the sharers reference shall be made to arbitration, and the limits of the respective shares shall be then determined. The whole land is 24 *bighás* in four parcels, the sharers in each parcel being the same. The plaintiff sues for his share in one parcel of 7 *bighás* only, and makes mention of other property. In a supplementary and subsequent writing he says that, having ceased to be interested in the other parcels, he does not sue for his

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share in them. No *panchayatnamá* or award of arbitrators, or proof of partition, is adduced, nor does the plaintiff show how or when partition took place. Even if partition of one parcel of 13 *bighás*, as to which proof was not given below, be admitted, there remain 11 *bighás* undivided, and the plaintiff even then does not sue for his whole claim in suing for his share out of 7 *bighás* only. The agreement No. 7 seems to contemplate a single partition, and not that each parcel may be apportioned at a different date if demanded by any sharer. The plaintiff does not show that only 7 *bighás* remain undivided, nor does he show that he has no interest whatever in the remainder of the property not sued for by him."

He, accordingly, reversed the Munsif's decree.

The plaintiff appealed from this decision, and the appeal was argued before COUCH, C.J., and MELVILL, J.

Nánabhái Haridás, for the appellant:—The plaintiff's share in the field sued for is admitted; and as to the objection that the present claim does not include the whole of the undivided property, the plaintiff says he lays no claim to any other property, and that he has ceased to be interested in any other property. The allegation of the defendant is that the plaintiff is already in possession of other lands in which the defendants have not shared; but there is no evidence to show that the plaintiff has any such property, and the plaintiff distinctly says that the property alluded to by the defendant is not in his possession, but with strangers. If this statement were not true, and the plaintiff was in possession of other undivided property, the court had the power of compelling the plaintiff to bring his own property into hotchpot in which defendants could show that they were interested. In a recent case, Special Appeal No. 339, this same point was raised. In that case the plaintiff stated in his plaint that he would sue for the remaining portion of the property not included in the suit; in this case the plaintiff expressly says he has ceased to be interested in any other property.

[COUCH, C.J.:—But this is a partition suit, which that was not.]

Dhīrajāl Mathurādās, for the respondent :—In Special Appeal No. 112 of 1869, decided on the 24th of June 1869, it was held that in partition suits the plaintiff must sue for a partition of the whole property. The court in that case did not follow several old precedents which allowed amendment of the plaint so far as to permit the plaintiff to add his willingness to throw what he held of the undivided land into hotchpot on the ground that it was shown in that case that undivided property other than the subject-matter of the suit was held by both parties. The court, accordingly, rejected the claim, and, following the precedent of Special Appeal No. 95 of 1868, permission was given to bring a fresh suit for a share of the whole undivided property. The present case is entirely governed by the decision of the court in the abovementioned appeal. There was a previous suit against the present plaintiff by the present defendant, *Náthábhái*, of a similar sort, for a partial partition; that claim was disallowed. The plaintiff in the supplementary plaint does not expressly relinquish all right to other property; he simply says he has ceased to be interested in the other parcels.

Couch, C.J.:—We think that the District Judge was right in rejecting the claim. It is plain that some other land than the subject of the suit was admitted in the agreement document No. 7 to be the subject of partition; and now the plaintiff claims a share in a portion of the lands which have yet to be divided, according to the plaintiff's own admission evidenced by the document. Under the circumstances, it is incumbent upon him to show that all the other lands except the parcel sued for have been divided, or to show the reason why they have not been divided. It seems that the plaintiff sues for a share of the lands in which there is no dispute, and leaves the defendants to claim their share in a fresh suit. This cannot be allowed. The plaintiff has not clearly shown that he relinquishes his claim to all other lands; and not having done so, and being in possession himself of other undivided property, he cannot, contrary to the agreement, which contemplates a single partition, sue for a parcel without including the whole claim. We, accordingly, confirm the decision of the lower appellate court with costs.

Decree confirmed with costs.