

Shamrav Vithal appeared for the respondents.
The following is the judgment of the Court:—

JUDGMENT.

SARGENT, A.C.J.—As the Judge has found that the plaintiff and second defendant are members of a joint family, the first defendant is entitled to stand in the place of the second defendant. This Court, therefore, reverses the decree of the Court below; and following the decisions in *Babaji Lakshman and another v. Vasudev Vinayak* (1) and *Kallapa bin Girmallapa v. Venkatesh Vinayak* (2), directs that plaintiff be put into joint possession with the first defendant of plots 3 and 4, and declares that the first defendant is a trustee of the 800 rupees and the value of the 53 muras of rice mentioned in the decree of the Court below so far as the members of the joint family, other than the second defendant, are interested in the same. Parties to bear their own costs throughout.

5 B. 496.

[496] APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
and Mr. Justice F. D. Melvill.*

KRISHNAJI LAKSHMAN RAJVADE (*Original Plaintiff*), Appellant v.
SITARAM MURARRAV JAKHI AND OTHERS (*Original
Defendants*), Respondents.* [12th July, 1880.]

Undivided Hindu family—Ancestral estate—Mortgage by one co-parcener of a portion of the undivided estate—Mortgagee affected by acts of mortgagor—Partition—Possession—Res judicata—Amendment of plaint.

A mortgagor's acts prior to the date of the mortgage bind the mortgagee; but his subsequent acts do not bind the latter, unless they are done by the mortgagor as agent for the mortgagee.

A. one of three members of an undivided Hindu family, mortgaged his share in the immoveable family property to B. The mortgage recited that the money was raised in order to enable A to sue his co-parceners for partition of the family property and possession of his share therein. A subsequently did bring a suit with that object against his co-parceners, but allowed it to be dismissed against him for default. B now brought a suit against A and his co-parceners for possession of A's share in such family property.

Held—that as it was not made out that A, in bringing his suit, had acted as the agent of B and at B's request, B's suit was not barred by the dismissal of A's suit.

Held, also, that B's suit being a suit for possession, was wrongly framed and was not maintainable, there never having been any partition of the joint family property. Leave, however, was given to B, on certain terms, to amend his plaint, so as to make his suit a suit for partition.

[F., 5 B. 499; R., 21 B. 570; 5 Bom. L.R. 314 (317).]

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnagiri, in appeal No. 291 of 1878, affirming the decree of the Second Class Subordinate Judge of Sangameshvar.

The plaintiff Krishnaji brought this suit against (1) Sitaram Murar, (2) Chimnaji Ravji, and (3) Mahadji Ravji for possession of a one-anna share in a certain village mortgaged to him by the first defendant (Sitaram)

* Second Appeal No. 447 of 1879.

(1) 1 B. 95.

(2) 2 B. 676.

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on the 18th May, 1872, for Rs. 200. He also claimed Rs. 54 for interest and Rs. 50 on account of mesne profits. The mortgage recited that the mortgagor (the first defendant Sitaram) borrowed the money for the purpose of bringing a partition suit against his brother, Ravji, father of the second and third defendants. Sitaram did, in fact, file a suit on the 4th [497] July, 1872, against Ravji for a partition and possession of his (Sitaram's) one-anna share; but when the suit came on for hearing Sitaram allowed judgment to go against him by default. In 1874 the plaintiff brought a suit against the present second and third defendants for mesne profits in respect of the one-anna share mortgaged to him by Sitaram. That suit was dismissed on the 20th March, 1876, on the ground that Sitaram, the mortgagor, was not in possession of his share, and that it would be necessary for the plaintiff first to sue for possession of the mortgaged property. He, therefore, instituted the present suit for possession of his mortgagor's share in the property in question.

The first and second defendants did not appear. The third defendant answered, *inter alia*, that Sitaram, the mortgagor, was not in separate possession of his share, and that the action was barred by the two former suits mentioned above. Both the lower Courts dismissed the plaintiff's suit, holding it was barred by the previous suit brought by Sitaram against his brother, Ravji, for partition and possession. The plaintiff thereupon filed a second appeal in the High Court.

Y. V. Athalye, for the appellant.—The lower Courts were wrong in holding that the present suit was barred by the previous suit. That suit was brought by the mortgagor (the first defendant, Sitaram), subsequently to the date of the mortgage. If Sitaram had prosecuted that suit and obtained a decree of partition, the plaintiff, no doubt, as mortgagee would have been benefited by it. But the mortgagor allowed the suit to be dismissed for default, evidently in collusion with the second and third defendants. His act did not bind the mortgagee, as it was subsequent to the mortgage, and he was not acting as the agent of the mortgagee. The mere recital in the mortgage that the loan was raised in order to bring a partition suit against his brother is no proof that that was to be done on behalf of the mortgagor, and there is no other evidence to show that such was the case. If this suit is wrong in form, and the Court thinks it should have been a suit for partition, I will ask the Court to allow the plaint to be amended accordingly.

Shamrav Vithal, for the third defendant.—The plaintiff should not be allowed to change the form of his action after having [498] dragged my clients through three Courts. The case in its present form is not sustainable, and should be dismissed.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C.J.—It appears to us that the decree in Sitaram's suit for partition is not a bar to the plaintiff's present suit. The acts of Sitaram antecedent to the mortgage by him to the plaintiff would bind the latter, but the acts of Sitaram subsequently to the mortgage do not bind the plaintiff, unless they were done by Sitaram as agent for the plaintiff. The mortgage contains a recital that Sitaram borrowed the mortgage money for the purpose of enabling him to maintain a suit against certain of his co-parceners, but that recital does not establish that Sitaram was to bring such an action on behalf of his mortgagee (the present plaintiff); although, if the suit brought were for partition and were persisted up

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to the decree, it might to a certain extent redound to the benefit of the mortgagee. To the extent of the equity of redemption in Sitaram's share such suit would be solely for the benefit of the mortgagee, Sitaram. The circumstance, that Sitaram permitted, in that suit, a decree to go against him by default, tends strongly to show that he was not acting as the agent of the plaintiff, and may very probably have been acting in collusion with his co-parceners in abandoning the suit. Except the insufficient recital in the mortgage, no evidence has been pointed out to us of agency on the part of Sitaram for the plaintiff, and there is not any finding, in either of the Courts below, that there was any such agency. We cannot agree with the Courts below in holding the decree in Sitaram's suit to be any bar to the present suit.

We concur with the District Judge in holding that the decree in the plaintiff's suit for mesne profits is not any bar to the present suit for possession.

But we are of opinion that this suit has not been framed correctly in asking for possession. It has been admitted in the plaint that the defendants Sitaram, Chimnaji and Mahadaji are undivided in estate. It would, under such circumstances, be impossible for the Court to put the plaintiff, as purchaser of Sitaram's undivided share, into possession of it. The proper course to pursue in such a case is for the purchaser to sue [499] for a partition: *Pandurang v. Bhaskar* (1); *Udaram Sitaram v. Ranu Panduji* (2). The cases of *Mahabalaya v. Tmiaya* (3), *Babaji v. Vasudev*, (4) and *Kallapa v. Venkatesh* (5), in which declarations of tenancy in common were made by the Court, were all instances in which the purchaser from a co-parcener had already obtained possession of the undivided property, or of a part of it, and are, therefore, inapplicable here, where the purchaser (the plaintiff) has never had any real possession.

There being no denial of the *bona fides* of the mortgage by Sitaram so far as the plaintiff is concerned, and it appearing to us that the plaintiff was erroneously advised as to the forms in which he has brought both his former and his present suit, we will allow him to amend by altering it to a suit for partition, and by adding parties if he be so advised, and for this purpose we reverse the decrees of the Courts below. The said permission to amend is granted only upon the terms of the plaintiff paying to the defendants their costs of this suit and of both appeals therein up to the present time. Such amendment and payment of costs must be made within three calendar months after the making of the present decree has been notified by the District Court of Ratnagiri to the plaintiff or his pleader in that Court. In the event of the payment of costs aforesaid and of the said amendment not being made within the said period, this suit is to stand dismissed with costs throughout to be paid by the plaintiff to the defendants.

(1) 11 B.H.C.R. 72.
 (4) 1 B. 95.

(2) 11 B.H.C.R. 76.
 (5) 2 B. 676.

(3) 12 B.H.C.R. 138.