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property and its sale in accordance with the provisions of the Code.

The pleader for the appellants has, however, relied upon the decisions of this Court in *Baldev Dhanrup Marvadi* v. *Ramchandra Balvant Kulkarni*[1] and *Tarvadi Bholanath* v. *Bai Kashi*[2] in which the decisions of the Madras High Court in *Appasami* v. *Scott*[3] and of the Calcutta High Court in *Debendra Kumar Mandel* v. *Rup Lall Dass*[4] were followed.

It is to be observed, however, that the learned Judges in delivering judgment in *Tarvadi Bholanath* v. *Bai Kashi*[2], were careful to point out that their decision was based upon the fact that the mortgagee was a mortgagee under a simple mortgage and was not in possession, and upon that ground the decisions in the other cases which we have been referred to may be distinguished from that now before us.

We, therefore, affirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

(1) (1893) 19 Bom. 121.
(2) (1901) 26 Bom. 305.
(3) (1885) 9 Mad. 5.
(4) (1886) 12 Cal. 546.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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February 21.

ANANDIBAI KOM RAM PAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI SUBA PAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu Law—Partition—Partial partition—Re-union.

Out of six co-parceners in a joint Hindu family, three separated under a deed of partition, from the rest who continued joint as before. The Court found on these facts that the last three persons either continued as before to be co-parceners or they must be held as having immediately re-united with each other after executing the deed of partition. In appeal it was contended that there was no finding by the Court as to an agreement to re-unite or any evidence recorded of such agreement:

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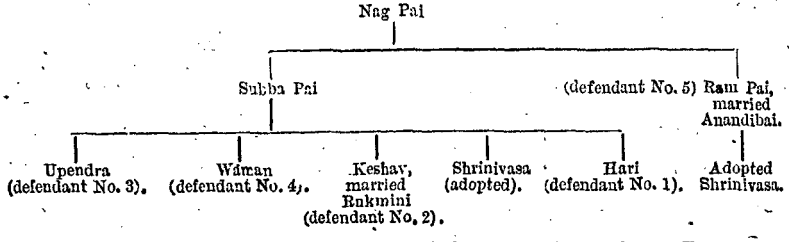
Held, overruling the contention, that the evidence was that the co-parceners agreed to effect not a complete but partial disruption of the co-parcenery, that, in other words, three of them separated from the rest and also *inter se* and that the latter agreed to continue joint.

Per Curiam.—According to Hindu Law, he who alleges partition must prove it, because "once is a partition made." If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united.

SECOND appeal from the decision of T. Walker, District Judge of Kanara, confirming the decree passed by K. R. Natu, Subordinate Judge of Kumta.

Suit for declaration.

The following genealogical tree shows the relationship of parties to the suit:—



At first the parties lived as a joint family. Ram Pai and Anandibai adopted Shrinivas as their son. Then in 1888 there was a partition by which Upendra, Waman and Ram Pai separated from the other three—Hari, Keshav and Shrinivasa, the last three remaining joint as before. The first three also separated *inter se*. Subsequent to the adoption, Ram Pai and Anandibai had a son born to them, whereupon they allotted to their adopted son Shrinivasa one-fourth of Ram Pai's share. In 1892, Shrinivasa died a bachelor.

In 1904, Anandibai filed the present suit for a declaration that she was entitled to the share which Shrinivasa had in the property.

The defendants contended *inter alia* that there having been a re-union of Shrinivasa with Hari and Keshav, they were entitled

to his share; and that the plaintiff would not have any right to succeed in preference to Ram Pai, who was defendant No. 5.

The Subordinate Judge held that the plaintiff had no right to succeed to Shrinivasa in preference to Ram Pai; but as Ram Pai died during the progress of the suit, he further found that there was re-union between Shrinivasa, Hari and Keshav. He dismissed the suit.

On appeal, the District Judge only went into the question whether Anandibai had a right to succeed to Shrinivasa, and finding it against her, dismissed her suit. This finding was reversed by the High Court and he was asked to dispose of the case on merits. *Vide* I. L. R., 33 Bombay, p. 404.

On remand, the District Judge found that "Hari, Keshav and Shrinivasa remained joint with each other, or (if the legal fiction is to be employed) must be held as having immediately re-united with each other after executing the partition-deed." He again dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant:—Under Hindu Law, re-union cannot be proved by presumption; it must be proved as a fact. See *Balabux Ladhuram* v. *Rukhmabai*[1]. Even if re-union be regarded as proved in fact, there can be no re-union between brothers. See Mitakshara, c. 2, s. 9, pl. 3; *Basanta Kumar Singha* v. *Jogendra Nath Singha*[2]; *Vishvanath Gangadhar* v. *Krishnaji Ganesh*[3]; and *Lakshmibai* v. *Ganpat Moroba*[4].

S. V. Palekar, for the respondents:—The finding of the lower Court is that three of the co-parceners remained joint as before, and that finding is one of fact. The brothers having agreed to continue joint as before, there was no separation.

CHANDAVARKAR, J.:—The facts found by the lower appellate Court are shortly these: Upendra, Waman, Rampai (defendants Nos. 3, 4 and 5 respectively), Hari, Keshav and Shrinivasa were members of a joint Hindu family. The first three of them separated from the rest under a deed of partition in 1888 (Exhibit 44), the last three continuing joint as before.

(1) (1903) L. R. 30 I. A. 130.
(2) (1905) 33 Cal. 371.
(3) (1866) 3 Bom. H. C. R. (A. C. J.) 69.
(4) (1867) 4 Bom. H. C. R. (O. C. J.) 150.

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On these facts the lower Court has found that the last three persons either continued as before to be co-parceners or that they "(if the legal fiction is to be employed) must be held as having immediately re-united with each other after executing Exhibit 44."

The legal correctness of the latter view as to re-union is challenged by the learned pleader for the appellant on the authority of the Privy Council judgment in *Balabux Ladhuram* v. *Rukhmabai*(1). There it was held "that there is no presumption, when one co-parcener separates from the others that the latter remained united," but that the agreement to remain united or to re-unite "must be proved like any other fact." It is contended that in the present case there is no finding by the appellate Court as to an agreement to re-unite and that there is no evidence of such agreement. The answer to that contention is simple. The evidence is that the co-parceners agreed to effect not a complete but partial disruption of the co-parcenery, that, in other words, three of them separated from the rest and also *inter se* and that the latter agreed to continue joint. The Courts below have found accordingly. The finding satisfies the law enunciated by the Judicial Committee of the Privy Council in the case cited.

According to Hindu Law, he who alleges partition must prove it, because "once is a partition made." If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united. In the present case the former was alleged and has been found established by the evidence.

The decree must, therefore, be confirmed with costs.

Decree confirmed.

R. R.

(1) (1903) L. R. 30 I. A. 130.