APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Heaton.

NARAYAN BALKRISHNA RAJADHYAKSHA (ORIGINAL PLAINTIFF), APPELLANT *v.* FASKU MONU LEM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1917. *September* 27.

Parties, joinder of—Tenants-in-common—Lands in possession of lessees—Suit by a tenant-in-common to recover his share by partition from the lessees direct—Other tenants-in-common not necessary parties.

A piece of land was held in common by several persons, of whom those owning 11/12ths share leased out their share to defendants Nos. 1 and 2 on permanent tenure. The plaintiff and defendants Nos. 3 and 4 who owned the remaining 1/12th share leased their share to the same defendants on a yearly tenancy. The plaintiff sued defendants Nos. 1 and 2 to recover the 1/12th share by partition and also to recover its rent, without making the other tenants-in-common parties to the suit:—

Held, that the tenants-in-common were not necessary parties and that the plaintiff was entitled to recover by partition the 1/12th share and also the rent.

SECOND appeal from the decision of V. M. Ferrers, District Judge of Ratnagiri, amending the decree passed by V. S. Nerurkar, Subordinate Judge at Vengurla.

Suit for partition.

The property to be partitioned was a piece of land which was held in common by several persons. Of these, persons owning 11/12th share in the land leased it on permanent tenure to defendants Nos. 1 and 2. The plaintiff and defendants Nos. 3 and 4 who owned the remaining 1/12th share also leased it to the same defendants on a yearly tenancy.

The plaintiff next sued defendants Nos. 1 and 2 to recover the 1/12th share in the land by partition and also to obtain the rent for that share. Defendants

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Nos. 3 and 4 were made parties to the suit, but not the persons owning the 11/12ths share.

The Subordinate Judge awarded the plaintiff's claim, by ordering partition of 1/12th share of the property and awarding Rs. 45-11-5 as rent, to plaintiff and defendants Nos. 3 and 4.

On appeal, the District Judge held that the claim to partition was not maintainable as all the tenants-in-common were not made parties to the suit; and as to rent, he awarded only 1/3rd of Rs. 45-11-5 as defendants Nos. 3 and 4 had asked for no relief.

The plaintiff appealed to the High Court.

S. S. Patkar, for the appellant.

V. D. Kamat, for respondents Nos. 1 and 2.

BEAMAN, J.:—This is one of those troublesome cases in which a piece of land appears to have been held for many years by various tenants-in-common one of whom now seeks to recover from the lessee of the others his own share of the tenancy by partition together with arrears of rent. It is not as plain as it might be whether from the commencement the plaintiff was seeking partition or whether he intended his suit to be regarded as one in ejectment against the tenant wrongfully holding over. The defendants Nos. 1 and 2 are the lessees of 11/12ths of the entire tenancy-in-common. The plaintiff and the defendants Nos. 3 and 4 are joint tenants of the remaining 1/12th of the tenancy-in-common. In 1901, it is admitted that the defendants Nos. 1 and 2 had attorned to the plaintiff as representing the joint owners of the 1/12th share for a term of one year. Since then we are not informed whether the defendants actually paid rent to the plaintiff and his co-sharers, for this relatively small part of the entire property. But the defendants Nos. 1 and 2 as permanent tenants of the 11/12ths share set to work to

improve it by erecting a large *band* around it and no doubt had thereby effected considerable improvements.

The first Court found in favour of the plaintiff and decreed partition as well as arrears of rent, but these arrears of rent he apportioned equally between the plaintiff and his co-sharers, the defendants Nos. 3 and 4. The lower appellate Court held that the plaintiff could not sue for partition without making all the other joint tenants parties to the suit and satisfying the Court that there was no other property held by them together as joint tenants. He further held that the defendants Nos. 3 and 4 were not entitled to any rent which they had not claimed and he decreed the plaintiff one-third of the rent decreed to him by the Court below.

We have felt very great difficulty over the principal point discussed, viz., whether the plaintiff can ask for a partition at the hands of mere lessees from the other tenants-in-common. The doctrine that a vendee and then a mortgagee of the unascertained and undivided share of one of several Hindu coparceners acquires thereby a right to enforce partition of the joint estate has been logically extended to the case of permanent lessees. Were the matter *res integra* and supposing that the first case coming up for judicial decision had been the case of an out-and-out sale by one coparcener of an undivided share in the coparcenery and the question had been whether such a sale conferred any coparcenery rights upon the vendee, I should have thought that the case of a lease might very well have been used almost as a *reductio ad absurdum* of the case contended for by the alienee. For if a permanent lessee from one of several Hindu coparceners may insist upon a partition of the whole family estate in order to discover the property of which he has become a tenant on the ground that the permanent lease is *pro tanto* an

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alienation, the same principle must be extended to the case of a lease for a term, and when that term is sufficiently short, I think it really will be seen to be a *reductio ad absurdum*. Here, however, we are not really dealing with the case of a joint Hindu family but of a tenancy-in-common with the origin and development of which we are not acquainted. No difficulties therefore of the kind suggested by the learned District Judge on account of other joint family property not being made at the same time the subject of the partition appear to me to arise. I certainly cannot say so confidently that the non-joinder of the other tenants-in-common from whom the defendants Nos. 1 and 2 have their permanent leases does not create a difficulty. If, however, a permanent lessee from one of several members of a joint Hindu family can by reason of the rights he acquires under such a lease be enabled to enforce a partition, it follows, I suppose, that any member of the family might, on the principle of mutuality, assuming he had taken possession of more than he was entitled to, bring a suit for partition against him. I hope I may not be understood as implying my own assent to any such doctrine. But I think the argument has been fairly enough used here in favour of the appellant, so that in the present case where the lessee admittedly has taken permanent leases from joint tenants to whom 11/12ths of the entire property belonged and is in *de facto* possession of that as well as the remaining 1/12th, it is difficult to see what more useful and practical remedy could be given to the plaintiff who is admittedly entitled to relief of some sort than by an immediate severance of the tenancy-in-common and restitution to the plaintiff of so much of it as he is admittedly entitled to. Difficulties as I have suggested may arise between him and the other tenants-in-common who cannot, as far as I can see, be completely represented by their lessees, but

these difficulties may prove rather theoretical than actual.

We are asked on behalf of the defendants Nos. 1 and 2 to limit the plaintiff's right to a mere declaration if we are disposed to give him so much relief, and his learned pleader has pressed upon us as an alternative remedy, should we not be disposed to decree him partition, that this Court should now put him in joint possession. I always feel that that is the very last relief a Court should give where all other more satisfactory modes are denied it. But here I see no real difficulty since the plaintiff with the defendants Nos. 3 and 4 is admittedly entitled to a 1/12th of this property, in decreeing that he should now obtain so much of it by partition from the defendants Nos. 1 and 2. They have objected that the plaintiff should not be allowed to recover so much of this property as he is entitled to without making compensation to the defendants Nos. 1 and 2 for their improvements. There is, however, in my opinion, no satisfactory evidence upon which in this respect to ground and apply the doctrine of equitable estoppel. I do not think that the defendants Nos. 1 and 2 can be decreed any compensation from the plaintiff and the defendants Nos. 3 and 4. The defendants Nos. 1 and 2, I gather, have no real objection to paying the rent in the manner provided by the trial Court.

I would, therefore, reverse the decree of the learned Judge of first appeal and restore that of the trial Court with costs throughout upon the defendants Nos. 1 and 2.

HEATON, J.:—I agree that is the decree which should be made in this case. We are dealing with it, as the lower Courts dealt with it, as substantially a suit for partition. I quite agree with my learned brother that it is a suit for partition in relation to property held by tenants-in-common and that the law to apply is not the

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law relating to the partition of the joint property of a Hindu family. I also agree that seeing that the plaintiff has brought his suit without joining all the tenants-in-common, he may have laid up for himself difficulties hereafter, because those tenants-in-common who are not parties to this suit cannot be bound by the decree. The lower appellate Court appears to have regarded the suit as governed by the law which relates to the partition of Hindu joint family property, and in that particular, I think, it was mistaken, although it was quite right in pointing out the circumstance that the persons we have called tenants-in-common were not all parties. That, as I have said, is a circumstance in the suit which may hereafter give rise to difficulties and the Assistant Judge was quite right to emphasize that particular matter. But our law of procedure requires us as far as possible to do justice between the parties who are before the Court, even though those parties are not all who have an interest in the property. I feel therefore no hesitation in saying that the decree for partition in this case was the right decree to make.

I share my learned brother's hesitation wherever it can be avoided, to decree joint possession which he has described as the very last relief—and I think rightly so—to which a Court of Justice ought to resort. The reason is that instead of being a relief, if that is the right word to use, it is likely in the majority of cases to be nothing but an added irritation to the litigants.

I also agree with the other parts of the decree which he has proposed for the reasons given by my learned brother.

Decree reversed.

R. R.