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THACKER PRAGJI ANANDJI

v.

MANSUKH AMBALAL (DEAD) THROUGH
HIS HEIRS AND LRS. AND ANR.

B

NOVEMBER 28, 1996

[K. RAMASWAMY AND G.T. NANAVATI, JJ.]

C

Hindu Law—Joint Family Properties—Partition—Two brothers P and D succeeded Joint Family Properties viz. two houses—D and his father mortgaged properties to respondent—Mortgaged redeemed under compromise—Findings recorded by courts below that consideration for redemption of the mortgage was by hypothecation—Question whether the appellant was entitled to the partition of the properties in two equal shares and allotment of one such share—In view of the finding that both the houses are joint family properties succeeded by P and D the brothers, they are liable to partition—However, it would be subject to the redemption of the mortgage.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 381 of 1981.

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From the Judgment and Order dated 13.2.80 of the Gujarat High Court in Second Appeal No. 444 of 1975.

Vimal Dave for the Appellant.

S.C. Patel for the Respondents.

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The following Order of the Court was delivered :

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Pragji Anandji and Damji Anandji are brothers. House Nos. 247 & 248 situated in Anjar are the joint family properties. It would appear that on December 18, 1956, Anandji, their father and Damji - the 2nd defendant had mortgaged these properties which admittedly were redeemed with their consent as evinced under Ex.27, a compromise. The appellant's father - Pragji had claimed that the consideration for redemption of the first mortgage was their money. The finding recorded by all the courts is that consideration for redemption of that mortgage was by hypothecation on the second occasion of the said properties in favour of Mansukhlal Am-

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balal, the first defendant. Pragji had filed Suit No. 66/69 for a declaration

that the second mortgage dated September 30, 1958 executed by Damji and Anandji does not bind him. He also sought partition and possession of his half share in the said properties. He also set up a plea that after the redemption of the first mortgage, there was an oral partition in which House No. 248 fell to his share and House No. 247 fell to the share of Damji. But that plea was negatived by all the courts. The consequence would be that House Nos. 247 & 248 are joint family properties in which Pragji, the father of the appellant and Damji, the second defendant, have equal share in the properties. The findings recorded by the courts below is that the mortgage dated September 30, 1958 binds the parties.

In view of these findings, the question is: whether the appellant is entitled to the partition of the properties in two equal shares and allotment of one such share? In view of the finding that both the houses are joint family properties succeeded by Pragji and Damji, the brothers, they are liable to partition. However, it would be subject to the redemption of the mortgage under Ex. 38 dated September 30, 1958 executed in favour of Mansukhlal, the first defendant. Accordingly, there is a preliminary decree for partition of the houses in two equal shares and one such share should be allotted to the appellant. It is open to the appellant before executing the preliminary decree and passing the final decree to have the mortgage executed, Ex. 38, in favour of Mansukhlal redeemed by paying the mortgage debt and then have the properties partitioned in meets and bounds. In case the second defendant does not pay his share in the mortgage debt, the entire amount should be paid by the appellant in which event the second defendant is not entitled to his share engrafted in the stamps and registration and the appellant may seek appropriate direction from the trial Court for payment.

The appeal is accordingly allowed. But, in the circumstances, without costs.

T.N.A.

Appeal allowed.