
(1906) 09 BOM CK 0007
In the Bombay High Court
Case No : O.C.J. Suit No. 432 of 1905

Ashidbai

APPELLANT

Vs

Abdulla Haji Mahomed

RESPONDENT

Date of Decision : 13-09-1906

Acts Referred:

Citation : (1906) 8 BOMLR 758

Hon'ble Judges : Chandavarkar, J

Bench : Single Bench

Judgement

Chandavarkar, J.—Though the plaintiff's suit for partition has been dismissed by the judgment finally delivered by this Court on the 9th of August, defendants Nos. 6 to 11 contend that they are entitled to a declaration that they have a share in the property which is the subject-matter of the suit and to have that share allotted to them by partition in this suit. In support of that contention reliance is placed on the decision in *Sheikh Khoorshed Hossein and Ors. v. Nubbee Fatma and Ors.* ILR (1877) Cal. 551, where it was held that a decree for partition, when properly drawn up, is in favour of each shareholder, whether he is plaintiff or defendant, in the suit. That decision is, however, inapplicable here, because here the question is whether, the plaintiff who brought the suit for partition having failed to establish her right to partition, any of the defendants can nevertheless claim partition upon the ground that such defendant has a share in the property. There are cases both in our authorised law reports and the old printed judgments on the appellate side of this Court in which it has been held that "it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him," and that "a defendant claiming a share on partition is, qua that claim, in the position of a plaintiff." *Shivmurteppa v. Virappa* ILR (1899) 24 Bom. 128. Further, "it is obvious"y most undesirable that parties should be driven to further litigation to obtain a relief which they are entitled to ask for at a proper time and which can be given to them in an existing suit." (*Abdul Kadar v. Bapubhai*) ILR (1898) 23 Bom. 188. This rule was first enunciated in very clear terms by Westropp C.J. in *Abu valad Budankhan and*

Ors. v. Amin valad Hamidkhan (1875) P.J. 218 where his Lordship said: - "this Court has over and over again pointed out that all persons interested as coparceners or tenants in common or joint tenants in an estate should in a partition suit be made parties in order to prevent a multiplicity of actions in respect of the same property" and that the Court must strictly observe it by refusing to make a partial division of undivided property. But all the cases in which this rule has been adopted by this Court will on examination be found to be cases in each of which the plaintiff suing for partition succeeded in proving his right to it and the decree passed in favour of the defendants followed as a natural result of or corollary to the decree in favour of the plaintiff. And on principle that must be the essential condition of the rule. When a suit for partition is brought by a person alleging that it is undivided property and that he has a certain share in it, the law requires that in order to enable the Court to ascertain such person's share, it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property. Otherwise there cannot be a valid, final, and binding decree for partition. The quantum of the share of the plaintiff must be determined with reference to the number of sharers and their respective shares. And such determination of the shares, being essential for the determination of the plaintiff's share, enables the Court to pass a complete decree for partition, allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share already determined and partitioned off. That is the reason of the rule. But where the case of the plaintiff fails on the preliminary ground that he has no right to a share at all and that a suit for partition is not maintainable at his instance, the reason of the rule fails to apply. There is nothing on which a defendant's right to have his share ascertained and awarded in that suit can rest. The defendant was brought in for determining the share of the plaintiff, if any. If the plaintiff is found to have no share at all, there is no suit for partition and consequently no necessity for determining the defendant's share. To hold in such a case that notwithstanding the plaintiff's failure the defendant is entitled on his own account to go into and try the question whether he has any share at all would be to convert a suit brought by an unsuccessful plaintiff into a suit brought by another person placed on the record as a defendant for the purpose of determining the quantum of the plaintiff's share in the event of the plaintiff proving that he has a right to some share. The decision in Sheikh Khoorshed Hossein and Ors. v. Nubbee Fatma ILR (1877) Cal. 551 on which the learned Advocate General, appearing for defendants Nos. 6 to 11, strongly relies, lends no support to his argument. That decision applies only where there has been a decree properly drawn up in favour of the plaintiff and the defendants in a suit for partition.

2. There is further this peculiarity in the present case that the right of defendants Nos. 6 to 11 to a share is by no means admitted by the other parties to the suit. In the plaint it is alleged that their right is barred by adverse possession. Were I to allow their prayer, I should be trying a practically separate suit. And as the

rule on the basis of which the prayer is made is a rule of judicial discretion, in the exercise of which the Court must be guided by what I have above pointed out to be its proper limits, I must disallow the prayer of defendants Nos. 6 to 11 for the determination in this suit of their right to a partition of the property which forms its subject-matter. It is open to the said defendants, if they choose, to file a suit for partition. Defendants Nos. 6 to 11 must pay to defendants Nos. 1 to 5 the costs of and incidental to this application.