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**(1951) 02 BOM CK 0014**  
**In the Bombay High Court**  
**Case No : First Appeal No. 182 of 1950**

Dasharathrao Ganpatrao

APPELLANT

Vs

Ramchandrarao Vinayakrao and Others

RESPONDENT

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**Date of Decision :** 06-02-1951

**Acts Referred:**

**Citation :** AIR 1951 Bom 141 : (1951) 53 BOMLR 575 : (1952) ILR (Bom) 31

**Hon'ble Judges :** Chagla, C.J.;Gajendragadkar, J

**Bench :** Division Bench

**Advocate :** K.J. Abhyankar, for the Appellant; G.R. Madbhavi and P.V. Vaze for Nos. 1-5 and 10-12, M.R. Navanqule, for No. 6, B.M. Kalagate, for No. 7, Y.N. Nadkarni and R.G. Samant for No. 8, K.N. Dharap and T.S. Jahagirdar for No. 9, for the Respondent

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## Judgement

Gajendragadkar, J.—After dealing with certain points not material to this report his Lord-ship proceeded.] In support of his contention that the pltfs. cannot claim a share by partition in the properties in suit Mr. Abhyankar has raised an interesting point under Hindu law. He con-cedes that Bhaskarrao who is the common ancestor of the parties in the present suit is within four degrees in ascent from the pltfs. The pedigree shows that Bhaskarrao's son was Narayanrao, Narayanrao's son was Vinayakrao, & the pltfs. are Vinayakrao's sons. Mr. Abhyankar, however, points out that the defts. against whom the present claim has been made are beyond four degrees in descent from Bhaskarrao. That again is true; because according to the same pedigree Bhaskarrao's eldest son was Ramchandrarao, Ramchandrarao's son was Ballalrao, Ballalrao's eldest son was Ganpatrao, & the two defts. for whom Mr. Abyankar appears are the sons of Ganpatrao. Mr. Abhyankar's contention is that it is a rule of Hindu law that a partition cannot be demanded by any person who is more than four degrees re-moved from the last owner. In this case accord- ding to Mr. Abhyankar the pltfs. are clearly removed by more than four degrees from the defts. & so they cannot make a valid claim for partition under Hindu law. Now, it is well settled that a Hindu coparcenary is a much narrower body than

the joint Hindu family. The joint Hindu family consists of persons who are lineally descended from a common ancestor. Such a family includes the wives of the male members as well as unmarried daughters; as soon as a daughter marries she leaves the family of her birth & becomes a member of her husband's family. It is quite true that every member of a joint Hindu family is not a coparcener. A coparcenary consists of persons who acquire by birth an interest in the joint or coparcenary property. This right by birth entitles a coparcener in most cases to demand a partition of the coparcenary property. To this rule an exception is recognised in the State of Bombay where a son is not permitted to claim a partition when his father is living in union with his own collaterals. Subject to this exception, however, the right to demand a partition is the necessary result of the right by birth which a coparcener has in the undivided property of the coparcenary. Obviously every coparcenary begins with a common ancestor, but it is not the rule of Hindu law that such a coparcenary is necessarily limited to four degrees from the common ancestor. Whether a member of an undivided family is a coparcener or not would depend upon whether he is entitled to demand a partition, & that naturally would in its turn depend upon the question whether he has a right in the property of the coparcenary by his birth. Broadly stated, all members of a joint Hindu family who are not removed more than four degrees from the last holder are coparceners, however much remote they may be from the original holder or acquirer of the property. If a person is removed by more than four degrees from the last holder, he does not acquire any interest in the property of the family by birth, & as such he is not entitled to demand a partition. Even in such a case as soon as the last holder dies, the distance between the next holder & the person who was more than four degrees removed from the last holder would be reduced by one degree with the result that such person would be entitled to enter the coparcenary & would be clothed with the right to demand a partition of his share in the properties of the family. As has been observed by Mayne :

"..... As each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. So the coparcenary may go on widening & extending, as long as its members include agnates descended from a common ancestor, irrespective of their degrees of agnatic relationship to each other. But this is always subject to the condition that no person who claims to take a share is more than three steps removed from a direct ascendant who has taken a share." (Mayne on Hindu Law and Usage, Edn. 11 pp. 328-329).

Applying this test it would be clear that during the lifetime of Bhaskarrao his son Narayanrao, his grandson Vinayakrao, & his great grandsons the present plffs. would have been entitled by birth to a share in the properties belonging to their undivided family. This position is clear & Mr, Abhyankar cannot dispute it.

2. Mr. Abhyankar, however, contends that in deciding the question as to whether the plffs. are entitled to claim a share in the properties in suit it would not be

enough to consider their relation-ship with the common ancestor; that, according to him, is an imperfect test. He insists that the Court must also consider whether the plffs. are removed from the last owner in possession by more than four degrees. The plffs. in the present case are clearly removed from such last owner by more than four degrees & Mr. Abhyankar says that if they are so removed from the last owner by more than four degrees, they are not entitled to claim a share. In support of this contention Mr. Abhyankar strongly relies upon a decision of this Court in *Moro Vishvanath v. Ganesh Vithal* 10 Bom. C. R. 444. The rule which was enunciated by Nanabhai Haridas J. in this case has been thus stated by the learned Judge himself (p. 465):

"The rule, then, which I deduce from the authorities on this subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or original owner of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the last owner, however remote he may be from the original owner thereof."

West J. substantially agreed with this view. We are fully conscious that the views of Nanabhai Haridas J. particularly on questions of Hindu law are entitled to the highest respect. Indeed, this judgment of Nanabhai Haridas J. has become a classic on the subject and all the illustrations set out in the judgment & the rule deduced therefrom have been copied by all the text books on Hindu law. It is, therefore, necessary to examine this judgment carefully to find out whether it affords any support to the contention urged before us by Mr. Abhyankar.

3. The first feature of the case with which West & Nanabhai Haridas JJ, were dealing to which it is necessary to refer is that the position of the parties in reference to the common acquirer in that case was converse of the position before us. One Udhav was the common acquirer in that case & the pltfs. were more than four degrees removed from the said common acquirer. Some of them were five degrees removed from him, while some others were six degrees removed from him. The defts. against whom a claim for partition had been made by the said pltfs. were, however, within four degrees from Udhav. As I have already indicated, in the case before us the pltfs. are within four degrees from the common acquirer, whereas the defts. are beyond four degrees from him. Now, in *Moro Vishvanath's* case the defence was that since the pltfs. were removed beyond four degrees from the common acquirer they could not be regarded as coparceners, as such they were not entitled to a right by birth in the properties of the family & they had, therefore, no right to claim a partition. The defts. had also pleaded a bar of limitation & had besides urged that the property in dispute was not the joint family property at all. The trial Judge had rejected all the pleas of the defts. & had decreed the pltf.s" suit. When the matter came in appeal to this Court both the learned Judges reversed the finding of the trial Court that the pltfs. were members of an undivided family. On evidence this Court came to the conclusion that there had been a partition in this family & that the pltfs. were, therefore, not justified in making a claim for partition on the

footing that they & the defts. were members of an undivided family. In fact, on this view both the learned Judges proceeded to consider the principles of Hindu law under which partition once made can be reopened. It would thus be noticed that it was really unnecessary to consider the question as to whether the pltfs. would be entitled to claim partition if they had succeeded in showing that no prior partition had taken place between the parties. Nanabhai Haridas J. has expressly stated in Ma judgment that the question of Hindu law as to the pltfs." right to demand a partition in view of the distance of degrees between them & the common acquirer did not really fall to be decided. Even so, the learned Judge & West J. have both considered this question, & as I have already stated their opinions, though obiter, are entitled to respect. In dealing with their views, however, it is important to bear in mind the facts with which they were dealing. A claim for partition had been made by persons removed by more than four degrees from the common ancestor & it was alleged that this claim was not maintainable under Hindu law. The argument was that a coparcenary consists of persons who are less than four degrees removed from the last holder, & since the pltfs. were outside this relationship, they could not be said to be coparceners at all. Nanabhai Haridas J. considered all the Sanskrit tests that were cited before him & ultimately deduced the rule which has already been cited. The rule is negatively worded by the learned Judge & its effect clearly was to save the right of persons to claim their share by a partition in the properties of the family even though the claimants may be removed from the common acquirer by more than four degrees if they happen to be within four degrees from the last owner. In other words if the defts. had not proved a prior partition in Moro Vishvanath's case, Nanabhai Haridas J. would have been prepared to pass a decree for partition in favour of the pltfs. in spite of the fact that they were more than four degrees removed from the common ancestor. The test that the learned Judge was disposed to apply to a claim for partition on the facts before him was whether the claimants were within four degrees from the last owner or not. It is unnecessary to consider the texts on which Nanabhai Haridas J. relied in support of this view. Mr. Madbhavi has invited our attention to the fact that Benson J. & Sundara Aiyar J. have commented on the views expressed by Nanabhai Haridas J, & on the opinion expressed by Mayne on this topic in Thirumal Rao Saheb v. Rangadani Rao Saheb 23 M. L. J. 79, but in the present appeal it is unnecessary for us to consider whether the said comment is justified or not. The question which we have to decide is whether the rule thus enunciated by Nanabhai Haridas J. supports Mr. Abhyankar's contention. Mr. Abhyankar naturally relies upon the fact that the pltfs. before us are removed more than four degrees from the last owner & he says that the present case falls within the latter part of the rule laid down by Nanabhai Haridas J. We are unable to accept this argument. The rule in question, we think, must be read as a whole & it cannot be extended to the cases of persons who are removed by less than four degrees from the common acquirer. Indeed, the rule was intended to protect the rights of the pltfs. though they were more than four degrees removed from the common ancestor, subject to the condition that they must be within, four degrees from the last

owner. We think it is impossible to apply this rule to pltfs. before us when undoubtedly they would be entitled to have a share in the properties of the family at the moment of their birth West & Nanabhai Haridas JJ. were dealing with the case of pltfs. against whom it could have been said that they did not acquire a right by birth in the properties in suit Yet they held that they could claim that right since at the time when the claim was made the property was in the possession of persons who were removed by less than four degrees from the pltfs. In other words, the principle laid down by this case cannot apply to the pltfs. before us who clearly had acquired a right by birth in the properties in suit. The fact that at the time when they made the claim for partition the property was in the possession of the defts. who are more than four degrees removed from them would not, in our opinion, divest the right which had vested in the pltfs. at the time of their birth. It must be pointed out that in dealing with this argument we are assuming that the properties in suit are partible properties & that they belong to the undivided family of the parties. We are further assuming that there has been no partition in this family & there is no room for pleading adverse possession against the pltfs. Thus, on the facts found in this case there is no other bar to the pltfs." claim which can be successfully pleaded by the defts. in possession except the circumstance that they are more than four degrees removed from the pltfs. Now, if the pltfs. acquired a right by birth in these properties, we do not see how the said right could be deemed to be divested by reason of the fact that the persons in possession are more than four degrees removed from them. The distance between the pltfs. & the present defts. has increased by unfortunate deaths that took place in the defts." branch in quick succession; but no rule of Hindu law has been cited before us in support of the contention that if there are deaths in the branch managing the property, the vested right of the other members of the family is extinguished as soon as the management of the property goes to a member who is more than four degrees removed from these persons. With respect, we do not think we would be justified in reading the rule laid down by Nanabhai Haridas J. as applying to persons who are within four degrees from the common acquirer. The pltfs. in Moro Vishvanath's case did not acquire a right in the properties by birth; when they were born they were more than four degrees removed from the common acquirer. Even so since the claim was made against persons who were within four degrees from the common acquirer Nanabhai Haridas J. was prepared to concede to the plaintiffs a right to claim partition. In other words, the texts of Hindu law were liberally construed by the learned Judge with a view to save the pltfs." right of partition. On the other hand, Mr. Abhyankar's contention is quite clearly inconsistent with the liberal interpretation of the Sanskrit texts on which the rule enunciated by Nanabhai Haridas J. was based.

4. It is true that cases of this kind are not likely to occur very frequently. The presumption of jointness which is very strong as between a father & his sons or as between brothers grows weaker & weaker with the advent of newer generations. The coparcenary under Hindu law is a somewhat unique institution.

It is very elastic. Community of interest and unity of possession are its invariable features. But its membership and the respective rights of the members are not immutable or fixed. By deaths senior coparceners depart, while births introduce new coparceners. The respective rights of such coparceners increase or decrease according as there are deaths or births in the family. In a sense the institution of coparcenary is indestructible. Whenever a partition breaks up an old coparcenary, several new coparcenaries are born as each dividing member forms a separate coparcenary with his own sons and grandsons. Even so, from time to time partitions do bring about a change in the constitution of such coparcenaries so that we rarely come across cases where property belonging to a coparcenary remains undivided for generations together. But when we come across a case like the present, we must decide the pltfs' right principally by reference to the question as to whether the pltfs. had a right by birth in the properties in suit. On the findings which we have already recorded in this appeal we hold that the pltfs. must be deemed to have a right by birth in the properties in suit. If that is so, we are not prepared to hold that this right is either divested or extinguished merely because the pltfs. seek to enforce that right against defts. who are more than four degrees removed from them. [After dealing with matters not material to the report & giving directions regarding the shares of the parties his Lordship concluded:] We wish to make a general direction as regards all the parties before us that in effecting partition according to this decree, as far as possible parties in possession of their properties should not be dispossessed if the same can be done without injustice or inconvenience to the claims of other parties.

5. As regards the court-fees paid in this litigation we direct that deft. 5 was liable to pay only court-fees of Rs. 18-12-0 both in the trial Court & in appeal. Therefore in respect of the excess court-fees paid as regards the suit by deft. 5 or by defts. 1 to 4 in the appeals therefrom, the same should be refunded to the parties that may have paid the excess.

6. As regards the costs, we think deft. 5 is entitled to his costs as 1/6th share in the suit which he had filed & in the appeals before the Kolhapur High Court. Parties will bear their own costs in appeals 12 & 16 before us. The other parties to the said litigation will bear their own costs in the Courts below. So far as the costs of the principal suit & the two appeals 182 & 197 & cross objections thereunder are concerned, it is agreed between the parties that the costs of all the parties should come out of the estate. We direct accordingly. Rules discharged, no order as to costs, in the civil applications.