

(1936) 08 BOM CK 0015
In the Bombay High Court

Gemalsingji Khumansingji and Another	APPELLANT
Vs	
Bai Fati and Others	RESPONDENT

Date of Decision : 06-08-1936

Acts Referred:

Citation : AIR 1939 Bom 40

Hon'ble Judges : Rangnekar, J

Bench : Division Bench

Judgement

Rangnekar, J.—The facts which gave rise to the suit, out of which this appeal arises, are somewhat complicated, but for the purpose of elucidating the point which arises for decision in this appeal they may be briefly stated as follows: It appears from the pedigree, which is set out at print page 2, that certain property, including the property in suit, belonged to one Umar Asmal Gani. He died in 1915 leaving a widow Bai Maula and two daughters, Bai Fati, plaintiff 1, and Bai Mulag, who died before the suit. He had two brothers, Gori and Fuli, who were plaintiffs 3 and 4. His father had four brothers, two of whom were plaintiff 5 and plaintiff 6. The other brothers were Vali and Abhram. The parties are Mahomedans. Prior to his death Umar had made a will. His uncles, plaintiff 5 and plaintiff 6 and Vali and Abhram, therefore brought a suit No. 163 of 1916 for a declaration that the will made by Umar was not binding on them, and for a partition of the property left by Umar and recovery of their shares therein. Bai Maula was defendant 1 to that suit, and her daughters were also joined as party defendants. The plaintiffs claimed five-twenty-fourth share in the whole property. In 1917 they obtained a decree. The decree provided that the plaintiffs were entitled to a five-twenty-fourth share, Bai Maula to a one-eighth share and her daughters to a two-third share, and directed partition and separate possession. Bai Maula died thereafter, and plaintiff 2 in the present suit is her husband. In April 1918, Bai Maula sold survey No. 218/1 to one Bapu, under whom the present defendants are claiming, and died thereafter in November 1918. In April 1919, as a result of the settlement of disputes between the parties and the heirs of the deceased parties and certain releases executed by the parties, it is

common ground that the whole of the property was assigned to plaintiffs 5 and 6, and they became the owners of the whole of the property, excepting survey No. 218/1, which was in the possession of the defendants. In consequence of these transactions, and the settlement of disputes between the parties, no application for execution of the partition decree was made, and it is common ground that the partition decree remained unexecuted.

2. In 1928 the plaintiffs brought the present suit against the defendants, who had purchased survey No. 218/1 from an alienee from Bapu, for partition and separate possession of their shares therein, claiming a seven-eighths share in the property. Their case was that the defendants were entitled only to a one-eighth share belonging to Bai Maula. Various defences were taken on behalf of the defendants, into which it is not necessary to enter. They however contended that if their other pleas were rejected and a partition was directed, then, in effecting partition, in any event, they were entitled to have this property allotted to them as they had been in possession of it as bona fide purchasers for value since 1918, and that if the value of that property was less than what was represented by the one-eighth share of Bai Maula, then the deficiency should be made good by allotting to them some other property which would have gone to the share of Bai Maula if a general partition had taken place. The trial Court accepted this plea and held that the entire property belonging to Umar consisted of seventy-six bighas, out of which nine and a half bighas represented the one-eighth share of Bai Maula, that survey No. 218/1 comprised a little more than six bighas, and therefore the defendants had an equitable right to continue in possession of that property and dismissed the suit. In appeal from this decree, the learned Assistant Judge confirmed the judgment of the trial Court on almost all the points but held that the defendants were not entitled to the equitable right claimed by them as they were not the immediate purchasers of any specific joint property from Bai Maula, but were alienees from an alienee from the original alienee from Bai Maula. Relying therefore on *Dhadha Sahib v. Muhammad Sultan Sahib* A.I.R.(1921) Mad 384 he rejected the contention that they were entitled to any equity, and in the result passed a decree for partition declaring that the plaintiffs were entitled to seven-eighth share in the property and that the defendants were entitled to one-eighth.

3. From that decree the present appeal is made; and the only question raised in the appeal is, whether the equitable right set up on behalf of the appellants can be given effect to under the circumstances of this case. Before doing that, I may refer to the decision in *Dhadha Sahib v. Muhammad Sultan Sahib* AIR (1921) Mad 384. It was held there that a vendee from the first purchaser has no equity in his favour, and that if there is any loss to him in the bargain by reason of any suit brought by other cosharers to set aside the alienation, then his only remedy was to sue his own vendor (that is, the first purchaser), for damages for breach of warranty. The ratio decidendi is that to take any other view is to give such vendee property which he never bargained for. The learned author of Mulla's Hindu Law has adversely criticized this decision, and I have no hesitation in

saying that I agree with him. In my opinion, in suits for partition between cosharers to which an alienee from one of them is a party, it is difficult on principle to make any distinction between the case of an immediate vendee from one of the cosharers and that of a vendee from such vendee. It is well established that, in effecting partition of joint property between cosharers and an alienee from one or some of them, equity requires that partition should be so effected as not to prejudice the latter. The principles which apply in cases of partition among Hindus also apply, according to our decisions, as observed by the learned appellate Judge, in the case of Mahomedans. The underlying principle is, that a bona fide purchaser for value should not be prejudiced by reason of any subsequent suit for partition brought on behalf of the other cosharers, and that if, without doing in-justice between the parties, the equities between the alienee and the other cosharers can be so adjusted as to allow the purchaser the full fruit of his bargain for which he has paid full consideration, that ought to be done. It is therefore difficult to see what distinction exists between the case of an immediate vendee and that of a second vendee. The principle which applies in the case of an immediate vendee would and ought to apply in the case of a vendee from such vendee. What is said is that if a second vendee suffers any loss by any such transaction being set aside in toto and by his being deprived of the property of which he is in possession, he can go against his vendor, but that would apply equally in the case of an immediate vendee from a cosharer. I must therefore respectfully dissent from that decision.

4. The position as to the equitable rights of purchasers on partition is set out, in my opinion, correctly in paragraph 261 (3) of Mulla's Hindu Law (Edn. 8) at page 300 in those words:

The alienee of a specific property or of the undivided interest of a coparcener in such property has on a general partition an equitable right to have that property, or his alienor's share in that property, as the case may be, assigned to him if it could be done without injustice to the other coparceners. But there may be equities between the coparceners or liabilities attaching to the alienor's share which may render it inequitable or impracticable to do so. In such a case the alienee is entitled to recover from his alienor property of an equivalent value out of the properties allotted to the alienor for his share in substitution of the property alienated. But a purchaser at a court-sale has no such right, there being no warranty of title at such a sale. And it has been held that a vendee from the first purchaser also has no such right, and that his only remedy is to sue his own vendor (that is, the first purchaser) for damages for breach of warranty, the reason given being that to hold otherwise would be to give to such vendee property which he never bargained for. But this argument, it is submitted, applies equally as between the alienor and the immediate purchaser from him.

5. It is argued that this principle would only apply in cases where there is general partition; but, in my opinion, that contention is not sound-and for this reason. It is well established that an alienee from a cosharer cannot ask for separate

possession of the property alienated to him if it forms part of the joint property. His only right is to apply for a decree for joint possession, and such joint possession will be allowed to him along with the other members of the family. If they object to such joint possession, then their only remedy is to sue for partition and for separate possession. But, the general body of joint owners is not bound to bring a suit for general partition where there is an alienation of a specific joint property; they may well confine their suit to a partition of the particular property which is in possession of the alienee. In that case, it is difficult to see why the principles which apply in the case of partition decrees where the suit is for a general partition cannot equally apply to a suit for partial partition. I am supported in the view which I am taking by the decision in *Ramasami Aiyar v. Venkatarama Ayvar* A.I.R.(1924) Mad 81. In my opinion, it is difficult to distinguish the present case from the facts of that case. There it was not necessary for the plaintiff to bring a suit for general partition as he was the last surviving coparcener, and he therefore brought a suit for partition and separate possession of the particular property which had been alienated. Here the position is exactly the same. The several cosharers ceased to exist as a result of the transaction to which I have referred, and the rights of the general body of joint owners now vest in plaintiffs 5 and 6. It is true that they have joined other cosharers, but that is only for the sake of form, and they are formal parties. No question therefore of general partition arises, apart from the fact that a decree for general partition was made between the cosharers. It was held in *Ramasami Aiyar v. Venkatarama Ayvar* AIR (1924) Mad 81 that the alienee need not be directed to institute a separate suit to work out his rights by partition, but was entitled in the coparcener's suit as a defendant to get a decree for partition and claim to be allotted the item purchased by him in respect of his vendor's share if that was consistent with the rights of the other coparceners, and that if the value of the item did not exceed the value of the alienor's share in the entire family property at the time of the alienation, the alienee was entitled to retain the entire property sold to him. That exactly is the position here.

6. As it has been found by both the Courts that the value of Survey No. 218/1 is much less than what would have gone to the share of the vendor by alienation, the trial Court was right in dismissing the suit. That being the position, I think the appeal must be allowed, the decree made by the learned Assistant Judge set aside, and the suit dismissed. In the circumstances of this case, I make no order as to costs through-out.