
(1928) 03 BOM CK 0024
In the Bombay High Court
Case No : Second Appeal No. 840 of 1925

Govinddas Rajaramdas Gujar

APPELLANT

Vs

Ganpatdas Narottamdas Gujar

RESPONDENT

Date of Decision : 02-03-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1928 Bom 365 : (1928) 30 BOMLR 912

Hon'ble Judges : Patkar, J; Baker, J

Bench : Division Bench

Judgement

Patkar, J.—[His Lordship, after stating the facts, proceeded:] The first question which arises in this case is whether the present suit is barred by res judicata or by Section 47 of the Civil Procedure Code. The house was not included in the plaint in the previous suit. It was a subsequent acquisition by defendant No. 1 on behalf of the family, and in the decree passed by the Subordinate Judge partition could not have been and was not in fact ordered with regard to the plaint house. It is clear, therefore), that the suit is not barred by res judicata.

2. The next question is whether it is barred u/s 47 of the Civil Procedure Code. Reliance is placed on behalf of the defendants on the order of the commissioner approved by the First Class Subordinate Judge on August 11, 1910. If the order of the First Class Subordinate Judge, dated August 11, 1910, be construed as a decree for partition of the house, the present suit would be barred u/s 47 of the Civil Procedure Code. If, on the other hand, the decree be considered as merely a declaratory decree declaring the rights of the parties in the house and out-standings and the rent, the present suit would not be so barred. The order says that "the parties had agreed to divide the house of the aforementioned Sonar half and half and the plaintiffs agreed to pay to the defendant half the expenses of the execution." The house did not come into the possession of the family till 1912, that is, two years after the date of the order, and it cannot be supposed that the Court intended to direct partition of a house which did not then come

into the possession of the parties and with regard to which the parties only agreed to make a division between themselves. It was held in First Appeal No. 282 of 1921, in execution proceedings of the previous decree that "the plaintiff can either come to an arrangement with the defendant for partition of the house or he can file another suit.

3. In *Lade v. Sadashiva* (1903) 6 Bom. L.R. 35 it was held, following (1879) L.R. 6 I.A. 177 (Privy Council) that a decree directing a partition, or the equivalent of a decree substantially undistinguishable from the decree under consideration is a declaratory decree converting the parties into tenants-in-common; that a tenant-in-common is entitled as of right to have a partition made of the property which he holds in common with others, whatever the means whereby he acquired that character; and, that where a partition in interest is once effected by a decree between the coparcener, a suit, and not an application u/s 244 of the CPC (corresponding to Section 47 of the present Code), is the proper procedure whereby to obtain a partition by metes and bounds. To the same effect is the decision in *Jagu Babaji v. Balu Laxman* I.L.R (1912) Bom. 307 : 14 Bom. L.R. 1198 where the case of *Soni v. Munshi* (1900) 3 Bom. L.R. 94 was distinguished on the ground that the partition decree directed allotment of the southern half to one party and the northern half to another, and the ruling in *Nasrat-ullah v. Mujib-ullah* I.L.R (1801) All. 309 was apparently approved in so far as it held that the decree declaring a right to partition not having been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for enforcing their right by partition by metes and bounds in case their right is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained.

4. On the proper construction of the order of August 11, 1910, we think that the parties agreed to divide the house half and half, and it was left to them either to effect the partition by mutual agreement or enforce their rights by a separate suit, and therefore, the present suit is not barred u/s 47 of the Civil Procedure Code.

5. The next question is whether the claim with regard to the rent of the house and with regard to the share in the recoveries of the balance of the mortgage debt is barred by limitation. The learned Subordinate Judge held that Article 89 of the Indian Limitation Act applied to such a claim. The learned District Judge, relying on the case of *Vaidyanatha Aiyar v. Aiyasamy Aiyar* I.L.R (1903) Mad. 191, came to the conclusion that Article 62 applied. The circumstances of this case show that after the previous partition defendant No. 1, as manager of the family, executed the mortgage-decree, and purchased the property in suit and recovered the rents and the balance of the mortgage amount on behalf of the whole family. The circumstances of this case are similar to those in the case of *Gabu Naroba Rajput Vs. Zipru Ramsing Rajput*, , where it was held that where at a partition between members of a joint Hindu family, a portion of the family

property is left undivided with the senior member of the family with a view to the property being realised and its proceeds divided, a suit for account and for recovery of a share in such property by a member of the family is governed by Article 89 and not by Article 62 of the Indian Limitation Act.

6. It cannot be said that defendant No. 1 in this case recovered the amount of rent and the mortgage debt solely on behalf of the plaintiffs, but he recovered it on behalf of the plaintiffs and himself as representative of the family on behalf of the other members as well. This view is in accordance with the decision in *Girjabai Shivdeorao Vinchurkar Vs. Narayanrao Ganpatrao Vinchurkar*, . There are sufficient grounds in this case to infer that defendant No. 1, who received the moneys and rents and profits, received them as the agent of the plaintiffs and other members of the family, and therefore, Article 89 would apply; but if Article 89 did not apply, the suit for money had and received would not lie by one tenant-in-common against another who had received more than his share and the proper remedy would be a suit for account which would be governed by Article 120 of the Indian Limitation Act and in either case time would begin to run from the date when an account was demanded and refused, according to the decision of the Madras Full Bench in *Yerukola v. Yerukola* I.L.R (1922) Mad F.B.

7. We think, therefore, that the claim of the plaintiffs with regard to the rent and the recoveries of the mortgage debt is not barred by limitation.

8. The plaintiffs are, therefore, entitled to recover possession of a half share in the plaint property on partition from defendant No. 1, and are entitled to Rs. 240 due to them on account of their share in the balance of mortgage debt recovered by defendant No. 1 and are also entitled to a half share of the amount of rent which was actually received, viz., 264, which comes to Rs. 132. We would, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with this variation that for the amount of Rs. 464 we would allow Rs. 132 for the plaintiffs' share in the rent.

9. The appellants are entitled to their costs in this Court and in the lower appellate Court.