

(2004) 04 BOM CK 0001
In the Bombay High Court
Case No : Second Appeal No. 220 of 1990

Govindrao Ajmire

APPELLANT

Vs

Dadarao " Shrawan Ajmire (dead) LRs. Indrani Ajmire and
Others

RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:

Citation : (2004) 3 ALLMR 660 : (2004) 4 MhLj 653

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : A.M. Gordey, for the Appellant; J.T. Gilda, for the Respondent

Judgement

S.T. Kharche, J.—By invoking the jurisdiction of this Court u/s 100 of the Code of Civil Procedure, this Second Appeal has been filed by the original Plaintiff. Being aggrieved by the Judgment dated 2nd of March, 1990, passed by the learned Additional District Judge, Amravati in Regular Civil Appeal No. 57 of 1989, whereby he dismissed the appeal and confirmed the Judgment and decree passed by the trial Court dismissing the suit of the plaintiff for partition and separate possession of his share in the suit house.

2. The relevant facts are required to be stated as under :--

The plaintiff filed a suit for partition and separate possession of his share. It is contended that the plaintiff had purchased the suit house out of the income of ancestral joint family property. The joint Hindu family owned 234 acres of agricultural land and same was subject matter of partition between the plaintiff and defendant and their sons and the property i.e. Agriculture land was partitioned vide registered partition deed dated 14-3-1959. The suit house was not partitioned in between the parties and it is in their joint possession. The plaintiff and defendant are the real brothers. The plaintiff contended that one room out of the suit house is in his possession and rest of the rooms of the suit house are in possession of the defendant. The plaintiff claimed and demanded his

half share in the suit house but the defendant refused to give the same and therefore the plaintiff had filed suit for partition and separate possession of his share in the suit house. The defendant resisted the claim of the plaintiff by filing written statement and contended that the suit for partial partition of the properties is not maintainable. He is in exclusive possession of the suit house and the partition deed dated 14-3-1959 was nominal and bogus and it was executed with a view to protect the property of their joint family from the ceiling legislation. The defendant contended that there was no partition at all of any of the properties belonging to the joint family. The defendant further contended that the entire joint family property has not been brought into the common hotchpotch by making partition by metes and bounds and therefore the suit is bad. The defendant contended that the title to the suit house is entered in the name of defendant alone in the year 1936, and thereafter, from 1971-72 the same is transferred in the name of Ambadas who is his son. The defendant has also taken a plea that he has acquired title to the suit house by virtue of adverse possession. The trial Court on the aforesaid pleadings framed the issues and parties adduced evidence on record in support of their contentions. The trial Court on considering evidence and on hearing the parties, had recorded the findings that the suit house is liable to be partitioned, but the suit is bad for not impleading necessary parties and moreover suit for partial partition is not tenable in respect of the isolated property without bringing into the common hotchpotch the entire house property owned by the joint family. He negated the contention of the defendant that he became owner of the suit house by adverse possession and that the plaintiff has got his half undivided share in the suit house. Consistent with these findings the trial Court dismissed the suit. Being aggrieved by the judgment and decree passed by the trial Court the plaintiff carried appeal to the District Court. The learned Additional District Judge on hearing learned counsel for the parties and on appreciation of the evidence dismissed the appeal. This judgment of the appellate Court is under challenge in this second appeal.

3. Mr. Gordey, the learned counsel for the plaintiff contended that there is concurrent findings of both the Courts that the plaintiff is entitled to one half share in the suit house and therefore simply because the entire joint family property was not made subject matter of the suit for partition, it cannot be said that the plaintiff is not entitled to decree for partition, so far as the suit house is concerned. He contended that there was no necessity to bring into common hotchpotch the entire joint family property. He contended that as per Article 333(3)(i) of the Hindu Law by Mulla, 16th Edition, the general rule is that where a suit for partition is brought by a coparcener against the other coparceners, it should embrace the whole family property. This rule is subject to certain qualifications. He contended that the suit for partial partition, brought by a coparcener against other coparcener is perfectly maintainable due to exceptions provided to the general rule. He contended that it is not in dispute that the suit house was not the subject matter of the partition, said to have been effected on

14th March, 1959 by virtue of partition deed. Therefore, the general rule does not apply to the property held by tenants in common. He contended that by virtue of partition deed dated 14-3-1959, mostly the agricultural lands owned by the joint Hindu family were partitioned and in such circumstances it was not necessary for the plaintiff to include the other house property situated at Pimpalkhuta in the suit for making them subject matter of partition. He contended that admittedly the plaintiff has a half share in the suit house and it is a joint family property and it is also not in disputed that the plaintiff and the deceased defendant Shrawan are the heads of their branches.

4. He contended that the original defendant Shrawan died during the pendency of this appeal and his legal representatives have been brought on record which are comprised of his widow Indrayani, son Ambadas, another son Prabhakar, third son Dr. Prakash and fourth Bhalchandra. He contended that since the suit house was the only joint family property left by the father of plaintiff and original defendant Shrawan, the plaintiff is entitled for decree of partition of his half share in the suit house. He contended that since this is a suit brought by plaintiff for partition between two branches of the joint family, the head of each of the branch is a party to the suit and therefore it was not necessary to implead the sons of deceased Shrawan for claiming the half share in the suit house. He contended that in the circumstances suit is not bad for non-joinder of necessary parties and suit for partial partition was perfectly maintainable and the concurrent findings of both the Court dismissing the suit of the plaintiff cannot be sustained in Law.

5. Mr. Gordey contended that the written statement filed by the defendant in Regular Civil Suit No. 85/86 cannot be taken into consideration in the present suit for want of any evidence adduced on record to show that the house property situated at Amravati and village Pimpalkhuta is still un partitioned and there is no division by partition in respect of that house property and that whatever house property is situated at Pimpalkhuta is a joint family property liable for partition. He therefore contended that the suit filed by the plaintiff for partition of the single house situated at Amravati is perfectly maintainable. In Support of these submissions he relied on Harihar Rajguru Mohapatra and Another Vs. Nabakishore Rajaguru Mohapatra and Others, , on the Division Bench decision of this Court in Sitaram Vinayak Hasabnis Vs. Narayan Shankarrao Hasabnis, . He also placed reliance, in support of his submissions that a partial partition of Joint family property is permissible, on the decision of the Apex Court in the case of Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, and in the case of Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., .

6. Mr. Gilda, the learned counsel for defendant has contended that the general rule is that all property held in co-tenancy should be included in a partition suit and that various house properties situated at Amravati and Pimpalkhuta have not been brought into the common hotchpotch and therefore both the Courts below

were perfectly justified in dismissing the suit of the plaintiff on this ground. He contended that the defendant had filed his written statement in Regular Civil Suit No. 85/86 wherein he had clearly admitted that the joint family house property in possession of the parties included in that suit was described in written statement. He contended that the defendant pleaded in that suit that in the year 1959 the plaintiff Shrawanji, had effected partition of agricultural landed property by executing a registered partition deed dated 14-3-1959 and house property situated at Amravati and Pimpalkhuta are still un partitioned and there is no division by partition in respect of the house property up till then. Mr. Gilda, therefore, contended that admission by the plaintiff is the best evidence which goes to indicate that the plaintiff has not included all the joint family property in the suit and therefore the suit itself seeking the relief of partial partition and separate possession of half share was not maintainable.

7. He contended that the exception which has been carved out by the plaintiff for not including these properties, is not really an exception to the general rule and in the circumstances therefore the suit has been rightly dismissed by the trial Court. He pointed out that the findings of the trial Court that the defendant has admitted in his written statement about the existence of the house property at Pimpalkhuta has not been challenged before the appellate Court and hence the plaintiff cannot be allowed to agitate the same point in the second appeal.

8. Mr. Gilda, the learned counsel contended that since the suit for partial partition was not maintainable, the appellate Court has also rightly dismissed the appeal. In support of these submissions he relied on the decision of Calcutta High Court in the case of Rajendra Kumar Bose v. Brojendra Kumar Bose AIR 1923 Cal 501. He also relied on the decision of the Apex Court in the case of Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, .

9. He contended that the suit is bad for want of necessary parties on record. He contended that the defendant Shrawan died during the pendency of the suit leaving behind him widow and four sons but the plaintiff did not implead son of the defendant i.e. Ambadas in whose name mutation entry was recorded in respect of the house properties and therefore the suit for partition without impleading him as a party was not maintainable because Ambadas was a necessary and proper party in view of Order 1, Rule 9 of the Civil Procedure Code. In support of his contentions he placed reliance on the Division Bench decision of this Court in Sitaram Vinayak Hasabnis Vs. Narayan Shankarrao Hasabnis, .

10. This Court has given thoughtful consideration to the contentions canvassed by the learned counsel for the parties. The genealogical tree of parties is not disputed which can be drawn as under --

Gangaram (died in 1940)		-----	
Son Govinda Shrawan (Defendant)	=	Indrayani (Plaintiff) (died on 17-7-2003) (Widow)	
Ashok	-----		

Ambadas Prabhakar Dr. Prakash Bhalchandra

11. Gangaram died sometime in the year 1940 leaving behind him two sons namely Govinda and Shrawan. Govinda has one son by name Ashok whereas Shrawan died during the pendency of the appeal on 17-7-2003 and his legal representatives have been brought on record. He died leaving behind him his widow Indrayani and four sons namely Ambadas, Prabhakar, Dr. Prakash and Bhalchandra. Shrawan had instituted Regular Civil Suit No. 85/86 for possession of the properties described therein. The present plaintiff Govindrao was the defendant in that regular Civil Suit. He had filed his written statement in that suit wherein it has been mentioned in para 6 that Gangaramji was the head (Karta) of the joint family and after his death in the year 1940, his estate left by him was inherited by his legal representatives. The age of Shrawanji was about 20 years and age of Govindrao was 8 years at that time and Shrawanji being eldest in the family became the head of the joint family and was managing the entire properties. In the year 1959 Shrawan had effected partition of the agricultural landed property by virtue of registered partition deed dated 14-3-1959. The house property situated at Amravati and village Pimpalkhuta was still unpartitioned and there was no division by partition in respect of the house property till that time. The Joint family house property in possession of the parties is described as below --

(A) House property in possession of the plaintiff:

(i) Ancestral original residential big house situated at village Pimpalkhuta, double storied house constructed in bricks, lime, cement, having terrace.

Big four, rooms on ground floor and same structure on the first floor area of the plot about 65 ft. x 30 ft.

(ii) Open plot Area 60 x 40 ft. situated at village Pimpalkhuta.

(iii) Old shade having area 32 x 26 ft.

(iv) Big shade used as a cattle shed by the plaintiff are about 170 x 45 ft.

(v) A big house situated at Amravati in Ambagate locality bearing House No. 200 Ward No. 34 Nazul Plot No. 52 sheet No. 80-A. The plaintiff is in possession of 9 rooms out of total 11 rooms. The plaintiff is in possession of 85% area of this house at Amravati whereas defendant is in possession of only 15% area.

(B) The house property in possession of the defendant:

(i) one shade which is being used by the defendant as a residential house having area 65 x 40 ft.

(ii) One Tin shed used for storage of the agriculture material having area 32 x 25 feet (suit house),

(iii) One Tin shed used as a cattle shed.

(iv) One room and adjacent varanda in possession of the defendant out of total 11 rooms in the house situated at Amravati near Ambagate locality bearing Mpl. House No. 200 Ward No. 34 Nazul Plot No. 52 Sheet No. 80 at Amravati.

12. In Harihar Rajguru Mohapatra and Another Vs. Nabakishore Rajaguru Mohapatra and Others, the Orissa High Court observed cited supra observed in para No. 6 as under --

"The first contention has no substance. No issue on this point was raised by defendant 5 and the point was not agitated before the trial Court. We are, therefore, not prepared to allow such a contention to be raised for the first time at the appellate stage. Further whether a suit for partition should comprise all the joint family properties, or whether it can be brought in respect of a portion of such properties would depend upon many circumstances. There is no absolute rule of law prohibiting a suit for partition of some of the properties only. Assuming that some properties have been left out, parties are not precluded from effecting partition of those properties at a subsequent stage. The appellants are also not precluded from raising valid objections, if any, in a subsequent litigation. This contention accordingly fails." In Sitaram Vinayak Hasabnis Vs. Narayan Shankarrao Hasabnis, , the division bench of this Court held that -- "The ordinary rule applicable to suits for coparcenary property is that when a suit for partition is between coparceners it should embrace the whole family property, and a member of a joint family suing his coparceners for the partition of joint family property is bound to bring into hotchpotch all the property that may be in his own possession in order that there may be a complete and final partition. The rule is subject to exceptions arising out of convenience and from other causes. But there is no such basis for the application of the rule to property which is held in common, though special circumstances do sometimes exist which make it necessary or desirable to apply the rule to suits relating to land held in common". In Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., , the Hon"ble Supreme Court held that -- "It is always open to the members of a joint Hindu family to divide some properties of the family and to keep the remaining undivided. Such properties as are not partitioned can be divided later on - Such division is to be made consistently with the rules of Hindu Law." In Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, , it has been held that it is always open to the member of a joint Hindu family to divide some properties of the family and to keep the remaining undivided. Such properties as are not partitioned can be divided later on. Such division is to be made consistently with the rules of Hindu Law." "A partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu law and must be held to be valid and binding. This right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as patria potestas has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just. When father can bring about a complete

partition of joint family properties between himself and his minor sons even against the will of the minor sons and when partial partition under the Hindu law is now accepted and recognized as valid by judicial decisions, it cannot be said that the father who can bring about a complete partition of the joint family properties between himself and his minor sons will not be entitled to effect a partial partition of joint family properties between himself and his minor sons, if the father in the interest of the joint family and its members feels that partial partition of the properties will be in the best interest of the joint family and its members including the minor sons. If the father does not act bona fide in the matter when he effects partition of joint family properties between himself and his minor sons, whether wholly or partially, the sons on attaining majority may challenge the partition and ask for appropriate reliefs including a proper partition. In appropriate case even during minority, the minor sons through a proper guardian may impeach the validity of the partition brought about by the father either in entirety of the joint family properties only in respect of part thereof, if the partition had been effected by the father to the detriment of the minor sons and to the prejudice of their interest."

13. In *Rajendra Kumar Bose* AIR 1923 Cal 5017, cited supra it has been laid down by the Division Bench of the Calcutta High Court that -- "The rule that a partition suit should embrace all the joint property is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognized and firmly applied, multiplicity of litigation would be the inevitable result. If suit for partition were allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered; it might be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court, and whether he should at all be permitted to seek the judgment of the judicial committee with regard to the matters in controversy. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. It need not be disputed that there may be a very special cases where the application of the rule may be justly relaxed."

14. In *Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda*, , the Hon'ble Supreme Court held that "when all the joint family properties are not made the subject-matter of the suit, nor the co-sharers have been impleaded, the suit for partial partition is not maintainable,"

15. On resume of the aforesaid authorities it would reveal that the general rule is that all the joint family properties should be brought into common hotchpotch and then seek partition of the same. A member of a joint property suing his coparceners for partition of family property is bound to bring into common hotchpotch the entire joint property in order that there may be complete and final partition of family properties that may be in his possession. The general rule is that initially suit for partition is brought by a coparcener against other

coparceners, it should embrace the whole family property but this rule is subject to certain qualifications and exceptions. In the present case it is not in dispute that the plaintiff has filed suit for partition and separate possession of his half share in the suit house, without bringing into common hotchpotch the house property and open plot which are described in the written statement filed by him in Regular Civil Suit No. 85/86. The plaintiff even did not make any reference to these properties in his plaint and simply stated that the agricultural lands were partitioned by the partition deed dated 14-3-1959 between him and his brother Shrawan. It would thus reveal that there was already partition of some of the properties which were the agricultural lands by virtue of the said partition deed dated 14-3-1959.

16. The house property described in the plaint in this suit as well as in the written statement filed by the plaintiff in Regular Civil Suit No. 85/86 would show that the house property is situated at Amravati as well as at Pimpalkhuta and the plaintiff has suppressed in the plaint as to whether the house property and open plot situated at Pimpalkhuta is also a joint family property or it is the self acquired property either of his father or of the deceased defendant Shrawan, In such circumstances it is not possible to accept the contention of the learned counsel for the plaintiff that the suit for partial partition of the house properties is maintainable and therefore the said contention is required to be rejected for the simple reason that no exceptional circumstances have been brought on record to show that an exception to the general rule would prevail in the present case.

17. It may be pertinent to note that the rule that a partition suit should embrace of the joint family property is recognized and firmly applied in order to bring the equitable partition by metes and bounds. If the rules were not recognized and firmly applied, the multiplicity of litigation would be the inevitable result. If the suit for partial partition is allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered; it might be of paramount importance to a party litigant whether he should have a first appeal or a second appeal to the High Court, and whether it should at all be permitted to seek the judgment of the Judicial Committee with regard to the matters in controversy. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements, and adjustment of accounts. Therefore, in the present case, it is not possible to accept the contention of the learned counsel for the plaintiff that the suit for partial partition of the properties owned by the joint family is maintainable, without bringing into the common hotchpotch the entire joint house property of the parties. Therefore, it is quite obvious that authorities on which reliance placed by the learned counsel for the plaintiffs is totally misconceived and cannot be accepted.

18. The trial Court on consideration of the facts and circumstances rightly observed that u/s 333 of the Hindu Law, Sub-clause (3) it is laid down that in a suit for partition the general rule that where a suit for partition is brought by a

coparcener against the other coparceners, it should embrace the whole family property. This rule is subject to certain qualifications which are mentioned in the Sub-rule. The instant suit filed by the plaintiff does not fall in any of the exception and it is, therefore, apparent that the plaintiff ought to have brought the entire family property in common hotchpotch so as to bring about the complete and final partition of all the joint family house property and thus the instant suit, singling out a house for partition is not maintainable.

19. The trial Court rightly held that the mutation entry in relation to the suit house was recorded in the name of Ambadas and therefore he was necessary party to the suit. It is pertinent to note that the plaintiff though has claimed partition of the single house property situated at Amravati, he did not make it clear as to what has been done with the house property which is situated at Pimpalkhuta. The deceased defendant Shrawan has four sons namely Ambadas, Prabhakar, Prakash and Bhalchandra and they all ought to have been impleaded as parties to the suit in which claim for partition and separate possession of the share of the plaintiff has been claimed. Therefore, it is obvious that the suit is bad for non-joinder of necessary parties and without impleading the coparceners, suit for partition would not lie. In such a situation, this Court do not find any force in the submissions of the learned counsel for the plaintiff that the suit for partition between the two heads of the branches of the Hindu family is maintainable without including the entire joint family house property in the common hotchpotch.

20. The appellate Court also considered this aspect of the matter and rightly held that the suit is not maintainable without bringing entire joint family house property into common hotchpotch. Consequently, the appellate Court dismissed the appeal. It would be quite clear that the suit house is not the only property owned by the joint family and having regard to the joint family house property situated at Pimpalkhuta and Amravati, it is apparent that the suit for partition of the suit house only would not be maintainable and even if it is held that the plaintiff has half share in the suit house, the partition of the same would not be equitable and just. Since all the properties were not included in the suit and the two brothers i.e. Plaintiff and defendant are claiming their rights and shares in the house properties left by Gangaram, ends of justice would be met if the case is remanded to the trial Court. The joint house property owned by the two brothers will also be included in the suit and will be dealt with in such a manner as the Court may consider, consistent with justice equity and good conscience. If the plaintiff declines to have partition of entire joint house properties, the suit will stand dismissed with costs throughout. The plaintiff is permitted to implead the necessary parties and also to include the entire joint family house property in this suit. In the result, the case is remitted to the trial Judge for decision in accordance with law in the light of the observations mentioned above in this judgment and the impugned order is set aside and the appeal is allowed to the extent indicated above with no costs in the circumstances.