
(1922) 01 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 380 of 1920

Ishrappa Ganap Hegde

APPELLANT

Vs

Krishna Putta Shankar Hegde

RESPONDENT

Date of Decision : 31-01-1922

Acts Referred:

Citation : (1922) 24 BOMLR 428 : 67 Ind. Cas. 833

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Judgement

Norman Macleod, C.J.—The plaintiff sued for a partition of the plaint strip of land and separation of his two-thirds share claiming title under a sale by defendants Nos. 3 and 4 of their two-thirds interest to the plaintiff in the suit property. Defendants Nos. 3 and 4 were members of a joint family consisting of themselves together with defendants Nos. 2 and 5, who were jointly interested to the extent of one-third. After the sale by defendants Nos. 3 and 4 to the plaintiff, the second defendant as manager of the family sold the plaint strip to the first defendant.

2. In the trial Court the first defendant endeavoured to prove that there had been a sale to him of the plaint strip by defendant No. 2 prior to the date of the sale to the plaintiff of two-thirds of the property by defendants Nos 3 and 4. This issue was found against him.

3. Then the first defendant claimed that defendants Nos. 3 and 4 were estopped from selling the plaint strip or an interest therein to the plaintiff, and that issue was found in the trial Court in the affirmative, and the suit was dismissed, on the ground that the plaintiff's suit for partition for specific property could not lie without suing for a general partition.

4. In appeal the learned appellate Judge considered that the suit could lie. The first defendant claimed to have purchased the interest of the whole undivided family:

The plaintiff so far agreed with him to say that he had purchased all that remained of the joint family interest after the plaintiff's own purchase had taken effect. It was therefore common ground that the joint family had been altogether ousted. The contest was between two strangers. There was no reason why such strangers could not without instituting a general suit for partition of the entire family property, maintain an action for the partition of the fraction which was in dispute between them.

5. Now there may be cases in which one coparcener purports to convey his interest in a particular item of family property to a stranger, while the other coparcener (taking the simplest case of two coparceners) sells his interest in the same property to another stranger. In such a case a suit might lie by one stranger against the other for partition for that item of the family property which had been wholly disposed of by the persons who were entitled to it. But such an action between strangers, in my opinion, should only be allowed in the very plainest of cases, when it has been proved that the whole of the family interest in the property has been disposed of either by joint action between the members of the family or by separate action against which no dispute has been raised.

6. In this case the first defendant claims to be entitled to the entire strip of land in dispute under his sale from the second defendant who appears to have sold as manager; and assuming that this plaintiff strip had entirely gone out of the family, still the question might arise whether the first defendant was entitled to the whole or only to the share of his vendor. That question has never been raised in the suit. Accordingly there is no evidence to show that the alienation by the second defendant of the whole strip was competent. The learned appellate Judge, however, although he considered that the suit would lie, dismissed it on the ground that the third and fourth defendants were estopped by their conduct in disputing the sale effected by the second defendant. I do not think the ground on which that estoppel was found to be effective will stand the light of analysis.

7. But apart from that, it seems to me that the plaintiff's suit was not competent. It is true that all the members of the joint family are parties to the suit. But the question whether the suit could be converted into a general suit for partition has never been raised, and it is much better that the plaintiff, if he wishes to proceed further, should file a general partition action, rather than confuse the issues by changing the nature of the present suit. The dealings by members of a joint family with their undivided shares either in the whole of the family property, or in particular items, necessarily lead to a considerable amount of confusion. It cannot be said that any coparcener has a particular share in any item of the family property. He has only an undivided share in the whole of it, and although it may be taken as settled law now that a coparcener can sell his own interest in the joint family property, the relief given to the purchaser by the Courts can only be given by way of a suit for a general partition. See *Pandu Vithoji v. Goma Ramji* ILR (1919) Bom. 472; 21 Bom. L.R. 213. Again in *Hanmandas Ramdayal v. Valabhdas* ILR (1918) Bom. 17; 20 Bom. L.R. 472

defendants Nos. 1 to 4 became purchasers at a Court sale in execution of the decree against the fifth defendant of two of the properties belonging to the joint family. The plaintiff, a minor, thereupon, brought a suit against his father (defendant No. 5) and the decree-holders as well as the auction purchasers for a declaration that the plaintiff's half share in the two properties did not pass to the auction purchasers, and for possession of his half share on equitable partition. It was held that the son's interest did not pass to the purchasers at the Court sale; and it was also held that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties.

8. The result must be that the plaintiff's suit as purchaser from defendants Nos. 3 and 4 for partition of this particular item of family property cannot lie, and we think that the order dismissing the plaintiff's suit should be confirmed, expressing our opinion that there is nothing to prevent the plaintiff from endeavouring to get advantage of his sale from defendants Nos. 3 and 4 by filing a suit for a general partition.

Coyajee, J.

9. I agree in holding that the plaintiff in this case is not entitled to demand by partition his vendors' alleged two-third share in this particular item of joint family property. It is clear on the facts that the plaintiff's vendors are only two out of four coparceners owning considerable undivided property. As such coparceners they are not entitled to say that they have a right to a specific share in any particular portion of the joint family estate. And a purchaser of their unascertained share cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included, and all necessary parties joined: *Pandu Vithoji v. Goma Ramji* ILR (1919) Bom. 472 In a suit of that nature the Court, in making the partition, would endeavour to give effect to the alienation, and "so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much of it as may be just" to the purchaser: *Udaram Sitaram v. Ranu Panduji* (1874) 11 B.H.C.R. 76.