
(1922) 08 BOM CK 0005

In the Bombay High Court

Case No : O.C.J. Appeal No. 151 of 1921 and Suit No. 2726 of 1919

Shantaram Balkrishna

APPELLANT

Vs

Waman Gopal Wadekar

RESPONDENT

Date of Decision : 09-08-1922

Acts Referred:

Citation : AIR 1923 Bom 85 : (1922) 24 BOMLR 1029

Hon'ble Judges : Lallubhai Shah, J;Crump, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Shah, Acting C.J.

1. The facts which have given rise to this appeal are briefly these. A plot of ground, which is shown in the plan, was originally owned by one Balkrishna. He left four sons, Shantaram, Vasantao, Janardan and Shivshankar, and at a partition which was effected among the four brothers in the year 1916, this plot was divided into four parts. The plot marked A in the plan fell to the share of Shantaram, the plot marked B was assigned to Vasantao, the plot marked C was assigned to Janardan and the plot marked D was assigned to Shivshankar. There was a common passage left which is shown in the plan and which is marked E F H G. There is no special provision in the decree based upon the award relating to the partition, but it appears from the descriptions of the various plots given in the Schedules that the said land was reserved for the common passage. On September 19, 1916, Janardan conveyed his interest in the plot D to the present plaintiffs, and on September 28, 1916, Shivshankar conveyed his interest in the plot D to the 1st plaintiff on behalf of both the plaintiffs. On June 18, 1919, Vasantao conveyed the plot B including his right, title and interest in the strip of land called the common passage to Bhagvandas Tapidas, the original defendant No. 2.

2. It appears that before the date of this last conveyance the present plaintiffs

who had become owners of plots C and D built in such a manner as to make some encroachments upon the common passage which are shown in the plan, and a suit was filed by Shantaram and Vasantrao for the removal of those encroachments. In that suit a decree was passed on August 6, 1918, against the present plaintiffs. A copy of that decree was annexed to the plaint but has not been formally put in as an exhibit. In the course of the argument the decree has been referred to, subject to the appellant putting in a certified copy of the decree as an exhibit. The result of this decree was that the plaintiff's were required to remove the encroachments which they had made on this common passage.

3. Then on August 22, 1919, the said Bhagvandas conveyed in favour of the plaintiff's his interest in the small strip of land forming part of the plot B in the south marked OPJL, and his right, title and interest in the portion of the common passage between the plots C and D and marked EFML. In virtue of these conveyances at the date of the present suit, which was filed in September 1919, the plaintiffs had become owners of the plots C and D, and it may be taken for the purpose of this appeal that they had become owners of 3/4 of the interest in that portion of the common passage which is marked EFML. and were interested along with the owners of plots A and B as co-owners in the remaining portion of the land described as common passage, namely LMHG. I may add that the common passage joins the main road at its northern end and is closed by a wall of the adjoining premises at its southern end. As a passage it ends at the line EF. The present suit was filed with a view to seek partition of the land which has been described as common passage, and the prayer was to secure the result-that the partition should be so effected as to make the owners of plots C and D absolute owners of the portion of the passage EFML; to assign the absolute interest in the soil of that part of LMHG towards the line MH so far as the owner of the plot A was concerned, which would represent 1/4 th of the whole area of this passage, to the 1st defendant; and to allow to the owner of plot B the absolute interest in the soil of that portion of LMHG towards the line LG to the extent of 1/4th interest in that part of the passage which is marked LMHG. The intermediate narrow strip which would be very small was to remain the absolute property of the owners of the plots C and D with the right of passage in favour of the plaintiffs over the whole of the land marked LMHG subject to such compensation being paid to the owners of plots A and B as the Court might think proper. This would make the plaintiffs the absolute owners of the southern half of the passage, while the remaining half would remain exactly as it was at the date of the suit for the benefit of all the four owners.

4. During the course of the suit there were various amendments made from time to time which it is not necessary to detail for the purposes of this appeal. The objection taken by defendant No. 1, who is the owner of plot A, was that this was really an attempt to get rid of the clear effect of the decree against the plaintiffs for the removal of the encroachments, and to secure a partition, which in effect would deprive the 1st defendant compulsorily of such right of ownership as he had in the whole of this common passage as a co-owner. Defendant No. 2,

Dwarkadas, who purchased the interest of the original defendant No. 2, Bhagvandas in the plot B as also defendant No. 3, the original owner of the plot D, resisted the plaintiffs' claim. I need not detail the various defences; but five issues were raised on the pleadings. The 1st issue is whether the portion of the t passage marked EFLM is of no use to the defendants as alleged in the plaint, and the other material issue which I need note is the third issue whether the plaintiff is entitled to partition as claimed. The learned trial Judge found in favour of the plaintiffs, and made the following observations:-

Having regard to all the considerations in the case and having seen the passage this afternoon I am fully convinced that the passage between LM and LF is absolutely useless to the proprietors of plots A and B, and this passage was kept open only for the purpose of giving access to the owners of plots C and D as they had no other access except through this passage. I think it is fib that this partition should be ordered and special directions should be given to the Commissioner.

5. The learned Judge gave directions as to partition practically as prayed for.

6. In the appeal the principal point argued is whether the partition of this narrow strip of land, which was reserved at the time of the partition in 1916 as common passage, can be allowed. In the course of the argument a further point that arose in connection with this question was whether as a matter of law such a claim for partition of the common passage was maintainable in view of the rule of Hindu law, by which the parties are governed, that common passages are indivisible.

7. I shall first deal with the question as to whether in view of the special rule of Hindu law, which undoubtedly is applicable to the parties to this suit, the claim for partition is maintainable. I am of opinion that it is not. The rule to which I refer is to be found in the Mitakshara Chapter I, Section iv, (Stokes' Hindu Law Books, pp. 384, 387 and 389.) That section relates to "Effects not liable to partition" and the relevant passages in that section are to be found in paragraphs 16 and 25 which are as follows:-

16. Other things exempt from partition, have been enumerated by Manu; "Clothes, vehicles, ornaments, prepared food, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution.

8. Then the commentator proceeds to deal with each of these items, and the opinion expressed by Vijnaneshwara as to "common way" is to be found in paragraph 25 which is as follows:-

The common way, or road of ingress and egress to and from the house, garden, or the like, is also indivisible.

9. The same rule is referred to by Nilkantha in the Vyavahara Mayukha. The same verse from Manusmriti is quoted in Chapter iv, Section vii, and the word "prachara" which has been used for the expression "common way" is thus

explained in the same section: "prachara is the way to the house, or the like, as also a pasture ground for cattle etc." (See Mandlik's Hindu Law, pp. 70 and 71.)

10. These passages make it quite clear that if this is to be treated as "common way, or road of ingress and egress", it is indivisible. I may add here that the word "prachara" which is used in the verse quoted from Manusmriti, and which has been rendered in these translations as "common way" is translated in the Sacred Books of the East Series, Vol. XXV, as "pasture ground", and I have not overlooked the interpretation which has been put by some commentators upon the word "prachara" as indicating "pasture ground." In the foot-note on this verse (Manu IX, 219) in the said volume at page 379 it is also indicated that the word "prachara" is understood by some of the commentators on Manusmriti in the sense of "common way". But what is important is that this word has been interpreted in the Mitakshara in the sense of "common way"; and that is how it is interpreted in the Vyavahara Mayukha. The author of the Vyavahara Mayukha gets over the apparent difficulty by accepting both the meanings of the word "prachara". There is no doubt, therefore, that on the authority of the Mitakshara and the Vyavahara Mayukha, by which we are bound, that the land which was reserved as common passage at the time of partition between the parties in 1916 is not divisible.

11. It is urged, however, that this rule ought not to be strictly applied, under the modern conditions obtaining in a large city like Bombay. The rule to my mind is so plain that I do not see how it could be said to make any difference whether it is to be applied to any land in the city of Bombay or outside. Further it is urged that the "common way" referred to in the texts would refer to the "common ways" existing prior to partition but not to such "common passages" as are created for the first time and reserved by agreement between the parties at the time of the partition. I am unable to discover in this contention any real answer to the application of the plain and simple rule to the facts of this case. This point was not raised in the trial Court, and as I have already stated, it was only referred to in the course of the argument before us. But the rule is clear, and I do not see how the plaintiffs can escape the application of that rule. This rule is referred to in *Nathubhai Dhirajram v. Bai Hansgavri* ILR (1912) 36 Bom. 379; 14 Bom. L.R. 418 No doubt there the facts were different and the rule was referred to under somewhat different circumstances. I refer to that judgment for the purpose of showing that the rule is not an obsolete rule of Hindu law, but a rule which is capable of application, and which ought to be applied, wherever it can properly apply.

12. In the present case it is clear to my mind that when in 1916 the brothers divided the property and kept this passage common, they really kept it as a common way for the use of all the four brothers; and the attempt which has been made in the course of the argument to show that the owners of the southern plots C and D have greater interest than the owners of plots A and B in the north does not appear to me to derive any support from the words used with

reference to this passage in the decree relating to partition. The land which is shown in the plan as passage has been described throughout as "common passage" and the plaintiffs' claim for partition is based on the footing that all the owners of the four plots are co-owners of this land. It may be that the plaintiffs have some greater use of the passage in virtue of the position of the plots C and D than the owners of plots A and B. But I do not see how the accident of the southern end of the passage being closed by a wall could make any difference in law to the rights of the parties, nor can I see how in law they can be said to have any more interest in the passage than the owners of plots A and B. Really the land which is now sought to be partitioned is "common way" and it ought not to be divided according to the rule of Hindu law to which I have referred. That seems to afford a complete answer to the plaintiffs' claim.

13. But apart from this rule of Hindu law the point has been raised on behalf of the appellant that such a partition which has practically the effect of depriving one co-owner of his interest in the property ought not to be allowed. On the other hand on behalf of the plaintiffs reliance is placed upon the rule about which there can be no doubt that a co-owner of any land is entitled to seek partition of the land at his will. But in the present case it is not a simple partition by metes and bounds that the plaintiffs seek, but a partition on certain lines without which the partition would obviously be of no use to the plaintiffs. The strip of land which is marked as common passage varies in width from eight to ten feet throughout the whole length, and as a strip of land it is absolutely inconvenient to divide it by metes and bounds.

14. But the way in which the plaintiffs seek to get over the difficulty is by drawing a distinction between the right of passage as an easement and the right of ownership over the land as distinguished from the right of passage. The argument is somewhat ingenious and I shall not attempt to state it in detail. In the case of land which is owned by certain persons, it ought to be divided in the ordinary way if it is capable of division. If it is incapable of division it must be kept as the common property of the co-owners. It is not suggested that the alternative remedy of sale under certain circumstances as provided by the Partition Act is applicable to this case nor is it suggested that such a remedy is suited to the present case. The very nature of the prayer shows that the plaintiffs do not desire a simple partition, which obviously is not possible under the circumstances of the case, but a peculiar partition to serve their own interests without due regard to the interests of the co-owners. In view of the rule of Hindu law upon which I base my decision, it is not necessary for me to arrive at any final conclusion on the general question whether, apart from that rule, such a partition as is claimed by the plaintiffs is permissible in law, and even if it be permissible in law, whether under the circumstances of the case it would be right to direct such a partition.

15. It is difficult to escape the inference that soon after the decree was passed for the removal of the encroachments, in 1918, against the plaintiffs, they filed

this suit with a view to circumvent, if possible, that decree. If it be open to them in law to do so, they are entitled to that remedy. But in my opinion it is not open to them to do so.

16. I would, therefore, allow the appeal, discharge the decree of the trial Court and dismiss the plaintiffs' suit with costs throughout.

Crump, J.

17. As I agree that the decree of the trial Court cannot stand, I wish to indicate briefly my reasons for that conclusion. The parties to this case stand in the shoes of the four sons of Balkrishna who were parties to the original division of this property. That partition by virtue of the decree in Suit No. 337 of 1910 was a complete partition, and I cannot see any ground on which it can now be reopened. It is not suggested that there was any bona fide error there, or that the partition was of a partial nature. The effect of the decree clearly was to decide that the property of which partition is now sought should be reserved as a common passage to the houses of the four parties. That being so, it would follow from the decree itself that that passage is not property such as can be the subject of a further partition. Therefore even apart from the rule of Hindu law, as to which it is unnecessary for me to add anything in view of the judgment of the learned Chief Justice, it does appear to me that the suit is not maintainable, and that the jurisdiction which the Judge of the trial Court has exercised is a jurisdiction which he did not possess. The ingenuity of counsel has failed to discover any precedent for such a suit as this, the reason obviously being that it is probably the first suit of its nature. If I felt any doubt as to the correctness of our view of the law, that doubt would be removed by a consideration of the motive which has impelled the plaintiffs to file the present suit. They do not in reality desire partition of this common way. What they really desire to do is to get rid of the effect of the decree against them whereby they were ordered by this Court to remove a certain encroachment on that way. It is an ingenious course, but one which I do not think could possibly be permitted to succeed. The grounds on which the trial Judge has proceeded are those of convenience rather than law. It may be true that the portion of the passage which has been assigned to the plaintiffs is of no value to the other parties, but then they are the best judges, and they cannot be compelled to surrender the rights which were awarded to them by the partition decree in the previous suit without their own consent. Therefore it seems to me that the suit must of necessity fail, whether it be approached on the basis of the rule of Hindu law or on the basis of any other system of law which could conceivably be applicable to the present case. I agree, therefore, that the appeal should be allowed and the suit dismissed with costs.