

(1908) 07 BOM CK 0010
In the Bombay High Court
Case No : O.C.J. Suit No. 424 of 1907

Shivajirao Madhavrao

APPELLANT

Vs

Vasantrao Madhavrao

RESPONDENT

Date of Decision : 20-07-1908

Acts Referred:

Citation : (1908) 10 BOMLR 778

Hon'ble Judges : Knight, J

Bench : Single Bench

Judgement

Knight, J.—This suit is a pendant to the case of Vasantrao v. Anandrao (1904) 6 Bom. L.R. 925, decided by the appellate Court in September 1904, and subsequently by the Privy Council Anandrao Ganpatrao Vs. Vasantrao Madhavrao, .

2. The facts of the case, so far as they concern the question now before me, are the following. In 1889 there was a joint Hindu family consisting of one Kashinath, his two sons Ganpatrao and Madhavrao. Ganpatrao's six sons and Madhavrao's only son Vasantrao This family was possessed of considerable ancestral property. In January 1889, Vasantrao being then some five years of age Madhavrao found himself heavily involved in debt; and in consideration of his father's Kashinath paying Rs. 5,000 "in settling the debts and for various other considerations," Madhavrao executed a deed of release in his favour relinquishing all interest in the family property.

3. In 1901 Vasantrao instituted a suit against Ganpatrao s sons (Ganpatrao and Kashinath both being dead) to obtain a share in the ancestral property. Among thevarious grounds raised by the then defendants I need only refer to the contention that by the release Madhavrao forfeited not only his own interest in the ancestral property but that of his descendants. It was held, however, and the Privy Council confirmed the finding, that the release operated to extinguish only Madhavrao's own personal interest and did not bind his son, and that it must be treated as enuring, not as for the benefit of Kashinath alone, but for that of the

whole co-parcenary. Vasantrao, therefore, as representing one of the two sons of Kashinath, was held entitled on partition to a half share of the property, Ganpatrao's children taking the other half.

4. Now the present plaintiff is a second son of Madhavrao's, born in 1905, nearly a year after the decree for partition, and more than sixteen years after the date of the release. He sues his brother Vasantrao for a moiety of the ancestral property that has fallen to the latter's share, and the preliminary issue has been raised whether he is at all entitled to participate in the property.

5. The answer to this question must in the main depend on the determination of Madhavrao's precise position. He is still alive, he claims no further share in the property himself, nor was any claimed on his behalf by the Official Assignee who represented him in the previous suit. The only direct allusion to his status made in the judgment of the appeal Court is in a passage towards the end, where it is said that " the shares must be determined as though Madhavrao were dead""; but this, although clear and adequate for the purposes of that judgment, is of little present assistance. The learned Counsel for the plaintiff however sought to make it the basis of an argument that Madhavrao must be regarded merely as one civilly dead, as if he had turned to the ascetic life, or at the most as one disqualified from sharing in the family estate. But this supposition is not in accord with the facts and it needs but few words to demonstrate its impropriety. Hindu Law bases exclusion from participation on certain clear and well-defined grounds, none of which can be applied to Madhavrao either literally or metaphorically. He is not afflicted with insanity or other congenital infirmity, and it is not pretended that he has " assumed another order." Whatever- be the true history of the transactions culminating in the release of 1889, the facts accepted by the parties in the present suit are these, that Madhavrao received Rs.5000 from his father, directly or indirectly, and that he thereon resigned all his interest in the ancestral estate. No doubt this sum seems exiguous in comparison to the three quarters of a lakh to which he was then apparently entitled, but small as it was, he accepted it in satisfaction of his claims, and he has never sought to recede from the arrangement. I can only look upon him. therefore, as a co-parcener who has elected to take his portion and secede from the family and it is thus as I understand that he was regarded in the earlier suit.

6. The question then resolves itself into this : what are the rights as against the joint family of the son of a separated co-parcener born subsequent to his father's separation? So stated, the question bears its answer upon its face : there is no known rule or principle which can entitle such a son to claim aught from the co-parcenary. Vasantrao's example affords plaintiff no assistance. He was alive when his father executed the release. and the latter was powerless to divest him of rights already vested in him. But the plaintiff stands in entirely different case ; he was not even en ventre sa mere when his father quitted the family. The various authorities cited by his learned counsel. I may more particularly instance. Ganpat v. Gopalrao (1899) L.R.R. 23 . 636, Bom. L.R. 123.

Bishanchand v. Asmaida (1884) L.R. R. 6 All. 560 and Chengama v. Munisami ILR (1896) 20 Mad. 75-amount to no more than this : that where there has been a partition between a father and his sons, an after-born son may claim a share from his brothers if his father reserved no property for himself or is unable to provide for him. The Madras case bears a bastard resemblance to that now before me, in that Madhavrao is destitute of means and unable to provide for the plaintiff; but there the similarity ceases. These cases proceed upon the special principle of Hindu law that the unborn son cannot be deprived of his share in the paternal estate by a prior partition. ""Sons with whom the father has made a partition shall give a share to another son who is born after it." (Vishnu-2 Colebrooke, II.268). But the application of this principle is expressly limited to the case of partition between sons and father, and there is no warrant "for its extension to a son born to a separated co-parcener, other than the father of the family, after partition. Indeed, it is only necessary to reflect upon the confusion that such an extension of the principle would entail, to realize its impracticability.

7. There is little need to reinforce the argument. The texts of Vishnu and Yajnavalkya which direct separated brothers to cede a share to the after-born brother have been explained by the commentators as applicable only to posthumous sons. (Ganpat v Gopalrao), and even this direction is restricted, it would seem, to the case of the son en ventre sa mere at the date of the partition (Mayne, Section 472). Relatively to the head of the family with whom Madhavrao effected partition, plaintiff is not a son but a grandson ; he was not en ventre sa mere at the date of the partition, and he was not posthumously born. The circumstances that the father has dissipated the small patrimony that he received and is now unable to provide for him is an accident that does not bear upon the argument.

8. I. therefore, decide that plaintiff is not entitled to claim a share of the property in suit.