

BOMBAY HIGH COURT

Jehrabi Sadullakhan Mokasi

Vs

Bismillabi Sadruddin Kaji

(Norman Macleod, Kt., C.J. Shah, J.)

12.02.1924

JUDGMENT

Norman Macleod, C.J.

1. The plaintiffs filed this suit to obtain their shares in the suit property. There is no dispute with regard to the shares of the parties. The only question that arises in this appeal is whether the lower appellate Court was right in holding that properties 32, 36 and 39 to 42 did not belong to Mahomedkhan. There can be no doubt that this decision was right. These properties were sold in execution of the decree against Talumiya so far back as 1873, and they were purchased by one Balkrishna Sapre. He got symbolical possession in 1877. He filed Suit No. 143 of 1899 against Mahmadkhan for actual possession. The suit was dismissed in the lower Court, and before the appeal which was filed was decided Mahmadkhan died leaving a widow Sahebbi who was put on the record as his legal representative. The appeal was successful. Possession was decreed in 1902 while the second appeal filed by defendant No. 2 was dismissed. Sapre's widow sold this property to the seventh defendant, who had been in possession of it, we are told, on behalf of the second defendant, for a thousand rupees. It is perfectly clear, therefore, that this property went out of the family so far back as 1873, and no suggestion has been made to show how it was possible for it to be restored to the family unless it had been acquired by adverse possession. The only contention that the appellants could raise was that the appeal against the decree in Suit No.

143 of 1899 by which the auction purchaser got actual possession was not valid against any of the heirs of Mahmadvkhan except his widow who had been put on the record. That point, however, was decided in *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar*¹ That case makes it clear that it is sufficient for the plaintiff in a suit, if a defendant dies, to put one of the heirs on the record as his legal representative who will then represent the estate of the deceased for the purpose of the suit. As the learned Judge points out it would be impossible for a plaintiff to find out who are all the heirs of a deceased defendant, and it is for those who claim to be heirs to come in if they wish to be represented in the suit. It was contended that defendant No. 7 bought Mahmadvkhan's estate on behalf of the heirs of Sapre's widow. That is a question which could not possibly be decided in this suit, and must be left for any further proceedings which the parties may be advised to take. Assuming that defendant No. 7 obtained possession of the property he was only in possession as a trespasser, the title being in Sapre. Sapre's widow was entitled to sell to him and that property could not be included in the present suit for partition. Whether any of the members of the family have any cause of action against defendant No. 7 on account of his purchase from Sapre's widow remains at present undecided. The appeal is dismissed with costs.

Cases Referred.

1(1902) I.L.R. 26 Mad. 230