

BOMBAY HIGH COURT

Bapu Hambira Patil

Vs

Shankar Bhau Patil

(Fawcett, C.J. Madgavkar,J.)

03.09.1925

JUDGMENT

Madgavkar, J.

1. The plaintiff's father Nana had two wives and sons by each wife. During the minority of all the sons he executed a deed of partition partitioning his own share and that of each of the sons inter se. Both the lower Courts held that he had power to effect such a complete partition and agreed that ' it had been acted upon inter se by the sons of the younger wife Tai. The lower appellate Court held that it had also been acted upon inter se by the appellant and his brothers, the sons of his elder wife Yesa. In appeal it is contended for the appellant, firstly, that the father had no such power to effect a partition inter se among the minor sons, and secondly, that the conclusion of the lower appellate Court that it had been acted upon among the sons of Yesa omitted to take two material facts into consideration, namely, certain acquisition of property by the father which had gone to the share of one 5f the sons, Appa, and secondly, the joint advance taken for the construction of a well.

2. The second question is, in our opinion, a question of fact. The . latter circumstance as regards the well has as a matter of fact been considered by both the Courts, and the other circumstance is not decisive. Benami transactions are not uncommon, and it may well be that the purchase was benami by the father, In any case that single circumstance would not justify us, in the face of the other evidence, in allowing the finding of the lower appellate Court to be questioned. But as a matter of fact the sons of Yesa inter se had also acted upon the partition and had enjoyed the property separately. The appellant Bapu had in a previous litigation himself admitted the partition inter ae among the sons of Yesa and had based his claim upon it.

3. The only question which remains, therefore, is the question of law, namely, the power of the father to effect a partition inter se amongst the minor sons in his own life-time. There is no reported decision on the point in this Presidency. For the appellant reliance is placed on the

opinion expressed by the learned authors of West and Buhler (p. 617), but that opinion is not supported by any text. The definite text of Yajnavalkya, placitum 114, says: "If the father makes a partition; let him separate his sons at his pleasure and either separate the eldest with the best share or if (he choose) all may be (made) equal sharers." It is followed by other texts on the subject of such a partition, and on the authority of that text, it has been held by the Madras High Court in *Kandasami v. Doraisami Ayyar*¹ a case which resembles the present, that the father with two wives effecting a partition among the sons and himself had the power for which the respondents contend. That such a power may exist appears to be implicitly conceded in the decision of their lordships of the Privy Council in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal*². There it was also laid down that such a partition with the uncle or stranger may be questioned by the sons. On the authorities as they stand it appears, firstly, that the father has such a power of partition; secondly, that it is open to the sons on attaining majority to re-unite and remain united if they prefer; and thirdly, it is open to them on attaining majority to question the partition if they feel aggrieved by the shares as actually effected by the father. And in fact considering the circumstances of the joint family and the powers of the manager in general and the father in , particular, it is clear that some such power is necessary in order to prevent subsequent disputes and litigation. That in fact is the object professed by the appellant's father in this case. He had two wives and sons by each, and he expressed apprehension of disputes between them upon his death and therefore professed to effect the present partition not only of his own share but of the shares of each inter se.

4. The appeal No. 459 of 1923 therefore fails and both the appeals must be dismissed with costs.

Cases Referred.

1(1880) I.L.R. 2 Mad. 317

2(1913) I.L.R. 40 Cal. 966