

# **BOMBAY HIGH COURT**

Bai Shevantibai

Vs.

Janardan R. Warick

O.C.J. Appeal No. 46 of 1938

(John Beaumont, Kt., C.J. and B.J. Wadia, J.)

17.03.1939

## **JUDGMENT**

### **John Beaumont, Kt., C.J.**

1. This is an appeal from a judgment of Mr. Justice Rangnekar, and the only question raised is as to limitation. That question arises in this way.

2. In 1879, there was a mortgage to the plaintiff's predecessor-in-title by two brothers, Jagannath and Harischandra, who were members of a joint Hindu family and were two of the coparceners. They were entitled together to a third of the estate. They mortgaged their share in the estate. In 1882, one of the brothers, Jagannath, sold his share to the predecessor-in-title of the plaintiff, so that such predecessor became entitled absolutely to one-sixth of the joint family property and was mortgagee of another one-sixth. Jagannath died in the year 1896, and Harish chandra died in 1898, and neither of them had any male issue. So that their branch of the family ceased to be represented in the co-parcenary. The plaintiff is now suing for partition of the joint family property and to have allotted to her the share which she purchased from Jagannath, and she also seeks to enforce the mortgage. The learned Judge held that the suit was time-barred, and I entirely agree with him.

3. The first question to consider, before deciding the question of limitation, is as to what interest the plaintiff acquired. It is, in my opinion, clearly established that a purchaser from a member of a Hindu joint family does not acquire a right to be considered himself a member of the joint family in place of the vendor, or a right to have joint possession of the family property in place of the vendor, nor, of course, does he acquire any right to possession of any specific part of the property, that being a right which the vendor himself did not possess. The only right which] the purchaser has in such a case is a right to sue for partition and procure to be allotted to himself the share which would have gone to his vendor. I think that that is the result of the three Privy

Council cases, *Deendyal Lal v. Jugdeep Narain Singh*<sup>1</sup> *Suraj Bunsu Koer v. Shea Persad Singh*<sup>2</sup> and *Hardi Narain Sahu v. Ruder Perakash Misser*<sup>3</sup> and the decisions of this Court in *Nano Gopal v. Paragauda*<sup>4</sup> and in *Pandu Vithoji v. Goma Ramji*<sup>5</sup> all of which cases are

<sup>1</sup> 4 I.A. 247

<sup>3</sup> I.L.R. (1883) Cal. 626 : 11 I.A. 26

<sup>5</sup> I.L.R. (1918) Bom. 472

<sup>2</sup> I.L.R. (1879) Cal. 148

<sup>4</sup> I.L.R. (1916) Bom. 347 : 19 Bom. L.R. 69

discussed by the learned Judge. It seems to me unnecessary to consider a decision of a bench of this Court in *Bhau v. Budha Manaku*<sup>6</sup> which is discussed by the learned Judge and relied on by the appellant. The effect of that decision is that although a purchaser from a member of a joint family is not entitled to possession of any part of the joint family property, except after obtaining partition, nevertheless if he in fact gets possession of a part of the property, the Court is not bound to disturb his possession pending a partition suit. I do not think that the decision went beyond that. It is unnecessary to consider whether that decision was right or wrong, because there is no suggestion here that the plaintiff did obtain possession of any part of the joint family property.

4. Now, two things seem to me necessarily to follow from the proposition that the plaintiff is not entitled to joint possession of the family property, first, that she cannot rely on the ordinary rule that the possession of one co-tenant is the possession of all; the plaintiff not being entitled to possession, the possession of the other co-owners cannot help her. Secondly, that the possession of other parties cannot be adverse to the plaintiff, because adverse possession denotes exclusion of somebody entitled to possession, and if the plaintiff is not entitled to possession, she cannot be excluded. Therefore, I am not prepared to agree with the learned Judge's view that the plaintiff's case is barred under Article 144 of the Indian Limitation Act. It might possibly be held to be barred under Article 142, because in paragraph 10 of the plaint she pleads that the vendor, after the date of the sale, remained in possession as her tenant. She failed to prove that, but if that plea were accepted, it would seem to bring the case under Article 142. But if no article relating to adverse possession of the Immovable property applies, it seems to me clear that the residuary Article 120 must apply, and at the date of suit far more than six years had elapsed since the date of the sale or the date of the death of the vendor, whichever date be the proper starting point for limitation. This is not like the case of *Rum Lakhi v. Durga Charon Sen*<sup>7</sup> on which Mr. Desai relied, because in that case the vendor had been in possession of the property within twelve years from the date of the suit, and in such a case it might, perhaps, be held that the purchaser is enforcing the right of partition which the vendor possessed. In this case; as I have said, the vendor died in 1896. and, therefore, there is no question of enforcing any right to possession which he possessed. I think, therefore, the learned Judge was right in dismissing the suit on the ground of limitation.

5. With regard to the claim under the mortgage, the only question is as to costs. The plaintiff claimed arrears of interest which increased the original capital sum of ₹ 350/- to about rupees two lacs, but she admits that the rule of damdupat applies, and that she cannot get more than twice the amount of the principal, and the defendants paid that amount into Court. So that, in any case, the

plaintiff could not get any costs in relation to the mortgage beyond the date of payment. The learned Judge dismissed the suit against the plaintiff with costs throughout, and I think he was right in so doing. It is, no doubt, a well-established rule that a mortgagee is entitled by contract to all proper costs, and that includes costs properly incurred in enforcing his mortgage. But, in this case, the mortgage had never been acted upon, as far as we know, since 1879, and when the mortgagee was asked before the suit to produce the mortgage-deed and state what amount was due under it, she refused to assist in any way and filed this suit, and the suit has only resulted in the payment of very much less than the plaintiff claimed. In my opinion it cannot be said that

<sup>6</sup> I.L.R. (1925) Bom. 204

<sup>7</sup> I.L.R. (1885) Cal. 680

the costs in this suit were costs properly incurred by the mortgagee, and in the result I think the appeal fails and must be dismissed with costs. There will be two sets of costs, one for defendants Nos. 1 to 7 and another for defendants; Nos. 8 and 9.

### **B.J. Wadia, J.**

6. I am of the same opinion. The appeal involves a consideration of the old question as to what are the rights of an alienee of the undivided interest of a Hindu coparcener in joint family property, as the result of an alienation in his favor, and whether he is, as has been stated in some cases, a tenant-in-common with the other members of the joint family. The expression "tenant-in-common" was first used by Mr. Justice West in *Mahabalaya bin Parmaya v. Timaya bin Appaya*<sup>8</sup> Tenants-in-common hold land generally by several titles and not by one joint title, but their occupation or possession is by law in common between them. They hold by unity of possession, and there need not be necessarily any unity of interest or title.

7. It has been held in numerous cases that an alienee from a Hindu coparcener is not entitled to possession on behalf of himself separately or jointly with the other members of the coparcenery. His only remedy is to get a declaration that he is entitled to all the interest of his alienor, and he may enforce his right under that declaration by bringing a suit for partition. Strictly speaking, according to the doctrine of Hindu law as expounded in the Mitakshara, a member of a coparcenery cannot alienate his undivided interest in the joint family property, because it cannot be said at any time that he has a definite share in it, until partition. But this strict rule of the Hindu law has been gradually relaxed, and it has now been held generally that a coparcener can sell, encumber, or otherwise alienate his undivided interest in joint family property, or his undivided interest in a specific property, forming part of the joint family property, for valuable consideration, though in no case can he dispose of his interest by will.

8. The rights of such an alienee have been discussed in various cases, and these cases have been considered by the learned Judge in the Court below. Counsel for the appellant mainly relied on *Mahabalaya bin Parmaya v. Timaya bin Appaya*<sup>9</sup> *Babaji Lakshman v. Vasudev Vinayak*<sup>10</sup> *Gurulingapa v. Nandapa*<sup>11</sup> and lastly, *Bhau v. Budha Manaku*<sup>12</sup> in order to show that an alienee is in the position of a tenant-in-common. In Madras it has been clearly laid down that the alienee or

purchaser does not get joint possession with the other members, but only a right to enforce partition. Mr. Justice Fawcett in *Bhau v. Budha Manaku*<sup>13</sup> only went to the length of saying that a purchaser in possession need not be ejected in a suit for recovery of possession brought by an excluded coparcener, but can be declared to be entitled to hold (pending a partition) as a tenant-in-common with the other co-parceners. Under the facts and circumstances of the case he held that there were no grounds for evicting the party who was in possession, because he was a bhauband or relation and had been in long possession himself. It follows, therefore, in Bombay that if a purchaser is a stranger, and has not gone into possession, he does not get anything more than the remedy which is left to him to enforce his right by partition. If he is not a stranger, and has obtained possession, as in *Bhau v. Budha Manaku*, the Court is not bound necessarily to eject him, as is held by the Madras

<sup>8</sup>(1875)12 B.H.C.R.138

<sup>10</sup> I.L.R. (1876) 1 Bom.95

<sup>12</sup> I.L.R. (1925) Bom.204

<sup>9</sup>(1875) 12 B.H.C.R.138

<sup>11</sup> I.L.R.(1896) Bom.797

<sup>13</sup>28 Bom. L.R

High Court, but may, in its discretion, and in a proper case, hold him to be a tenant-in-common with the co-parceners pending partition, that is to say, admissible as such tenant-in-common to his distributive share when a partition actually takes place. Each case, therefore, according to the decision in *Bhau v. Budha Manaku*, has to be decided on its own merits, and that decision goes no further than what I have indicated. The alienee never acquires the status of an undivided Hindu member of the coparcenery. All that he generally acquires is the undivided interest of his alienor, and a right to ascertain that interest by partition : see *Pandu Vithoji v. Goma Ramji*<sup>14</sup> which is also a decision of the Appeal Court. Calling him, therefore, a tenant-in-common by borrowing a technical expression of the English law of property is to lay down a very broad proposition which is not in accordance with any known principle or text of the Hindu law.

9. The other question is whether the suit to enforce partition is barred by limitation. I do not think the case falls within Article 127, because that clearly refers to a claim made by the plaintiff as a member of the coparcenery; and the words "when the exclusion becomes known to the plaintiff" refer to the plaintiff as the member of the coparcenary, and not to the purchaser from that member. I do not think that the case falls within arts. 136, 137 and 138 either. Nor does it fall within Article 142, though the allegations, In para. 10 of the plaint seem to point to it. Article 144 also does not apply. Both these articles are articles applicable to suits for possession, and it is admitted that an alienee of the undivided interest of a Hindu coparcener is not entitled to possession. It cannot be said that the possession of any person is adverse to that of a person who is not entitled to any possession at all. The only other article, therefore, is the residuary Article 120, and that gives six years as the period of limitation from the time the cause of action arose. The cause of action in this case at the latest would arise from the death of the vendor when he lost his right to possession by reason of his death, and that was more than six years before the suit.

10. I, therefore, agree that this appeal must be dismissed with costs.

Appeal dismissed.

<sup>14</sup> I.L.R. (1918) 43 Bom. 472