(1926) 04 BOM CK 0002

Bombay High Court

Case No: Second Appeal No. 761 of 1924

Bhau Laxman Dhor		APPELLANT
	Vs	
Budha Manku Dhor		RESPONDENT

Date of Decision: April 6, 1926

Acts Referred:

- Limitation Act, 1908 - Section 28

Citation: (1926) 28 BOMLR 765

Hon'ble Judges: Fawcett, J; Coyajee, J

Bench: Division Bench

Judgement

Fawcett, J.
The following principles seem to me to have been laid down, so far as this Presidency is concerned :-

(1). A stranger-purchaser of the undivided share of a coparcener in a joint Hindu family, if out of possession, should not be given joint possession with the other co-parceners but should be left to his remedy of a suit for partition: Balaji Anant Rajadiksha v. Ganesh Janurdan Kamati ILR (1881) 5 Bom. 499; Pandu Vithoji v. Goma Ramji ILR (1918) 43 Bom. 472, 21 Bom. L.R. 213; and Ishrappa Ganap Hegde Vs. Krishna Putta Shankar Hegde, .

(2). On the other hand, a coparcener, who has been excluded, may obtain joint possession with such a purchaser, who has obtained possession of the joint family property: Bhiku v. Puttu (1905) 8 Bom. L.R. 99 and the prior rulings there cited.

(3). The 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 coparceners: Babaji Lakshman v. Vasudev Vinayak I.L.R (1876) 1 Bom. 95; Kallapa bin Girmallapa v. Venkatesh Vinayak ILR (1878) 2 Bom. 676; and Dugappa Shetti v. Venka-tramnaya

ILR (1880) 5 Bom. 493; of Balaji Anant Rajadiksha v. Ganesh Janardan Kamati ILR (1881) 5 Bom. 499.

2. The question is, whether Rule (3) has been overruled by the Privy Council decisions in Deendyal Lal v. Jugdeep Narain Singh ILR (1877) Cal. 198, p.c. and Hardi Narain Sahu v. Ruder Perkash Misser ILR (1883) Cal. 626, p.c.. In Pandu Vithoji v. Goma Ramji ILR (1918) 43 Bom. 472, 21 Bom. L.R. 213 the point did not really arise, because the purchaser was there suing for possession, so that the case fell under Rule (1). But Heaton J. in his judgment refers to these two Privy Council cases, and says he does not think that " any stranger should ever be placed in joint possession of joint Hindu family property " (p. 475), so that it may be taken he disapproved of Rule (3). Similarly, in Naro Gopal v. Paragauda ILR (1916) Bom. 34719 Bom. L.R. 69 he held that a purchaser in possession had only acquired "a right to partition not a right to possession prior to partition." In Hanmandas Ramdayal v. Valabhdas ILR (1918) 43 Bom. 17, 20 Bom. L.R. 472 Kemp J. says (p. 27):-

It has been held by the Privy Council in the oases referred to by my Lord the Chief Justice [viz, the two already mentioned] that where he [an auction purchaser]... obtains possession the other coparceners are entitled to sue to eject him and that all that the auction-purchaser is entitled to in such a suit is a declaration that he is entitled to the share of the coparcener against whom the decree has been passed.

3. These remarks are also obiter dicta but show that the question of the validity of Rule (3) has been raised in this Court. In Madras it has been definitely held that " the Privy Council has decided that the alienee in possession is liable to be ejected at the instance of the coparceners who are not bound by the alienation": Maharaja of Bobbili v. Venkataramanjulu Naidu ILR (1914) Mad. 265.

4. I have carefully considered the two Privy Council cases in question, as also the similar case of Suraj Bunsi Koer v. Sheo Persad Singh ILR (1879) Cal. 148 They are all cases of Court-sales of a coparcener''s share in Bengal, where the law as to the right of a coparcener to alienate his undivided share is different from that in Bombay and Madras, as pointed out in Suraj Bunsi''s case at pp. 166 and 167. In Bengal one coparcener has not authority, without the consent of his co-sharers, to mortgage or sell his undivided share in a portion of the joint family estate, in order to raise money on his own account, and not for the benefit of the familyi In such a case the principle applicable to the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners, viz., that " the partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value," which their lordships in Deendyal Lal''s case (at p. 209) held " ought to be applied to shares in a joint and undivided Hindu estate," was one which obviously could properly be applied. But does it follow that it applies equally to the case of a coparcener in Bombay, who can alienate his undivided share

without the consent of his coparceners? In such a case the analogy of a partnership-firm, where one partner cannot introduce a stranger into the firm without the consent of his coparceners, does not operate, at any rate, to anything like the same extent. Accordingly, I venture to doubt whether (if the question directly arose with reference to the decision on which Rule (3) is based) the Privy Council would apply the principle with the same strictness to Bombay, Again in Deendyal Lal''s case their lordships only decided that, on the above principle, they "ought not to interfere with " a decree giving the excluded coparcener possession of the whole property; and it may legitimately be doubted whether, if the decree had been one leaving the purchaser in possession of a half-share, they would have interfered, apart from the doubt whether the plaintiff''s mother was entitled to a share. It should be noted that in Suraj Bunsi''s case (at pp. 167-169) their lordships referred with approval to Sir Michael Westropp''s judgment in Udaram Sitaram v. Ranu Panduji (1875) 11 B.H.C.R. 76 showing inter alia how the remedy against an undivided share is to be worked out by the holder of a decree in the debtor''s life-time; and this covers the observation of Sir Michael Westropp at p. 83 that " the sale should be conducted on the same principle as the attachment, unless by arrangement with the coparceners, which would often be advantageous to every body concerned, the sale were confined to a particular portion of the family estate." A stranger-purchaser might get possession with the consent of the then coparceners: surely the Privy Council would not say that, on the suit of a coparcener, subsequently born, the purchaser should be ejected, and merely be given a declaration of his right to obtain a partition. Equitable considerations may come into play against ejecting him; and it must be remembered that he is not in '' unlawful possession '' and so liable to pay mesne profits: of Bhirgu Nath Chaube v. Narsingh Tiwari ILR (1916) All. 61; Banwari Lal v. Mahesh ILR (1918) 41 All. 63; and Gangabisan Jeevanram Marwadi Vs. Vallabhdas Shankarlal, . The Privy Council decision does not, in my opinion, amount to saying that in no ease can the Court properly allow a stranger-purchaser to remain in possession, nor to an implied overruling of the view taken in Balaji Anant Bajadiksha v. Ganesh Janardan Kamati ILR (1881) Bom. 499 that Rule (3) can be given effect to by this Court and those subordinate to it, though it is " as far as it can go with prudence." There are no decisions (as opposed to obiter dicta in which Balaji''s case is not considered) binding us to take the contrary view; and I do not, therefore, think it necessary to refer the question to a Full Bench, The principle of the Privy Council decision should be given effect to in proper cases; but, in the view we take, it is not necessarily applicable to all cases, and the Court has a discretion to allow the alienee to have joint possession with the plaintiff'' coparcener. Each case (as to the propriety or otherwise of allowing the purchaser to retain possession) should, I think, be decided on its own facts, just as the Court in Naranbhai v. Ranchod ILR (1901) Bom. 141, 3 Bom. R. 598, left to be decided "on the merits" whether the plaintiff coparcener in that case should be decreed joint possession under Rule (2). In the present case, I agree with my learned colleague, that there are no sufficient grounds for evicting defendant No. 5, who is a bhauband

and has been in long possession, supported by a civil Court decree against Borne of the coparceners,

5. The decree of the lower appellate Court, in Appeal No. 308 of 1923, is accordingly reversed, and the decree of the trial Court restored. Appellant to get his costs of this appeal and Appeal No. 308 of 1923 in the lower Court from respondents: but the lower Court''s order as to the costs of Appeal No. 312 of 1923 to stand.

Coyajee J.

1. Plaintiffs and defendants Nos. 1, 2 and 3, form a joint Hindu family. Defendants Nos. 4, 5 and 6, are their bhaubands. Plaintiff No. 1, defendant No. 1, and Daji (father of plaintiff No. 2) are the sons of Manku Devji. Defendants Nos. 2 and 3 are the grandsons of Manku''s brother Appa.

2. In the year 1918 defendants Nos. 1, 2 and 3, brought Suit No. 457 against defendants Nos. 4 and 5, in the Court of the Second Class Subordinate Judge at Baramati, for possession of certain Immovable property. The suit was decreed by that Court, but was dismissed on appeal, Plaintiffs then brought this suit in 1921, against defendants Nos. 1 to 6, for a declaration that they and defendants Nos. 1, 2 and 3, were joint owners of the said property and to recover possession of the same jointly with defendants Nos. 1, 2 and 3. The claim was resisted by defendant No. 5 who denied the plaintiffs'' title and contended that the appellate Court''s decree in Suit No. 457 was binding on the plaintiffs. Both these defences failed in the lower Courts. They held the plaintiffs'' title proved; and that finding must be accepted in this second appeal. As to the other contention it is sufficient to say that these plaintiffs were not joined as parties to Suit No. 457 of 1918, nor do they claim under any of the parties to that suit. In the opinion of the lower Courts, therefore, the only effect of the final decree in that litigation was to extinguish the rights of defendants Nos. 1, 2 and 3, in the suit-property and to leave unaffected the plaintiffs'' undivided share therein. The trial Judge then passed a, decree declaring that the plaintiffs had an undivided one-third share in the suit property and awarding them possession of that share jointly with defendants Nos. 5 and 6. On appeal, the learned Assistant Judge varied that decree for the reasons, and in the manner, following.-
It is an established principle of Hindu law that a stranger should nob be placed in joint possession with coparceners in the joint family : Pandu Vithoji V. Goma Ramji ILR (1918) Bom. 472, 21 Bom. L.R. 213. That ruling and another in the same volume at page 17 lay down that in such cases the stranger should be allowed to file a suit against the members of the joint) family for a general partition of the entire family properties. In is in evidence that there are other properties owned by the joint family of plaintiffs and defendants Nos. 1 to 3. Following those rulings, I hold that plaintiffs are entitled to possession of the plaint property as against defendants Nos. 5 and 6, who may file a suit for general partition of the entire property of the joint family of plaintiffs and defendants Nos. 1 to 3 and then obtain possession of what

property may be awarded to them.

3. Defendant No. 5 has brought this second appeal. His main contention is that, in the circumstances of this case, the plaintiffs were not entitled to deprive him of his long possession, and that the decree passed by the trial Court was right, I see much force in that contention,

4. Defendant No. 5 is a divided bhauband of the plaintiffs; he has acquired a title to a portion of the property belonging to the joint family consisting of the plaintiffs and defendants Nos. 1, 2 and 3; he has now been in possession of that property for some years; and his possession is sanctioned by a decree of the Court, He is, no doubt, not entitled to exclusive possession of that property. In the circumstances, it was open to the plaintiffs to sue for a complete partition; or to claim their share in this particular parcel of property, if the other coparceners did not object (as in Naro Gopal v. Paragauda ILR (1916) 41 Bom. 347 19 Bom. L.R. 69, or to sue for joint possession with defendant No. 5 (as in Dugappa Shetii v. Vtnkatramnaya ILR (1830) 5 Bom. 493; Waranbhai v. Ranchod ILR (1901) 26 Bom. 141, 3 Bom. L.R. 598; and Bhiku v. Puttu (1905) 8 Bom. L.R. 99. The present suit however, is an attempt on the part of the plaintiffs, in association with their copar-ceners, defendants Nos. 1, 2 and 3, to evict defendant No. 5 who has long been in possession and whose possession is supported by the decree obtained by him against those coparceners. In Balaji Anant Rajdiksha v. Ganesh Janardan Kamati ILR (1881) 5 Bom. 499, Westropp C.J. said (at p 503):
In certain cases, in which the purchaser of a co-parceners''s share has peaceably obtained possession. Division Benches of this Court have refused to oust him, and have declared him entitled to hold as a tenant-in-common with the other co-parceners. Such were Mahabalaya v. Timaya (1875) 12 B.H.C.R. 138, Babaji Lakshmon v. Vasudev Vinayak ILR (1876) 1 Bom. 95 and Kallapa bin Girmallapa v. Venkatesh Vinayak ILR (1878) 2 Bom. 676. In all of these oases the suit was instituted by the co-parceners, other than he whose share had been sold, against the purchaser in possession, and the plaintiffs sought to oust him from that possession.

5. In Bhiku v. Puttu (1905) 8 Bom. L.R. 99, Batty J. referred to several decisions of this Court bearing on the subject and said (at p. 105):

But in along series of decisions it has also been laid down that though the separate possession claimed cannot be given without partition, in such cases a co-parcener, joint tenant or tenant-in-common may obtain possession in common with a purchaser who has obtained separate possession without partition of specific undivided property in which such co-parcener has an undivided unascertained share.

6. The respondents (plaintiffs) have, however, relied on the view expressed in Pandu Vithoji v. Goma Ramji ILR (1918) 43 Bom. 472, 21 Bom. L.R. 213. The facts of that case were these One Vithu and his son Pandu owned the property in dispute as a

joint family property. In 1913 Vithu sold the whole property to plaintiffs, who then brought a suit to recover possession of the property from Pandu. The contention of Pandu was that the sale by his father was not binding on him and did not affect his share in the property. His defence succeeded and the trial Court passed a decree granting the plaintiffs joint possession of half the suit property, namely, Vithu''s share, along with Pandu. The decree was confirmed on appeal. In second appeal, H eaton J. referred to the judgment in Deendyal Lal v. Jugdeep Narain Singh (1877) I.R.4 I.A. 247, ILR 3 Cal. 198 and said (p. 476):

I think myself I cannot do better than follow the very words used in framing the decree of the Privy Council. The plaintiff obviously cannot obtain full possession of the property which is what he sues for, for he is not entitled to such possession. He ought not to be allowed be have joint possession for that as I have explained is contrary to reason and authority. The most that he can get is a declaration

7. It will be seen that it was a suit brought by the purchaser of the interests of one co-parcener to obtain possession of the property sold to him. On those facts, it may be conceded that the purchaser was not entitled to claim either exclusive possession or joint possession with the other members of the family. There is much to be said in favour of the view that the Court will not place a stranger by force in joint possession with members of a Hindu family. But the position is different where he has peaceably obtained possession, and has been long in possession, and a coparcener other than he whose share has been sold sues to eject him. Such coparcener is not left without a remedy. None of the cases referred to by Westropp C.J. in Balaji Anant Rajadiksha v. Ganesh Janardan Kamati ILR (1881) 5 Bom. 499 and by Batty J. in Bhiku v. Puttu (1905) 8 Bom. L.R. 99 were considered in Pandu v. Goma. And their lordships'' judgment in Deendyal''s case does not lay down the Rule that a purchaser from one coparcener can under no circumstances be allowed to remain in possession as a tenant-incommon with the other coparceners. In Hanmandas Ramdayal v. Valabhdas ILR (1918) 43 Bom. 17 20 Bom. L.R. 472 which is the other case referred to by the Assistant Judge, the main question was, whether it was competent to one member of a joint Hindu family to sue a person who had purchased a particular parcel of family property for his share therein without suing for a complete partition; it was held that it was not a valid objection to the suit that the plaintiff claimed only a partial partition.
8. For these reasons I agree in the order proposed by my learned colleague.

Fawcett, J.
In this application for review it is contended that the Court has overlooked the fact that defendant No. 5 was not a "purchaser" in possession of a share of a joint family property, but was merely a person who had succeeded in defeating the claim of defendants Nos. 1 to 3 to eject him in the previous suit of 1918, on account of their failure to prove possession within twelve years under Article 142 of the Indian Limitation Act.

2. It is true that the previous cases cited in Rule (3), at the beginning of my judgment, are oases of purchasers of the undivided share of a co-parcener at a Court auction; and that the Court should be careful about extending that rule beyond its recognised limits. The question can no doubt be legitimately raised whether it is proper to treat defendant No. 5 as a person on the same footing as a " purchaser," who has peaceably obtained possession of a co-parcener''s share and who is allowed to remain in joint possession under the rulings in question.

3. It was contended by Mr. Thakor that defendant No. 5 should be regarded as a mere intruder, and that the lower appellate Court wrongly described him as " a stranger who had acquired title to the interests which defendants Nos. 1 to 3 had in the joint family property." I do not agree with that contention. It is clear that, u/s 28 of the Indian Limitation Act, not only has the right of defendants Nos. 1 to 3 in this property been extinguished, but it has also been transferred to defendant No. 6. This is how their lordships of the Privy Council described its effect in Muhammad Mumtaz Ali Khan v. Mohan Singh ILR (1923) 45 All. 419 and many authorities could be cited to the same effect: of. Halsbury''s Laws of England, Vol. XIX, Article 316 at page 155; Dalip Rai v. Deoki Rai ILR (1899) All. 204 and Hargovandas Lahhmidas v. Bajibhai Jijibhai ILR (1889) 14 Bom. 222 and other cases cited in Rustomji''s Law of Limitation, 3rd Edn. pp. 631, 632. In other words, defendant No. 5 has acquired a title (viz., that of defendants Nos. 1 to 3) by prescription.

4. Technically that makes him a "purchaser" in the legal acceptation of that word in English law, For prescription is one of the six ways of acquiring a title by "purchase": see Bouvier''s Law Dictionary, Vol. II, p. 796, and Wharton''s Law Lexicon, 10th Edn. p. 626. He has the backing of a Court''s authority for his title, just as much as a purchaser at a Court''s auction; and he has equally had to pay for that authority though in another way, viz., in legal costs over and above what he was awarded against defendants Nos. 1 to 3 in the litigation of 1918-20.

5. Why should he not then be treated as on the same footing as a " purchaser " in its more ordinary sense ? In the present case, I can see no sufficient reason. In para 10 of the appellate Court''s judgment in the prior litigation it is stated that admittedly he had been in possession for a number of years; and he is still in possession. He obtained that possession peaceably. He is not shown to have been a mere trespasser without any shadow of right for his possession. The attempt of defendants Nos. 1 to 3 to show that it was permissory failed. And finally he is not a member of a different caste or community, but a bhauband of the plaintiffs, who owns property adjoining the plot in dispute.

6. I can see, therefore, no sufficient ground for altering my previous opinion that he ought not to be evicted in the circum-stances of the case; and I reject this application.