(1955) 10 BOM CK 0030

Bombay High Court

Case No: A.F.A.D. No. 592 of 1953

Sanja Bandaji		APPELLANT
	Vs	
Ahmedabad Jaybharat Cotton Mills Ltd.		RESPONDENT

Date of Decision: Oct. 7, 1955

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 12

Citation: AIR 1956 Bom 612

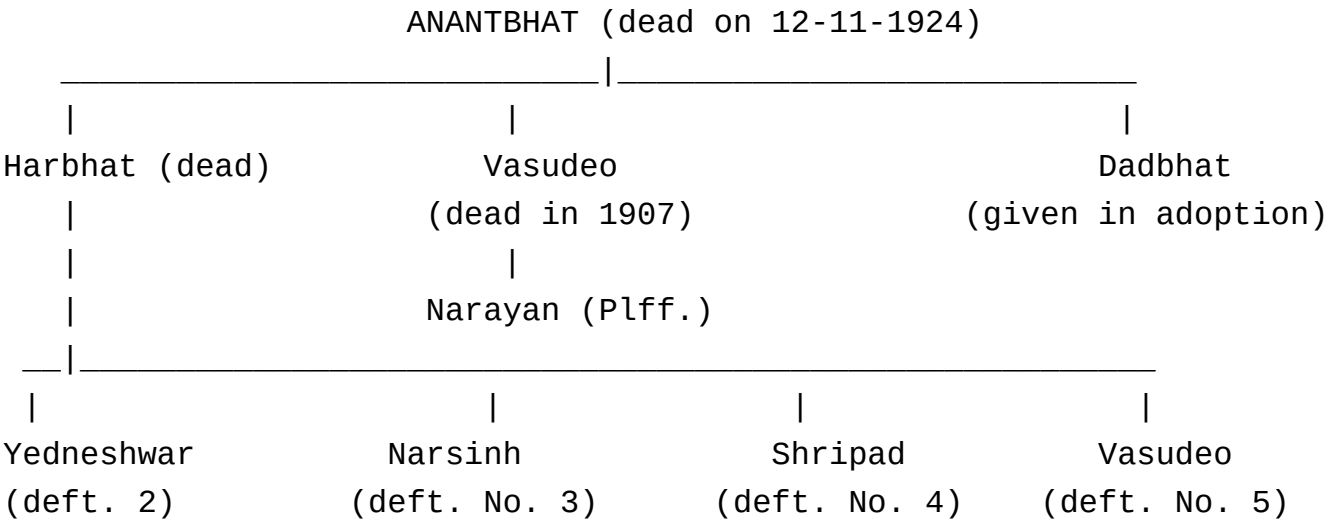
Hon'ble Judges: Shah, J

Bench: Single Bench

Advocate: V.B. Rege, for the Appellant;

Judgement

1. The following genealogy shows the relationship between the parties to this dispute.



Anantbhat died on 12-11-1924. His son Dadbhat had gone out of the joint family by adoption before the death of Anantbhat. Vasudeo had predeceased Anantbhat and

he died in 1907. Harbhat the eldest son was alive at the date of the death of Anantbhat. Anantbhat held at the time of his death several properties two out of which were S. Nos. 110 and 111.

After the death of Anantbhat there was a partition of some of the joint family properties. But S. Nos. 110 and 111 were not divided because S. No. 111 was a Dharmadaya property, and it was assumed that the Vat Hukums which were in operation in the former Kolhapur State would not permit partition of that property. S. No. 110 was regarded as accretion of S. No. 111 and therefore not liable to partition.

In 1929 the State Government issued a Vat Hukum whereby the Dharmadaya properties were regarded not as Inam properties, but as Rayatava properties and therefore partible. The plaintiff who is the son of Vasudeo filed Suit No. 328 of 1942 in the Court of the Subordinate Judge at Hatkanangale for a half share in S. Nos. 110 and 111 on the footing that he was entitled on partition to a share in those properties as they were the properties of the joint family to which he and the first defendant belonged. The suit was transferred to the Court of the Civil Judge, Junior Division at Kagal, and was numbered 163 Of 1949.

2. The suit was resisted by the defendants. They contended that the plaintiff was not the owner of half of the share in the suit properties, and that the plaintiff''s suit in any event was barred by the law of limitation. The learned trial Judge accepted the contentions raised by the defendants and dismissed the plaintiff''s suit.

3. In appeal to the District Court at Kolhapur, the learned Assistant Judge reversed the decree passed by the. trial Court and awarded to the plaintiff a half share in the suit property together with mesne profits to be ascertained under Order 20, Rule 12, Clause (c), C. P. C. The learned appellate Judge also awarded Rs. 375/-to the plaintiff by way of mesne profits. Defendants 3 and 4 have come to. this Court in second appeal.

4. It is unnecessary to decide that under the Vat Hukums of the Kolhapur State a Dharmadaya property must be regarded as impartible and devolving only by the rule of primogeniture. Even on the assumption that S. No. 111 was impartible property and devolved by the rule of primogeniture, I am of the view that the learned Appellate Judge was fight in holding that after the tenure of the property was altered and the property became recognised as Rayatava property the plaintiff was entitled to obtain a share therein on partition.

As I have stated earlier in 1925 there was partition of the other properties of the joint family, but S. Nos. 110 and 111 were not partitioned. AS pointed out by Sir Dinshah Mulla in Article 587 of his Hindu Law in considering whether an ancestral impartible estate is a coparcenary property or not a distinction should be drawn between the present rights, that is, the right to demand a partition and the right to joint enjoyment, and future rights.

In the case of an impartible estate, the. right to partition and the right of joint enjoyment are from the very nature of the property incapable bf existence, and there is no coparcenary to this extent. No coparcener, therefore, can prevent alienation of the estate by the holder for the time being either by gift or by will, nor is he entitled to maintenance out of the estate. But as regards future rights, that is the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rule stated in Section 591.

It is evident that impartible property is joint family property. But two out of the three principal incidences of the joint family property can (not?) be enforced in respect of such property. The incidence of partition is inconsistent with the tenure of the property being impartible and cannot be enforced. Similarly, the incidence of joint enjoyment cannot be enforced, because the property devolves upon the eldest member of the eldest line by reason of the rule of primogeniture by which it devolves. But the property in my judgment still remains to be a joint family property. As pointed out in -- ''Rani Sartaj Kuari v. Rani Deoraj Kuari'' 15 IA 51 (A),

"the property in the paternal or ancestral estate acquired by birth under the Mitakshara law, is in their Lordships'' opinion so connected with the right to a partition, that it does not exist where there is no right to it. In the -- ''Hanaspore Case, Baboo Beer Pertap v. Rajender Pertab'' 12 Moo I.A. 1 (B) there was a right to have babuana allowance as there is In this case, but that was not thought to create a community of interest which would be a restraint upon alienation.

By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held In severalty ..... If, as their Lordships are of opinion, the eldest son, where the Mitakshara Jaw prevails and there is the custom of primogeniture, Goes not become a co-sharer with his father in the estate, the inalienability of the estate depends upon ''custom, which must be proved, or, it may be in some cases, upon the nature of the tenure".

Their Lordships of the Privy Council in that case regarded that when the property was joint family property two incidences of partibility and joint enjoyment were present in the view of the tenure and therefore it was not open to the other members to challenge the alienation effected by the person on whom the title had devolved on the death of the previous owner. The property which is impartible by tenure is property of the Joint family. The property is held by the person on whom it devolves for and on behalf of the joint family.

It is true that the right of partition cannot be claimed in respect of that property, but the right to claim Joint enjoyment also cannot be enforced as against the holder for the time being. But the right to take property by survivorship subject to the incidence that it devolves upon the eldest member of the eldest line is still enforcible.

Once the tenure of the property is altered the right to claim partition and the right to claim enjoyment would become enforcible as if they were in suspense during the time that the property by tenure was impartible and devolved by primogeniture. If that is the correct view to take, evidently in 1929 the property having been converted into Rayatava property the plaintiff became entitled to claim partition of the property.

5. Mr. Rege relied upon a judgment of the Madras High Court in support of his contention that the alteration of the tenure of the property cannot bring into existence rights in favour of the junior coparceners which they had originally not when the property was held as impartible property. He referred to -- Sri Ravu Janardhana Krishna Ranga Rao Bahadur Vs. The State of Madras and Others, .

That was a case in which impartible property was acquited by compulsory acquisition under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1948, and it was converted into a mine; and the High Court held that the money in the hands of the person upon whom the estate had devolved still bore the character of an impartible estate, and other members were not entitled to claim a share therein.

In my view that case cannot affect the principle which in my judgment is applicable to cases where tenure of property has been altered. In that case the nature of the estate was altered, but not the tenure.

6. An unreported judgment of this Court was also referred to by Mr. Rege in -- ''Bahu Bapu Pundpal v. Gangaji Subhana Pundpal'', Second Appeal No. 625 of 1949, D/- 19-9-1950 (Bom) (D). That was a case in which there had been a partition a long time ago and there was a complete partition of the property.

Thereafter certain properties which belonged to the joint family and which were regarded as Inam properties and assumed to have devolved upon the eldest member of the branch by the rule of primogeniture were by subsequent Vat Hukum declared to be Ryotawa property and the partition was sought to be reopened by the junior members. The Court negatived the contention raised by the junior members on the ground that the partition can be reopened only on the ground of mistake or fraud or similar other ground, and it cannot he reopened only on the ground of mistake.

In the present case the partition is not sought to be reopened: but the plaintiff is seeking partition of the property which was not partitioned in 1925. In my view the learned appellate Judge was right in granting a decree for partition to the plaintiff.

7. The appeal therefore fails and is dismissed.

8. Appeal dismissed.