

(1943) 01 BOM CK 0015

Bombay High Court

Case No: Second Appeal No. 743 of 1941

Siddappa Nagappa Divate

APPELLANT

Vs

Vishvanathsa Ramchandrasa
Kabadi

RESPONDENT

Date of Decision: Jan. 28, 1943

Acts Referred:

- Limitation Act, 1908 - Article 144, 95, 96

Citation: AIR 1943 Bom 419 : (1943) 45 BOMLR 825

Hon'ble Judges: Lokur, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Lokur, J.

The suit out of which this appeal arises was filed by the plaintiff Siddappa for the partition of, and possession of his half share in, the family house at Gadag on the ground that it had been excluded from the partition effected by the award decree in suit No. 11 of 1928 by reason of the fraud of his father Nagappa and his elder brother Shidramappa. That suit was filed by the plaintiff Shiddappa against Nagappa and Shidramappa for recovering by partition his one-third share in the joint family property. During the pendency of the suit the dispute was referred to arbitration, and when the arbitrators made the award, a decree was passed in terms of that award. That decree did not include the house in suit, and it is alleged that the plaintiff himself, who is a resident of Hubli, was not aware of the joint family house at Gadag and that his father and brother who gave the necessary information to the arbitrators designedly and fraudulently omitted to give information about the suit house. By that award decree the plaintiff was given his one-third share and Nagappa and his elder son Shidramappa, were given a joint two-thirds share. Nagappa died in March, 1934, and Shidramappa in August, 1935. Defendants Nos. 1, 4, 5 and 6 are Shidramappa's sons and defendants Nos. 2 and 3 are the sons of

defendant No. 1. Defendant No. 1, to whose share the house in suit was allotted, sold it on behalf of himself and his two minor sons to defendant No. 7 for Rs. 2,500 on September 13, 1937, and it is now in his possession. He contended inter alia that the house in suit was the self-acquired property of Nagappa, that the plaintiff had no interest in it, that no fraud was practised upon him by his father or brother at the time of the partition, that the plaintiff's claim was time-barred under Article 95 or 96 of the first schedule to the Indian Limitation Act, 1908, that the plaintiff was not entitled to one-half share in the house and that, as he was a bona fide purchaser for value, the plaintiff's claim was barred u/s 41 of the Transfer of Property Act, 1882.

2. The trial Court held that the house in suit was excluded from partition in 1928 by reason of its fraudulent concealment by Nagappa and Shidramappa, that it was not Nagappa's self-acquired property but the joint family property, that the plaintiff was entitled to a share in it, that his claim was not barred u/s 41 of the Transfer of Property Act, as defendant No. 7, though a purchaser for value, had not made proper inquiry before purchasing the house from defendant No. 1, and that plaintiff's claim was in time. The plaintiff was, therefore, given a decree for one-half share in the house in suit together with future mesne profits and costs.

3. In appeal the learned Assistant Judge accepted the findings of the trial Court on all the issues, except on the issue of limitation, and held that the suit was barred under Article 95 or 96 of the first schedule to the Indian Limitation Act. He, therefore, allowed the appeal and dismissed the plaintiffs suit with costs.

4. It is now urged in this Court that the lower appellate Court was wrong in holding the suit to be time-barred under Article 95 or 96 and that the suit is governed by Article 127 and is, therefore, in time. Article 127 is applicable to a suit by a person excluded from joint family property to enforce a right to share therein. It presupposes the existence of a joint family and can have no application where there has been disruption of the status of jointness, since thereafter the members of the family become tenants-in-common in respect of property left undivided and any exclusion from it would not be exclusion from joint family property within the meaning of that article.

5. In *Isap Ahmed v. Abhramji Ahmadji* ILR (1917) 41 Bom. 588 in giving the decision of the full bench, Scott C.J. pointed out that "joint family" in Article 127 must be read as a compound adjective and the expression "joint family property" must be read as property appertaining to a joint family. The award decree of 1928 effected a severance of the joint family status, and, as observed by Crump J. in *Dagadu Govind v. Sakhubai* ILR (1923) 47 Bom. 773

Once it is held that there has been partition (between members of a joint Hindu family), I should myself be inclined to hold that the presumption must be that as regards that portion of the estate which remained undivided, the members of the family would hold as tenants-in-common unless and until a special agreement to

hold as joint tenants is proved.

6. No such special agreement is alleged in this case; and it could not be alleged, since it has been the plaintiff's case that the house in suit was fraudulently concealed from him and from the arbitrators by his father and brother.

7. It must therefore be held that the family having been already divided in status at the date of the suit, Article 127 would not be applicable, even though the property in suit was left out of the partition. This was the view taken by a full bench in *Yerukola v. Yerukola* ILR (1922) Mad. 648. In *Govind Rao v. Rajabai* (1930) L.R. 58 IndAp 106 the Privy Council observed that (p. 114) "the effect of that separation was that any immovable joint, property which continued undivided was no longer joint family property so as to come under Article 127, but came under Article 144". Thus Article 127 proceeds upon the hypothesis that there is a joint: family and some joint family property, and provides for the remedy of a member of that family who is excluded from that property.

8. Mr. Moropanth referred to the rulings in *Ramchandra Narayan v. Narayan Mahadev* ILR (1886) 11 Bom. 216 and *Raoji v. Bala* ILR (1890) 15 Bom. 135. In those cases on the occasion of the previous partition a portion of the joint family property was reserved from partition and therefore it was still regarded as joint family property and Article 127 was held to be applicable. But it would not be applicable where the joint family has been completely disrupted by severance of status between the various members as in this case. In such a case the property left undivided either through inadvertence, ignorance, mistake or fraud cannot be styled "joint family property" and therefore the plaintiff's suit to recover his share in it is not governed by Article 127.

9. The lower appellate Court has held that the suit is time-barred under Article 95 or 96. Article 96 would not be applicable as it is no one's case that there was a mistake. The plaintiff asserts that his father Nagappa, who supplied information about the family property to the arbitrators, deliberately omitted to mention the house in suit, taking advantage of his ignorance about its existence. The arbitrator Hirji, exhibit 67, says the same thing. The defendants contend that the house was the self-acquired property of Nagappa and do not allege that there was any mistake or fraudulent concealment by Nagappa. It is now held by both the Courts below that the house in suit was joint family property and should have been included in the partition. The plaintiff does not ask for any relief on the ground of mistake. Moreover, Article 96 does not apply to a suit for possession of Immovable property. In *Slier v. Piara Ram* AIR [1924] Lah. 324 the plaintiffs were allotted an area at a partition which fell short of what they were entitled to, and when they sued for possession of an additional area to make up the shortage in respect of a field which was omitted from the partition, it was held that no relief on the ground of mistake such as is contemplated by Article 96 was claimed and hence the article did not apply. It was observed (p. 325) :-

...Article 96 is intended to apply to those cases in which the Courts are asked ;to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions and we doubt whether a suit for possession of Immovable property or for a declaratory decree with respect to such property comes within the purview of the article.

10. This clearly shows that Article 96 is intended to apply only to cases where the plaintiff seeks to be relieved of a mistake committed in the course of contractual transactions, such as a suit for rectification of deeds of rescission of contracts [Panna Lal Ghose Vs. The Adjai Coal Co. and Others](#), . The plaintiff's suit is, therefore, not barred under that article.

11. Article 95 is equally inapplicable. It prescribes for suits to set aside a decree obtained by fraud or for other relief on the ground of fraud a period of three years from the date when the fraud becomes known to the party wronged. On behalf of the plaintiff it is argued by Mr. Moropanth that the plaintiff has not based his claim on the ground of fraud and that the wording used in the plaint does not impute fraud either to the plaintiff's father or his brother. But in paragraph 4 of the plaint he has definitely alleged that his father and brother had "designedly omitted" to include the property in suit in the partition and that on account of their deception he had not been given his share in it. This leaves no doubt that the plaintiff did want to impute fraud to his father and brother. But Article 95 is applicable only when the relief is claimed solely on the ground of fraud. In Abdul Rahim v. Kirparam Dajji ILR (1891) 16 Bom. 186 though there was a clear allegation in the plaint that the defendants, into whose hands the lands had passed, had obtained them by fraud, yet Parsons J. held that Article 95 had no application as the plaintiff did not ask for any relief on the ground of fraud, but sued for possession by partition of the share to which he claimed to be entitled, This case was followed in Jamsetji Nassarwanji v. Hirjibhai Naoroji ILR (1912) 37 Bom. 158 where Scott C.J. observed that Article 95 had no application where on the face of the plaint no equitable relief was claimed on the ground of fraud. In the present case fraud is mentioned in the plaint only as a reason for the omission of the house from the partition decree of 1928, but the plaintiff's right to recover his share in it is quite irrespective of that fraud. He has discovered that a house which was joint family property at the date of the partition was not included and wants it to be partitioned now. The effect of the exclusion of some joint family property at a partition is thus summarised by Mayne in his treatise on Hindu Law and Usage (tenth edition) (p. 576):

Where at a partition intended to be final some part of the property has been overlooked, or fraudulently concealed, but. is afterwards discovered, it will be the subject of a like distribution among the persons who were parties to the original partition, or their representatives. But the former distribution will not be opened up again.

12. Thus, whether the exclusion be due to mistake, accident or fraud, the property excluded continues to be the joint property of the family and it must be divided amongst the persons who were parties to the partition. The foundation of the plaintiff's suit is this right to enforce a partition of the house in suit which was excluded from partition and not the fraud of his father or brother which made such exclusion possible. Fraud or no fraud, that house continued to be the joint property even after the partition of the remaining joint family property, and the plaintiff, who was excluded from it, is entitled to recover his share in it without the original partition being reopened. Hence the plaintiff's suit is not time-barred under Article 95.

13. Thus there remains the residuary Article 144, which would govern this case, there being no other article specially applicable to a suit for possession by one of the tenants-in-common against the others, and time begins to run from the date of his exclusion or ouster. In the Privy Council case cited above, *Govind Rao v. Rajabai* (1931) L.R. 58 IndAp 106 their Lordships held that to such a suit Article 144 and not Article 127 would be applicable. Under Article 144 time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff, and in the case of co-owners or tenants-in-common it becomes adverse when it amounts to an ouster or exclusion. In this case even the partition of 1928 took place within twelve years before suit. Hence the plaintiff's claim is not time-barred.

14. The next question is whether it is barred u/s 41 of the Transfer of Property Act. That section provides that where, with the consent, express or implied, of the persons interested in Immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. It is not disputed that defendant No. 7 is a transferee of the house in suit for valuable consideration. But the plaintiff never knowingly allowed defendant No. 1 to represent himself as the ostensible owner of the house. On the other hand, he himself was ignorant of the existence of the house in suit until his brother Shidramappa made an application to the Mamlatdar of Gadag that, as his father was dead, his name should be entered against the house in suit in the city survey records. When the plaintiff was asked about that application, he gave in writing below it that Shidramappa should be shown as the manager of the "joint family". The plaintiff says that he first discovered that the house was joint family property when he came to know about this application and, instead of giving his consent to the entry of Shidramappa's name as the sole owner of the house, he wanted that his name should be entered only as the manager of the joint family, thus indicating that the other members also had an interest in it. Accordingly in the property register Shidramappa's name was entered on May 14, 1934, as the eldest son of Nagappa, suggesting that there were other sons of Nagappa who might have an interest in it. Thus one of the essential ingredients of Section 41 is absent in this

case. Defendant No. 7 never cared to find out who were the other joint members that might be interested in the house. In his deposition he admitted that, although he made inquiries in the City Survey Office, he did not inquire whether there were other sons of deceased Nagappa in spite of the entry of Shidramappa's name as the eldest son of Nagappa. The lower appellate Court has held that defendant No. 7 did not make any proper inquiry before purchasing the house, and that is a finding of fact. He is, therefore, not entitled to the benefit of Section 41 of the Transfer of Property Act.

15. It follows that the plaintiff has a right to recover his proper share in the house in suit. He has claimed one-half share on the ground that after his father's death he and his brother Shidramappa alone became entitled to it. But it appears from the award and the partition decree that the suit was filed by the plaintiff alone for his one-third share in the family property and the arbitrators separated his one-third share and gave it to him, but the remaining two-thirds share was given jointly to his father Nagappa and his brother Shidramappa. Hence the plaintiff alone separated and Nagappa and Shidramappa continued as coparceners. On Nagappa's death, his undivided share devolved upon Shidramappa by survivorship. The plaintiff, therefore, is not entitled to Nagappa's share and can recover only his one-third share in the house. Even if the house had not been excluded from partition, the arbitrators would have awarded him only one-third share, and the remaining two-thirds share would have been allotted to Nagappa and Shidramappa, and on Nagappa's death his undivided one-third share out of that two-thirds share would have gone to Shidramappa.

16. I, therefore, allow the appeal and pass a preliminary decree for the partition of the house in suit and possession of his one-third share in it in favour of the plaintiff, together with mesne profits from the date of suit to be determined under Order XX, Rule 12(1)(c), of the Civil Procedure Code, 1908. The plaintiff shall recover proportionate costs from the defendants throughout.