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worshippers could obtain only by way of a suit under section 92 and is therefore *ultra vires*. The other alteration is one for the trustees themselves under the scheme.

I therefore agree that the alterations must be and are hereby cancelled.

Costs of both parties in this appeal will come out of the trust estate.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Odgers.

1925, October 28.

SHANMUGAM PILLAI (FIRST DEFENDANT), APPELLANT,

v.

PANCHALI AMMAL AND OTHERS (SECOND PLAINTIFF AND DEFENDANTS 2 AND 6), RESPONDENTS.*

Limitation Act (IX of 1908), *art.* 11 *(A)—Hindu Law—Auction purchaser of a share of a co-parcener of a Joint Hindu family—Right of the purchaser—Purchaser gets only an equity to partition and is not a tenant-in-common—Application by purchaser for delivery of possession in execution proceedings, ordered—Subsequent order for redelivery—Suit by purchaser for exclusive or joint possession within one year of the order, dismissed as incompetent—Subsequent suit for partition, and delivery of possession, instituted more than one year after order for redelivery—Bar of limitation*—Res Judicata—*Civil Procedure Code (Act V of* 1908), *sec.* 11 *and O. II, rule* 2.

In execution of a money decree against one of the members of a joint Hindu family, a house belonging to the joint family was sold in auction and the purchaser applied for and obtained possession in execution proceedings; but the house was redelivered to the other members in execution proceedings by

* Second Appeal No. 751 of 1924.

order of Court; the purchaser instituted a suit within one year of the last order to recover possession but it was finally dismissed on the ground that the plaintiff was not entitled to exclusive possession or joint possession along with the other members of the family. Thereupon the purchaser instituted the present suit for partition of a block of houses belonging to the family and delivery to him of his vendor's share therein, more than one year from the date of the order for redelivery in the execution proceedings; the defendants pleaded that the suit was barred by limitation under article 11 (A) of the Limitation Act, by the rule of *res judicata* and by Order II, rule 2 of the Civil Procedure Code.

Held, that an auction purchaser of the undivided share of a co-parcener of a joint Hindu family in the Madras Presidency got by his purchase a mere equity to a partition of the joint family property, and did not become a tenant-in-common with the other members of the family;

that the purchaser was not entitled to get exclusive possession or joint possession of the property along with the other members either in execution proceedings or by a suit;

that a suit instituted by the purchaser for partition and delivery to him of his vendor's share in the family property, more than one year from the order in execution proceedings, was not barred under article 11 (A) of the Limitation Act, 1908;

that, as the relief the plaintiff now prayed for in the present suit for partition, based on the cause of action of his purchase of the undivided share of a member of a joint Hindu family, would be inconsistent with what he prayed for in the prior suit, in which the cause of action was the order on the claim petition, there was no bar of *res judicata* under section 11 or by order II, rule 2, of the Civil Procedure Code.

Baldeo v. *Kanhaiyalal*, (1920) 24 C.W.N., 1001 (P.C.), and *Bhemappa* v. *Irappa*, (1902) I.L.R., 26 Bom., 146, distinguished; *Munjaya* v. *Shanmuga*, (1915) I.L.R., 38 Mad., 684, and *Yelumalai Chetti* v. *Srinivasa Chetti*, (1906) I.L.R., 29 Mad., 294, followed.

SECOND APPEAL against the decree of L. R. ANANTHANARAYANA AYYAR, the Second Additional Subordinate Judge of Madura, in A. S. No. 2 of 1924, preferred against the decree of V. DANIEL CHELLAPPA, the District

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Munsif of Madura town, in Original Suit No. 551 of 1920.

The material facts appear from the Judgment of SPENCER, J.

P. R. Srinivasan for appellant—The present suit is barred under article 11 (A) of the Limitation Act, as it was instituted more than one year after the date of the previous order for re-delivery: the suit is instituted under Order XXI, rule 103 and is barred by article 11 (A), Limitation Act. A suit for partition is a suit for present possession. Though his title is the purchase, the special article 11 (A) applies, as he failed in the execution proceedings. The point is concluded by the decision of the Privy Council in *Baldeo* v. *Kanhaiyalal* (1), see also *Ganpat Rai* v. *Husaini Begam* (2), *Bhimappa* v. *Irappa* (3), *Tilokchand* v. *Sadaram* (4), See also the decision of PHILLIPS, J., in S.A. No. 1708 of 1922, which distinguishes the case in *Yelumalai Chetti* v. *Sreenivasa Chetti* (5). The last case is a decision on rule 95 of Order XXI, etc., to which rule 103 or article 11 (A), does not apply. In the Privy Council Case also (24 C.W.N., 1001), the plaintiff was not entitled to present possession; he asked for partition there also. It does not matter whether the petitioner is entitled to present possession or not, the prayer in the petition in execution proceedings is what matters. If he asks for present possession in the petition and in the suit, the article 11 (A) applies. The suit is also barred by the rule of *res judicata* (section 11, clause 4) and Order II, rule 2, Civil Procedure Code.

C. A. Seshagiri Sastri for respondent (plaintiff).—The appellant applied under rule 100 of Order XXI and an order was passed under rule 101, as the purchaser was not entitled to present possession; both rule 103 of Order XXI, Civil Procedure Code and article 11 (A), Limitation Act, mention present possession. A purchaser of a share of a co-parcener is entitled only to an equity to get a partition, and is not a tenant-in-common. He is not entitled to joint possession with the other members of the family under the well established law of this Presidency. See *Kota Balabadra Patro* v. *Khetra Doss*, (6),

(1) (1920) 24 C.W.N., 1001 (P.C.); s.c.; 12 L.W., 408.
(2) (1921) 19 A.L.J., 53. (3) (1902) I.L.R., 26 Bom., 146.
(4) (1875) 7 N.W. P.H.C.R. 113. (5) (1906) I.L.R., 29 Mad., 294.
(6) (1916) 31 M.L.J., 275.

Manjaya v. *Shanmuga* (1), *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (2), *Subba Goundan* v. *Krishnamachari* (3).

The Privy Council Case in *Baldeo* v. *Kanhaiyalal*(4) was one apparently of a divided family, because (1) the family property was entered in the names of both the brothers, and not in the name of one as manager, (2) symbolical possession had been given showing that they were tenants-in-common; see Order XXI, rule 35 (2) as to delivery of joint possession.

In Bombay the position of a purchaser from a coparcener is that of a tenant-in-common, unlike the view that prevails in Madras; the Bombay cases are not applicable; so also cases of Muhammadan joint families, the members of which and the purchasers from a sharer of a Muhammadan family are tenants-in-common; hence those cases are not relevant.

JUDGMENT.

SPENCER, J.

SPENCER, J.—The second plaintiff in the suit, who is the first respondent in this appeal, is the second wife of one Ganapathia Pillai (deceased), who was the assignee of the rights of one Sankararama Ayyar, auction-purchaser of a house, which belonged to the joint family of one Ramalingam Pillai and the first and second defendants, and which was attached in execution of a money decree obtained by one Narayanaswami Ayyar against Ramalingam Pillai. The present suit is for partition by metes and bounds of a block of houses belonging to the joint family and for delivery to the plaintiff of the share of the minor son of Ramalingam Pillai, who is now dead. The question to be decided in second appeal is whether the suit is barred by reason of its having been instituted more than one year after an order which was passed on 7th September 1915 under Order XXI, rule 101 of the Civil Procedure Code, redelivering the property to the possession of defendants 1 and 2 after the plaintiff's husband had got

(1) (1915) I.L.R., 38 Mad., 684. (2) (1916) I.L.R., 39 Mad., 267.
(3) (1922) I.L.R., 45 Mad., 449. (4) (1920) 24 C.W.N., 1001 (P.C.).

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possession in spite of their obstruction. Within a year of the order under rule 101 the plaintiff's husband brought a suit (Original Suit No. 40 of 1916) for setting it aside and for a declaration that the defendants had no manner of right in these properties. That suit was finally dismissed by this Court in Second Appeal No. 707 of 1919 on the ground that the plaintiff was not entitled to joint possession along with the other members of the joint family of the defendants.

Additional arguments against the maintainability of this suit are based on defences arising out of section 11 and Order II, rule 2, Civil Procedure Code, in consequence of the prior suit of 1916 having been dismissed.

For establishing his contention that this suit is barred by limitation under article 11 (A) the appellant's vakil relies on *Ganpat Rai* v. *Husaini Beyam*(1), *Bhimappa* v. *Irappa*(2), and *Baldeo* v. *Kanhaiyalal*(3), the same case being also reported in Calcutta Weekly Notes(4) and on *Tilokchand* v. *Sada Ram* (5).

In *Ganpat Rai* v. *Husaini Begam* (1) the plaintiff's father was resisted in attempting in execution to get present possession of a house that he had purchased in Court auction and an order was passed against him. Eleven years later the plaintiff sued for separation and present possession of a two-fifths share of the same property by virtue of his purchase. PIGOTT, J., observed,

"On the principle that the greater includes the less, it seems reasonable to hold that the right now claimed to present possession, over portion of the house, is included in the right claimed in the year 1906 to present possession over the entire house so as to bring into operation the provisions of article 11 (A) of the Limitation Act Schedule."

(1) (1921) 19 A. L.J., 53. (2) (1903) I.L.R., 26 Bom., 146.
(3) (1920) 12 L.W., 408 (P.C.). (4) (1920) 24 Calc. W.N., 1001 (P.C.).
(5) (1875) 7 N.W.P. H.C.R., 113.

He also observed that the order itself had very definitely referred the auction purchaser to his remedy by way of a regular suit, yet he had put off availing himself of this remedy to rectify the adverse order passed against him for nearly 12 years.

This case can be distinguished from the one before us on the ground that the property there belonged to Muhammadans and the plaintiff in the suit asserted that the judgment-debtor whose share he had purchased was the owner of a two-fifths share while the claim order negatived his right to any portion of the house. A purchaser of the share of a sharer under Muhammadan Law is entitled to something more than a mere equity to partition of the joint family property, which is what the purchaser of the undivided share of a co-parcener in a Hindu family in Madras gets by his purchase. I do not see any occasion to regard this decision as directly opposed to *Yelumalai Chetti* v. *Srinivasa Chetti*(1) as PHILLIPS, J., did recently in Second Appeal No. 1708 of 1922, a second appeal in which, as in this case, a question arose as to the right of a Court auction purchaser to enforce his right to an order for partition of joint family property more than one year after the dismissal of an application for delivery of possession. The principle established by *Yelumalai Chetti* v. *Srinivasa Chetti* (1), as I understand the decision, is that an order for partition of joint family property cannot be passed in execution proceedings and, therefore, a subsequent suit for that relief is not barred either by section 47 (old section 244) of the Civil Procedure Code or by failure to appeal against an order made under Order XXI, rule 93 (old section 318). The case does not deal with the application of any article of the Limitation Act.

(1) (1906) I.L.R., 29 Mad., 294.

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In *Bhimappa* v. *Irappa*(1) a purchaser at a Court sale, having been obstructed, applied for removal of the obstruction and for possession, and his application was rejected. More than a year after the order passed against him he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a partition might be directed and that the whole of the plot of land which he purchased might be allotted to the share of his judgment-debtor and that he might be placed in present possession of it. CHANDAVARKAR, J., remarked that his suit, though in name a suit for partition, was in substance a suit for possession of that very property under the self same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and having been brought more than a year after the date of the order in the miscellaneous proceedings, which he asked to have set aside, it was barred. In considering how far we should be influenced by the ruling of the Bombay Court in such a matter we must remember that, as noticed by Mr. Mayne in paragraph 355 of his Hindu Law,

> "In Bombay it is held that even before partition the purchaser of the interest of one co-parcener is a tenant-in-common with the others; but, in Madras, this view is not accepted, and it is held that the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition."

To make this clear, it will be sufficient to refer to *Patil Hari Premji* v. *Hakam Chand*(2), and *Naro Gopal* v. *Paragauda*(3), where it was laid down that an alienation by a joint tenant effects a severance, as a result of which the alienee before division by metes and bounds becomes a tenant-in-common. But in *Kota*

(1) (1902) I.L.R., 26 Bom., 146.
(2) (1886) I.L.R., 10 Bom., 263 at page 266.
(3) (1917) I.L.R., 41 Bom., 347 at pages 354 and 356.

Balabadra Patro v. *Khetra Doss*(1), *Manjaya* v. *Shanmuga*(2), and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(3), it was held that a purchaser of a co-parcener's interest in the joint family property has not a common right to joint possession with the rest of the family nor is he a tenant-in-common; but he has only an equity to compel a partition and to work out his rights against the share that falls to him (See also *Subba Goundan* v. *Krishnamachari*(4). Here, as in other cases where the application of article 11 (A) of the Limitation Act is in question, the important thing is to see, as the Judicial Committee did in *Baldeo* v. *Kanhaiyalal* (5), what was asked for in the claim proceedings and what is asked for in the present suit. The law provides *ut sit finis litium* that a person defeated in claim proceedings shall not ask for the same relief that was denied him in those proceedings, which are summary, except in a suit filed within a year of the order. Under Order XXI, rule 103, Civil Procedure Code, a party against whom an order for possession is made under rule 101 may institute a suit to establish his right to present possession of the property, but on his failing to do so the order becomes final.

From the fuller report of the Privy Council case of *Baldeo* v. *Kanhaiyalal*(6), which appears in 24 Calcutta Weekly Notes, 1001, it appears that the village which belonged to a joint family was on the death of the head of the family registered in the names of his two sons, and that the appellant both in his application for possession under rule 97 and in his suit asked for actual possession of the eight annas share of one of the sons whose interest he purchased. Their Lordships observed

(1) (1916) 31 M.L.J., 275. (2) (1915) I.L.R., 38 Mad., 684 at page 692.
(3) (1916) I.L.R., 39 Mad., 265. (4) (1922) I.L.R., 45 Mad., 449.
(5) (1920) 12 L.W., 408 (P.C.). (6) (1920) 24 C.W.N., 1001 (P.C.).

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that it was too clear for argument that on both occasions he asked for exactly the same relief, and his suit brought more than one year after the disposal of his claim was thus time barred.

In *Tilokchand* v. *Sada Ram*(1), which was a decision under the Civil Procedure Code of 1859, the plaintiff asserted in execution proceedings that there had been a partition and he claimed to recover one-fourth of certain immovable property which had fallen by the partition to his lot. Both at the time of the claim and at the time of the suit a right to present possession was asserted, and the suit being more than one year after his failure in the claim proceedings, was thus barred. The facts of the case before us are different. Both in the claim proceedings and in the prior suit (Original Suit No. 407 of 1915) the plaintiff asserted his right to have his title to actual possession of the house declared; but in the present suit, he asks for partition, after allowing for good and bad qualities, of the family properties, and for delivery of a moiety to him. In making such a partition it is not necessary to go behind or re-open the decisions in the prior proceedings. The plaintiff is only exercising the equitable right of the co-parcener whose share he has purchased to demand a partition at any time. Article 11 (A) is thus not a bar to this suit, and as the relief the plaintiff now asks for in a suit based on the cause of action of his purchase of the undivided share of a member of a joint family would be inconsistent with what he asked for in the prior suit, in which the cause of action was the order on the claim petition, there is equally no bar of *res judicata* under section 11, Civil Procedure Code or by Order II, rule (2).

The decrees of the lower Courts are confirmed and the Second Appeal is dismissed with costs.

(1) (1875) 7 N.W.P. H.C.R., 113.

ODGERS, J.—The facts are fully set out in the judgment of my learned brother and the only question of importance to be decided in the Second Appeal is whether the present suit is barred under the provisions of article 11 (A) of the Limitation Act by reason of the order made against the plaintiff's husband (and son) on 7th September 1915 (Exhibit C), whereby possession of the suit house was re-delivered to the defendants 1 and 2 under Order XXI, rules 100 and 101, Civil Procedure Code. The plaintiff's husband then brought a suit on 8th September 1915 (Original Suit No. 407 of 1915) for a declaration that all the suit properties belonged to him and that defendants 1 and 2 had no right to the same and for cancellation of the order of 7th September 1915. The Munsif dismissed the suit but the Subordinate Judge held that plaintiff was entitled to retain possession of item 2 till the otti was redeemed and for joint possession of all other items with defendants 1 and 2. On Second Appeal (S.A. 707/19) to this Court, ABDUR RAHIM and OLDFIELD, JJ., held that plaintiff was not entitled to get possession along with members of the family as being the purchaser of joint family property. They restored the decree of the Munsif. Now in the present suit the plaintiff asks for possession after partition. The simple question is, is this a different thing from what was asked for in the suit of 1915 as appears on the face of it or is it in fact the same thing so as to attract the limitation of one year under article 11 (A) of the Limitation Act?

Now a person who acquires the rights of a co-parcener of joint family property is not a person entitled to present possession; in other words he does not become a tenant-in-common with the joint family. His only right is to be obtain by partition the share to which his

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alienor is entitled; cf., *Kota Balabadra Patro* v. *Khetra Doss*(1) where the Court thought it unnecessary to discuss the rulings of the Bombay High Court, and SESHAGIRI AYYAR, J., remarked in the course of the argument that the law in Bombay is different. To the same effect is the decision in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*(2). See also *Subba Goundan* v. *Krishnamachari*(3) and the cases therein cited. The case relied on by the appellant may be shortly referred to. In *Baldeo* v. *Kanhaiyalal*(4) there are indications that the property had become divided though this is not clear and the plea was raised that the appellant was not entitled to actual possession as purchaser in Court auction of the 8 annas share of one of the sons. Their Lordships say this does not matter, the question being not what appellant might or ought to have asked but what he did ask. Viewed by this standard, the present case seems to be outside the purview of the Privy Council decision. There the appellant twice asked for exactly the same relief. Here the plaintiff first asked for a declaration of his title and possession as against defendants 1 and 2, but in the present suit, after setting out in paragraph 12 of the plaint that plaintiff and defendants 1 and 2 are each entitled to half the suit properties, he asks for partition and delivery of his share. In my opinion these facts have only to be stated to put the present case outside the Privy Council decision. In *Ganpat Rai* v. *Husaini Begam*(5) the case was one between Muhammadans as to whom of course the doctrine of the Hindu Law set out above has no application. The purchaser of a share of a Muhammadan heir no doubt has a right to present possession after partition. In 1906 the plaintiff's father claimed the

(1) (1916) 31 M.L.J., 275. (2) (1916) I.L.R., 39 Mad., 265.
(3) (1922) I.L.R., 45 Mad., 449 at 462. (4) (1920) 24 C.W.N., 1001 (P.C.).
(5) (1921) 19 A.L.J., 53.

entire house. He then discovered that his vendor was only entitled to two-fifths of the house and asked to be put in possession. It was held that he had in effect asked for this before, when he was definitely referred to a suit and did not bring one till the last possible day. I do not think this case helps us. In *Bhimappa* v. *Irappa*(1) the suit was "both in form and in substance one for establishing plaintiff's right to and for the present, possession of Survey No. 78" in which he had purchased the right, title and interest of defendant 1 at a Court sale and as to which when he went to take possession he was obstructed. If the law in Bombay is that a purchaser of an undivided co-parcener's share is entitled to possession [as to which see *Patil Hari Premji* v. *Hakam Chand* (2), *Naro Gopal* v. *Paragauda*(3)] there is no doubt that the plaintiff here was asking for exactly the same thing in the suit as he asked for in the summary proceedings. I very much doubt if the case is useful as a guide.

Tilokchand v. *Sada Ram*(4) was a case under section 246 of Act VIII of 1859 which corresponds to present Order XXI, rule 58, the claim section. There was no question of present possession and I think this case affords no help.

In *Yelumalai Chetti* v. *Srinivasa Chetti*(5) it was held that as the only right acquired by Court sale against the second defendant, whose undivided half share had been purchased by plaintiffs, was to effectuate the sale by a suit for partition of the joint property of the co-parceners, it was not competent to the Court, on a mere application for execution by the purchaser to enforce the purchaser's right by an order for partition.

(1) (1902) I.L.R., 26 Bom., 146. (2) (1886) I.L.R., 10 Bom. 363.
(3) (1917) I.L.R., 41 Bom., 347. (4) (1875) 7 N.W.P.H.C.R., 113.
(5) (1906) I.L.R., 29 Mad., 294.

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So that present section 47 could not be a bar to plaintiff's suit for partition. The question of article 11 (A) did not arise in this case.

ODGERS, J.

A recent ruling of PHILLIPS, J., in S.A. No. 1708 of 1922 has been cited to us in which he held that *Yelumalai Chetti* v. *Srinivasa Chetti*(1) is directly opposed to *Ganpat Rai* v. *Husaini Begam*(2). With respect, I think if we bear in mind that the latter case had to do with Muhammadans who are tenants-in-common whereas *Yelumalai Chetti* v. *Srinivasa Chetti*(1) had to do with the alienation of an undivided share of a Hindu co-parcener the opposition disappears as the cases do not really relate to the same doctrine at all. The authority of *Yelumalai Chetti* v. *Srinivasa Chetti*(1) can be accepted without in the least diminishing the weight of the argument adduced for the respondent in this case.

I have examined the authorities adduced for the appellant on this point at some length as the issue is of importance. I agree with my learned brother that they do not enable or compel us to say that the view of the lower Appellate Court is wrong. I agree with my learned brother as to the other points raised and that this appeal must be dismissed with costs.

K.R.

(1) (1906) I.L.R., 29 Mad., 294. (2) (1921) 19 A.L.J., 53.