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The answer to the fourth question is as follows:—The whole of Cursetbai's one-fifth share will go to her grand-daughter, the third defendant Bhicaiji. Cursetji's two-fifths share will be divided among his children, each son taking double the portion of each daughter, the defendants Nos. 6 and 7 taking the portion of their assignor Hormusji (without prejudice to any question which may hereafter be raised with reference to the assignment), and Ratanbai taking the portion of the deceased Rustomji. Sorabji's two-fifths share will be divided so that a two-fifths portion goes to the first defendant Burjorji. A one-fifth portion of the same share will be taken in equal parts by Bapuji and Bomonji, the sons of Ratanbai. Another one-fifth portion of the same share will be taken by the children of Maneckbai, each son taking double the portion of each daughter, and the grand-child Pirozbai taking the portion of the deceased Awabai. Of the remaining one-fifth portion of Sorabji's share, Framji, the son of Dinbai, will take a moiety, and the other moiety will be taken by the children of Dadabhái, each son taking double the portion of Goolbai. The costs of all parties to this summons will be paid out of the estate. The plaintiff's costs to be taxed as between attorney and client.

Attorney for the plaintiff.—Mr. *F. P. Pavri.*

Attorneys for the defendants:—Messrs. *Pestonji, Rustim and Kola*; *Crawford, Brown and Co.*; *Mansukhlal, Damodhar and Jamsedji*; *Ardesir, Hormasji and Dinsha*; and *Wadia and Ghandy.*

ORIGINAL CIVIL.

Before Mr. Justice Candy.

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August 29, 30.

BALARAM BHASKARJI AND ANOTHER, PLAINTIFFS, *v.* RAMCHANDRA BHASKARJI AND OTHERS, DEFENDANTS.*

Jurisdiction—Partition—Property in different jurisdictions—Suit for partial partition—Suit for land—Letters Patent, 1865, *Cl.* 12—*Practice—Procedure—Joint family—Onus of proof—Evidence of separate acquisition.*

The plaintiff sued for partition of certain property, alleging it to be joint family property. It consisted of a house in Bombay and certain fields at Vavla,

* Suit No. 61 of 1897.

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in the Thána District, outside the jurisdiction of the Court. The parties were all resident in Bombay.

Held, that as to the Vavla property the Court had no jurisdiction, the plaintiff not having obtained leave to sue under clause 12 of the Letters Patent, 1865, but that the suit might proceed as regards the property in Bombay.

Punchanun v. *Shib Chunder* (1) followed.

As to the house in Bombay, the first defendant alleged that it was his self-acquired property; that he had purchased it in his own name in 1863 out of his private funds; that there were no family funds and that neither his father nor his brothers (the latter of whom were then very young) were in a position to contribute anything towards the purchase; that by his invitation his father and brother had lived with him in the house; that his father had died then and that one of his brothers had subsequently left the house and with his family had gone to reside elsewhere; that the plaintiff (the youngest brother of the first defendant) had continued to occupy a room in the house by the first defendant's permission up to the date of suit. The plaintiff, on the other hand, relied on the facts that the house was purchased and used as a family residence while the father and sons were all living in union; that it was bought in the name of the eldest son (defendant No. 1), who was then the manager of the family; that the father lived and died there; and that he himself (the plaintiff) and his family had continued to live there, even after he had separated in food from his brother (defendant No. 1):

Held, that the house was liable to partition. No doubt the *onus* of proof was upon the plaintiff. The facts, however, proved by him or admitted by the first defendant raised a strong presumption that the house was family property and against it there was only the first defendant's statement that the house was bought with his own money. But there was nothing to show that he kept a private fund apart from the family funds. He was the manager of the family and he kept no separate accounts.

SUIT for partition. The plaintiff was the third son of one Bhaskarji Bhikaji, who died intestate in 1867 leaving, him surviving, four sons and three daughters.

The first defendant was the eldest son and he was in possession of the property in dispute. The property consisted of—

(*a*) a house in Khattargalli in Bombay alleged by the plaintiff to have been purchased in 1863 out of family funds, but in the name of the first defendant, who as eldest son was then the manager of the family;

(*b*) certain fields at Vavla in the Thána District (outside the

(1) I. L. R., 14 Cal., 835.

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jurisdiction), some of which the plaintiff alleged had descended from his grandfather and some had been purchased in his father's life-time out of family funds, but in the first defendant's name;

(*c*) other fields, also in the Thána District, purchased after his father's death by the first defendant in his own name, but out of the family funds.

The plaintiff in his plaint claimed partition of all the above property.

The first defendant denied that the plaintiff was entitled to partition. He alleged that all the above property, with the exception of one field in class (*b*), was his own self-acquired property purchased by himself out of his own earnings. He denied that there had ever been any common family funds.

At the hearing it was (*inter alia*) contended on behalf of the first defendant that the suit should be dismissed on the grounds (1) that the suit was a suit for land partly within and partly outside the jurisdiction of the Court, and, therefore, leave to sue under clause 12 of the Letters Patent, 1865, was necessary, but had not been obtained; (2) that the suit having thus been improperly brought, the plaintiff could not now elect to abandon or postpone his claim to the property outside the jurisdiction and proceed as to part of his claim, nor could the Court hear the suit so altered; (3) that the rule was that there could not be a suit for partial partition; that the plaintiff must claim complete partition, and that the law having provided a procedure for so doing when the property lay in different jurisdictions, that procedure must be followed or the plaintiff must fail.

The arguments and authorities cited appear from the judgment.

Bahadurji and *Jina* for the plaintiffs.

Kirkpatrick and *Setlur* for the first defendant.

In addition to the authorities mentioned in the judgment, the following cases were also referred to. As to jurisdiction in cases of partition, *Ramacharya* v. *Anantacharya*[1]. As to suing for partial partition, *Radha Churn* v. *Kripa Sindhu*[2]. As to *onus* of proof,

(1) I. L. R., 18 Bom., 389. (2) I. L. R., 5 Cal., 474.

Dhunookdharee v. *Gunput*[1]; *Phoolbas Kooer* v. *Lall Juggessur*[2]; *Pran Kristo* v. *Sreemutty Bhageerutee*[3]; *Obhoy Churn* v. *Gobind Chunder*[4]; *Nanabhai* v. *Achratbai*[5]; *Toolseydas* v. *Premji*[6]; *Ahmedbhoy* v. *Cassumbhoy*[7]; *Denonath Shaw* v. *Hurrynarain Shaw*[8].

CANDY, J.:—In this suit the plaintiff claims partition of land and immoveable property situated in Bombay and at Vavla in the Thána District. The parties all live in Bombay. The preliminary question arises as to the jurisdiction of the Court to try such a suit.

This question depends upon the construction of clause 12 of the Letters Patent of this Court (His Lordship read the clause and continued). The uniform practice of the three High Courts at Bombay, Calcutta and Madras has apparently been to read that clause as if it ran as follows :—

"The said High Court in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try, and determine suits of every description if

"(*a*) in the case of suits for land or other immoveable property, such land or property shall be situated either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if

"(*b*) in all other cases the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

I confess, were the matter *res integra*, I should be inclined to doubt the correctness of the above construction, but there are obvious difficulties in whatever way we regard the clause, and I am not prepared after this lapse of time to question the uniform practice of all the Courts.

As authorities for the proposition that the words as to leave being first obtained apply both to suits for land or other immoveable property, and also to all other cases, I may refer to the judgment of Norman, J., in *Prasanna Mayi Dasi* v. *Kadambini*

(1) 10 Cal., W. R., 122.
(2) 14 Cal., W. R., 340.
(3) 20 Cal., W. R., 158.
(4) I. L. R., 9 Cal., 237 at p. 241.
(5) I. L. R., 12 Bom., 122.
(6) I. L. R., 13 Bom., 61.
(7) I. L. R., 13 Bom., 534 at p. 545.
(8) 12 Beng L. R., 349.

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Dasi[1] followed by Phear, J., who alluded to the uniform practice in *Jagadamba Dasi* v. *Padmamani Dasi*[2], and by Sir A. Collins, C.J., Parker, J., and Shephard, J., in *Seshagiri Rau* v. *Rama Rau*[3], and by West, J., in *Jairam Narayan Raje* v. *Atmaram Narayan Raje*[4]. The words "in all other cases" in clause 12 mean those suits in which immoveable property is not involved—per West, J., in *Jairam* v. *Atmaram, supra.*

As authorities for the proposition that the condition as to defendant's residence or carrying on business relate solely to all other cases, and not to suits for land or other immoveable property, I may refer to the judgment of Macpherson, J., in *Bibi Jaun* v. *Meerza Mahomed Hadee*[5], where it was held that as the land was not within the local jurisdiction, the suit could not be entertained by the Court merely on the ground that defendant was personally dwelling in Calcutta; and to the judgment of Phear, J., in *Khalut Chunder Ghose* v. *Minto*[6], where it was held that as defendant dwelt within the local limits the Court had jurisdiction unless it was a suit for land not within the local limits. Further support for this proposition may be obtained from the fact that it has never been apparently contended that a defendant residing in Bombay could be sued in the Bombay High Court for land, say in Calcutta, simply because the defendant resided in Bombay. That a suit for partition of landed property is a suit for land, there can be no doubt. (See judgment of Phear, J., in a former stage of the above noticed case, *Padmamani* v. *Jagadamba*[7]).

Applying the above law to the present case it is seen that it is a suit for land partly in Bombay and partly at Vavla in the Thána District. No leave of the Court has been obtained under clause 12 of the Letters Patent. Therefore this Court has no jurisdiction to entertain the suit as regards the property at Vavla.

So much cannot be denied; but Mr. Kirkpatrick for the first defendant goes further, and says that, as this suit is a suit for

(1) 3 Beng. L. R., (O. C.,) 85 at p. 87.
(2) 6 Beng. L. R., 686.
(3) I. L. R., 19 Mad., 448.
(4) I. L. R., 4 Bom., 482.
(5) 1 Ind. Jur. (N. S.), 40.
(6) 1 Ind. Jur. (N. S.), 426.
(7) 3 Beng. L. R., 124 at p. 140.

partition, it must include all the property alleged to be liable to partition, and as it cannot be so framed without the leave of the Court having been first obtained, the suit is in its inception bad, and should be dismissed. I held that the suit could proceed as regards immoveable property in Bombay, and my reasons for so holding were as follows:—The case of *Punchanun Mullick* v. *Shib Chunder Mullick*[1] was a suit on all fours with the present one. Trevelyan, J., held that the suit was not liable to be dismissed on the ground that partial partition of a property cannot be granted, but the claim might be decreed as far as the property within the jurisdiction was concerned. Mr. Mayne says (5th edition, Sec. 452): "Every suit for a partition should embrace all the joint family property, unless different portions of it lie in different jurisdictions, in which case suits may be brought in the different Courts to which the property is subject." And though all the cases quoted by Mr. Mayne in his note to the above passage do not apparently entirely support his proposition, one of them (*Subba Rau* v. *Rama Rau*[2]) is strongly in favour of it. That case had reference to sections 11 and 12 of Act VIII of 1859; and Scotland, C. J., and Ellis, J., pointed out that the right of suit would no doubt have been absolute, and not, as it is, conditional on the leave of a superior Court, if the provision had been intended to be imperative. So here it is optional with the plaintiff to obtain the leave of the Court to bring the Vavla property within the jurisdiction of the Court. He has not done so, therefore the suit as regards the Vavla property is bad, but as regards the Bombay property it remains good. No doubt cases may be easily imagined in which it might be inconvenient for separate suits to be brought. Mr. Justice Norman alluded to this in the judgment (*Prasannamayi* v. *Kadambini*[3]) quoted above. He said: "Partition suits are in all cases necessarily expensive enough. It would be most unfortunate if in all such cases we were obliged to say that two suits must be brought, one in the mofussil and one within the local jurisdiction. The expenses would be doubled, and the decree would necessarily be far less satisfactory than that which would be arrived at when all the facts are before a single Judge in the

(1) I. L. R., 14 Cal., 835. (2) 3 Mad. H. C. Rep., 376.
(3) 3 Beng. L. R. (O. C.), 85.

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same suit." Here the facts connected with the Vavla property are quite distinct from those connected with the Bombay property. The former was acquired at a different time and under different circumstances. In *Hari Narayan Brahme* v. *Ganpatrav Daji*[1], Kemball, J., said: "No doubt the rule that every partition suit shall embrace all the joint family property has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions . . . but I am not aware of any authority for the proposition that a member who sues for partition of property in the hands of the defendant can refuse to bring into the hotchpot any undivided property held by himself on the ground that it is situated within another jurisdiction. . . It is obvious that when a plaintiff seeks to recover a share of property in the hands of the defendant, it is necessary for the Court to decide whether, under the circumstances of the case, he is entitled to that partition." So here: The plaintiff seeking partition is not refusing to bring into hotchpot any undivided property held by himself. Defendant does not assert that the Vavla property is undivided and liable to partition; he strongly asserts the contrary. Similarly in the Calcutta case (*Padmamani* v. *Jagadamba*[2]) quoted above, Phear, J., said: "I find nothing to make me think that the plaintiff must necessarily bring a suit, if he brings a suit at all, for partition of the whole of the joint property. . . . If on the part of his client (the defendant) he (the Advocate-General) can go further than he has done, and would give me ground for thinking that a fair and equitable division of the joint property could not be come to without bringing in the Mofussil property, and making that the subject of division together with the Calcutta property, I think I might possibly consider it right to stay the proceedings in this suit upon his undertaking to file a plaint within a reasonable time, embracing the whole of the property, and of course to ask for the necessary leave for that purpose." So here I could stay proceedings for the same object, or to enable plaintiff to file a suit in the Thána Court for the Vavla property, and to then apply to this Court under clause 13 of the Letters Patent for a removal of that suit to this Court, when both suits could be consolidated

(1) I. L. R., 7 Bom., 272, at p. 278. (2) 6 Beng. L. R., 134.

and disposed of by one Judge. But there is no necessity for such a course. The question as to the Vavla property stands on its own footing quite apart from the Bombay property. Plaintiff wishes this suit as to the Bombay property to be disposed of on its own merits. He is willing to run the risk of his suit in a Thána Court for the Vavla property, if he files such a suit, being met with the plea that he relinquished his claim for the Vavla property, when he could have legally sued for the same by first obtaining the leave of the Court, and that, therefore, his second suit is bad. I express no opinion on such a plea. I have simply to deal with the Bombay property.

As to that property on the merits, the following facts are admitted or proved beyond doubt. Many years ago Bhaskar left his relatives and whatever family property there was at Vavla and came to earn his living in Bombay. This was at any rate before his eldest son (Ramchandra, the first defendant) was born in 1833. Bhaskar was then living with his wife in Vithalwádi, where also his younger sons were born—*viz.*, Sitaram about 1840, Balaram (plaintiff) about 1850, and Srikrishna about 1853. There were also three daughters. Bhaskar was a customs pass-writer, and apparently earned from Rs. 30 to Rs. 60 a month for eight months at least in a year. The eldest son, Ramchandra, it will be noticed, was much older than his brothers, and of course he became capable of earning a salary long before they did. In 1858 he was married, and in that year he also began to earn a regular salary, which, though small at first (Rs. 10) gradually increased till in 1881 he was earning Rs. 88; and in 1882 he retired on a pension of Rs. 41 odd. In 1861 or 1862, Bhaskar's wife, the mother of these sons, died. From that time the eldest son, Ramchandra, managed the family affairs. His wife was the senior lady in the house, and the father, Bhaskar, was getting old. In December, 1867, he died; but prior to that in 1863, he and his family had removed from Vithalwádi to the Khattargalli house, the subject of the present suit. It was purchased in the name of Ramchandra in partnership with one Sakharam, whose share was subsequently partitioned off. In Ramchandra's share he and his father and brothers all lived together. Four months after his father's death, *i.e.*, in 1868,

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Sitaram (who had been married in 1864, and who in 1866 began to earn a salary, all or most of which he handed over to the family manager) left the Khattargalli house, and with his wife resided separately from the other members of the family. With his own earnings he subsequently purchased a house for Rs. 800, which, after his death in 1881, his widow, Savitribai (third defendant), sold. He left two sons, the third and fourth defendants. One of these now lives with his uncle, Ramchandra, the first defendant; the other lives with his mother. It is admitted that the house purchased by Sitaram, after he had separated in residence from his brethren, was his self-acquired property and not joint. It is also admitted that if the Khattargalli house is liable to partition, then defendants Nos. 3 and 4 are entitled to one-third share therein. Savitribai would also be entitled to residence. Srikrishna, the fourth son, was married in 1878, and he lived in the Khattargalli house till his death in 1886. He did not earn any fixed salary. His widow is Radhabai, the second defendant. These defendants (second, third, fourth, and fifth) have taken no active part in the present suit.

There remains the third son, Balaram, the present plaintiff. He was a youth of thirteen when the family moved to the Khattargalli house in 1863. In 1872 he was married, and in that year also he began to earn a fixed salary, which has risen from Rs. 20 to Rs. 35 in 1882. This he asserts he paid over almost entirely to his eldest brother. He also asserts that he published a book in 1877, the profits of which were taken by his eldest brother or by the wife of the latter. This latter assertion is not denied. Ramchandra also admits that plaintiff paid him monthly Rs. 15, and from 1877 Rs. 20. In 1885, Balaram had a dispute with his brother Ramchandra, and from then ceased to take food with him; but he has continued to occupy a room in the house.

These are the main facts, and on them the question is, whether plaintiff is entitled to say that the Khattargalli house is joint property. In the arguments at the Bar stress was laid on the burden of proof, and various dicta were quoted from several cases. But I agree with Mr. Mayne that it is impossible to lay down an abstract proposition of law which will govern every case,

however different its facts (5th edition, section 267). Of course the *onus* is primarily on the plaintiff. He comes into Court and asserts that the house is joint family property. It is for him to show *primâ facie* that it is so. He points to the fact that it was purchased as a family residence while the father and his sons were all living in union; it was bought in the name of the eldest son, Ramchandra, who was then the manager of the family; the father lived and died there. Balaram and his family have continued to live there, even after he has separated in food from his brother. If defendant's witness is to be believed, Ramchandra tried to eject Balaram, and the latter refused to go.

What has Ramchandra got to show against the strong presumption from those facts? He says that he purchased the house with his own private funds. Rs. 50 were paid by him as earnest-money and Rs. 50 by Sakharam. Then each paid Rs. 450 when the deed of sale was signed. Then each paid Rs. 20 a month for seven years, after which there was a balance paid in a lump sum. All this is, no doubt, perfectly true, but what is there to show that these moneys were paid by Ramchandra from his private purse quite apart from the family funds? No separate accounts were kept, that is admitted. Sakharam, to support his former partner says that to procure the Rs. 450, in his presence Ramchandra's wife took the ornaments off her person and handed them to him for sale--a story hardly worthy of credit. The ornaments are said to have been sold to a person whose son is alive, and who could have been called with the accounts to show the sale. The facts that Ramchandra subsequently raised Rs. 1,000 by a mortgage of this house (partly he says to make additions to this house and partly to pay for the marriage expenses of his brother, the plaintiff), which sum was repaid by instalments, as also were three bonds (one for Rs. 200 in October, 1869, one for Rs. 450 in November, 1870, and one for Rs. 100 in March, 1873), point to the conclusion that Ramchandra treated the house as joint family property. He was evidently a generous eldest brother, educating two of his sisters' sons, and making due arrangements for raising funds for the marriages and other ceremonial expenses of his brothers and their families, without plunging the family into debt.

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It no doubt seems hard that he, the eldest and largest wage-earner in the family, should, when partition takes place, be in no better position than the youngest member of the family. But that is just one of the paradoxes to be met with in the system of the Hindu joint family. Of course, if Ramchandra could establish the fact that he kept a separate private purse, apart from the family funds which were used for the maintenance of all the members of the family, and if he could show that he purchased the house from the private purse, and always treated the house as his own separate property, then the fact that he let his father and brothers live in the house with him—possibly from love and affection—would not show that he had waived his separate rights as owner. But I have no doubt that, as so often is the case, Ramchandra had no thought of separate ownership apart from the other members of the family. Now that he has quarrelled with the plaintiff he, not unnaturally, is loth to agree to partition. Hence the suit, fostered possibly by the touts who wrote the lawyer's letters which are the cause of more than half the litigation in this Court.

I find that the Khattargalli house is liable to partition. There must, therefore, be a decree for the plaintiff, and the case will go to the Commissioner to effect a partition, and if necessary under the Partition Act to sell the same. The costs of effecting partition will come out of the estate, but costs of plaintiff up to date must be borne by first defendant, as he has practically caused the suit. This will not include costs (if any) connected with the Vavla property. The plaintiff must bear all those. Defendants Nos. 2 to 5 have incurred no costs. The Commissioner will make due provision for the maintenance and residence of the ladies Radhabai and Savitribai.

Attorneys for the plaintiff:—Messrs. *Captain and Vaidya.*

Attorneys for the defendant:—Messrs. *Jehangir and Seervai.*