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MUNICIPAL
COMMISSIONER
OF BOMBAY
v.
HARI
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For this reason we reverse the conviction and sentence and acquit the applicant, and direct the fine if paid to be refunded. This will leave the Commissioner free to take such further steps, if any, as he may be advised in the matter and as may be legal.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899.

August 15.

SHIVMURTEPPA (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. VIRAPPA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Suit by a purchaser of a co-sharer's interest for partition of a specific part of joint property—Right of defendant co-sharers to require a general partition—Rules as to partition, general and partial.

Where a co-parcener or a purchaser of the rights of a co-parcener sues for partition, the partition must be general: a suit for a partial partition of a single property will not lie.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

Suit for partition. Plaintiffs sued for partition of a certain warehouse in which they claimed a half share. They alleged that it was the joint ancestral property of the first and second defendants; that the right, title and interest therein of the first defendant had been sold in execution of a decree and purchased by their (the plaintiffs') ancestor in 1880, and that they (the plaintiffs) were now in joint possession with defendant No. 2.

Defendant No. 2, who alone defended the suit, pleaded (*inter alia*) that, besides the warehouse, there was other family property belonging jointly to himself and defendant No. 1 which ought to be included in the present partition suit; that a general partition ought to be made of the whole of the joint property; and he prayed that his share thereof should be ascertained and allotted to him.

The Subordinate Judge awarded the plaintiff a half share of the warehouse, without ordering a general partition of the joint property as prayed by the second defendant.

* Second Appeal, No. 164 of 1898.

This decision was upheld, on appeal, by the Assistant Judge. His reasons were as follows:—

“*Prima facie* the share of defendant No. 1 may be more or less than one-half, but I see no reason why a general partition need be decreed in order to ascertain it. In the present suit defendant No. 2, who is the only appellant, has admitted through his pleader that he has no objection to half of the property in suit being awarded to plaintiff.

“Further, it may be pointed out that the bulk of the ancestral property is admittedly in the possession of strangers, and is not available for partition, and could not, therefore, be brought into the hotspot, even if a general partition were ordered.

“It appears to me that the Subordinate Judge has laid down a correct principle in dealing with this case. He says, ‘the equities are to be ascertained by taking evidence, and then giving to the purchaser what equitably can be given consistently with an imaginary general partition.’ This principle appears to me to be laid down in *Haribharthi v. Vithal*⁽¹⁾ and *Gadadhar v. Balvant*⁽²⁾. In the present case I fail to see that it has been improperly applied, as it is clear that defendant No. 2 does not dispute the fact that a half share of the warehouse in suit would fall to defendant No. 1, if a general partition were made.”

Against this decision defendant No. 2 preferred a second appeal to the High Court.

Shamrao Vithal for appellant.

N. G. Chandavarkar and *V. G. Bhandarkar* for respondents.

PARSONS, J.:—For the purposes of this suit it will be sufficient to state the following facts. The defendants Nos. 1 and 2 are undivided brothers. The plaintiffs bought at a court sale the right, title and interest of the defendant No. 1 in a warehouse and they brought this suit to obtain a half share of it partitioned off and given to them. On the objection of the defendant No. 2 that the whole of the joint property should have been brought into suit, and the persons in possession thereof made parties, twelve persons were joined as co-defendants and a list was filed showing the joint property which consisted of 4 houses valued at Rs. 5,650 and 10 fields assessed at Rs. 199-6-0 (Exhibit 11). Any defect, therefore, that may have existed in the suit as originally filed was thus cured.

The defendant No. 2 further claimed that there should be a general partition made of all the joint property and that his own

(1) P. J. for 1883, p. 143.

(2) P. J. for 1883, p. 250.

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share in it should be ascertained and given to him. The Judges of both the lower Courts refused him this relief. They were of opinion that there was no necessity for a general partition, as it was clear that a half share of the warehouse in suit would fall to the defendant No. 1, if a general partition were made.

The Judge of the appellate Court thus puts the case:—

“It appears to me that the Subordinate Judge has laid down a correct principle in dealing with this suit. He says ‘the equities are to be ascertained by taking evidence * * * and then giving to the purchaser what equitably can be given consistently with an imaginary general partition.’ This principle appears to me to be laid down in *Haribharthi v. Vithal*⁽¹⁾ and *Gadadhar v. Balvant*⁽²⁾. In the present suit I fail to see that it has been improperly applied, as it is clear that defendant No. 2 does not dispute the fact that a half share of the warehouse in suit would fall to defendant No. 1 if a general partition were made.”

It appears to us that that might be a correct mode of disposing of a case where no one of the co-parceners except the purchaser wished a partition, but that the principle cannot be applied where, as here, a general partition is desired and asked for. The general rule is that a suit for partial partition will not lie. See *Haribharthi v. Vithal*⁽¹⁾. This was found in practice to work very hardly upon the purchaser and upon the members of the joint family, and the evident desire of the Courts here was to give a purchaser his rights without creating a disruption of the joint family and its property against the wishes of the latter. For this purpose they introduced the principle of an imaginary general partition as in *Gadadhar v. Balvant*⁽²⁾, and doubtless that principle can be applied in suitable cases. Where, however, the members of the family themselves desire a general partition, we do not see how that prayer can be refused. It is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right. The objection raised by the Subordinate Judge that the defendant will get his share without any costs to him in court fees, is not sound. A defendant claiming a share on partition

(1) P. J. for 1882, p. 148.

(2) P. J. for 1883, p. 250.

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is, *quod* that claim, in the position of a plaintiff and could be called on to pay court fees on the value of his claim. We have dealt with the points involved in this appeal very recently (see *Murarrao v. Sitaram*⁽¹⁾, *Abdul Kadar v. Bapubhai*⁽²⁾), and we have nothing to add to what we then said.

We think that in the present case the appellant (defendant No. 2) is clearly entitled to have his own share ascertained and partitioned, and we, therefore, reverse the decrees of the lower Courts and remand the case to the Court of first instance for retrial. All costs incurred to be costs in the cause.

RANADE, J.:—In this case, one Chanappa, the ancestor of the respondents (plaintiffs Nos. 1—12) purchased the right, title and interest of respondent No. 13 (original defendant No. 1) in a certain warehouse, and obtained possession of the same through Court. The appellant (original defendant No. 2) was brother of respondent No. 13, and on his application he was placed in joint possession of the warehouse along with the auction-purchaser Chanappa. The respondents Nos. 1—12 sought in this partition suit to recover respondent No. 13's half share in the warehouse, and the plaint stated that, besides the warehouse in dispute, the original defendants Nos. 1, 2 owned other joint property.

Appellant (defendant No. 2) did not object to the division of the warehouse, but he insisted that, besides the warehouse and the properties stated in the plaint, he and his brother (defendant No. 1) had other properties, which had been mortgaged and sold by the latter to strangers, and these properties should be included in the suit, and the persons in possession joined as parties to the suit, and a general partition made of the whole property including the warehouse. The necessary parties were added, and the plaint amended so as to include all the properties alleged to be jointly owned by the two brothers. The Court of first instance held that, though these other properties so included had to be considered along with the warehouse in dispute, for the purpose of fixing the judgment-debtor's proper share in the property purchased by the plaintiffs, no general partition of the

⁽¹⁾ (1898) 21 Bom., 184.

⁽²⁾ (1898) 23 Bom., 188.

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entire property could be ordered in this suit at the instance of the appellant, and that the division should be confined to the warehouse only, in respect of which it was ordered that respondents, plaintiffs Nos. 1--12, should recover a half share as belonging to the judgment-debtor.

This view was upheld by the District Court in the appeal brought by the only appellant who objected to the decree. The same appellant in the present second appeal before us contended that he had a right, under the circumstances, to require the Courts below to order a general partition such as he demanded, as all the necessary parties had been joined in the suit, and the whole of the joint property had been included in the amended plaint, and was thus available for division among all parties.

It appears to me that, under the circumstances of this case, the appellant's contention is well founded, and the appeal must be allowed. The Courts below have obviously made a mistake in holding that the appellant did not object to the division of the warehouse in dispute. His admission appears to have been made with the qualification that the division of the warehouse should be accompanied by a general partition of the whole of the joint property. The appellant's contention seems to have been all along that as his brother, the judgment-debtor, had mortgaged and sold the joint property on his own responsibility, his share in the particular warehouse in dispute could not be determined without considering all the equities arising between the claims of the appellant and his brother. The Court of first instance appears to have at first acted upon this view when it allowed the plaint to be amended, and new parties to be added. In finally disposing of the case, however, it appears to have changed its first view, and it came to the conclusion that a general partition could not be claimed in this case by the appellant, and that the actual division must be confined to the particular warehouse in dispute. This was clearly based on a mistaken view of the law of partition.

Leaving aside for the present the subsequently added properties, which were not in the possession of the appellant and his brother, the appellant had clearly a right to insist on an actual partition of the properties first mentioned in the plaint, which

were admittedly in the possession of his brother. Supposing that the judgment-debtor, whose rights had been purchased by Chanappa, had himself sought to recover possession of an equal half share of the warehouse, he could only have done so by bringing a suit for general partition, including therein all the properties in the possession of both the brothers. A suit will not lie for the division of any single property, and the only remedy is by general partition—*Nanabhai v. Nathabhai* ⁽¹⁾; *Trimbak v. Narayan* ⁽²⁾; *Venkatesh v. Ganpaya* ⁽³⁾; *Gopal v. Narnapa* ⁽⁴⁾; *Haridas v. Pran Nath* ⁽⁵⁾. The only exception recognised to this general rule is where any portion of the joint property is not in the possession of any of the co-parceners by reason of its being in mortgage with third parties, in which case such mortgaged property, if not available for immediate partition, may be excluded from the partition suit—*Balkrishna v. Hari Shankar* ⁽⁶⁾; *Narayan v. Pandurang* ⁽⁷⁾. With this exception, as also where any property is within the jurisdiction of a foreign Court, a member of an undivided family, suing his co-parceners for partition, must bring together into hotchpot the whole of the property in his possession—*Hari v. Ganpatrav* ⁽⁸⁾. The whole property and all the parties must be represented in a partition suit—*Chhotibibi v. Pachhabi* ⁽⁹⁾. Similarly, when a co-parcener brought a suit to recover his moiety of a particular property which another co-parcener had mortgaged to a third party, it was held that no such suit would lie for a defined moiety, as, on an equitable adjustment of the right of the sharers, the whole of the property in dispute might be left in the hands of the mortgagee by assigning it to the share of the mortgaging co-parcener—*Daji v. Aba* ⁽¹⁰⁾. Of course a co-parcener is free to abandon any portion of the property to which he has a claim, but he cannot be permitted to do so if by such action he throws a disproportionate burden on the portion of the estate alienated or mortgaged by him—*Wannaji v. Atmaran* ⁽¹¹⁾.

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(1) (1870) 7 Bom. H. C. R., 46.

(5) (1871) 8 Bom. H. C. R., 64.

(2) (1874) 11 Bom. H. C. R., 69.

(7) (1875) 12 Bom. H. C. R., 148.

(3) P. J. for 1876, p. 110.

(8) (1883) 7 Bom., 272.

(4) P. J. for 1883, p. 3.

(9) P. J. for 1892, p. 112.

(6) (1886) 12 Calc., 566.

(10) P. J. for 1892, p. 290.

(11) P. J. for 1883, p. 337.

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Such being the state of the law as between co-parceners and those who derive rights under them, the same principle must hold good in suits where an execution purchaser sues for a division of a particular property purchased by him from one of the co-parceners. In *Venkatarama v. Meera Labai*⁽¹⁾, where a purchaser of a joint co-parcener's share in a specific portion of the property sued to obtain a division of that property, it was held that such a suit did not lie. The purchaser of a co-parcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular property, but a joint right with other co-parceners to the ownership of the whole with an incidental right to obtain a partition. This view was given effect to in a later decision of the same Court—*Palani Konan v. Masakonnan*⁽²⁾; *Venkayya v. Lakshmayya*⁽³⁾. In a decision of this Court in *Udaram v. Ranu*⁽⁴⁾, the rule was laid down that the purchaser of an undivided co-parcener cannot, before a partition is made, insist upon the possession of any particular portion of the undivided estate. Westropp, C.J., laid down that in such cases partition must be of the whole of the family property, and it must be made in a regularly constituted suit to which all the co-parceners must be made parties. The Calcutta High Court has also held that there can be no partial division of family property—*Radha Churn v. Kripa Sindhu*⁽⁵⁾. This decision was questioned on another point in *Upendra Narain v. Gopee Nath*⁽⁶⁾, but that point has no bearing on the present dispute.

These rulings leave no doubt that both when a co-parcener himself, or the purchaser who obtains his rights, brings the suit, no suit for a partial partition of any single property can lie, and that the partition must be general. Both the Courts below rely chiefly on the decision of Mr. Justice West in *Gadadhar v. Balvant*⁽⁷⁾. It was, however, not a case of partition, either partial or general, but a contest between two purchasers about four fields which one of them had bought from two brothers, and the other

(1) (1889) 13 Mad., 275.

(2) (1896) 20 Mad., 243.

(3) (1892) 16 Mad., 98.

(4) (1875) 11 Bom. H. C R., 76.

(5) (1879) 5 CIL., 474.

(6) (1883) 9 Cal., 817.

(7) P. J. for 1833, p. 250.

had bought the same four fields before from a third brother, and an account had to be taken to ascertain each brother's particular share in the four fields.

It is clear from a review of the authorities noted above that the appellant was entitled to require the Court to proceed with the partition inquiry, and fix the appellant's share in the family property. As the property not in the possession of the brothers has been included in the plaint, and the necessary parties have been joined, there is no particular reason, if the appellant pays the additional court-fees, why the whole claim should not be dealt with as in a regular partition suit, and appellant's share in the whole family property determined.

I would reverse the decrees of the Courts below, and remand the case for passing a regular partition decree after due inquiry.

• APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice and Mr. Justice Candy.

DEVJI (ORIGINAL DEFENDANT), APPELLANT, v. SAMBHU AND ANOTHER
(ORIGINAL PLAINTIFFS), RESPONDENTS.*

1899.
August 31.

Hindu law—Joint family—Father's debt—Liability of family property—Decree against widow for husband's debt—Execution sale—Minor sons bound though not parties to suit.

One Ghanu died leaving him surviving a widow and two minor sons. The widow mortgaged some lands and a house to pay off a debt due by her husband. Subsequently a money decree was passed against her for another debt due by her husband, and the greater part of the mortgaged property was sold in execution, and the equity of redemption thereof was purchased by the mortgagee (the defendant). The sons were not parties to the suit in execution proceedings.

The sons afterwards brought this suit claiming that not having been parties to the suit their interests were not affected by the sale and praying for redemption. The lower Courts allowed the claim and passed a decree for the plaintiffs. On second appeal,

Held (reversing the decree and remanding the case) that the Courts in determining the effect of an execution sale must look to the substance of the transaction. The question was whether the debt for which the property was sold was a joint family debt, and whether it was the equity of redemption in the

* Second Appeal, No. 700 of 1898.

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