

(whether the same consists of houses, lands or moveables), and should make a fair partition of such undivided property amongst the various coparceners. Costs of suit and both appeals should be disposed of by the District Court in such manner as may be just.

Case remanded.

5 B. 27.

[27] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F.D. Melvill.

SHIVRAM (*Original Plaintiff*), *Appellant v. NARAYAN AND OTHERS* (*Original Defendants*), *Respondents.** [25th August, 1880.]

Limitation Act, IX of 1871, sch. II, art. 46—Partition suit—Res judicata—Bombay Act, V of 1864.

Art. 46 of sch. II of the Limitation Act, IX of 1871, is not applicable to a partition suit.

In 1871, the plaintiff sued to establish his sole right to a portion of a field on the ground that it had been allotted to him by partition. The defendant also claimed it as his share obtained by partition. The Court rejected the plaintiff's claim, holding that no partition had taken place and that the field was the joint property of five coparceners, including the plaintiff and defendant. In 1878, the plaintiff brought a second suit for a partition of the field, including the portion for which his former suit had been instituted.

Held that the present suit for partition was not barred by the previous suit which was brought to establish the plaintiff's sole right to the lands in question.

Bhaguji Raghujji v. Aniaba (1) followed.

[*Appl.*, 15 B. 299.]

THIS was a second appeal from the decision of E. Hosking, Assistant Judge at Nasik in the District of Thana, in appeal No. 273 of 1878, reversing the decree of R. D. Paranjape, Second Class Subordinate Judge at Sinnar.

The plaintiff, Shivram, sued Narayan and three others to recover possession, by partition, of his fifth share in a field No. 159, situated at the village of Gonde in the Taluka of Sinnar. In 1871, the plaintiff sued Vithoji (defendant No. 3) in the Mamlatdar's Court for possession of the northern portion of the field in dispute under Bombay Act V of 1864. On the 11th August of that year, the Mamlatdar rejected the plaintiff's claim and gave possession of the land to defendant No. 3. The plaintiff thereupon brought a regular suit (No. 1126 of 1871) for possession of the land awarded by the Mamlatdar to defendant No. 3, alleging that it had been allotted to him by partition. The defendant No. 3 also claimed it as his share, obtained by partition. The Court, on the 20th October, 1875, rejected the plaintiff's claim, on the ground that no partition had taken place. The [28] plaintiff, therefore, brought the present suit on the 5th February, 1878, for a partition of the field in dispute and for possession of his fifth share therein.

Defendants Nos. 1, 2 and 4 admitted the plaintiff's claim. Defendant No. 3 (Vithoji) pleaded, among other things, that the claim was barred by the previous suit (No. 1126 of 1871).

* Second Appeal No. 241 of 1880.

(1) 5 B. 25.

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The Subordinate Judge allowed the plaintiff's claim, holding that it was not barred by the former suit. His decree was reversed by the Assistant Judge in appeal (17th February, 1880), which was preferred by Vithoji (defendant No. 3) alone. The Assistant Judge observed: "under the Limitation Act of 1871, the plaintiff, after the order passed by the Mamlatdar, could only bring a suit to recover possession of the land awarded to Vithoji, within three years from the date of the order. His first suit having failed, he brought no other till the present suit was instituted; consequently, under the operation of s. 29 of Act IX of 1871, plaintiff's right to the land in Vithoji's possession is extinguished * * * Plaintiff's remedy was to establish his right by suit within the time allowed by law, and this he neglected to do. Plaintiff having sued for a fifth of the whole field and one-fifth of the field not being liable to partition at his suit, the claim must be rejected as against all the defendants."

The plaintiff appealed to the High Court on the 7th June, 1880.

Pandurang Balibhadra, for the appellant.—The plaintiff was entitled to claim partition within twelve years from the date when his cause of action arose. The lower Court was wrong in holding his claim barred. The Mamlatdar's order does interfere with a partition suit, as ruled in *Bhaguji Raghujii v. Aniaba Raghoba* (1). Such order is not conclusive evidence of the facts of possession and dispossession, *Basapa v. Lakshmapa* (2).

Shantaram Narayan, for respondent (defendant No. 3).

JUDGMENT.

WESTROPP, C.J.—Following the decision in *Bhaguji v. Aniaba* we hold that art. 46 of sch. II of Act IX [29] of 1871 is not applicable to a partition suit. And this Court being requested by the parties to decide now whether the decree in suit No. 1126 of 1871 brought by Shivram (the present plaintiff) constitutes the relief sought in the present suit for partition a *res judicata*, rules that question in the negative, as the suit No. 1126 of 1871 was brought to establish a sole right in Shivram to the seven acres of land, the subject of that suit, and not for a partition of the family estate at large, including the seven acres in question. The decree of the Assistant Judge is accordingly reversed and the Subordinate Judge is directed to proceed to make a just and equal partition amongst the coparceners of the undivided family of which the plaintiff and defendants are members, of the thirty-nine acres of land in the plaint mentioned. The parties respectively should bear their own costs of the suit and appeals.

Decree reversed.

(1) 5 B. 25.

(2) 1 B. 624.