

ORIGINAL CIVIL.

Before Mr. Justice Knight.

SHIVAJIRAO MADHAVRAO AND ANOTHER, PLAINTIFFS, v.
VASANTRAO MADHAVRAO, DEFENDANT.*

1908.
July 20.

Hindu Law—Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers.

M., a member of a joint Hindu family, being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5,000. At the time of this release M. had one son living. On this son suing the co-parcenary for partition it was held (in Suit No. 423 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M. had another son born who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

Held, that the second son was not entitled to any share in the property.

One Vithoba Mankojee, a Hindu inhabitant of Bombay, and the great-grandfather of the first plaintiff and of the defendant, herein acquired considerable moveable and immoveable property under the will and codicil of his grandfather Kashinath Bhikhaji. This said will and codicil were afterwards held void and inoperative as dealing with property which was ancestral in the hands of Kashinath Bhikhaji.

Vithoba Mankoji died on the 22nd of April 1873 leaving him surviving one son Kashinath Vithoba and two grandsons Ganpatrao Kashinath and Madhavrao Kashinath. The said Kashinath and his said son and grandsons contracted to live together after the death of the said Vithoba as an united Hindu family joint in food, worship and estate. The first plaintiff and the defendant are the sons of the said Madhavrao Kashinath. The defendant was born in 1884. Kashinath Vithoba died on the 23rd June 1901.

On the 20th January 1889 Madhavrao Kashinath became involved in debt and in consideration of his father paying the sum of Rs. 5,000 in settling his debts and for various other

* Suit No. 424 of 1907

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considerations executed a release of all his interest in the family property in favour of his father. Ultimately Madhavrao Kashinath became insolvent in or about the year 1892 and by virtue of the vesting order under section 7 of the Insolvent Act all his estate became vested in the Official Assignee.

In 1901, Vasantryao Madhavrao, the defendant herein, filed a suit in the High Court of Judicature at Bombay, being Suit No. 423 of 1901, for partition of certain joint and ancestral properties. The Appeal Court at Bombay reversing the decision of Tyabji, J., held that the properties were joint and ancestral and that the said Vasantryao Madhavrao was entitled to a half share therein.

The Appeal Court further remarked "Madhavrao has released his share and in answer to an enquiry from the Court it was stated that neither he nor his assignee in insolvency questions the release as against himself. But it follows that the release must be treated not as for the benefit of Kashinath alone but of the co-parcenary and so the shares must be determined as though Madhavrao was dead."

The Privy Council confirmed the decree of the Appellate Court on the 8th February 1907.

After the date of the decree of the Appellate Court and pending the appeal to the Privy Council the first plaintiff was born to the said Madhavrao on the 8th May 1905, and in this suit claims a share in the moiety of the properties to which the defendant has been declared entitled.

By a consent Judge's order dated the 11th April 1908 the suit was directed to be set down for trial of the following preliminary issue:—

"Whether the first plaintiff is entitled to any and what interest in the defendant's share of the properties to which he is declared entitled in Suit No. 423 of 1901 in the plaint mentioned."

Padsha and *Dastur*, for the plaintiff:—There has been no partition of the joint family property before the birth of the plaintiff. In 1889 all that happened was that the father retired

from the family. It was a personal relinquishment. The rest of the family was joint, that is why Vasant Rao was allowed one half and not one quarter. The Appeal Court declares the release is for the benefit of the whole family, yet it has operated solely for the benefit of Vasant Rao. In effect it is a gift by the father to his son and that with the consent of the co-parceners. Viewed in that light the case nearly approaches *Rai Bishen Chand v. Mussumat Asmaida Koer*⁽¹⁾ and so long as the father has not kept enough to give an afterborn son as much as the earlier born sons received, an equal share must be made good to the afterborn son by the brothers: *Krishna v. Sami*⁽²⁾, *Chengama Nayudu v. Munisami Nayudu*⁽³⁾.

Where the father leaves nothing to himself and the afterborn son has no source from which to maintain himself he can claim from the separated brothers a share equal to theirs.

Our second point is that the judgment of the Privy Council says that the release enures for the benefit of the other branch. The judgment treats Madhav Rao as civilly dead but this does not break up the coparcenary. Madhav Rao is personally disqualified by the release but this does not prevent the son of a disqualified person from inheriting property. The afterborn son is in the same position as his brothers.

Sethna (with *Setabrad*), for defendant:—*Krishna v. Sami*⁽²⁾ has not been followed in Bombay. See *Bapuji v. Pandurang*⁽⁴⁾, *Bal-krishna Trimbak Tendulkar v. Savitribai*⁽⁵⁾, *Bailur Krishna Rau v. Lakshmana Shanbhogue*⁽⁶⁾, *Nawal Singh v. Bhagwan Singh*⁽⁷⁾, *Vir-Mitrodaya*, p. 492.

KNIGHT, J.:—This suit is a pendent to the case of *Vasant Rao v. Anand Rao*⁽⁸⁾ decided by the Appellate Court in September 1904, and subsequently by the Privy Council⁽⁹⁾.

(1) (1884) L. R. 11 I. A. 164.

(2) (1885) 9 Mad. 64.

(3) (1896) 20 Mad. 75.

(4) (1882) 6 Bom. 616.

(5) (1878) 3 Bom. 54.

(6) (1881) 4 Mad. 302.

(7) (1882) 4 All. 427.

(8) (1904) 6 Bom. L. R. 925.

(9) (1907) 9 Bom. L. R. 595.

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The facts of the case, so far as they concern the question now before me, are the following :—In 1889 there was a joint Hindu family consisting of one Kashinath, his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasantryao. This family was possessed of considerable ancestral property. In January 1889, Vasantryao being then some five years of age, Madhavrao found himself heavily involved in debt; and in consideration of his father's Kashinath paying Rs. 5,000 "in settling the debts and for various other considerations," Madhavrao executed a deed of release in his favour relinquishing all interest in the family property.

In 1901 Vasantryao instituted a suit against Ganpatrao's sons (Ganpatrao and Kashinath both being dead) to obtain a share in the ancestral property. Among the various grounds raised by the then defendants, I need only refer to the contention that by the release Madhavrao forfeited not only his own interest in the ancestral property but that of his descendants. It was held, however, and the Privy Council confirmed the finding, that the release operated to extinguish only Madhavrao's own personal interest and did not bind his son, and that it must be treated as enuring, not as for the benefit of Kashinath alone, but for that of the whole coparcenary. Vasantryao, therefore, as representing one of the two sons of Kashinath, was held entitled on partition to a half share of the property, Ganpatrao's children taking the other half.

Now the present plaintiff is a second son of Madhavrao's, born in 1905, nearly a year after the decree for partition, and more than sixteen years after the date of the release. He sues his brother Vasantryao for a moiety of the ancestral property that has fallen to the latter's share, and the preliminary issue has been raised whether he is at all entitled to participate in the property.

The answer to this question must in the main depend on the determination of Madhavrao's precise position. He is still alive, he claims no further share in the property himself, nor was any claimed on his behalf by the Official Assignee who represented him in the previous suit. The only direct allusion

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to his status made in the judgment of the Appeal Court is in a passage towards the end, where it is said that "the shares must be determined as though Madhavrao were dead"; but this, although clear and adequate for the purposes of that judgment, is of little present assistance. The learned counsel for the plaintiff however sought to make it the basis of an argument that Madhavrao must be regarded merely as one civilly dead, as if he had turned to the ascetic life, or at the most as one disqualified from sharing in the family estate. But this supposition is not in accord with the facts and it needs but few words to demonstrate its impropriety. Hindu law bases exclusion from participation on certain clear and well-defined grounds, none of which can be applied to Madhavrao either literally or metaphorically. He is not afflicted with insanity or other congenital infirmity, and it is not pretended that he has "assumed another order." Whatever be the true history of the transactions culminating in the release of 1889, the facts accepted by the parties in the present suit are these, that Madhavrao received Rs. 5,000 from his father, directly or indirectly, and that he thereon resigned all his interest in the ancestral estate. No doubt this sum seems exiguous in comparison to the three-quarters of a lakh to which he was then apparently entitled, but small as it was, he accepted it in satisfaction of his claims, and he has never sought to recede from the arrangement. I can only look upon him, therefore, as a coparcener who has elected to take his portion and recede from the family and it is thus as I understand that he was regarded in the earlier suit.

The question then resolves itself into this: what are the rights as against the joint family of the son of a separated coparcener born subsequent to his father's separation? So stated, the question bears its answer upon its face: there is no known rule or principle which can entitle such a son to claim aught from the coparcenary. Vasant Rao's example affords plaintiff no assistance. He was alive when his father executed the release, and the latter was powerless to divest him of rights already vested in him. But the plaintiff stands in entirely different

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case; he was not even *en ventre sa mere* when his father quitted the family. The various authorities cited by his learned counsel—I may more particularly instance *Ganpat v. Gopalrao*⁽¹⁾, *Rai Bishen Chand v. Mussumat Asmaida Koer*⁽²⁾, and *Chengama Nayudu v. Munisami Nayudu*⁽³⁾—amount to no more than this: that where there has been a partition between a father and his sons; an afterborn son may claim a share from his brothers, if his father reserved no property for himself or is unable to provide for him. The Madras case bears a bastard resemblance to that now before me, in that Madhavrao is destitute of means and unable to provide for the plaintiff; but there the similarity ceases. These cases proceed upon the special principle of Hindu Law that the unborn son cannot be deprived of his share in the paternal estate by a prior partition. “Sons with whom the father has made a partition shall give a share to another son who is born after it” (Vishnu, 2 Colebrooke, II, 268). But the application of this principle is expressly limited to the case of partition between sons and father, and there is no warrant for its extension to a son born to a separated coparcener, other than the father of the family, after partition. Indeed, it is only necessary to reflect upon the confusion that such an extension of the principle would entail, to realize its impracticability.

There is little need to reinforce the argument. The texts of Vishnu and Yajnavalkya which direct separated brothers to cede a share to the afterborn brother have been explained by the commentators as applicable only to posthumous sons (*Ganpat v. Gopalrao*⁽¹⁾), and even this direction is restricted, it would seem, to the case of the son *en ventre sa mere* at the date of the partition (Mayne, section 472, 7th edn.). Relatively to the head of the family with whom Madhavrao effected partition, plaintiff is not a son but a grandson; he was not *en ventre sa mere* at the date of the partition, and he was not posthumously born. The circumstances that the father has dissipated the small patrimony that he received and is now unable to provide for him is an accident that does not bear upon the argument.

(1) (1890) 23 Bom. 636.

(2) (1884) L. R. 11 I. A. 164; 6 All. 560.

(3) (1896) 20 Mad. 75.

I, therefore, decide that plaintiff is not entitled to claim a share of the property in suit.

Attorneys for the plaintiff:—*Messrs. Jehangir, Gulabbhai and Billimoria.*

Attorneys for the defendant:—*Messrs. Bicknell, Mervanji and Romer.*

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Before Mr. Justice Macleod.

SIR JEHANGIR COWASJI JEHANGIR (PLAINTIFF) v. THE HOPE MILLS, LIMITED (DEFENDANTS).*

1908.

September 19,

Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec. 244—Transfer of Property Act (IV of 1882), sec. 93.

An application for redemption or foreclosure of a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution.

Where a decree *nisi* contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

Ajudhia Pershad v. Baldeo Singh(1) and *Nandram v. Babaji*(2), followed.

PROCEEDINGS IN CHAMBERS.

The plaintiff, a mortgagee in possession of the property belonging to the defendants, instituted this suit to recover the money due to him under his mortgage and prayed that in default of payment the right to redeem might be foreclosed or the mortgaged premises sold. After the mortgage the plaintiff had entered into an agreement with the defendants under which they could work the Mills.

* Suit No. 490 of 1903.

(1) (1894) 21 Cal. 818.

(2) (1897) 22 Bom. 771.