

## APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

PIROJSHAH BHIKAJI VANDRIVALLA (ORIGINAL DEFENDANT No. 19),  
APPELLANT, v. MANIBHAI NICHHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.\*

1911.

August 1.

VASANJI KALLIANJI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 6, 12 AND 11),  
APPELLANTS, v. MANIBHAI NICHHABHAI AND OTHERS (ORIGINAL PLAINTIFF  
AND DEFENDANTS NOS. 2 TO 5, 8, 9, 10, 14 AND 19), RESPONDENTS.\*

*Civil Procedure Code (Act XIV of 1882), sections 13, 462—Res judicata—Consent  
decree—Lands—Tenants-in-common paying land revenue jointly to Government—  
Lands do not thereby become impartible—Compromise—Minor—Sanction of Court.*

A suit for the partition of a village was resisted on the plea that the village was impartible, first, because the arrangement with Government had all along been that the tenants-in-common should be jointly responsible to Government for the land revenue, and, secondly, because in a previous suit between the parties it was held that the lands in the village were not divisible, only the profits thereof were. The previous suit was decided in terms of a compromise. A minor was a party to it. The guardian of the minor had applied to the Court stating that he had no objection to keep all the lands joint provided the minor got his share of the profits; and the Court had made the endorsement that the application had been allowed and filed in the suit:—

*Held*, overruling the plea, that the arrangement settling the relations between Government and the tenants-in-common could not be regarded as determination of the relations between the tenants *inter se*.

*Held*, further, that the decision in the previous suit was passed in terms of a compromise, but there was no issue raised and no adjudication on the issue whether the village was impartible.

*Held*, also, that the Court's sanction had not been obtained, under section 462 of the Civil Procedure Code (Act XIV of 1882), to the compromise to which a minor was a party.

The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or by some general, family or local custom. Parties cannot make an estate impartible which is partible. It is opposed to public policy.

*Vinayak Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar*(1), followed.

FIRST appeals from the decision of J. L. Thakore, Joint First Class Subordinate Judge, A. P., at Surat.

\* First Appeals Nos. 18 and 39 of 1909.

(1) (1903) L. R. 30 I. A. 77.

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Suit for partition and accounts.

The lands sought to be partitioned were situated in the village of Jamalpur, in the district of Surat. The plaintiff had  $\frac{11}{18}$ th share in the lands which he held in common with defendants Nos. 1—18. The remaining defendants were alienees of the foregoing defendants.

In 1891, one of the tenants-in-common had filed a suit in the District Court of Surat against the present plaintiff (who was a minor and who was represented by the Collector of Surat as his guardian) and others to recover his share by partition of the lands. The defendants denied the right claimed by the plaintiff there. Later on, the parties arrived at a compromise, under which they agreed to divide the profits of Jamalpur lands etc. hereditarily according to their shares. The Collector, on behalf of his minor ward, gave an application that he had no objection to keep all the lands joint provided his ward got his share in the profits. The Court made an endorsement on this application, that "the application has been allowed and filed in the suit". A decree was eventually passed in terms of the compromise.

In 1891, the defendant No. 1 (a co-sharer) took the village of Jamalpur in lease from all the co-sharers for a fixed period of nine years, agreeing to distribute Rs. 1,500 among the co-sharers after deducting expenses from it.

In 1905, the defendants Nos. 1—6 leased the village to defendant No. 19 for a period of 10 years at the annual rental of Rs. 1,600, exclusive of Government assessment.

In September 1905, the plaintiff filed the present suit praying *inter alia* for a declaration that the lease was void as against him and for recovering his share by partition in the Jamalpur lands. He urged that the decree of 1891 did not bind him, as it was based on a compromise to which sanction of the Court as provided for by section 462 of the Civil Procedure Code of 1882 was not taken. The Subordinate Judge held that the lease of 1905 was not binding on the plaintiff; that there was no substance in plaintiff's contention as to sanction under section 462 and that the decree in question

was merely declaratory and did not prohibit a partition in future. He, therefore, awarded the plaintiff's claim.

Defendants Nos. 1, 6, 11, 12 and 19 appealed to the High Court.

*G. K. Parekh* and *R. R. Desai* for the appellants:—The village of Jamalpur is impartible because it is a Bandhi Jama village and also it is a Bhagdari village: see *The Government of Bombay v. Haribhai Moxybhai*<sup>(1)</sup> and *The Government of Bombay v. Sundarji Savram*<sup>(2)</sup>. The assessment is payable to Government by all the co-sharers jointly: it would therefore be wrong to allow a partition. The sharers might lose the village for the default of a single co-sharer.

The arrangement decreed in 1891 was intended to be permanent. As the decree is in force the present suit is barred by *res judicata*. The lease of 1905 must be upheld; it has been given *bond fide* in the interests of all the co-sharers: see *Balvantrav Oze v. Ganpatrav Jadhav*<sup>(3)</sup>.

*Branson* with *Manubhai Nanabhai* for respondent No. 1.

*Nandavadan K. Mehta* for respondents Nos. 2, 3, 7, 9.

The respondents were not called upon.

CHANDAVARKAR, J.:—The first question is whether this is an impartible village. It is argued that it is, because its tenure is Bhagdari. In the Court below no point would appear to have been made that the village, being Bhagdari, could not be partitioned by metes and bounds. The question as to its impartibility was rested there by the appellant on other grounds. Whether the village is Bhagdari or not must be determined on evidence, and we should not be justified in deciding the case on that point, raised as it is for the first time in appeal. But the appellant's pleader has referred to certain documentary evidence to show that the point was present to the minds of the parties in the Court below and was raised there. That evidence consists of judgments in what are known as the Kabilpur, Jamalpur, and Visalpur cases. In the judg-

(1) (1875) 12 B. H. C. R. Appx. 225, 227.

(2) (1879) P. J. 333, 334.

(3) (1883) 7 Bom. 336.

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ments relating respectively to the first and the last, there is a reference to the fact of these villages being either Bhagdari or similar to Bhagdari; but the judgment (Exhibit 258) relating to Jamalpur, which is the village concerned in the present case, is silent as to that. The materials before us are too meagre to enable us to decide the question satisfactorily, and they are meagre, because it was either not raised in the lower Court, or, if raised, it was not sufficiently prosecuted. If the village is in fact held on the Bhagdari tenure, our decision upholding the lower Court's decree directing partition will not necessarily prejudice the appellant, because it is open to the Collector to intervene under the Bhagdari Act and take steps to prevent a partition of the village.

Failing on the point abovementioned, the appellant's pleader urges that the village is impartible, first, because the arrangement with Government has all along been that the tenants-in-common should be jointly responsible to Government for the land revenue payable to the latter; and secondly, because in a previous suit between the parties it was held that the lands in the village were not divisible, only the profits thereof were. As to the first of these grounds, no arrangement settling the relations between Government and the tenants-in-common can be regarded as determinative of the relations of the tenants *inter se*. As to the second ground, the decision in the previous suit was passed in terms of a compromise that the profits should be divided. There was no issue raised, no adjudication on the issue whether the village was impartible. The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or some general, family, or local custom: *Vinayak Waman Joshi Rayarikar v. Gopal Hari Joshi Rayarikar*<sup>(1)</sup>. Parties cannot make an estate impartible which is partible. That is opposed to public policy. Besides, the decision relied upon seems to have been made in terms of a

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compromise in which a minor was concerned. The Court's sanction ought to have been obtained to its terms being for the benefit of the minor, under section 462 of the Code of Civil Procedure (Act XIV of 1882) then in force. No such sanction is proved by the record to have been obtained in the manner prescribed by the provisions of section 462. So the argument of *res judicata* fails. The lease by defendants Nos. 1 and 6 to defendant No. 9 was plainly in violation of the long practice as to management, enjoyment and leasing which had obtained among the co-sharers; the lease in question was made without the consent of the other co-sharers; and was, as found by the lower Court, not beneficial to them. The authorities cited by Mr. Gokuldas to show that a lease by one co-sharer binds the other co-sharers unless it has done substantial injury to the latter or led to the destruction of the property, are inapplicable here, where it is found—and found rightly—by the lower Court upon unimpeachable evidence that all the co-sharers had been letting out the lands jointly before this lease by defendants Nos. 1 and 6. As to the deduction of Rs. 12 from the share of Surbhai and Rs. 40 out of the revenue of the Hoonda lands, we concur with the Subordinate Judge both in his reasons and conclusion. We cannot interfere with the order as to costs made by the Court below in its decree. The plaintiff alone asked for his share by partition. The defendants strenuously opposed his right. The case is thus taken out of the rule that where there is a general partition, the costs of all the parties should come out of the estate.

In appeal No. 18, by defendant No. 19, he has been held rightly liable for mesne profits after suit.

The decree is confirmed and both the appeals are dismissed with costs.

*Decree confirmed.*

R. R.