

apparent conflict between the decision in *Tayaballi's case*⁽¹⁾ and the *ratio decidendi* in *Dakore Town Municipality v. Travedi Anupram*⁽²⁾. But Mr. Justice Heaton, who was a party to both the decisions, agreed in the later case that the earlier decision was distinguishable. Under the circumstances I think that the decision in *Tayaballi's case*⁽¹⁾ should be followed. If that view is not in consonance with the true intention of the Legislature on this point, the Bombay District Municipal Act can be amended by the Legislature so as to give effect to its real intention.

Appeal allowed.

R. R.

⁽¹⁾ (1920) 22 Bom. L. R. 951.

⁽²⁾ (1913) 38 Bom. 15.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

KHANDERAO DATTATRAYA WAKDE (ORIGINAL DEFENDANT), APPELLANT
v. BALKRISHNA MAHADEV PHULAMBRIKAR AND OTHERS (ORIGINAL
PLAINTIFFS), RESPONDENTS^o

1921.

July 28.

AND VICE VERSA.

Partition Act (IV of 1893), section 4—Suit for partition of a dwelling house—Transferee of a sharer suing for partition—Section applies only to the plaintiff transferees—Other transferees of shares not affected by the section.

Two out of the three sharers in an undivided dwelling house sold their shares to different persons. The transferee of the one sharer having obtained a decree for partition of the house against the remaining sharer and the other transferee, the sharer applied, under section 4 of the Partition Act, to have the shares of both transferees valued:—

Held, that the sharer was entitled to have a valuation made of the share of the plaintiff-transferee; but that he could not similarly proceed against the share of the other transferee who was one of the defendants in the suit for partition.

^o Cross Appeals Nos. 851 of 1920 and 1 of 1921.

1921.

APPLICATION under the Partition Act.

KHANDERAO
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v.
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MAHADEV.

Three persons, Bhikaji, Balvant (defendant No. 2) and Gangadhar, owned an undivided dwelling house. Bhikaji sold his share to the plaintiff and Gangadhar transferred his share to defendant No. 3.

The plaintiff obtained a decree to have his share in the house partitioned. Defendant No. 2 thereupon applied to the Court to have the shares of plaintiff and defendant No. 3 valued under section 4 of the Partition Act.

The lower Courts made the order. Both plaintiff and defendant No. 3 preferred separate appeals to the High Court.

In second appeal No. 851 of 1920.

K. H. Kelkar, for the appellant.

B. G. Rao, for the respondent No. 6.

In second appeal No. 1 of 1921.

Y. N. Nadkarni, for the appellant.

B. G. Rao, for the respondent No. 2.

MACLEOD, C. J.:—In this case a decree was passed in a partition suit instituted by one Phulambrikar asking for partition of his one-third share of a certain house in Poona. The house is owned by the following persons in equal shares, Phulambrikar who had bought one-third from Bhikaji, a member of the original family of owners, Balvant the 2nd defendant a member of that family, and Khanderao the 3rd defendant who derives his title through Gangadhar, a member of the original family. After the partition decree was passed, applications were made by the 2nd defendant under section 4 of the Partition Act, asking the execution Court to take

action under that section with regard to the shares of the plaintiff and the 3rd defendant.

The lower Court granted the application and an appeal against that decision was dismissed. Undoubtedly the 2nd defendant is entitled to have a valuation made of the share of the plaintiff who is a transferee from a member of the original family. But the lower Courts have also granted the application of the 2nd defendant with regard to the share of the 3rd defendant. That could only be done if the 3rd defendant could be considered as a transferee from a member of the family suing for partition. He is a transferee from a member of the family, but it certainly cannot be said that he is suing for partition.

The object of section 4 of the Partition Act is to enable the members of a family in the case of one of their members having transferred his share to an outsider who seeks partition, to buy out that outsider by having his share valued; and in ordinary cases such an application would be made before any preliminary decree was passed in the suit. That would then put an end to the suit unless one of the defendants wished to continue and apply to have his name inserted as plaintiff in the place of the plaintiff who had been bought out.

In this case the proceedings had gone so far that the Courts decided the question of partition, but the method of partition has not been decided. That, however, does not make any difference, as it is not suggested that the application of the 2nd defendant is too late. But it seems to me the result must be that if the plaintiff's share is valued under section 4, and defendant No. 2 pays its value, then there is an end to the partition suit, as there is no longer any plaintiff to the suit, and unless

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one of the defendants applies to be made a plaintiff in his place, the proceedings must necessarily abate. However, that is a matter for consideration when the valuation of plaintiff's share has been made and the 2nd defendant has paid the amount of the valuation. At present this appeal must be allowed to this extent, that the share of the 3rd defendant cannot be dealt with under section 4 of the Partition Act.

Second Appeal No. 851 of 1920 filed by Khanderao is successful, while the appeal filed by the plaintiffs fails, so that Second Appeal No. 851 of 1920 is allowed with costs against the 2nd defendant, and Second Appeal No. 1 of 1921 is dismissed with costs in favour of the 2nd defendant.

SHAH, J.—I agree. It is clear that defendant No. 2's application under section 4 of the Partition Act could succeed only against the person who is a transferee from a member of an undivided family and who sues for partition. I do not desire to express any opinion as to what the effect of the application of defendant No. 2 being granted against the plaintiff under section 4 would be upon the suit at the stage at which the right to buy out the plaintiff is asserted by the defendant No. 2. That question does not arise at present. But I feel quite clear that section 4 is limited to the transferee who sues for partition. The right given to a sharer to buy out a transferee who is not a member of the family is limited to a transferee who sues for partition and cannot be extended to any defendant co-sharer who may claim his share in a partition suit.

Orders accordingly.

R. R.