

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

VISHNU MORESHWAR DABHOLKAR AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* GANGADHAR GANESH DABHOLKAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS\*.

1922.

January 10.

*Partition—Claims prior to partition ought to be included in partition suit—Separate suit for such claims not allowed.*

When a suit for partition is filed the plaintiff is bound to include in that suit all the claims he may have at the time the suit is filed in respect of the suit property. A separate suit for accounts for a period prior to partition is not permitted.

SECOND appeal against the decision of T. R. Kotwal, Assistant Judge of Ahmednagar, confirming the decree passed by D. M. Mehta, Subordinate Judge at Ahmednagar.

Suit to recover money.

In prior litigation between the parties up to Second Appeal No. 899 of 1908, the controversy was as to whether eight annas share in the Jahagir village of Khedle purchased in 1883 by the first defendant was purchased on account of the joint family to which the parties belonged or on account of the defendant Moreshwar (present defendant's father). It was held in that appeal that it was purchased on account of the joint family.

In 1912, the plaintiffs filed Suit No. 2 of 1912 claiming their share of the profits for the three years 1905-06, 1906-07 and 1907-08. They obtained a decree for Rs. 616-5-6 and interest and recovered that amount in execution. The decree was confirmed by the District Court but was reversed by the High Court in Second

\* Second Appeal No. 290 of 1921.

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Appeal No. 365 of 1914 on the 28th August 1915. In execution of the High Court decree, the defendant got a refund of the amount which was paid to the plaintiffs. The ground on which the High Court proceeded was that the property was joint and the suit would not lie between the co-sharers of joint family property for a share of that property, the proper remedy being by a suit for partition.

In 1916 the plaintiff accordingly brought a Suit No. 741 of 1916 for partition to recover their four annas share in the Jahagir village and the same was decreed. There was an Appeal No. 246 of 1918 to the High Court, which confirmed the decree.

In 1919 the present Suit No. 548 of 1919 was filed on the strength of the decree obtained in Suit No. 741 of 1916, claiming exactly the same amount which the plaintiffs had claimed in the previous Suit No. 2 of 1912.

The Subordinate Judge decreed the suit by serving :

" Plaintiffs had to refund what they got in Suit No. 2 of 1912 because the High Court required that partition suit was necessary before the plaintiffs could get their share. Partition suit was filed and partition decreed. It is nonsense for defendants to say as I have already observed that they impeach the question of partition. The contentions are all vague and vexatious."

On appeal the Assistant Judge confirmed the decree.

The defendants appealed to the High Court.

*P. V. Nijasure*, for the appellants.

*D. R. Patwardhan*, for the respondents.

MACLEOD, C. J.—First Appeal No. 246 of 1918 was an appeal against the decision of the First Class Subordinate Judge at Ahmednagar in Suit No. 741 of 1916. The parties were the same as the parties in the present second Appeal No. 290 of 1921 which is now before us. Suit No. 741 of 1916 was a suit by the plaintiffs against

the present defendants to recover possession of their four annas share in the Jahagir village of Khedle, and I expressed a hope when I gave judgment that it was the last of a series of suits between the parties. I was not aware at that time that still yet another suit was pending being Suit No. 548 of 1919 from which the present appeal arises.

The plaintiffs in this suit, after a judgment was given by the High Court on the 3rd February 1911 in Second Appeal No. 899 of 1908 declaring the shares of the parties of the Jahagir village, filed Suit No. 2 of 1912 claiming their share of the profits for the three years 1905-06, 1906-07 and 1907-08. They obtained a decree for Rs. 616-5-6 and interest in the lower Court and recovered that amount in execution. But eventually that decree was reversed by the High Court on the 26th August 1915 and the defendant got a refund of the amount that had been paid to the plaintiffs. The ground for that decision of the High Court, as I understand it, was that the property was joint and that the suit would not lie between the co-sharers of joint family property for a share of that property, the proper remedy being by a suit for partition. Accordingly the plaintiffs brought a partition Suit No. 741 of 1916 to which I have already referred and partition was decreed. But before that suit was finally disposed of they filed this suit on the strength of the decree obtained in the lower Court claiming exactly the same amount which they had claimed in the previous Suit No. 2 of 1912.

Both the lower Courts decided in favour of the plaintiffs, but it is difficult to understand the reasons for those decisions. When the suit for partition was filed, then the plaintiffs were bound to include in that suit all the claims that they might have at

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the time the suit was filed in respect of the suit property. There is no precedent for the proposition that a party is entitled first to file a partition suit, and then when partition has been decreed, to file another suit in effect for accounts for a period prior to the partition. It has been contended before us that the result of the proceedings in Suit No. 2 of 1912 was to change the nature of the plaintiffs' claim for their share in the profits for those three years and that therefore there was entirely a new cause of action on which the plaintiffs could base the present suit. I cannot see any foundation for that argument because the plaintiff's suit was dismissed in appeal. The fact that it was decreed in the lower Court and the plaintiffs actually obtained the money which was afterwards refunded makes no difference to the original cause of action, for the plaintiffs are not suing to recover what they had to refund in the previous suit but they are suing on the original cause of action on which the previous suit was based. Obviously if they wished to bring any claim for an account of the revenues of the suit village prior to the partition, they should have included it in the partition suit, and, not having done so, they are clearly barred from claiming it in a later suit. The decision of the lower Courts is wrong and the suit is dismissed with costs throughout.

COYAJEE, J.:—I agree.

*Decree reversed.*

J. G. R.

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