

the shop. Therefore this is one of those cases in which the fact of the plaintiffs' title comes to his aid with greater force as far as the evidence goes with regard to the possession of the open sites; and eliminating all the oral evidence on both sides as being unsatisfactory, (and naturally, considering the position of these open sites, and the difficulty of proving active user, it would be unsatisfactory), we think the learned Assistant Judge was perfectly right in holding that possession went with the title. Therefore, unless the defendant could show that he had been in possession adversely to the plaintiff for more than twelve years, the plaintiff would be entitled to a decree. The decree of the lower appellate Court is varied by eliminating the direction as to past mesne profits. In other respects the decree is confirmed and the appeal dismissed with costs.

Decree varied; appeal dismissed.

J. G. R.

APPELLATE CIVIL.

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

ISHRAPPA, GANAP HEGDE (ORIGINAL PLAINTIFF), APPELLANT v.
MANAGER KRISHNA PUTTA SHANKAR HEGDE AND OTHERS
(ORIGINAL DEFENDANTS NOS. 1 TO 5), RESPONDENTS^c.

Hindu law—Partition—Sale of co-parcener's interest in a particular item of property—Suit for partition of specific property—Suit not maintainable—General suit for partition necessary.

Where a Hindu co-parcener sells his interest in a particular item of property belonging to the joint family, a suit by the vendee for partition of the specific property cannot lie. His remedy will be to sue for general partition.

Pandu Vithoji v. Goma Ranji⁽¹⁾, relied on.

^cSecond Appeal No. 380 of 1920.

⁽¹⁾ (1918) 43 Bom. 472.

1922.

MAHAMAD-
SAHEB
v.
TILOKCHAND.

1922.

January

1922.

ISHRAPPA

v.

KRISHNA.

SECOND appeal against the decision of V. M. Ferrers, District Judge of Kanara, confirming the decree passed by R. Baindur, Subordinate Judge at Honavar.

Suit for partition.

The plaint Survey No. 147, Pot No. 2 of Salkod village belonged to the joint family of defendants Nos. 2 to 4. By a deed, dated the 5th April 1916, defendants Nos. 3 and 4 sold their two-thirds interest in the family property to the plaintiff.

On the 23rd November 1916, defendant No. 2 executed a sale deed of the suit property in favour of defendant No. 1.

In 1918 the plaintiff sued for a partition of the specific item of the property purchased by him.

The defendant No. 1 contended that by reason of his purchase of plaint strip from defendant No. 2 who was the manager of the family, the plaintiff had no interest in the property and that a general suit for partition of the entire family property was necessary.

The Subordinate Judge dismissed the suit as in his opinion a suit for partition without asking for a general partition of all the property of the family could not lie.

On appeal, the District Judge was of opinion that the suit could lie but confirmed the decree on other grounds.

The plaintiff appealed to the High Court.

G. P. Murdeshwar, for the appellant:—The lower Court holds that my suit for partition in this particular is good. It has relied on *Iburamsa Rowthan v. Theruvenkatasami Naick*⁽¹⁾; *Murarrao v. Sitaram*⁽²⁾ and *Subbarazu v. Venkataratnam*.⁽³⁾ So far the lower

⁽¹⁾ (1910) 34 Mad. 269.

⁽²⁾ (1898) 23 Bom. 184.

⁽³⁾ (1891) 15 Mad. 234.

Court is in my favour. But it is wrong when it says that my vendors were estopped from selling the plaint strip or any interest therein to me. The rule of estoppel in India is laid down by section 115 of the Indian Evidence Act. Admittedly this case does not fall under that section. But the lower Court has relied upon the authority of the case of *Ramsden v. Dyson*⁽¹⁾. That case has no application to the facts of the present case.

Nilkanth Atmaram, for the respondent:—The principle of estoppel enunciated in section 115 of the Indian Evidence Act may not literally apply. Still it cannot be said that the authority of the case cited by the lower Court has no application.

But I would rely upon the point which has been decided against me by the lower Court, viz., as to whether the plaintiff's suit for the partition of a specific property can lie without his suing for a general partition. In the present case defendants Nos. 3 and 4 sold their two-thirds share in the particular property to the plaintiff. Defendant No. 2, as the manager of the family sold the whole of the property to defendant No. 1. Under the circumstances, according to the Bombay authorities, a suit by the plaintiff for partition of that specific property cannot lie, the reason being that until partition is actually effected no co-parcener can claim to own a particular share in any specific property. He must sue for a general partition, and that partition will be so made as to adjust the equities of all the parties concerned: See *Udaram Sitaram v. Ranu Panduji*⁽²⁾; *Murarrao v. Sitaram*⁽³⁾; *Shivmurteppa v. Virappa*⁽⁴⁾; *Pandu Vithoji v. Goma Ramji*⁽⁵⁾; *Hanmandas Ramdayal v. Valabhdas*⁽⁶⁾.

(1) (1865) L. R. 1 H. L. 129.

(2) (1875) 11 Bom. H. C. 76.

(3) (1898) 23 Bom. 184.

(4) (1899) 24 Bom. 128.

(5) (1918) 43 Bom. 472.

(6) (1918) 43 Bom. 17.

1922.

ISHRAPPA
v.
KRISHNA.

Even in *Iburamsa Rowthan v. Theruvenkatasami Naick*⁽¹⁾ it was held at page 275, where the alienation bound the entire family interest, such a suit for partial partition could not lie. In the present case the manager, defendant No. 2, has sold the whole of the property, and not merely his interest therein to defendant No. 1.

MACLEOD, C. J. :—The plaintiff sued for a partition of the plaint strip of land and separation of his $\frac{2}{3}$ rd share claiming title under a sale by defendants Nos. 3 and 4 of their $\frac{2}{3}$ rd interest to the plaintiff in the suit property. Defendants Nos. 3 and 4 were members of a joint family consisting of themselves together with defendants Nos. 2 and 5, who were jointly interested to the extent of $\frac{1}{3}$ rd. After the sale by defendants Nos. 3 and 4 to the plaintiff, the 2nd defendant as manager of the family sold the plaint strip to the 1st defendant.

In the trial Court the 1st defendant endeavoured to prove that there had been a sale to him of the plaint strip by defendant No. 2 prior to the date of the sale to the plaintiff of $\frac{2}{3}$ rd of the property by defendants Nos. 3 and 4. This issue was found against him.

Then the 1st defendant claimed that defendants Nos. 3 and 4 were estopped from selling the plaint strip or an interest therein to the plaintiff, and that issue was found in the trial Court in the affirmative, and the suit was dismissed on the ground that the plaintiff's suit for partition for specific property could not lie without suing for a general partition.

In appeal the learned appellate Judge considered that the suit could lie. The 1st defendant claimed to have purchased the interest of the whole undivided family :

“The plaintiff so far agreed with him to say that he had purchased all that remained of the joint family interest after the plaintiff's own purchase

(1) (1910) 34 Mad. 269.

had taken effect. It was therefore common ground that the joint family had been altogether ousted. The contest was between two strangers. There was no reason why such strangers could not without instituting a general suit for partition of the entire family property, maintain an action for the partition of the fraction which was in dispute between them."

Now there may be cases in which one coparcener purports to convey his interest in a particular item of family property to a stranger, while the other coparcener (taking the simplest case of two coparceners) sells his interest in the same property to another stranger. In such a case a suit might lie by one stranger against the other for partition for that item of the family property which had been wholly disposed of by the persons who were entitled to it. But such an action between strangers, in my opinion, should only be allowed in the very plainest of cases, when it has been proved that the whole of the family interest in the property has been disposed of either by joint action between the members of the family or by separate action against which no dispute has been raised,

In this case the 1st defendant claims to be entitled to the entire strip of land in dispute under his sale from the 2nd defendant who appears to have sold as manager; and assuming that this plaintiff strip had entirely gone out of the family, still the question might arise whether the 1st defendant was entitled to the whole or only to the share of his vendor. That question has never been raised in the suit. Accordingly there is no evidence to show that the alienation by the 2nd defendant of the whole strip was competent. The learned appellate Judge, however, although he considered that the suit would lie, dismissed it on the ground that the 3rd and 4th defendants were estopped by their conduct in disputing the sale effected by the 2nd defendant. I do not think the ground on which that estoppel was found to be effective will stand the light of analysis.

1922.

ISHRAPPA
v.
KRISHNA.

1922.

ISHRAPP
v.
KRISHNA.

But apart from that, it seems to me that the plaintiff's suit was not competent. It is true that all the members of the joint family are parties to the suit. But the question whether the suit could be converted into a general suit for partition has never been raised, and it is much better that the plaintiff, if he wishes to proceed further, should file a general partition action, rather than confuse the issues by changing the nature of the present suit. The dealings by members of a joint family with their undivided shares either in the whole of the family property, or in particular items, have necessarily led to a considerable amount of confusion. It cannot be said that any coparcener has a particular share in any item of the family property. He has only an undivided share in the whole of it, and although it may be taken as settled law now that a coparcener can sell his own interest in the joint family property, the relief given to the purchaser by the Courts can only be given by way of a suit for a general partition: See *Pandu Vithoji v. Goma Ramji*⁽¹⁾. Again in *Hanmandas Ramdayal v. Valabhdas*⁽²⁾ defendants Nos. 1 to 4 became purchasers at a Court sale in execution of the decree against the 5th defendant of two of the properties belonging to the joint family. The plaintiff, a minor, thereupon, brought a suit against his father (defendant No. 5) and the decree-holders as well as the auction-purchasers for a declaration that the plaintiff's half share in the two properties did not pass to the auction-purchasers, and for possession of his half share on equitable partition. It was held that the son's interest did not pass to the purchasers at the Court sale; and it was also held that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties.

⁽¹⁾ (1918) 43 Bom. 472.⁽²⁾ (1918) 43 Bom. 17.

1922.

ISHRAPPA
v.
KRISHNA.

The result must be that the plaintiff's suit as purchaser from defendants Nos. 3 and 4 for partition of this particular item of family property cannot lie, and we think that the order dismissing the plaintiff's suit should be confirmed, expressing our opinion that there is nothing to prevent the plaintiff from endeavouring to get advantage of his sale from defendants Nos. 3 and 4 by filing a suit for a general partition.

COYAJEE, J.:—I agree in holding that the plaintiff in this case is not entitled to demand by partition his vendors' alleged 2/3rd share in this particular item of joint family property. It is clear on the facts that the plaintiff's vendors are only two out of four coparceners owning considerable undivided property. As such coparceners they are not entitled to say that they have a right to a specific share in any particular portion of the joint family estate. And a purchaser of their unascertained share cannot insist upon the possession of any definite piece of property. The remedy of the purchaser lies in a suit to have that share and interest ascertained by instituting a suit for general partition in which the whole of the joint family property should be included, and all necessary parties joined: *Pandu Vithoji v. Goma Ramji* ⁽¹⁾. In a suit of that nature the Court, in making the partition, would endeavour to give effect to the alienation, and "so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much thereof as may be just" to the purchaser: *Udaram Sitaram v. Ranu Panduji* ⁽²⁾.

Decree confirmed.

J. G. R.

⁽¹⁾ (1918) 43 Bom. 472.

⁽²⁾ (1875) 11 Bom. H. C. 76 at p. 82.