Both the contentions raised by Mr. Seervai on behalf of the petitioners therefore fail, and the petition must be dismissed with costs.

Petition dismissed.

A. J. P.

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G. CLARIDGE & Co., LTD. *v.* THE INDUSTRIAL TRIBUNAL

Shah J.

Attorneys for petitioners : *Crawford, Bayley & Co.*

Attorneys for respondents Nos. 1 and 2 : *Little & Co.*

Attorneys for respondents Nos. 3 and 4 : *Vakil, Dadabhai & Bharucha.*

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

1951 *Feb. 6*

DASHARATHRAO GANPATRAO JOSHIRAO (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* RAMCHANDRARAO VINAYAKRAO JOSHIRAO AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 2 TO 8), RESPONDENTS.*

Hindu law—Partition—Suit for—Plaintiffs within four degrees from last holder in ascent but removed by more than four degrees from defendants—Whether right of partition is barred.

The rule of Hindu law is that all the members of a joint family who are not removed more than four degrees from the last holder are coparceners, however remote they may be from the original holder of the property. If a person is removed by more than four degrees from the last holder he does not acquire any interest in the property of the family by birth and as such he is not entitled to demand a partition. But once that person enters the coparcenary by coming within four degrees from the last holder in direct line of male ascent and acquires a right by birth in the family property, his right to demand partition is not extinguished merely because he seeks to enforce that right against persons in possession who are more than four degrees removed from him.

Moro Vishvanath v. *Ganesh Vithal*,[1] explained.

First Appeal against the decision of V. B. Potdar, Esquire, Civil Judge, Senior Division, Kolhapur.

Suit for partition and possession.

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* First Appeal No. 182 of 1950 (with F. A. No. 197 of 1950).

[1] (1873) 10 B. H. C. R. 444.

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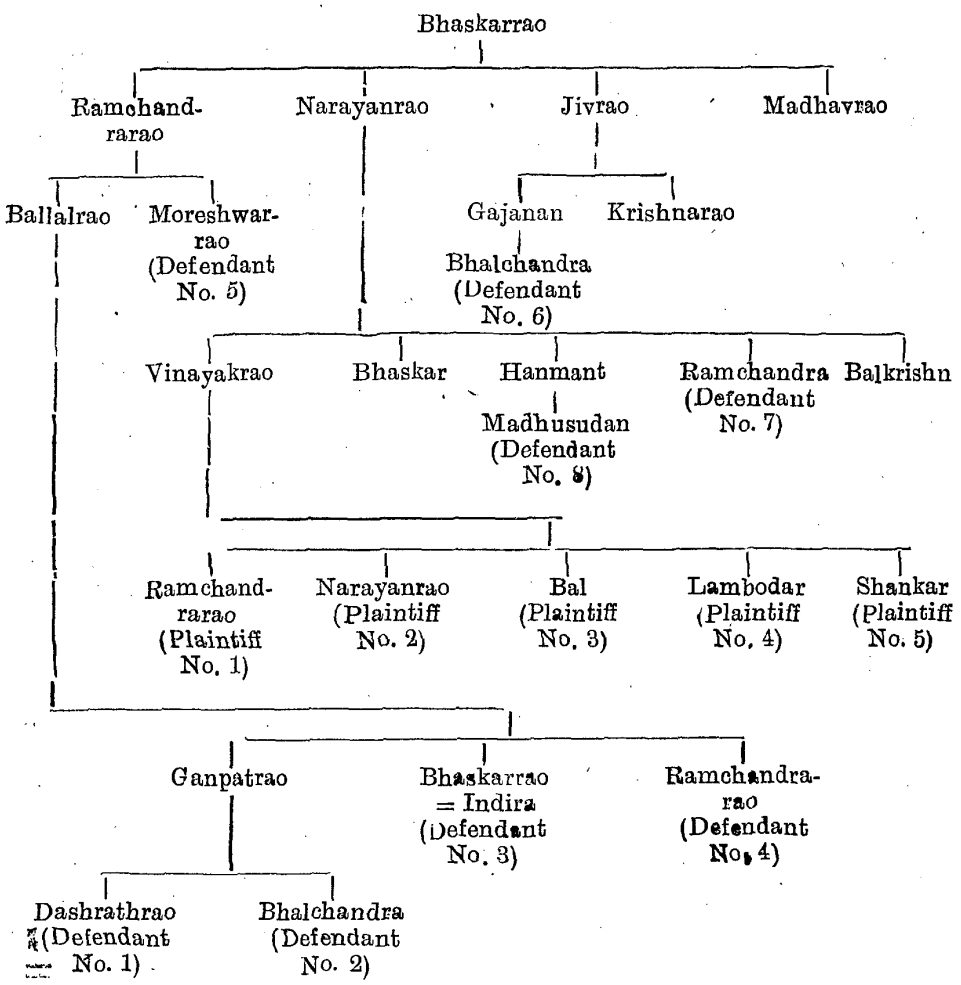
DASHARATH-RAO GANPATRAO *v.* RAM-CHANDRA-RAO VINAYAK-RAO

The parties to the suit were related to each other as shown in the following genealogical tree :



The property in suit which consisted of certain lands in Kolhapur State was at first Saranjam property and as such it was not divisible. The original ancestor Bhaskarrao Joshi-rao was the Nawwala Dumaldar and the property stood in his name. After his death, the successors in the eldest branch, namely, Ramchandrarao, Ballalrao, Ganpatrao and after his death Dasharathrao (defendant No. 1) were the successive Nawwale Saranjamdars.

On July 26, 1926, the Raytawa and Sheri lands of the Sarnjam were declared as liable for division by promulgation of a Vat Hukum by the State Government. By another Vat Hukum dated April 17, 1930, the Dharmdaya lands of the Saranjam were entered as Raytawa lands. In this way all the suit lands which were originally impartible became partible.

On August 30, 1943, the great grandsons of the said Bhaskarrao (plaintiffs), claiming to have one-ninth share in the suit lands which according to them continued to be the joint family property of the plaintiffs and the defendants, sued for partition and separate possession of their share.

The defendants *inter alia* contended that the property was not partible between the members of the family, and even if it was held to be partible the plaintiffs could not ask for its partition as they were removed more than four degrees from the defendants.

The learned trial Judge negatived the defendants' contentions and awarded the plaintiffs 4/34th share in some of the suit properties. In his judgment the learned Judge observed:

"The next point urged is that even though the property is held to be partible, the plaintiffs are not entitled to claim a share in it, as they are not within the coparcenary, as related to defendant No. 1, beyond three degrees from the common ancestor. It is to be noted that this proposition is contradicted for the plaintiffs who urge that the coparcenary is restricted to 3 degrees from the last holder and not from the common ancestors. (This is clear from the discussion and cases relied on in Mayne's Hindu Law, 1938 Edn. on pages 343 to 346.). The proposition laid down there is that a coparcenary is not limited to 3 degrees from common ancestors but is limited to three degrees from the last owner and that this proposition applies to impartible Zamindaris. The proposition is propounded in Mulla's Hindu Law (1946 Ed.) on pages 236 to 238, s. 215. I here give the relevant genealogy for ready reference....

It is clear from this genealogical tree that on the death of Bhaskarrao, the common ancestor, the sons of his became entitled to the property and defendant No. 1 is within 4 degrees of Ramchandrarao and as such got into the coparcenary on his birth after Bhaskarrao's death. On the other hand, plaintiff's are within 4 degrees from Bhaskarrao and Narayanrao. So in view of the clear proposition in law on this point as propounded both in Mulla's and Mayne's Hindu Law Books and the cases cited therein, I hold that both plaintiffs and defendants Nos. 6 to 8 are within the coparcenary also when the estate was held to be partible."

Defendant No. 1 appealed to the High Court.

K. J. Abhyankar, for the appellant.

G. R. Madbhavi, with *P. V. Vaze,* for respondents Nos. 1 to 5 and 10 to 12.

M. R. Navangule, for respondent No. 6.

B. M. Kalagate, for respondent No. 7.

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Y. N. Nadkarni, with R. G. Samant, for respondent No. 8.

K. N. Dharap, with T. S. Jahagirdar, for respondent No. 9.

GAJENDRAGADKAR J. [His Lordship, after dealing with points not material to this report proceeded.] In support of his contention that the plaintiffs cannot claim a share by partition in the properties in suit Mr. Abhyankar has raised an interesting point under Hindu law. He concedes that Bhaskarrao who is the common ancestor of the parties in the present suit is within four degrees in ascent from the plaintiffs. The pedigree shows that Bhaskarrao's son was Narayanrao, Narayanrao's son was Vinayakrao, and the plaintiffs are Vinayakrao's sons. Mr. Abhayankar, however, points out that the defendants against whom the present claim has been made are beyond four degrees in descent from Bhaskarrao. That again is true; because according to the same pedigree Bhaskarao's eldest son was Ramchandrarao, Ramchandrarao's son was Ballalrao, Ballalrao's eldest son was Ganpatrao, and the two defendants for whom Mr. Abhyankar appears are the sons of Ganpatrao. Mr. Abhyankar's contention is that it is a rule of Hindu law that a partition cannot be demanded by any person who is more than four degrees removed from the last owner. In this case according to Mr. Abhyankar the plaintiffs are clearly removed by more than four degrees from the defendants and so they cannot make a valid claim for partition under Hindu law. Now, it is well settled that a Hindu coparcenary is a much narrower body than the joint Hindu family. The joint Hindu family consists of persons who are lineally descended from a common ancestor. Such a family includes the wives of the male members as well as unmarried daughters; as soon as a daughter marries she leaves the family of her birth and becomes a member of her husband's family. It is quite true that every member of a joint Hindu family is not a coparcener. A coparcenary consists of persons who acquire by birth an interest in the joint or coparcenary property. This right by birth entitles a coparcener in most cases to demand a partition of the coparcenary property. To this rule an exception is recognised in the State of Bombay where a son is not permitted to claim a partition when his father is living in union with his own collaterals. Subject to this exception, however, the right to demand a partition is the necessary result of the right by birth which a coparcener has in the undivided property of the coparcenary. Obviously every coparcenary begins with a common ancestor, but it is not the rule

of Hindu law that such a coparcenary is necessarily limited to four degrees from the common ancestor. Whether a member of an undivided family is a coparcener or not would depend upon whether he is entitled to demand a partition and that naturally would in its turn depend upon the question whether he has a right in the property of the coparcenary by his birth. Broadly stated all members of a joint Hindu family who are not removed more than four degrees from the last holder are coparceners, however much remote they may be from the original holder or acquirer of the property. If a person is removed by more than four degrees from the last holder, he does not acquire any interest in the property of the family by birth, and as such he is not entitled to demand a partition. Even in such a case as soon as the last holder dies, the distance between the next holder and the person who was more than four degrees removed from the last holder would be reduced by one degree with the result that such person would be entitled to enter the coparcenary and would be clothed with the right to demand a partition of his share in the properties of the family. As has been observed by Mayne :

> ".....As each fresh member takes a share, his descendants to the third generation below him take an interest in that share by birth. So the coparcenary may go on widening and extending, as long as its members include agnates descended from a common ancestor, irrespective of their degrees of agnatic relationship to each other. But this is always subject to the condition that no person who claims to take a share is more than three steps removed from a direct ascendant who has taken a share." (Mayne on Hindu Law and Usage, Eleventh edn., pp. 328-329.)

Applying this test it would be clear that during the lifetime of Bhaskarrao his son Narayanrao, his grandson Vinayakrao, and his great-grandsons the present plaintiffs, would have been entitled by birth to a share in the properties belonging to their undivided family. This position is clear and Mr. Abhyankar cannot dispute it.

Mr. Abhayankar, however, contends that in deciding the question as to whether the plaintiffs are entitled to claim a share in the properties in suit it would not be enough to consider their relationship with the common ancestor; that, according to him, is an imperfect test. He insists that the Court must also consider whether the plaintiffs are removed from the last owner in possession by more than four degrees. The plaintiffs

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in the present case are clearly removed from such last owner by more than four degrees and Mr. Abhyankar says that if they are so removed from the last owner by more than four degrees, they are not entitled to claim a share. In support of this contention Mr. Abhyankar strongly relies upon a decision of this Court in *Moro Vishvanath* v. *Ganesh Vithal.*[1] The rule which was enunciated by Mr. Justice Nanabhai Haridas in this case has been thus stated by the learned Judge himself (p. 465) :

> "The rule, then, which I deduce from the authorities on this subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or *original owner* of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the *last owner*, however, remote he may be from the original owner thereof."

Mr. Justice West substantially agreed with this view. We are fully conscious that the views of Mr. Justice Nanabhai Haridas particularly on questions of Hindu law are entitled to the highest respect. Indeed, this judgment of Mr. Justice Nanabhai Haridas has become a classic on the subject and all the illustrations set out in the judgment and the rule deduced therefrom have been copied by all the text-books on Hindu law. It is, therefore, necessary to examine this judgment carefully to find out whether it affords any support to the contention urged before us by Mr. Abhyankar.

The first feature of the case with which West and Nanabhai Haridas JJ. were dealing to which it is necessary to refer is that the position of the parties in reference to the common acquirer in that case was converse of the position before us. One Udhav was the common acquirer in that case and the plaintiffs were more than four degrees removed from the said common acquirer. Some of them were five degrees removed from him, while some others were six degrees removed from him. The defendants against whom a claim for partition had been made by the said plaintiffs were, however, within four degrees from Udhav. As I have already indicated, in the case before us the plaintiffs are within four degrees from the common acquirer, whereas the defendants are beyond four degrees from him. Now, in *Moro Vishvanath's* case[1] the defence was that since the plaintiffs were removed beyond four degrees from the common acquirer they could not be regarded as coparceners, as such they were not entitled to a right by birth

[1] (1873) 10 B. H. C. R. 444.

in the properties of the family and they had, therefore, no right to claim a partition. The defendants had also pleaded a bar of limitation and had besides urged that the property in dispute was not the joint family property at all. The trial Judge had rejected all the pleas of the defendants and had decreed the plaintiff's suit. When the matter came in appeal to this Court both the learned Judges reversed the finding of the trial Court that the plaintiffs were members of an undivided family. On evidence this Court came to the conclusion that there had been a partition in this family and that the plaintiffs were, therefore, not justified in making a claim for partition on the footing that they and the defendants were members of an undivided family. In fact, on this view both the learned Judges proceeded to consider the principles of Hindu law under which partition once made can be reopened. It would thus be noticed that it was really unnecessary to consider the question as to whether the plaintiffs would be entitled to claim partition if they had succeeded in showing that no prior partition had taken place between the parties. Mr. Justice Nanabhai Haridas has expressly stated in his judgment that the question of Hindu law as to the plaintiffs' right to demand a partition in view of the distance of degrees between them and the common acquirer did not really fall to be decided. Even so, the learned Judge and Mr. Justice West have both considered this question, and as I have already stated their opinions, though obiter, are entitled to respect. In dealing with their views, however, it is important to bear in mind the facts with which they were dealing. A claim for partition had been made by persons removed by more than four degrees from the common ancestor and it was alleged that this claim was not maintainable under Hindu law. The argument was that a coparcenary consists of persons who are less than four degrees removed from the last holder, and since the plaintiffs were outside this relationship, they could not be said to be coparceners at all. Mr. Justice Nanabhai Haridas considered all the Sanskrit texts that were cited before him and ultimately deduced the rule which has already been cited. The rule is negatively worded by the learned Judge and its effect clearly was to save the right of persons to claim their share by a partition in the properties of the family even though the claimants may be removed from the common acquirer by more than four degrees if they happen to be within four degrees from the last owner. In other words, if the defendants had not proved a prior partition in *Moro Vishvanath's* case[1], Mr. Justice Nanabhai Haridas would have been

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prepared to pass a decree for partition in favour of the plaintiffs in spite of the fact that they were more than four degrees removed from the common ancestor. The test that the learned Judge was disposed to apply to a claim for partition on the facts before him was whether the claimants were within four degrees from the last owner or not. It is unnecessary to consider the texts on which Mr. Justice Nanabhai Haridas relied in support of this view. Mr. Madbhavi has invited our attention to the fact that Mr. Justice Benson and Mr. Justice Sundara Aiyar have commented on the views expressed by Mr. Justice Nanabhai Haridas and on the opinion expressed by Mayne on this topic in *Thirumal Rao Saheb* v. *Rangadani Rao Saheb*,[1] but in the present appeal it is unnecessary for us to consider whether the said comment is justified or not. The question which we have to decide is whether the rule thus enunciated by Mr. Justice Nanabhai Haridas supports Mr. Abhyankar's contention. Mr. Abhyankar naturally relies upon the fact that the plaintiffs before us are removed more than four degrees from the last owner and he says that the present case falls within the latter part of the rule laid down by Mr. Justice Nanabhai Haridas. We are unable to accept this argument. The rule in question, we think, must be read as a whole and it cannot be extended to the cases of persons who are removed by less than four degrees from the common acquirer. Indeed, the rule was intended to protect the rights of the plaintiffs though they were more than four degrees removed from the common ancestor, subject to the condition that they must be within four degrees from the last owner. We think it is impossible to apply this rule to the plaintiffs before us when undoubtedly they would be entitled to have a share in the properties of the family at the moment of their birth. West and Nanabhai Haridas JJ. were dealing with the case of plaintiffs against whom it could have been said that they did not acquire a right by birth in the properties in suit. Yet they held that they could claim that right since at the time when the claim was made the property was in the possession of persons who were removed by less than four degrees from the plaintiffs. In other words, the principle laid down by this case cannot apply to the plaintiffs before us who clearly had acquired a right by birth in the properties in suit. The fact that at the time when they made the claim for partition the property was in the possession of the defendants who are more than four degrees

[1] (1912) 23 M. L. J. 79.

removed from them would not, in our opinion, divest the right which had vested in the plaintiffs at the time of their birth. It must be pointed out that in dealing with this argument we are assuming that the properties in suit are partible properties and that they belong to the undivided family of the parties. We are further assuming that there has been no partition in this family and there is no room for pleading adverse possession against the plaintiffs. Thus, on the facts found in this case there is no other bar to the plaintiffs' claim which can be successfully pleaded by the defendants in possession except the circumstance that they are more than four degrees removed from the plaintiffs. Now, if the plaintiffs acquired a right by birth in these properties, we do not see how the said right could be deemed to be divested by reason of the fact that the persons in possession are more than four degrees removed from them. The distance between the plaintiffs and the present defendants has increased by unfortunate deaths that took place in the defendants' branch in quick succession; but no rule of Hindu law has been cited before us in support of the contention that if there are deaths in the branch managing the property, the vested right of the other members of the family is extinguished as soon as the management of the property goes to a member who is more than four degrees removed from these persons. With respect, we do not think we would be justified in reading the rule laid down by Mr. Justice Nanabhai Haridas as applying to persons who are within four degrees from the common acquirer. The plaintiffs in *Moro Vishvanath's* case[1] did not acquire a right in the properties by birth; when they were born they were more than four degrees removed from the common acquirer. Even so since the claim was made against persons who were within four degrees from the common acquirer Mr. Justice Nanabhai Haridas was prepared to concede to the plaintiffs a right to claim partition. In other words, the texts of Hindu law were liberally construed by the learned Judge with a view to save the plaintiffs right of partition. On the other hand, Mr. Abhyankar's contention is quite clearly inconsistent with the liberal interpretation of the Sanskrit texts on which the rule enunciated by Mr. Justice Nanabhai Haridas was based.

It is true that cases of this kind are not likely to occur very frequently. The presumption of jointness which is very strong as between a father and his sons or as between brothers

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grows weaker and weaker with the advent of newer generations. The coparcenary under Hindu law is a somewhat unique institution. It is very elastic. Community of interest and unity of possession are its invariable features. But its membership and the respective rights of the members are not immutable or fixed. By deaths senior coparceners depart, while births introduce new coparceners. The respective rights of such coparceners increase or decrease according as there are deaths or births in the family. In a sense the institution of coparcenary is indestructible. Whenever a partition breaks up an old coparcenary, several new coparcenaries are born as each dividing member forms a separate coparcenary with his own sons and grandsons. Even so, from time to time partitions do bring about a change in the constitution of such coparcenaries so that we rarely come across cases where property belonging to a coparcenary remains undivided for generations together. But when we come across a case like the present, we must decide the plaintiffs' right principally by reference to the question as to whether the plaintiffs had a right by birth in the properties in suit. On the findings which we have already recorded in this appeal we hold that the plaintiffs must be deemed to have a right by birth in the properties in suit. If that is so, we are not prepared to hold that this right is either divested or extinguished merely because the plaintiffs seek to enforce that right against defendants who are more than four degrees removed from them.

[The rest of the judgment is not material to this report.]

Appeal dismissed.

M. W. P.

APPELLATE CIVIL

Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

1951 *Feb. 7*

NIMALCHAND GULABSA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* MADANLAL JAGANNATH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), s. 66—Agreement antecedent to Court-sale—Undertaking to convey property to be purchased at auction—Suit against purchaser to enforce agreement—Whether suit is barred.

* Letters Patent Appeal No. 38 of 1949.