

**Vithappa Devappa Patil Vs. Basagowda Devappa Patil**

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**Court :** Mumbai

**Decided On :** Jul-02-1912

**Reported in :** (1912)14BOMLR771; 17Ind.Cas.10

**Judge :** Narayan G. Chandavarkar, Kt.,; Acting C.J. and ;Batchelor, J.

**Appeal No. :** First Appeal No. 110 of 1911

**Appellant :** Vithappa Devappa Patil

**Respondent :** Basagowda Devappa Patil

**Judgement :**

Narayan G. Chandavarkar, Kt., Acting C.J.

1. The present suit was one for partition brought by the appellant. His allegation was that he, defendant No. 1 and defendants Nos. 2 and 3, the sons of defendant No. 1, and two brothers of his, Rama and Laxmana, were members of a joint family, and that in 1886 defendant No. 1, the eldest member and manager, effected a partition with Rama and Laxmana, so that these two brothers having become separated in estate left the rest of the members of the family including the plaintiff joint, and that in 1907 defendant No. 1 turned the plaintiff out of the family house, in which he was living with the said defendant. Hence the suit for partition.

2. Defendant No. 1, in his written statement, pleaded that the plaintiff was not entitled to a share in the property, because there had been already a partition

among the members of the family in the year 1886. In support of that allegation he produced a farkhat executed by Rama and Laxmana and by Laxmana as the guardian of the plaintiff who was then a minor.

3. The defendants' case was that since 1886 the plaintiff had been living separately, enjoying the share of the property which had been allotted to him at the partition in 1886, and that, therefore, the plaintiff had been excluded from the general family property since that year, so that the claim was barred under Article 127 of the Limitation Act.

4. The Subordinate Judge found the partition of 1886 proved but he held that that partition was unfair and inequitable and was also the result of fraud. The finding on the question of fraud is as follows:-' Both Rama and Laxmana thus seem to have been hoodwinked and deceived by defendant No. 1 in the matter of the partition of the family property. Rama admits his having been imposed upon and says that he has been content with what was given to him. When two of the three brothers, deceived and imposed upon as noted above, have taken no steps to obtain redress for the wrong done to them and have submitted to it quietly, is it probable that the third (the plaintiff) who, though a minor, was made to throw in his lot with the two others would act differently ?' This is a substantial finding that defendant No. 1 acted fraudulently in the matter of the partition especially with reference to the plaintiff who was then a minor and whose interests all the three brothers, defendant No. 1, Rama and Laxmana, were bound to protect. After this finding the case became reduced to one of a fraudulent partition and the plaintiff's cause of action then is in substance to set aside that partition on the ground of fraud and to treat the family as joint and seek for a fresh partition of the family estate. In other words, for the purpose of limitation the case was taken out of Article 127 of the Limitation Act. Notwithstanding his finding on the question of fraud, the Subordinate Judge held that, because in virtue of the partition of 1886 Rama, Laxmana and the plaintiff had been living apart from defendant No. 1 and dealing with the estate which had been allotted to them at the partition, it must be held that they knew they had been excluded from the joint family property by defendant No. 1, and that the claim was barred under Article 127.

5. Where fraud is found and the Court has to apply the Limitation Act in order to see whether the suit is within time, the Court ought to have evidence of a definite character to show the point of time at which the plaintiff had not merely suspicion but definite knowledge of fraud: see *Rahimbhoy Habibbhoy v. Charles Agnew Turner* ILR (1892) 17 , in which their Lordships of the Privy Council say that 'in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts, constituting the fraud, at a time which is too remote for the suit to be brought. Suggestion of his having been defrauded does not amount to such knowledge as is required by Section 18 of the Indian Limitation Act XV of 1877.'

6. Under these circumstances the lower Court having failed to pursue the question of fraud from the point of view of the Limitation Act by the light of the authority just cited, it becomes necessary for this Court sitting in appeal to direct that there ought to be a fresh trial. The plaintiff will have to be amended. The plaintiff, no doubt, sues for partition but it now turning out that there had been a partition in the year 1886, the suit must be treated as one brought to set aside that partition on the ground of fraud, and the suit seeking a general partition of the family estate, all those who were co-parceners in 1886 or their legal representatives as the case may be, must be brought upon the record as defendants. The plaintiff must amend his plaint seeking relief on the ground of fraud alleging what that fraud is and when he came to have knowledge of it.

7. We reverse the decree of the Subordinate Judge and send back the case for a fresh hearing with due regard to the observations in this judgment. The plaintiff must amend his plaint in the manner directed by this Court within two months.

8. The Subordinate Judge will raise proper issues having regard to the law which has been pointed out by this Court's judgment.

9. All the family property will have to be brought into hotchpot as it existed in 1886 and though the plaintiff has abandoned his claim to the moveable property in appeal, yet, it will be open to the other parties who are brought upon the record to claim that it should be also brought into hotchpot and treated as part of the

subject-matter of the suit. Whether the plaintiff, by reason of his having abandoned in appeal the claim for moveable property, has any right to claim it again, is a question on which this Court expresses no opinion at present. It will be open to the Subordinate Judge to deal A.C.J. with that question on its own merits at the hearing.

9. All costs hitherto incurred will be costs in the cause.

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