

**Ajodhya Pershad Vs. Mahadeo Pershad**

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**Court :** Kolkata

**Decided On :** Jul-13-1909

**Reported in :** 3Ind.Cas.9

**Judge :** Stephen and ;Vincent, JJ.

**Appellant :** Ajodhya Pershad

**Respondent :** Mahadeo Pershad

**Judgement :**

1. This appeal arises out of a suit for partition of the property of a Hindu joint family, the parties being the descendants of one Gopal Lal, a banker of Mozafferpur.

2. The plaintiff, who is a son of Gopal Lal, alleges that in the year 1896 there was litigation between him and his father and other members of the family, regarding certain of the family properties, that while that litigation was pending, there was a partition of some of the family properties, and that he and the defendant remained in separate possession of the properties so divided, and he now seeks for a partition of the remaining movable and immovable properties of the family, including the profits derived from the lands and business transactions of the family after an account of the same has been taken. The defendant raised a number of objections in the lower Court, which will be dealt with as far as is necessary for the purpose of this appeal. Subsequently on the 2nd February 1905, a preliminary

decree for partition was granted to the plaintiff. The Court did not, however, decree the plaintiff's suit in regard to many of the properties claimed. A Commissioner was then appointed to divide certain movables and immovables and to take an account of the profits of the joint family property from the year 1895. The Commissioner submitted a report regarding the movable property on the 28th September 1905, and a further one regarding the immovables and the accounts on the 4th May 1906. On an examination of the accounts, he found that the defendant was liable to pay Rs. 8,683-11-2 to the plaintiff. On the 28th August 1906, a new Sub-Judge, after a consideration of all the objections raised to the report of the Commissioner, confirmed it in regard to the actual partition, but found that on account of the profits Rs. 4,342-10-4 1/2 only were due to the plaintiff.' The Sub-Judge directed, therefore, that this amount should be decreed on payment of the necessary Court fees. The Judge, though he apparently thought that the preliminary decree in regard to the accounts was incorrect, was of opinion that it was incumbent upon him to accept the decision of his predecessor on this point. Against that decision this appeal is filed by the defendants who now really attack not only the final decree but also the preliminary one. There are fourteen grounds of appeal mentioned in the memorandum but of these three only have been pressed at all before us, and they are the following:

(1) That property No. 10 of Schedule 3 should not have been divided but should have been left in the possession of the defendants who were willing to pay compensation to the plaintiff on this account.

(2) That the defendant No. 1 is not liable to render any accounts to the plaintiff and that the suit as framed is not maintainable.

(3) That if he is so liable, the suit in regard to many of the amounts claimed is time-barred, as it was brought more than three years after the cause of action arose.

3. There does not seem to be any reason to interfere with the decision of the learned Sub-Judge in regard to property No. 10 of Schedule 3. It appears that at one time the plaintiffs offered to surrender their claim to this property if the ancestral house were given to them solely. This offer was then refused by the appellant and he has, therefore, no cause for legitimate complaint if he cannot

secure the whole of the property No. 10. We find that when it was offered to him he refused it. We are also informed that the value of this property has increased lately from various causes, and that the plaintiff does not wish, therefore, to part with his interest in it. It has already been divided, and the Commissioner and the lower Court are both of opinion that the partition is an equitable one, and that the value of the property is not injured thereby, and that the property can be and in fact has been easily and conveniently divided into two portions. We must, therefore, decline to interfere with the order of the lower Court in this matter.

4. For a decision of the remaining two points, raised in the appeal, it is necessary, first, to discuss whether the family of the, plaintiff and the defendant is really a joint Hindu family. There is no doubt that there was a partial division of the property between the years 1893 and 1899. We do not think, however, that the status of the family in regard to properties not so divided was altered by this partial division, and on a consideration of the evidence of the plaintiff and the circumstances of the case and the admission of the plaintiff, we think that there can be no question that in regard to these undivided properties the family remained joint. Indeed, it appears from the judgment of the lower Court, (page 110 of the paper book) that it was admitted before him that the plaintiff and defendant were at that time members of a joint family and that most of the properties in suit were then admitted to be joint family properties. It appears, therefore, to be futile for the defendant to allege. now that he and the plaintiff are not members of a joint family. Further, the admission continued in the defendant's sworn testimony, and the statements made in the account papers filed by him clearly indicate that after this partial partition the family remained joint in regard to the remaining, properties and that this position was accepted, by him. If an authority is needed for the proposition that a family may remain joint in regard to some properties after a separation in regard to the others, it will be found in the case of Gavrisliankar Parabhuram v. Atmaram Rajaram 18 B. 611 where it was held that the mere fact that there had been a partial,; partition of the family property in the year 1876 did not affect the rights of the parties to sue for partition in regard to other properties which remained undivided and. in respect of which the rights of the parties continued to be the same as those of the members of any ordinary joint Hindu family.

5. Again in the case of *Purushottam v. Atmaram Janardan* 23 B. 597 it was held that a partial division of the property of a joint family, was no bar to a suit for partition of the remainder. The appellant, indeed, when he suggests that he should be allowed to retain possession of property No. 10 of Schedule 3 and pay proportionate compensation to the plaintiff for his share of it, admits indirectly by his proposals that he considers the property to be joint; nor can there be any doubt as to the facts. The properties were all joint family properties and portions were appropriated by various co-sharers after a partial partition; and the rest remained joint. On these findings of fact, it is difficult to see what objection can be made to the manner in which the suit is framed. Two suggestions are, however, made in this matter, firstly, that the plaintiff ought to have sued for partition and possession. We are of opinion, however, that the plaintiff's suit cannot fail on this ground. It is a suit for partition under article 127 of the Limitation Act and article 127 expressly deals with the case of a co-sharer who has been excluded from a share in the joint property. It is, moreover, open to doubt if the plaintiff can, in the circumstances of this case, be held to be out of possession to him for his co-sharers are in possession and their possession is really on behalf of the whole family. It is then suggested that the defendant No. 1 was not the karta or managing member of the family, and that even if he was, he is not liable to render an account. The answer to this is that on his own statements and from the evidence on record, it is abundantly clear that the defendant has been for years the managing member of the family, and that it is settled law that such a managing member is liable to render accounts to his co-sharers. There appears, therefore, to be no reason for accepting the proposition that this suit as framed is not maintainable.

6. Turning now to the question of limitation, the appellant argues that the suit, in so far as it relates to profits derived from the joint properties, comes under article 62 of the Limitation Act, and that, therefore, the claim for any sums which accrued due more than three years before this suit is time-barred. To support this view two cases have been cited. The first is the case of *Banoo Tewary v. Doona Tewary* 24 C. 309 and the second is the case of *Thakur Prasad v. Partab* 6 A. 442. These cases, however, appear to be entirely distinguishable from the present case. In the case of *Banoo Tewary v. Doona Tewary* 24 C. 309 it was found (page 314), that the case for the plaintiff was that all of the properties were divided, and that the

family became separate, and that only those debts were left undivided, which were not ripe for realization. They were to be divided, of course, when they were realized. There having been a complete separation, their Lordships held that article 127 did not apply. In the present case, however, the circumstances are different. The family is not completely separated, and many of the family properties have remained joint, and the case appears to us to be more analogous to that of *Muthusami Mudaliar v. Nallaku-laniha Mudaliar* 18 M. 418 in which case it was held that 12 years' limitation applied to a suit for partition like the present. This article, on a plain interpretation of the words used, applies equally to movable and immovable properties belonging to a joint family. Profits derived from the investment of joint family capital in business, or from immovable properties belonging to the joint-family is just as much joint-family property as the capital or landed property from which such profits are derived is, and the plaintiff in this case has an equal right to such partition of such profits as he has in regard to any other joint family property. If this position is accepted, the suit clearly comes under article 127, and is within time. It is not a suit for accounts, pure and simple, and the rendering of an account is only incidental to the suit for ascertainment of what share of the family property should be paid to the plaintiff on partition. Indeed, it is difficult to see in what manner a suit for such profits should be brought, save in the form of a suit for partition, for in the case of *Pirthipal v. Jowaliir Singh* 14 C. 493; 14 I.A. 37 it was held by the Privy Council that a member of a joint Hindu family cannot sue for a share of the profits of the joint family estate, as he has no definite share until partition, and that he can only sue for such partition. The plaintiff has adopted this course in this case, and has sued to partition all the joint family properties. In our opinion, his suit, therefore, comes under article 127, and on the findings of fact arrived at by the Sub-Judges, which we accept as correct, it is within time.

7. In the cross-appeal, it is argued that the plaintiff is entitled to certain profits which he did not claim in the pleadings, but which the Commissioner was of opinion he was entitled to recover. We consider that this question has also been dealt with correctly by the Sub-Judges, and we are content to say that the plaintiff in this suit was rightly not allowed to obtain any relief, which he has not definitely and clearly asked for in the plaint. The result is that the appeal and the cross-

appeal are dismissed.

8. There is no order as to costs in either case.

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