Bombay High Court
Parashuram Rajaram Tiwari vs Hirabai Rajaram Tiwari And Ors. on 11 October, 1956
Equivalent citations: AIR 1957 Bom 59, (1957) 59 BOMLR 74, ILR 1957 Bom 175
Author: Dixit
Bench: Dixit, Vyas
JUDGMENT Dixit, J.

1. This appeal raises an interesting question under the Hindu Law which is as to the effect of a preliminary decree made in a suit for partition upon the status of the family being continued joint.

2. The few facts, which are relevant to this question, are these : A Hindu family consisted of one Rajaram and his wife Hirabai. He has six sons; (1) Parashuram, (2) Balaram, (3) Ramakrishna, (4) Laxmikant, (5) Shamsundra and (6) Ashotharam who were respectively the plaintiff, defendant No. 3, defendant No. 4, defendant No. 5, defendant No. 6 and defendant No. 7 in suit No. 29 of 1947. In that year, Parshuram filed the aforesaid suit to recover, by partition, possession of his 1/8th share in the property described in the plaint. This suit resulted in a preliminary decree on the 29th November 1949, the terms of which were as follows :

"Plaintiff do recover possession of 1/8th share in the properties found in inventory and that in Schedules B and C of plaint by partition by metes and bounds from defendants Nos. 1 to 2 and whatever other defendants that arc found to be in possession. Defendants Nos. 1 to 7 have each 1/8th share in the above properties. They may get their share partitioned in execution proceedings on payment of necessary stamp. The partition of lands shall be done by the Collector or any of his gazetted subordinates and that of other properties by the Commissioner to be appointed by the Court in execution proceedings. Provision for marriage expenses of defendant No. 1's two daughters shall be made in execution. The court-fee due to Government and costs of suit shall he paid by defendants Nos. 1 and 2 in proportion to the extent of plaintiff's success while the rest of the court-fees shall be paid by plaintiff. No order for the rest of the costs. A copy of the decree shall be forwarded to the Collector through Government Pleader. Inquiry into future mesne profits as directed under Order 20, Rule 12 (c), Civil Procedure Code."

From this decree, defendants Nos. 1 and 2 preferred First Appeal No. 172 of 1950 in this Court and that First Appeal was withdrawn on the 11th June 1953. While the appeal was pending in this Court, Rajaram, the 1st defendant, died in 1952, Pursuant to the preliminary decree, the plaintiff filed Special Darkhast No. 2 of 1950 for partition and possession of his share in accordance with the decree passed in suit No. 29 of 1947. In the course of the darkhast, the plaintiff applied to have the decree amended and, to have awarded to him a 1/7th share. But it appears that the executing Court refused to grant the plaintiff's request. The plaintiff then applied to have the decree amended and claimed, by the application, that the decree be amended by providing that the plaintiff's share was 1/7th instead of 1/8th as awarded under the preliminary decree and this was on 5th February, 1954. Notice of this application was issued to the opponents and, upon hearing the parties, the learned Judge of the Court below dismissed the plaintiff's application on 23rd March 1955, holding that defendants Nos. 1 to 7 remained joint in spite of the preliminary decree and, although the relief claimed by the plaintiff could be given to him in the proceedings, the plaintiff's share was 1/8th and

not 1/7th, as claimed by him. The plaintiff, feeling aggrieved by this order has come up in appeal.

3. Upon this appeal, a preliminary objection has been taken by Mr. Datar appearing for the respondents and the preliminary objection is that no appeal lies in this case. It is urged by him that no appeal would lie against the order of the 23rd March 1955 because the order of the 23rd March 1955 is an order made upon an application made by the plaintiff and, therefore, no appeal would lie. In other words, the contention is that the order of the 23rd March 1955 would not amount to a decree and, therefore, no appeal would lie. The expression 'decree' has been defined in Section 2(2) of the Code of Civil Procedure and a 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Now, this was a suit for partition in which there was a preliminary decree and until there is a final decree in such a suit, the suit is pending and the application was made in a pending suit. By the application, the plaintiff claimed that by reason of his father's death, his share was augmented and the share which was 1/8th was increased to 1/7th. By the order of the 23rd March 1955, the learned Judge of the Court below refused this application and this would mean that the Court below refused to award the plaintiff his augmented share and, therefore, there was clearly a determination of his right which was refused. In our view, the order of 23rd March 1955 would amount, therefore, to a decree. The contention, therefore, so far as it relates to this aspect of the question must fail.

4. It was then urged by Mr. Datar that an appeal would lie only against a decree and as in this case, no formal decree was drawn up, the present appeal would not lie. Now, there is a history concerning this contention. When the plaintiff filed this appeal, he filed, along with the Memorandum of the appeal, a certified copy of the application made by him together with a copy of the order made by the Court below. There was, upon the certified copy, a statement as regards the bill of costs. The papers were placed before Mr. Justice Shah for admission and on 15th September 1955, he made an order in the terms following : "Stand over to enable the ap pellant to put in a copy of the decree (to be drawn up in terms of the order, passed)." The matter was again placed before Mr. Justice Shah and on 29th September 1955, he made a further order directing that the matter should stand over for a fortnight. It appears that the plaintiff then made an application in the Court below to draw up a decree adding the costs of the application made for amending the decree. On 15th October 1955, the learned Judge made an order: "What has the office to state?" and on 17th October 1955 he made the following order:

"Office states the question of a decree does not arise. In my opinion, that view is correct. No furthere decree can be drawn up as prayed. Reject." The matter was then placed for admission before Mr. Justice Gajendragadkar who admitted and ordered notice to issue on 11th November 1955. It is true that formal decree has not been drawn up in this case such as the one suggested by Mr. Justice Shah and as the application was to amend a preliminary decree which was refused, the Court below should have drawn a preliminary decree, as requested. But the plaintiff did all in his power by requesting the Court to draw up a decree and the Court below took the view that the question of a decree does not arise and that no further decree could be drawn up as prayed. In view of that order, the plaintiff was unable to produce a certified copy of the decree and Mr. Justice Gajendragadkar admitted the appeal which suggested that, in those circumstances, he did not insist upon the

production of a certified copy of the decree. Mr. Datar contends that even so, the plaintiff should have preferred an appeal from a decree when drawn up. It seems to me that this contention cannot be accepted. The plaintiff requested the Court below to draw up a decree and in the view of the Lower Court, a decree could not be drawn up. If, therefore, the plaintiff was unable to produce a certified copy of the decree, it was certainly not his fault and he cannot be punished for not producing something which he was unable to produce. The drawing up of a decree was only a formal affair and the omission has not affected the rights of the parties either way; and if for a mistake committed by the Court below, a decree was not formally drawn up and the plaintiff was unable to produce a certified copy of the decree, the plaintiff should not be visited with the consequence of his appeal, not being competent because he was unable to produce a certified copy of the decree. On the facts of this case, we must hold that the objection is not well-founded and must be rejected.

5. It was then urged by Mr. Datar that the plaintiff would be required to pay upon the Memorandum of Appeal the amount of Court fees on the footing of his augmented share. Now, this application has been made by the plaintiff to have the preliminary decree amended. This is an application in the suit. Therefore, no question of paying ad valorem court-fees arises in this case. It is only when a decree is passed in his favour increasing his share from 1/8th to 1/7th that the plaintiff will be called upon to pay the amount of stamp duty upon the difference between his increased share which is 1/7th and the 1/8th share which was awarded to him by the preliminary decree. In our view, there is no substance in this contention either.

6. This takes me to the important question raised in this appeal. Now, suit No. 29 of 1947 was a suit for partition between members of a joint Hindu family. The family was composed of a father, his wife and his six sons, and the effect of the institution of the suit was to bring about a disruption of the joint status of the family. Under the Hindu Law, partition is of two kinds: (1) separation in status and (2) separation in interest or estate. While the first kind of separation is a notional separation, a second kind of partition is a physical division of the property of the family, giving each member of the family, separate possession of his share. The terms of the decree which I have quoted above show firstly, that the plaintiff was given his 1/8th share in the family property and also was awarded separate possession of that share; secondly the Court declared the shares of the defendants which was 1/8th for each of the defendants; thirdly, the decree directed that the defendants might get their share partitioned on payment of necessary stamp. The decree further directed the partition to be made in the manner set out in the decree and lastly, there was a provision made in the decree for the marriage expenses of the two daughters of defendant No. 1. It is difficult to argue in the face of the provisions of this decree that there was, as a result of the decree, separation only in so far as regards the plaintiff. The terms of the decree show unmistakably the entire scheme of partition. The plaintiff was to get possession of his 1/8th share. Each of the defendants was to get possession of his 1/8th share if he was so minded by paying the necessary stamp duty, that the partition was to be worked out in a specified manner and finally, a provision was made for the marriage expenses of the two daughters of defendant No. 1. The contention of Mr. Datar is that in spite of those terms, there was no separation in status as such between the plaintiff on the one hand and the defendants on the other. He says that there was separation only so far as regards the plaintiff. It seems to me that this contention is not well-founded. How partition may be effected under Hindu Law is stated in the "Principles of Hindu Law" by D.F. Mulla, 11th Edition, 1952, at page 422. So far as material, the law

is as follows:

"Partition is a severance of joint status, and as such it is a matter of individual volition. All that is necessary therefore, to constitute a partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. It is immaterial, in such a case, whether the other members assent. Once a member of a joint family has clearly and unequivocally intimated to the other members his desire to sever himself from the joint family, his right to obtain and possess his share is unimpeachable whether or not they agree to a separation, and there in an immediate severance of the joint status. The intention to separate may be evinced in different ways, either by explicit declaration or by conduct ..... ....It may also be expressed by the institution of a suit for partition."

7. In the present case, a suit for partition was filed by the plaintiff. By the plaint, he claimed possession of his share and with the institution of the suit, there was, therefore, severance of the joint status. This conclusion is, further fortified by the terms of the decree. As already pointed out, the decree declared the shares of the defendants. The decree enabled each of the defendants to get his share separated on payment of the necessary stamp duty. The decree indicated the mode in which the partition was to be worked out and finally, the decree made a provision for the marriage expenses of defendant No. 1's daughters. If Mr. Datar's contention is that by the terms of the partition decree, only the plaintiff separated and there was, therefore, separation in status only as regards the plaintiff and not as regards the other members of the family, it seems to me that the terms of the decree are inconsistent with that contention. Here, there is not merely a declaration of the shares of the parties; what is more, there is a provision made for the marriage expenses of the daughters of defendant No. 1. This shows unmistakably that there was separation in status between the members of the family. If there was separation only with respect to the plaintiff and there was no separation as between the plaintiff and the defendants, one would hardly find a provision, like a provision for marriage expenses, such as is to be found in this decree.

8. In this case, it so happened that at the date of the suit, defendants Nos. 5, 6 and 7 were minors. Mr. Datar's contention is that, therefore, there could not be separation in status between the members of the family by a mere institution of a suit for partition. One evident answer to this contention is that the suit is not filed by a minor plaintiff. It is true that the suit has been filed by Parshuram, a major, against the defendants including the three defendants who happened to be minors at the date of the suit. If the rule was that the presence of a minor in a family would be an impediment in bringing about separation in a joint Hindu family, it would be impossible, speaking generally, to effect a partition in a joint family because in every family it may well be that at one time or the other, there would be a minor member in the family. But this argument must be rejected as being contrary to the decision of this Court in Dnyaneshwar v. Anant, 38 Bom LR 579: (AIR 1930 Bom 290) (A). The head note to that case runs as follows:

"Under Hindu Law a declaration of intention to separate by an adult member of a joint family is effective against a minor co-parcener even if the latter happens to he the only co-parcener".

In this case, the facts are stronger. Here, the defendants include three minor members. If, therefore, a declaration of intention to separate can be brought about against a minor co-parcener, there is no difficulty in saying that a similar result can be brought about when the family consists or members some of whom are minors. In our opinion, therefore, with the institution of a suit for partition in 1947, there was separation in status between the plaintiff, and the defendants. This separation was emphasized by the terms of the decree which I have set out above, and if the effect of the filing of the suit for partition and the effect of the terms of the decree is to bring about separation in status between the members of the family, it is clear that as from the date of the suit, there was a disruption of joint status and with the death of the 1st defendant pending the suit, the plaintiff would be entitled to claim his augmented share by virtue of his being an heir of his father. In dealing with this question, one should keep in mind the distinction between the two kinds of partition: (1) separation in status and (2) separation in interest or estate. The first kind of separation is brought about by an unequivocal intention on the part of the member to separate from the other members of the family. The second one is brought about by a physical division of the family property and to claim an-interest in the share left by defendant No. 1, it is not necessary for the plaintiff to show that there was a physical division. It is enough for him to establish that there was separation in status in the family prior to the death of the father.

9. Mr. Datar, however, argues that notwithstanding this separation of joint status, the defendants themselves continued to remain as members of a joint Hindu family. In this connection, the law as stated in Mulla's Principles of Hindu Law would be found in Section 328(2) at page 434:

"The general principle, is that every Hindu family is presumed to be joint unless the contrary is proved. This presumption, however, does not continue after one member has separated from the others. As observed by the Judicial Committee. 'There is no presumption when one co-parcener separates from the others, that the latter remain united. ..... An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact.' It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such a partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former co-parcener had separated from them, or it may he inferred from other conduct indicating such an intention ..... It is a question of intention which must be proved like any other fact."

Now, partition may take place either by an agreement between the members of a family or by a decree of the Court. In this case, the partition has taken place as a result of the decree made in the suit of 1947. With respect to this the law as stated in Mulla's Principles of Hindu Law is to be found in Section 328 (4) at page 433. It is as follows:

"Where in a suit a decree is passed for partition and the question arises whether the separation effected by the decree was only a separation of the plaintiff from his co-parceners or was separation of all the members of the joint family from each other, the decree alone should be looked at to determine that question. It is the decree alone which can be evidence of what was decreed."

It is obvious that one has, therefore, to look to the decree to find out whether there was separation of the joint status in this family. I have already shown above with reference to the terms of the decree that such a separation was brought about by the terms of the decree. But Mr. Datar argues that even so, the separation in status can be displaced by an agreement between members of the family who would agree to remain joint. Now, this question must depend upon the facts of each case. If the true test is to look to the terms of the decree, then one has to look to the terms of the decree whether there was such a separation of joint status. In the present instance, we do not see any difficulty in saying that there was separation of joint status. To succeed, Mr. Datar has to show that the separation of joint status was displaced by a subsequent agreement. Now, it is not necessary that the agreement should be reduced to writing. The agreement may be inferred from circumstances or from the conduct of the parties, and in this connection Mr. Datar relies upon the evidence adduced in the case. That evidence is to be found in the testimony of Hirabai, the wife of defendant No. 1 and the mother of the plaintiff and the other defendants. Her evidence was that her husband died three years back, i.e. in 1952, that after the decree, all the defendants were joint, that the pension and family income of defendant No. 1 was used for all the defendants, that defendant No. 1 was the Manager of the defendants' family, that the income of the family lands was used for all the defendants, that defendant No. 1 did not keep his income as such separate, that defendants Nos. 3 to 7 also did not have separate income and that defendant No. 1 did so till his death. In cross examination, she admitted that there was no agreement between defendant No. 1 and other defendants after the suit. This last answer suggests that there was no specific agreement between the defendants, inter se agreeing to remain united after the separation. The evidence is, I must say, consistent with contention of Mr. Datar; but it is clear that the evidence is not inconsistent with the plaintiffs case. Although there is a preliminary decree in the suit the suit is pending and a suit for a partition is pending until a final decree is made, and this is conceded by Mr. Datar. It is clear that, while the plaintiff is claiming possession of his separate share pursuant to the preliminary decree, the evidence as given by the mother would not at all be inconsistent with the plaintiff's case, because until the share of the plaintiff is separated from the family property, the defendants would continue to enjoy the income in common and that is the effect of the evidence of Hirabai. Now, as the separation in status has been brought about in this case by the filing of a suit for partition and by the terms of the decree made in the suit for partition, one would require stronger evidence to displace the separation resulting from the decree for partition. If, or example, in this case there was a written agreement between the defendants, inter se, whereby they agreed, in spite of the decree for partition, to remain united, the matter would stand upon a different footing. But when the evidence given by the mother Bai Hirabai is consistent with either position, it is not easy to displace the effect of the terms of the decree which shows unmistakably that there was separation in status between all the members of the family. In this connection, it would be convenient to refer to a decision of their Lordships of the Privy Council reported in Palani Ammal v. Muthuvenkatacharla Moniagar . This is what the Privy Council observed:

"It is also now beyond doubt that a member of such joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained ant! partitioned off for him, and that the remaining co-parceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the

remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparceners had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is, for reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved."

Then at p. 87 of Ind App: (at p. 51 of AIR), it was observed:

"In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show, whether the separation, was only a separation of the plaintiff from his coparceners or was a separation of all the members of the joint family from each other. It appears to be obvious to their Lordships that in a suit for partition, no effective decree can be made for a partition unless all the coparceners whose addresses are known are parties to the suit, and that it is the decree alone which can be evidence of what was decreed." In the face of this weighty pronouncement of their Lordships of the Privy Council, it is difficult to accept Mr. Datar's contention that, in spite of the terms of the decree made in the suit for partition, the defendants continued to remain united. To succeed Mr. Datar has to show that, notwithstanding, this decree for partition which brought about severance of joint status, the defendants, inter se, agreed to remain united. It may be that when a partition takes place by agreement, the intention may be gathered from the circumstances and from conduct of the parties. But, it seems to me that in the case of a decree for a partition, one would require strong evidence to show that what was brought about by, the decree was displaced by some specific agreement between the members of the family. In our view, therefore, it is clear that, when defendant No. 1 died in 1952 and at a time when there was separation in status between the members of the family, the plaintiff is entitled to claim his augmented share in defendant No. 1's property.

10. The learned trial Judge has, with respect, confused the issue. He does not seem to have understood the two positions with respect to a partition as one knows under the Hindu Law. He said that because none of the defendants prayed for partition, inter se, it would seem that the plaintiff alone wanted to separate from the defendants. In our view this is an entirely wrong approach. To determine as to what has taken place, he should have turned to the terms of the decree to find out as to the results flowing from the terms of the decree. He does not appear to have noticed that by the decree, the share of each of the seven defendants was determined. He does not seem to have realised that, by the decree, each of the defendants was entitled to claim separate possession of his share. He does not seem to have realised that, by the decree, partition was to be worked out either by the Collector or by the Commissioner according to the nature of the property to be divided and he does not seem to have at all realised that by making a provision for the marriage expenses of the 1st defendant's daughters, there was a complete partition and there was not merely a severance of the joint status of the family. It may well be that in spite of a decree for parti tion, there may be cases in which the defendants may agree to remain united; but there must be in such a case an agreement and very clear evidence to prove that. In the present case, the evidence given by Hirabai comes to this that there was enjoyment of the property in common. But the property would remain to be enjoyed in common until there was a partition worked out according to the terms of the decree. If,

therefore, the position is that the evidence of the mother is consistent with the defendants' contention, but is not inconsistent with the plaintiff's case, it seems to me that to succeed, the defendants would have to give clear evidence to displace the operation of the terms of the decree. In our view, therefore, the plaintiff is entitled to claim his augmented share and, upon that footing, the plaintiff would be entitled to claim a 1/7th share in the family property instead of 1/8th given to him by the preliminary, decree.

11. The result of the aforesaid discussion is that the Court below was wrong in taking the view that defendants Nos. 1 to 7 remained joint in spite of the preliminary decree and once we find that there was separation in status among the members of the family and there was disruption of the joint status, it follows that the plaintiff is entitled to claim his augmented share in the family property.

12. While the appeal was pending in this Court, the plaintiff made an application in which there was a two-fold prayer. This application was occasioned by the fact that Hirabai, defendant No. 2 died pending this appeal. According to the application, she died on 28th December 1955. Under the decree, she is given a 1/8th share. The plaintiff, by the application, says that the heirs and legal representatives of the deceased Hirabai, who are already upon the record should be shown as heirs upon this record and the second prayer is that, as Hirabai was dead the plaintiff's share would he as a result of her death, 1/6th and not 1/7th which the plaintiff gets by this judgment. One may say that the plaintiff seems to be an extremely lucky man to have his share augmented as a result of the deaths in this family. But, in our view, the plaintiff's application is misconceived, at least in part. The effect of this application is to have the preliminary decree amended. The Court which passed the preliminary decree is the trial Court. The application should have been made to that Court, and not to this Court. It is true that an appeal was filed in this court against the preliminary decree dated 29th November 1949, but that appeal was withdrawn. So far as, therefore, the plaintiff's prayer in the application to have his share increased to 1/6th from 1/7th is concerned, it is not possible to grant this prayer on this application. It is open to him to make such application as he may be advised in the matter. As regards the heirs to be shown upon the record of this appeal it is possible to grant that request. The heirs and legal representatives of Hirabai, defendant No. 2, are already upon the record and no new heirs or legal representatives are to be brought on the record. So far as that prayer is concerned, it will be granted and we direct that the plaintiff and his brother defendants should be shown as heirs and legal representatives of the deceased Hirabai. There will be no order as to costs of this application.

13. Upon the appeal, the order which we make is as follows: The appeal will be allowed; the order made by the Court below dismissing the plaintiff's application on 23rd March 1955 will be set aside and the plaintiff's claim for an increased share from 1/8th to 1/7th will be granted. We, therefore, direct that the original decree may be amended by providing that the plaintiff will get a 1/7th share in the property as mentioned in the preliminary decree. This is a suit for partition and the fairest order to make would be that the parties will bear their own costs in this Court as well as in the Court below.

14. Order accordingly.