

(1917) 04 PAT CK 0018

In the Patna High Court

Ajodhya Prasad

APPELLANT

Vs

Manohar Prasad and Others

RESPONDENT

Date of Decision : 02-04-1917

Acts Referred:

Citation : AIR 1917 Patna 205 : 40 Ind. Cas. 131

Hon'ble Judges : Mullick, J;Atkinson, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for partition instituted by the plaintiff in the Court of the Subordinate Judge of Patna in respect of the properties enumerated in Schedules I, II and III to the plaint. Defendant No. 1 is the father of the plaintiff; defendant No. 2 is the brother of the plaintiff's father; and defendants Nos. 3 and 4 are the adult sons of the plaintiff's father, who have declined to join as plaintiffs in this suit. Defendant No. 5 is the grandson of defendant No. 2.

2. Paragraph 19 of the plaint, contains prayers for the following reliefs:

1. That on getting all the properties mentioned in Schedules I, II and III of the plaint partitioned through an Amin Commissioner, the plaintiff's 2-annas out of the 16-annas share may be separated and "khas" possession thereof be delivered to the plaintiff.

2. That the property mentioned in Schedule II may be given to the defendant No. 2 and that in Schedule III to the defendant No. 1 or an additional share in proportion to the price of those properties may be allowed to the plaintiff after including it in the share of the defendants Nos. 1 and 2.

3. That the cost of the suit with interest may be realised from the contesting defendants and awarded to the plaintiff.

4. That such other order as be found proper, may be passed in favour of the plaintiff.

3. No less than 10 issues were framed by the learned Judge who tried the suit but those material for the purposes of this appeal are issues Nos. 6 and 7. Issue No. 6 runs as follows: "What are the joint family properties? Has plaintiff omitted to mention in the plaint any of the joint family properties?" And issue No. 7 runs as follows: "Is the plaintiff in joint possession of the properties in suit with the defendant? If not, does his suit for partition lie?"

4. The learned Judge found that the plaintiff was not entitled to maintain the suit during the lifetime of his (sic). He further found that there was no evidence that the plaintiff's interest in the property in suit was being imperilled. He also found that even if the suit lay, it was incompetent because the property now in suit had been partitioned in a previous suit brought before the Court of the Subordinate Judge of Meerut in the United Provinces. He accordingly dismissed the suit, but without costs. The plaintiff now prefers the present appeal before us.

5. Now, the first question that arises is whether upon the plaint as it is framed the suit can be said to be a simple suit for partition. On behalf of the respondent it has been strongly urged that unless the plaintiff brings upon the record certain persons into whose possession the properties -mentioned in Schedules II and III have passed, he cannot proceed with the partition against the defendants before us. It appears that some of the properties enumerated in Schedule II or a share in these properties have been sold in execution of a decree against defendant No. 2; and that the auction-purchasers have taken possession. These auction-purchasers are not impleaded as defendants in the present suit, and it is contended that unless the plaintiff brings a properly framed suit for the recovery of possession of these properties he cannot ask the Court to proceed with this partition.

6. It also appears that the properties in Schedule III have been alienated by the plaintiff's father and are now in the possession of third parties.

7. It is similarly contended that unless these transferees are brought upon the record and the property recovered from their possession the partition cannot proceed.

8. In my opinion there is considerable force in these contentions. The plaint as it stands is for partition of the properties in Schedules I, II and III; and unless the persons in possession of these properties are impleaded and unless it is decided in their presence that the transfers are invalid or not binding upon the plaintiff, the suit as a suit for partition is clearly incompetent. The plaintiff must bring all the persons in possession of the properties which he seeks to partition before the Court and the Court will then give him the equitable relief which he seeks.

9. Mr. Pugh on behalf of the plaintiff-appellant recognises this difficulty and suggests that we should allow him to amend the plaint in the following manner:-- He requests that Clause (1) of paragraph 19 of the plaint should run as follows:

1. That on getting all the properties mentioned in Schedule I, save that portion of

items 5 and 7 of the said schedule which remains unsold, partitioned through an Amin Commissioner the plaintiff's 2-annas out of the 16-annas share may be separated and khas" possession thereof be delivered to the plaintiff.

10. He next asks that Clause (2) of paragraph 19 may be expunged and the following Clause be substituted therefor:

(2) That an account be taken from defendant No. 1 in respect of that part of the properties which has been sold by defendant No. 1 since the institution of this suit.

11. It is necessary to explain that item No. 15 was the subject-matter of partition in the Meerut suit, three-fourths of the house which comprised this item falling to the share of the plaintiff's uncle, defendant No. 2, and one-fourth to the share of the plaintiff's father, defendant No. 1. Since the institution of the present suit defendant No. 1 and defendant No. 2 have jointly sold the house and the sale-proceeds are now in deposit in a bank. Defendant No. 1 is required by the plaintiff to account for the plaintiff's share in the one-fourth share of the sale-proceeds of the house.

12. We think that it is competent to the plaintiff in the present suit to take the account he seeks. He is not bound to ask for the partition of the properties which have been alienated. In a partition suit the other members of the joint family are liable to account for any expenditure out of the joint family funds which has been incurred for expenses not legitimate to the purposes of the joint family and if, as the plaintiff alleges, there has been any misappropriation or waste on the part of the defendants, all the defendants are liable to account to the plaintiff for the same. Therefore, it seems to me that the plaint as amended is in order and the plaintiff is competent to prosecute the suit without being required to file the additional Court fees which he would have been required to file if a prayer for declaration of title and recovery of possession had been added to the plaint. In my opinion the suit as amended is competent and treble as an ordinary partition suit.

13. The next question is whether or not the suit is at all maintainable during the lifetime of the plaintiff's father. The learned Vakil for the respondent relies upon Rameshwar Prosad Singh v. Lachmi Prosad Singh 31 C. 111 : 7 C.W.N. 688. Their Lordships in that case held that the plaintiff could maintain a suit for partition of ancestral property even when his father and grandfather were both alive, if they allowed the property to be wasted and the plaintiff's interest therein imperilled. Apparently in that case there was evidence of waste and the learned Judge, while holding that the suit was maintainable, decided on the merits that the plaintiff had no right to the property in suit. The learned Judges, however, approved of the judgment of Mr. Justice Telang in Apaji Narhar Kulkarni v. Ramchandra Ravji Kulakarni 16 B. 29 : 8 Ind. Dec. 497 in which that learned Judge expressed the opinion, without any qualification whatever that a suit by a Mitakshara son for partition was maintainable in the lifetime of both the father and the grandfather.

The same view was taken in *Subba Ayyar v. Ganasa Ayyar* 18 M. 179 : 6 Ind. Dec. 474. The learned Judges of the Madras High Court in this case made the following observation: "We should have considered ourselves concluded by authority, had it not been for the decision of the majority of the High Court at Bombay in *Apaji Narhar Kulakarni v. Ramchandra Ravji Kulakarni* 16 B. 29 : 8 Ind. Dec. (N.S.) 497. After carefully reading the judgments in that case and comparing them with, the *Mitakshara* and the decision in *Nagalinga Mudali v. Subbiramaniya Mudali* 1 M.H.C.R. 77 we agree in the opinion of Mr. Justice Telaug who has reviewed at length all the authorities on the subject and dissented from the conclusion arrived at by the majority of the Court." In, our opinion the present case is fully covered by this last mentioned authority.

14. The Calcutta decision upon which the learned Vakil for the respondent relies does not go the full length of his contention; and, in my opinion, that decision does not afford any authority for the proposition that the present suit is not maintainable, if the plaintiff is unable to prove waste or circumstances showing that His interest in the joint family property is being imperilled. The suit, therefore, is maintainable.

15. Then there remains the question whether the present suit is incompetent by reason of the partition in the Meerut District, referred to above. It appears that out of the fifteen items enumerated in Schedule No. I, items Nos. 1, 2, 3, 4, 6 and 15 were covered by the decision of the Sub-ordinate Judge of Meerut which was appealed against to the High Court of Allahabad and although Mr. Pugh at first contended that in spite of the decision of the Appellate Court he was still competent to re-open the partition on the ground that the partition was made in his absence, he does not press this contention very strongly. His argument was that under no circumstances could the plaintiff, who was a minor during the partition proceedings, be bound by a decree in a suit in which his uncle was the plaintiff and his father the principal defendant. Mr. Pugh points out that the defendant No. 1 in that suit set up a claim adverse to that of the plaintiff and raised the plea that the properties were his own self-acquired properties and not the joint family property at all. It is contended that as the interest set up by the defendant in that suit was adverse to the interest of the plaintiff, he would not have been competent to act as guardian ad litem for the plaintiff in that suit and that, therefore, the decision in that suit should not in any way prejudice the plaintiff's suit.

16. It appears, however, on the authorities that the plaintiff, though a minor and unrepresented, would, in the absence of prejudice, be bound by the partition decree. It has not been shown on the evidence recorded by the learned Subordinate Judge that the plaintiff was in any way prejudiced. It is certainly not necessary that he should have been represented in that suit. The only circumstance which is material is whether or not the results were prejudicial to the plaintiff's interest.

17. Although the plaintiff's father set up in that suit a plea that the properties

were his own self-acquired properties, the Court found that they were in fact joint family property. The partition, as between plaintiff's uncle on the one hand and plaintiff's father representing the plaintiff's branch of the family on the other, appears to have been a fair and equitable partition and is binding upon the plaintiff in the present suit.

18. Items Nos. 1, 2, 3, 4, 6 and 15, therefore, cannot be partitioned a second time and the present appeal so far as these properties are concerned must be dismissed against defendants Nos. 2 and 5.

19. With regard to property No. 15, as has already been mentioned, the plaintiff's father has sold his one-fourth share and the money is in deposit in the bank. The plaintiff's share can be easily ascertained and the plaintiff's father will be liable to account to the plaintiff for that portion of the sale-proceeds which represents the plaintiff's share.

20. With regard to properties Nos. 7, 8, 9, 10 11, 12, 13, 14 and 5, it is admitted that they were not covered by the partition proceedings in the Meerut District. But then the learned Vakil for the respondents urges that these properties were the subject-matter of a private partition in the year 1883 and that, therefore, the present suit in respect of them cannot proceed.

21. He relies upon an arbitration award as evidence of the fact that these properties were partitioned by an arbitrator in 1883. Now it appears from the judgment of the learned Judges of the Allahabad High Court in 1913, to which reference has already been made, that this arbitration award was considered and the learned Judges came to the conclusion that so far at least as the properties then in suit were concerned, the arbitration award did not touch those properties and that at the time of the partition proceedings at Meerut they were still joint family property and liable to partition, and it is on this basis that the learned Judges allowed the partition to proceed.

23. It does not appear on a careful perusal of the Appellate Court's judgment that the Court definitely found either that the rest of the property was joint family property or that the alleged partition of 1883 did not take place. We find, therefore, that there is no bar of res judicata as regards items Nos. 7, 8, 9, 10, 11, 12, 13, 14 and 5 in the present suit and the learned Subordinate Judge is in error in holding that these properties were partitioned by the Allahabad High Court and the present suit is on that account incompetent.

24. It will be a question for determination whether any of these properties are joint family properties or not and that matter will have to be gone into in the course of the remand which we propose to make.

25. The order, therefore, which we shall make is this. The order and decree of the lower Court will be set aside, and the case will be remanded for trial with the following directions:

1. It has been represented to us that the mother of the plaintiff is still alive and

under the Mitakshara Law she is entitled to a share in the joint family property. The partition cannot and ought not to proceed in her absence and we think it desirable that she should be brought on the record as defendant and that she should be allowed to file a written statement, if she wishes to do so. If out of the pleadings in that written statement any issue arises which is not covered by the issues already framed, a fresh issue or issues will have to be framed and evidence taken thereon. If no other issue is framed upon the written statement of the added defendant, the Court will proceed to try issues Nos. 6 and 7 as already framed by him. The remaining issues will be taken as decided in the plaintiff's favour and no further evidence will be allowed to be given on them.

2. With regard to properties Nos. 1, 2, 3, 4, 6, and 15, Schedule I, the suit is dismissed as against defendants Nos. 2 and 5. But the plaintiff will be entitled to a partition as against the remaining defendants.

3. With regard to the remaining properties of Schedule I, the Court will take evidence on issues Nos. 6 and 7 as framed by him and will decide to what portions of these properties the plaintiff is entitled as against all the defendants in the present suit including the added defendant, his mother.

4. Defendant No. 2 will not be liable to account to the plaintiff in respect of properties alleged to have been alienated by him, but defendant No. 1 will account to the plaintiff for that part of items Nos. 5, 7 and 15 of Schedule I and for the whole of Schedule III, which is alleged to have been alienated by the said defendant No. 1.

5. The parties will be entitled to adduce whatever oral and documentary evidence they may consider necessary for the decision of issues Nos. 6 and 7.

6. With regard to the properties in Schedule II the plaintiff, if so advised, must bring a separate suit for recovery of possession before suing for partition. In my opinion he cannot prosecute a suit for partition without first recovering that part of the property which has passed out of the joint family in execution of the decree obtained against defendant No. 2.

26. As a partial partition has already once been made in respect of this estate by the Allahabad High Court, we think that having regard to the special circumstances that have arisen since that partition we ought to allow the present partition suit to proceed, although incomplete; and we give leave to the plaintiff, if he so desires, to bring a third partition suit in respect of the properties mentioned in Schedule II. The circumstances of this case are exceptional and that is the reason why we allow this course.

27. The result is that the appeal is decreed in this modified form; each party will bear its own costs.

28. We direct that the learned Judge will take up and dispose of this matter within four months of the record reaching him.

29. It appears that there is an injunction in respect of properties Nos. 2 and 4 of Schedule I, prohibiting defendant No. 2 for taking possession thereof. In the view we have taken above the injunction must necessarily be dissolved.