

(2008) 09 BOM CK 0015

In the Bombay High Court

Case No : Notice of Motion No. 3461 of 2005

Aryan Kamal Wadhwa

APPELLANT

Vs

Biharilal Wadha (Huf) and Others

RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Hindu Marriage Act, 1955 — Section 24

Citation : AIR 2009 Bom 80

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Janak Dwarkadas, S. Jagatiani, Vijay B. Dhingreja and Yogendra M. Kanchan, for the Appellant; D.D. Madon C.S. Kapadia and K. Thakordas, instructed by K. Thakordas and Co., for the Respondent

Judgement

Roshan Dalvi, J.—This Suit has been filed by a minor through his next friend, his mother, against his legal guardian his father and other members of the HUF to which he belongs for partition of the HUF properties by metes and bounds and by delivery of the Plaintiffs share to him.

2. The existence of the HUF, the coparceners of the HUF as well as the minor's position in the HUF as a coparcener are admitted. In fact the Court's attention is drawn to the other minor coparceners in the HUF, other than the coparceners shown in the Plaint. They are the two daughters of Defendant No. 4. The HUF, therefore, consists of the Plaintiff, his grand-father, Defendant No. 2, his father. Defendant No. 3, his uncle, Defendant No. 4 and his cousins who are not Defendants in the Suit, they, having been born in 1993 and 1996 and being yet unmarried, are female coparceners in the HUF.

3. Defendant No. 2 acquired various properties and established the HUF. The properties are shown and assessed as HUF properties.

4. Upon seeing the admission of the HUF in the income tax returns of Defendant No. 2 and the members who comprise it, a suit for partition lies.

5. It is contended on behalf of the Defendants that the suit for partition is not filed bona fide and it has been filed at the instance of the mother of the minor who has filed the suit only to extract monies by availing of and depleting the share of the minor. It is contended that if the minor continues in the HUF, it would be to his benefit. It is also contended that the Defendants not only accept the minor as a coparcener but are prepared to maintain the minor out of the HUF properties.

6. There have been certain other proceedings between the parents of the minor in the Family Court. An application on behalf of the minor as well as his mother for maintenance, not out of the HUF properties but against the father/husband of the parties, has been made as an Interim Application u/s 24 of the Hindu Marriage Act.

7. It is contended on behalf of the Plaintiff that his mother is acting, and as his mother is expected to act, only for the benefit of the minor. To show the bona fides of the Plaintiff, it is offered that the 1/6th share of the minor in the coparcenary property be set aside and invested for and on behalf of the minor until he attains majority.

8. It is contended on behalf of the Defendants that a minor is not entitled to sue for partition during his minority if his father does not assent to giving him separate possession of his share. Mr. Madon on behalf of the Defendants has drawn my attention to two Bombay High Court judgments in the case of (1) Araj N. Kulkarni v. Ramchandra R. Kulkarni ILR 16 Bom 29 and (2) Jivabhai Vadilal v. Vadilal Sakarchand & Co. 1905 7 Bom LR 232 in this regard.

9. The judgment in the case of Bammangouda Shankargouda Patil Vs. Shankargouda Rangangouda Patil, has considered the application of a minor to partition the HUF to which he belongs. The only requirement for the Court to see is that the partition is for the benefit of the minor. It is observed at page 69 that that is a wholesome Rule of law as the property which would be in the hands of the adult coparceners in the family should not be divided and handed over to a minor at the instance of unscrupulous persons when the minor's share, if partitioned, would be in danger of being applied to purposes adverse to the minor's interest. Consequently, it would be for the Defendants to show that the application on behalf of the minor made by the mother in this case is vitiated by unscrupulousness such as to endanger the minor's share for an adverse interest. Once that is seen, it is held, that the principle of Hindu law which governs separation of estate is the same for minors as well for adults.

10. Mr. Dwarkadas on behalf of the Plaintiff has drawn my attention to two Supreme Court judgments in the case of (1) Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, and (2) Kakumanu Peda Subbayya and Another Vs. Kakumanu Akkamma and Another, in which it has been specifically held that a minor can sue for partition and obtain a decree if his next friend can show that it is for the minor's benefit and that there is no distinction between a major and

minor coparcener in HUF. If the Court is satisfied that the minor suing through his next friend has sued for the benefit of the minor and in the best interest of the minor, the right of partition implicit in a coparcener can be claimed by a minor coparcener also. In the case of *Kakumanu* (supra) a minor of two and half years sued through his maternal grand-father as his next friend. It was shown that the mother of the minor was ill-treated and neglected. The family was in good circumstances. It was held in Para-8 of that judgment that the right of a coparcener to share in the joint family properties arises on his birth and that right carries with it the right to be maintained out of those properties suitably consonant with the status of the family whilst the family is joint and to have a partition and separate possession of his share should a coparcener make a demand for it. The division takes place when the coparcener expresses his intention to become separate i.e. by filing of the Suit. Hence it is held that in Hindu Law there is no distinction between a major coparcener and the minor coparcener so far as their rights to joint properties are concerned. A minor is equally entitled as a major to be maintained out of the family properties and his rights to partition are "precisely those of a major." Hence this position in law is now settled and the contention to the contrary has to be rejected.

11. In this case, the marriage between the next friend of the minor, who is his mother and Defendant No. 3, who is his father, has been sought to be dissolved on account of their religious preferences and their actions thereupon. The child has remained with, the mother almost since his birth. There is nothing to show or suggest that the mother would not act in the interest of the child. The very offer on behalf of the child to deposit his share in Court and to invest until the child becomes a major shows the bona fides. The allegation that she seeks to only extract monies is not substantiated at all, even prima facie.

12. The minor is required to be sued through his next friend. In the absence of the father, which absence is brought about by the separation of the parties to the marriage, the mother is the legal guardian of the Plaintiff, as held in the case of *Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another*, . The only test laid down in the case of *Kakumanu* (supra) is whether it would be in the interest of the minor and beneficial for him to bring about a difference in the status of a minor by partition of the family property. A mother acting on behalf of the son is to be taken to be acting in the interest of her own child. The parents of the minor are yet young in age. There is every likelihood that the father of the minor would remarry once his present marriage is dissolved. There is a similar likelihood of he begetting another child or children. The Plaintiff as his first child must not be cared for or given his due share. Under the circumstances, the mother maintaining an action to secure his share, before it is thus depleted, can only be seen to be acting on his behalf and for his interest and benefit. It is, therefore, for the Defendants to specifically show absence of such interest or an act adverse to such interest. A mere fact that the mother sues on behalf of the minor does not show any act against the interest of the minor or even in her own interest. As observed in the case of *Kakumanu* (supra) a minor has to sue

through the next friend and the expression by such person that the suit is instituted for the benefit of the minor has to be accepted by the Court in the absence of any factor showing otherwise. The observation of the Apex Court in Para-12 of the judgment that "the Court is not in the position of a super-guardian of a minor expressing on his behalf an Indention to become divided" tells it all. Consequently, the observation that intention is expressed by some other person and the function which the Court exercises is merely to decide whether that other person riffs acted in the best interest of the minor in expressing on his behalf an intention to become divided itself shows the limited role which the Court is required to play.

13. This has to be considered alongside the fact that there is no dispute between the parties with regard to the coparceners in the HUF or factum of the HUF itself. There is a specific admission that the Plaintiff is a coparcener and even an offer to take custody of the Plaintiff to live jointly with the other co-parceners is made to Court. The Suit is for partition and the very Suit denotes intention of the Plaintiff to sever his status as a coparcener in the HUF. It is, therefore, of no use to say that it is not the intention of the minor but that of his mother. It has to be so. If it is not shown to be against the benefit of the minor, partition has to be granted.

14. Further in the case of Puttarangamma and Others Vs. M.S. Ranganna and Others, it is held that a member of HUF can bring about separation in status by a declaration of such an intention to separate from the family and enjoy his share in severalty even without filing a Suit. In view of the aforesaid two judgments of the Supreme Court, the Bombay High Court in the case of Narayan Ramachandra Katkar and Others Vs. Arjun Bhimrao Gore and Others, held that a minor can sue for partition. The decision in the case of Araj N. Kulkarni (supra) has been held to be not good law. In that case the question of bar of limitation also had to be considered in view of certain major children in the HUF but with which this case is not concerned.

15. Consequently, it is seen that the minor can sue for partition or be maintained out of HUF whilst it remains joint. Of course, the option exercised by the Plaintiff and the bona fide offer made to have his share deposited in the Court would not entitle the Plaintiff to be further maintained out of the HUF funds. His claim for maintenance gets crystallized in the 1/6th share. This share is required to be determined.

16. For determining and setting apart, the minor's 1/6th share, the valuation of the HUF properties is required to be considered. The minor's 1/6th share in the HUF is required to be ascertained. Once that is done, the other interim reliefs applied for in the Notice of Motion more specially the relief of Court Receiver need not even be granted.

17. Counsel OJJ behalf of the parties have addressed the Court with regard to the valuation of the HUF shown as such in the income tax returns from year to

year by the Karta, Defendant No. 2.

18. Three main divisions of the movable, immovable, tangible and intangible properties of the HUF arise as follows:

(i) Two flats and another half share in one flat (being two and half in flats at Nehru Road. Vile Parle (East).

(ii) Shares in Gayatri Impex Private Limited.

(iii) Other investments, loans and advances shown in the balance-sheet of the HUF as on 31-3-2008 produced by the Defendants.

19. Re: Immovable property at Vile Parle (East): The Ready Reckoner is the accepted mode of determining the valuation except when the market value exceeds such valuation in case of a specific property on a given date or if an instance of sale of a property in that area is shown. The valuation in the latest Ready Reckoner is produced by the Defendants. Two flats have been used as office premises of Wadhwa Business Centre which is the business of the HUF. The residential premises are shown to be valued at Rs. 73,000/- and the office premises are shown to be valued at Rs. 1,02,000/- per sq. meter in the Ready Reckoner. The Counsel on behalf of the Plaintiff upon calculation states that the valuation of the two flats used as office and half share in one flat which is residential is Rs. 87.50 Lakhs. The Counsel on behalf of the Defendants states that all these flats are in residential building and hence only the valuation as residence must be taken into account from the Ready Reckoner. The premises are shown by the Defendants themselves in their Affidavit as a Business Centre premises. They are to be valued for determining their market valuation as per their user. Hence the above valuation must be taken to be correct.

20. Reshares of Gayatri Impex Pvt. Ltd. This is not a listed Company. It carries on business in a rented premises. Defendant No. 4, is stated to be the tenant. Hence the balance-sheets of the Company do not reflect the valuation in respect of the tenanted premises of that firm. 42% of the shares of that firm are held by the HUF. Hence these shares are shown as an investment in the balance-sheet of the HUF. The latest balance-sheet shows the valuation of the shares to be Rs. 51,000/-. The number of equity shares of the Company is 120. The shareholding of the HUF in the Company is 42%. Hence the valuation of 51 shares constituting the shareholding of the HUF is shown at the flat rate of Rs. 1000 per share. It is argued on behalf of the Defendants that such valuation has been shown because there are two main liabilities of the said Company. One is certain Bonds issued to the Custom Department of Rs. 1.5 Crores. The other liability is towards the BMC charges in certain hoardings which is shown to be Rs. 75 Lakhs. These are shown as contingent liabilities in the balance-sheet of the Company. The notes to the accounts show that these contingent liabilities are not provided for in the accounts as the Company has disputed the liabilities. The notes show that they would be accounted for as and when determined. That is indeed the correct mode of accounting. However, if that mode is accepted, the valuation of the

shares of the Company when the liability is of a contingent nature and not crystallized cannot be depleted to show a lesser valuation.

21. It is contended on behalf of the Plaintiff that the Bonds which are issued in favour of the Customs Department are issued in the normal course of business of any Company importing goods and liable to pay customs duty. That liability has to be determined only if and when the precise customs duty is payable and is, therefore, shown as contingent liability and is, therefore, not such as would devalue the shares. Consequently, the lump sum arbitrary valuation of Rs. 51,000/- shown as the 42% share of the HUF in the balance-sheet of the HUF4 cannot be accepted. The valuation of the shares would have to be determined as accounted for.

22. This valuation is shown to be Rs. 1,33,41,879 as shown in the certificate of the Chartered Accountants R.P. Gandhi & Company dated 13-9-2008 produced by the Defendants themselves. 42% of the said valuation is that of the shares belonging to the HUF. That would be Rs. 56,03,589/-.

23. Re: Other investments and advances: The other advances in the HUF are shown to be certain silver utensils, jewellery, Sri Nikita Construction and various loans and advances. The figures mentioned in the last returns filed by the HUF are required to be accepted as these holdings do not have a grossly divergent market value. The Plaintiffs Counsel accepts the said valuation. The valuation in the balance-sheet is Rs. 96,62,391/-.

24. The total of the aforesaid three items is the net worth of the HUF at Rs. 2,40,15,980/-. The Plaintiff accepts the valuation.

Hence, the order:

(1) 1/6th share in the minor being Rs. 40,02,663/- shall be deposited by the Defendants in this Court within 8 weeks from today.

(2) Both the Counsel agree that the said amount shall be invested in any Nationalized Bank during the minority of the Plaintiff.

(3) It shall not be allowed to be withdrawn by the Plaintiff for his maintenance out of the HUF funds during his minority if the Plaintiff is otherwise maintained by his father.