
(1987) 02 CAL CK 0017
In the Calcutta High Court
Case No : A.F.A.D. No. 108 of 1966

Benoy Krishna Tewary and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 05-02-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 1987 Cal 190 : 91 CWN 1074

Hon'ble Judges : Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : S.B. Bhunia and P.R. Mitra, for the Appellant; A.N. Banerjee and Amit Lahiri, for the Respondent

Final Decision : Allowed

Judgement

A.M. Bhattacharjee, J.—The trial court having decreed the suit for partition on the finding that the suit-properties are Mitakshara coparcenary properties and the appellate court having dismissed the suit on reversal of the finding, the only question involved in this second appeal is whether the suit properties are Mitakshara coparcenary properties as found by the trial Judge or are separate properties as held by the appellate Court. There does not appear to be any misapprehension of the relevant laws either by the trial court or by the appellate court. But we are satisfied that there has been such serious misreading of the relevant portions of the plaint and the evidence by the appellate court as to have amounted to "no-reading" at all warranting our intervention in second appeal u/s 100 of the Civil P.C., as it stood before the Amendment of 1976, governing this appeal.

2. Parties, though residing for generations in the Dayabhagi State of Bengal (now West Bengal), are still governed by the Mitakshara School of Hindu Law having migrated from a Mitakshara State. As is well-known, as the domicile of origin attaches to a person wherever he goes until he accepts a new domicile of choice, the original school of law also continues to govern a migrating Hindu family,

wherever it goes, until it adopts another school of law operating at the place of its new settlement. Both the courts below have proceeded on the basis, and in our view rightly, that the parties having migrated from Uttar Pradesh to West Bengal are still governed by the Mitakshara School of Hindu Law, they not having adopted at any stage the Dayabhaga School of Hindu Law prevailing in West Bengal.

3. It is the categorical case of the plaintiffs in para 4 of the plaint that the suit properties are "Coparcenary ancestral properties" that they have acquired interest therein by "right by birth" (Janmadhikar Bale), by right of survivorship (Uttarjibi Sutra) and that the properties were "Paitamahik Sampathi". It should be noted that the Sanskrit word for ancestral is Paitamaha, meaning belonging to Pitamaha. This word Pitamaha, though ordinarily applied to the father's father, means in the plural number, all the paternal male ancestors of the father in the male line, how high so ever (Sarkar-Sastri's Hindu Law -- 8th Edition -- page 257).

4. These averments in the plaint have not been controverted by any of the principal defendants who all are members of the joint family. In view of these clear assertions, it is difficult to understand as to how the appellate court could find it to be the "plaintiff's positive case that the suit plots have been acquired by the plaintiff 1 with the aid from the ancestral properties that had come to his hand" and could transpose to and impose on the plaintiffs the onus to prove such acquisition. In the evidence also, the plaintiff 1, as PW-3, clearly stated that his "grandfather and his forefathers acquired the suit properties" and that his "father had no capacity to acquire the suit properties". The appellate court has dismissed the suit on the ground that the plaintiff could not discharge the onus to prove "the plaintiff's positive case" that the suit-properties are coparcenary as having been acquired by the plaintiffs with the aid of the joint family fund. That being not the case of the plaintiffs either in the plaint or in the evidence, and the positive and consistent case of the plaintiff being that the properties were acquired by their grandfather and his ancestors and that they have acquired interest therein by birth and by survivorship, the misreading by the appellate court of the pleading and the evidence palpably amounted to no consideration thereof and having thus vitiated the root of the matter and the entire process of reasoning of the appellate court, clearly warrants intervention u/s 100 of the Civil P.C., as it stood before the Amendment of 1976, by which this appeal is governed.

5. Once it is held, as was rightly held by the trial court, that the properties were ancestral or Paitamahik, the law is settled for about two thousand years that in those properties, the father and the sons acquire equal shares by birth -- "Tatra Syat Sadrisham Samwam Pituh Putrasya Chobhayo".

6. The appellate Court laid great stress on the fact that the suit properties are recorded in the R. S. Record only in the name of the plaintiff's father and not in the name of the coparceners and that, according to appellate court, militated against the coparcenary character of the properties. But it is undisputed that the

plaintiffs father, being the senior most male member of the family, was the Karta of the undivided family and recording of the properties in the name of the Karta alone, is in no way inconsistent with the coparcenary character of the properties, even if the Karta is not expressly described as the Karta in the relevant records. As was held by a Division Bench of the Oudh Chief Court in AIR 1927 27 (Oudh) , a Karta may still be held to have represented as the Karta, even though he has not been described as such in the relevant document or transaction.

7. We, therefore, allow the appeal, set aside the judgment and decree of the first appellate court and restore those of the trial court. No costs.

Ajit Kumar Nayak, J.

8. I agree.