

(2010) 06 BOM CK 0052
In the Bombay High Court
Case No : Second Appeal No. 149 of 1998

Bharat Vithal Sakhare

APPELLANT

Vs

Shankuntalabai Pulate and Chandrabhaga Dhokane

RESPONDENT

Date of Decision : 18-06-2010

Acts Referred:

Hindu Succession Act, 1956 — Section 23

Citation : (2010) 5 BomCR 695

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : C.S. Kaptan, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—This Appeal was admitted, inter alia, on the following substantial questions of law:-

(x) Has the learned Appellate Court not committed a serious error of law in holding that when there was only one male heir the right of any female heir to claim partition is not taken away by Section 23 of the Hindu Succession Act and the restrictions of Section 23 if not applicable in the above circumstances.

2. Hereinafter the parties are referred to as per their rankings as described in cause title of the suit.

3. Facts mentioned are: The plaintiff had filed Regular Civil Suit No. 474 /1985 in the Court of learned Civil Judge J.D. Pusad, Dist. Yavatmal, for partition and separate possession of her 2/9th share in the property, left behind by her father Vitthal Mahadji Sakhare, who owned following immovable properties

The land at village Pokhari, Tq. Pusad, Dist. Yavatmal

(a) S. No. 31/1 admeasuring H 4 = 49 R assessed at Rs. 9/-

(b) S. No. 40/1 admeasuring H 2 =46R assessed at Rs. 3.50

Land at village Kondhai, Tq. Pusad, Dist. Yavatmal

(c) S. No. 50/1 admeasuring H 7 =8R assessed at Rs. 7/-

(d) S. No. 50/2 admeasuring H 7 =8R assessed at Rs. 10/- (House property at village Pokhari, Tq. Pusad, Dist. Yavatmal)

(e) Plot No. 104 and 105 admeasuring 30" x 50" with house constructed on it bounded on North: Baburao Nagorao Hake, after the Road; On South - open land of Subhash Tukaram; on East Road, and after that house of Gangaram Mahadji Sakhare; on West Road and after that open land of Ukanda Laxman Fulate. The plaintiff also claimed mesne profit from defendant No. 1, who refused to partition the property as demanded.

4. The defendants resisted the suit stating that the Vitthal had partitioned the estate during his lifetime. It is contended that he had retained land S. No. 50/1 (c) to his share; and gave away (b) and (d) above; and as per partition allotment in the name of defendant No. 2 Bharat was entered in record of rights by ME 441 on 14.8.1974; and ME 493 dated 24.9.1974. Deceased Vitthal had only landed property S. No. 50/1 from 6.1.1970 and had no right over remaining property. Therefore, plaintiffs have no right to claim partition in respect of properties owned by defendant No. 2. Plots 104 and 105 i.e. house property did not belong to Vitthal and plaintiff has no right to claim partition in it.

5. Family tree for ready reference is as under:

6. The Trial Court in RCS No. 474 of 1985 partly decreed the suit decreeing that plaintiff shall take possession of 2/9th share in land S. No. 50/1 and house plot Nos. 104 and 105 (described above) and defendant No. 2 Bharat has 5/9th share; whereas defendant No. 3 has 2/9th share in above property.

7. The first Appellate Court allowed the appeal by holding that she is entitled to partition and separate possession to the extent of 2/9th share in all suit properties lands and house properties described above. It is main grievance of the appellant herein that cross-objections were not taken into consideration. Cross-objection in First Appeal are relevant to find out whether trial Court had based its findings upon evidence or to find out whether relevant admissible evidence was taken into consideration. The first Appellate Court was, therefore, required to consider Cross-objection.

8. Learned Counsel for the appellant Mr. C.S. Kaptan, made reference to the ruling in M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, , more particularly the observations made in para 12 thereof, which reads thus:-

12 A father in a Mitakshara joint family has undoubted right to divide the family property at any moment during his life, whether his sons consent or do not consent to the division. The only limitation on his powers is that the division directed by him must be fair one in which he gives his son an equal share with

himself.

Next reference is made to the ruling in Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, , in which the Hon''ble Supreme Court in Para No. 26 observed thus;

We must, therefore, hold that partial partition of properties brought about by the father between himself and his minor sons cannot be said to be invalid under the Hindu law and must be held to be valid and binding. We wish to make it clear that this right of the father to effect a partial partition of joint family properties between himself and his minor sons, whether in exercise of his superior right as father or in exercise of the right as partia potetas has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition if the partition is not fair and just.

9. Learned Counsel for appellant also placed reliance on Kalloomal Tapeswari Prasad (HUF), Kanpur Vs. Commissioner of Income Tax, Kanpur, . In Para No. 26 thereof, the Hon''ble Supreme Court it is held under Hindu law "Partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it."

It is further held that Hindu law does not require that the property must in every case be partitioned by metes and bounds or physically into different portions to complete a partition. A declaration of intention of coparcener to become divided brings about severance of status and it is open to the parties to enjoy their share of property as tenants -in-common in any manner known to law according to their desire.

The learned Counsel then cited Para No. 33 of the ruling in Narashimaha Murthy Vs. Smt. Susheelabai and others, , which reads thus:.

33. The second question does not present much difficulty. On literal interpretation the provision refers to male heirs in the plural and unless the choose to divide their respective shares in the dwelling house, female heirs have no right to claim partition In that sense there cannot be a division even when there is a single male. It would always be necessary to have more than one male heir. One way to look at it is that if there is no male heir, the section is inapplicable, which means that a single male heir cannot resist female heir''s claim to partition. This would obviously bring unjust results and intendment least conceived of as the underlying idea of maintenance of status quo would go to th winds. This does not seem to have been desired while enacting the special provision. It looks nebulous that if there are two males, partition at the instance of female heir could be resisted, but if there is one male, it would not. The emphasis on the section is to preserve a dwelling house as long as it is wholly occupied by some or all members of the intestate''s family which includes male or males. Understood in this manner, the language in plural with reference to male heirs would have to be read in singular with the aid of the provisions of the General Clauses Act. It would thus read to mean that when there is a single male

heir, unless he chooses to take out his share from the dwelling house, the female heirs cannot claim partition against him. It cannot be forgotten that in the Hindu male -oriented society, where begetting of a son was a religious obligation for the fulfilment of which Hindus have even been resorting to adoptions, it could not be visualised that it was intended that the single male heir should be worse off, unless he had a supportive second male as a Class I heir. The provision would have to be interpreted in such manner that it carries forward the spirit behind it. The second question would thus have to be answered in favour of the proposition holding that where a Hindu intestate leaves surviving him a single male heir and one or more female heirs specified in Class I of the Schedule, the provisions of Section 23 keep attracted to maintain the dwelling house impartible as in the case of more than one male heir, subject to the right of re-entry and residence of the female heirs so entitled, till such time the single male heir chooses to separate his share; this right of his being personal to him, neither transferable nor heritable.

10. It is main grievance of the appellant (original defendant No. 1) that the appellant's Cross-objection/Cross appeal was not at all taken in the cognizance while deciding the appeal by first Appellate Court. (vide Ground No. 4 in the Memo of Appeal).

11. Under these circumstances, the interest of justice would be subserved if the questions of law raised and grounds in cross appeal/objection by appellants herein are considered by the first Appellate Court afresh according to law, so as to decide the First Appeal according to law. For the above reasons, following order is passed:-

The judgment and order impugned herein is reversed and set aside with direction to the first Appellate Court (District Judge, Washim) to consider the cross appeal / objections and questions of law and facts raised by appellant herein, frame issues and to determine the same in accordance with law after giving opportunity of hearing to the learned Advocates for respective parties. Parties and their Advocates to appear before the learned and District Judge, Washim on 2August, 2010 at 11.00 a.m.

The Appeal is allowed accordingly.