
(1965) 10 AHC CK 0001
In the Allahabad High Court
Case No : Second Appeal No. 660 of 1957

Hardeo

APPELLANT

Vs

Mahadeo and another

RESPONDENT

Date of Decision : 07-10-1965

Acts Referred:

Citation : (1965) 10 AHC CK 0001

Hon'ble Judges : H.C.P. Tripathi, J

Bench : Single Bench

Advocate : Rajeshji Verma, for the Appellant; R.B. Misra, for the Respondent

Final Decision : Allowed

Judgement

H.C.P. Tripathi, J.—This is a plaintiff's appeal.

2. The plaintiff-appellant instituted a suit against the defendants on the allegations that the parties were real brothers, that the plaintiff's share in the house and the land in front of the same was one-third and that it be partitioned and given over in his possession. The defendant-respondents resisted the suit on a variety of grounds.

3. The trial court held that the house in dispute was an ancestral property of the parties in which the plaintiff-appellant had one-third share and therefore decreed the suit in terms of the relief claimed in the plaint.

4. On appeal the learned civil Judge took the view that as the plaintiff-appellant had claimed partition of only a part of the joint family property the suit was not maintainable. He, therefore, did not go into the question of jointness of the property in suit and left the same open but allowed the appeal and dismissed the suit on the ground that it was barred by the principle of law that joint family property cannot be partitioned piecemeal. This appeal is directed against the order.

5. I have heard the learned counsel for the parties.

6. The learned Civil Judge has given no finding as to what were the other item of the joint family property which were left out of partition in the suit. He has relied on paragraph 4 of the plaint in which it has been alleged that the agricultural Khata of the parties was still joint but they were in separate possession of plots by mutual agreement, for holding that some joint family property had been left out of the suit. The allegation referred to by the learned Civil Judge does not show as to what was the nature of the agricultural holding. If the holding consisted of Sirdari plots it could not have been partitioned through Civil Court on the date when the Civil Judge pronounced his judgment i.e. 2-2-1957. Therefore it is not clear as to what was the nature of the property which had been left out of the suit and as to whether the plaintiff could have sought its partition in the instant suit. In the circumstances, in my opinion, the learned Civil Judge ought to have remanded the case to the trial court for allowing the defendants to raise the plea of partial partition in their written statement which had been erroneously disallowed by the learned Munsif and then to have taken evidence from the parties in respect, of that plea and thereafter to have decided the case on merits.

7. It is true that while seeking partition of joint family property the plaintiff has to throw the entire property in hotch-pot but it is also true that there are certain recognised Exceptions to this general rule. In *Jagannath v. Diccession Corporation*, ILR 29 Pat 1065, it was held by a Division Bench of the Patna High Court that:

If a partition is sought through the intervention of the court, the general rule is that the entire joint property owned by the co-owners, whether as joint tenants or tenants-in-common, must be brought into hotch-pot for division by the court, but this rule is subject to certain qualifications, as for instance, where different portions of the joint property lie in different jurisdiction.....

7A. In the instant case the evidence on the record is insufficient to show as to what were the joint properties of which the parties were possessed of and whether they were capable of partition by a civil court. It must, therefore, be held that the order dismissing the suit on this ground is unsustainable.

8. Accordingly I allow the appeal, set aside the decree of the learned Civil Judge and remand the case to the trial court with a direction that it will allow the defendants to raise the plea of partial partition as they had sought to do by their application No. 21-A (of the record of the trial court) and shall permit the parties to lead evidence in respect of that specific plea and then shall decide the case on merit after hearing them. Parties are directed to bear their own costs throughout.