
(1960) 11 MP CK 0037
In the Madhya Pradesh High Court
Case No : S.A. No. 321 of 1958

Hazarilal Hariram and Another	Vs	APPELLANT
Nathmal Champalal and Another		RESPONDENT

Date of Decision : 29-11-1960

Acts Referred:

Citation : (1961) JLJ 227 : (1961) MPLJ 350

Hon'ble Judges : K.L. Pandey, J

Bench : Single Bench

Advocate : R.S. Dabir, for the Appellant; A.P. Sen, for the Respondent

Final Decision : Allowed

Judgement

K.L. Pandey, J.

This is a plaintiffs' appeal against the reversing decree of the lower appeal Court by which their suit for a declaration that the disputed house is the joint family property of themselves and the defendant No. 2, that the decree for pre-emption, which the defendant No. 1 obtained against the plaintiff No. 2 and the defendant No. 2 in Civil Suit No. 92 of 1947 dated 10th April 1950 does not bind the plaintiffs and that the defendant No. 1 is disentitled to execute that decree.

Hazarilal (plaintiff No. 1) and his two sons, Sardarmal (plaintiff No. 2) and Bagmal (defendant No. 2) are members of a Hindu joint family. By a sale deed dated 5th August 1947, the disputed house was acquired in the names of Sardarmal and Bagmal. Nathmal (defendant No. 1) filed Civil Suit No. 92 of 1947 against them and obtained a decree for pre-emption which was affirmed in two successive appeals.

Hazarilal and Sardarmal have assailed the decree in the pre-emption suit mainly on two grounds. The one is that the disputed house was acquired for the joint family with joint family fund and Hazarilal is, therefore, a joint owner of the house. Since he was not made a party to the pre-emption suit, the decree

obtained therein does not bind him. The other ground is that throughout the proceedings in the pre-emption suit, Sardarmal was a minor and was not represented by any guardian-ad litem because he was fraudulently shown to have attained majority. In consequence, the decree is a nullity.

While the Court of first instance found in favour of the plaintiffs the lower appeal Court, while affirming the findings of fact that the disputed house was acquired for the joint family with joint family fund and that Sardarmal was a minor throughout the proceedings in the pre-emption suit, reversed the decree on the ground that Bagmal was the karta of the family and, in that capacity, he represented in the pre-emption suit all the members of the joint family.

The two Courts below have found that the plaintiff No. 2 was a minor on the date on which the pre-emption suit was finally decided. Since he was a defendant in that suit and a guardian-ad litem was admittedly not appointed to represent him at any stage, the decree passed against him must be regarded as a nullity.

Since the lower Courts have found that the disputed house was acquired with the aid of joint family fund for the joint family of the plaintiffs and the defendant No. 2, the question is whether, in the pre-emption suit, the defendant No. 2, who has been held to be the karta of the family, acted on behalf of the minor plaintiff No. 2 in his interest and also with the assent of the plaintiff No. 2. Only when it is alleged and proved that the defendant No. 2 acted in that manner could the decree in the pre-emption suit bind the other two members of the family: AIR 1927 56 (Privy Council) . In this connexion, I may also notice three other principles which are equally well established. The consent of the adult members need not be express and may be implied from conduct and other circumstances of the case. It is also not necessary that the manager, who is sued in a representative capacity, should be described as such in the pleadings and that fact can be established by other evidence including the record of the suit. Finally, the fact that, besides the manager, some other members of the family were added as parties will not necessarily lead to the conclusion that the manager was not sued in a representative capacity. But the rule in the Privy Council case will not apply when a decree is obtained against individual members of the joint family as such.

Although the learned Judge of the lower appeal Court accepted that the pre-emption suit was brought against the plaintiff No. 2 and the defendant No. 2 who were vendees of the sale sought to be pre-empted, he was of the view that since the defendant No. 2 was the karta of the joint family, it should be presumed that he "continued undisturbed as manager in the proceedings of the previous case also". It is not that even the karta of a joint family cannot be sued in his personal capacity. The question is whether, having due regard to the principles already mentioned and the circumstances of the case, the defendant No. 2 could be regarded as having been sued in his representative capacity. In the first place, this is what was pleaded in this suit by the defendant No. 1:

The house in dispute was purchased by the plaintiff No. 2 and the defendant No. 2 in their individual capacities as their separate property. It was not the joint family property. Therefore the plaintiff No. 1 has no share in it. In any case, the defendant No. 2 was also the karta of the joint family. The decree passed against the defendant No. 2 would also be binding upon the plaintiff No. 1.

There is in this statement only a mention of the fact that the defendant No. 2 was the karta and no specific plea that the earlier action was brought against him in his representative capacity. Secondly, it would appear from the final judgment in the pre-emption suit, Ex. D-1, that the plaintiff No. 2 and the defendant No. 2 all along contested the suit on the ground that it was bad for non-joinder of a necessary party, namely, the plaintiff No. 1. The defendant No. 1 successfully met the contention for persuading the Court to accept that the plaintiff No. 2 and the defendant No. 2 had acquired the house as their separate property. This is what was observed in second appeal:

It has been made clear by the defendants Nos. 1 and 2 themselves by their reply dated 8-10-1947 (Ex. D-3) in which they did not say that it was family (sic) who had purchased the house, but have admitted that they alone were the purchasers. It must appear that there is nothing to prevent a member or members of a joint family from acquiring separate property. In the circumstances, it is futile to urge that the father of the defendants Nos. 1 and 2 was a necessary party.

For these two reasons, it must be held that the defendant No. 2 did not occupy a representative character in the pre-emption suit.

Assuming that the plaintiff No. 1 was a necessary party to the preemption suit even though the joint family property was acquired in the names of the plaintiff No. 2 and the defendant No. 2, the decree in that suit does not bind him (plaintiff No. 1), because he was not impleaded. In any event, as shown, the decree is a nullity so far as the plaintiff No. 2 is concerned. On this second ground alone, the decree in the pre-emption suit, which must stand or fall as a whole, cannot be sustained.

In the view that I have taken of this case, the appeal succeeds and is allowed. The decree of the lower appeal Court is set aside and the one passed by the Court of first instance is restored except in regard to costs. The defendant No. 1 shall bear his own costs and pay those of the plaintiffs throughout. The defendant No. 2 shall bear his own costs in all the Courts. Counsel's fee here according to schedule.