(1929) 12 PAT CK 0006

In the Patna High Court

Jyotibati Chaudharain APPELLANT

Vs

Lachhmeshwar Prasad Chaudhuri and Others RESPONDENT

Date of Decision : 02-12-1929

Acts Referred:

Citation : AIR 1930 Patna 260

Hon'ble Judges : Courtney-Terrell, C.J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an appeal by the defendant against the final decree in a suit for partition of joint family properties. There were four brothers: Debi Prasad Chaudhuri, Sital Prasad Chaudhuri, Chaturbhuj Sahay Chaudhuri and Matukdhari Prasad Chaudhuri. Debi Prasad Chaudhuri and his son Girdhar Gopal Chaudhuri are the defendants first party in the present suit. Sital Prasad Chaudhuri admittedly separated from the joint family in the year 1894, and Matukdhari Prasad Chaudhuri similarly separated in the year 1901. The plaintiffs are the sons of Chaturbhuj Sahay Chaudhuri, who died in 1310 Fs.

2. It appears that previously in the year 1911 defendant 1 instituted a suit for partition of the joint family property against the present plaintiffs. An objection was taken by the plaintiffs, as defendants in that suit, to the effect that all the joint family properties had not been included in the suit. This objection prevailed, and the suit was dismissed by the Subordinate Judge on 8th May 1913, and this decree was upheld by the Calcutta High Court in January 1916. The present suit was instituted by the plaintiffs on 19th November 1917. In para 5 of the plaint, the plaintiffs stated that defendant 1, Debi Prasad Chaudhuri had "been up to the present day the head member and the manager of the joint family." The plaintiffs asked for partition and for taking of an account from defendant 1 as the karta of the family, and they alleged that according to their estimate a sum of Rs. 3,000 would be found to be the share of the plaintiffs on a proper taking of the accounts. The defendant in the written statement alleged that the family was no longer a joint family and that the parties had separated and were in enjoyment

of their respective shares of the joint family properties and, further, that the defendant was not liable to render any account to the plaintiff.

3. Upon the pleadings various issues were raised. Issue 3 was: are plaintiffs and defendant 1st party joint; and issue 6 was: whether defendant 1 is liable to render account. There was also an issue as to whether the suit was barred by limitation. The learned Subordinate Judge in his preliminary decree, which was passed on 25 April 1919, found issue 3 in favour of the plaintiffs and held that the parties continued to be joint all along, and that the plaintiffs and defendants 1st party were still joint. As regards issue 6, the learned Subordinate Judge held that defendant 1 was liable to render account, and that the nature of the account which defendant 1 was liable to render was upon the principle laid down by the Calcutta High Court in Parmeshwar Dube. v. Gobind Dube [1916] 43 Cal. 459 where it was held that in an ordinary suit for partition of joint family property, in the absence of fraud or other improper conduct, the only account the karta if liable for is as to the existing state of the property divisible, and the enquiry directed by the Court must be in the manner usually adopted to discover what in fact the property now consists of. On the question of limitation, the learned Subordinate Judge hold that, as the parties were still members of a joint family, there could be no limitation. He accordingly made a preliminary decree for partition, and directed the appointment of a commissioner to take account and to effect the partition. Against this decree the defendant came in appeal to this Court. It was contended on his behalf that there could be no decree for account as against him as the institution of the privious suit of 1911 operated as a partition between the parties. This Court then held that, although the institution of a partition action operates as a separation in interest between the parties; but until the karta of the joint family has accounted to the coparceners for the joint family assets that are in his hands the liability to account continues. Their Lordships, therefore, upheld the decree of the Subordinate Judge as regards the rendering of account.

4. They, however, observed that the accounts should be taken on the basis of the decision of this Court in the case o? Gobind Dubey and Others Vs. Parmeshwar Dubey and Others, . The case was, however, remanded to the Subordinate Judge for a finding as, regards ornaments and certain bonds On remand the learned Subordinate Judge decided the points referred to him and appointed a commissioner to effect the partition and to take account. The commissioner took more than two years to make his report which was submitted on 8th September 1924. He reported that defendant 1, was liable to pay a sum of Rs. 60,426-1-11? to the plaintiffs as their share of the joint family properties over and above the existing properties which he partitioned between the parties. This sum of Rs. 60,426 and odd is made up as follows: income from milkiat properties: Rs. 22,335-15-11? bonds 41,432 out of which the commissioner allotted to the plaintiffs bonds of the value of Rs. 5,000 and made a decree against the defendants for Rs. 36,432-5-0, and moveables and other articles Rs. 1,657-13-0. Objections were taken to the commissioner''s report by both the plaintiffs as well

as the defendants. The learned Subordinate Judge disallowed all the objections of the parties and affirming the commissioner''s report made a decree in terms thereof. The present appeal is directed against this final decree.

5. The points taken by the learned advocate for the appellants raise questions of principle, and although some of the points do not appear to have bean takeru before the Subordinate Judge in the form in which they are now taken before us, it is necessary that those points should be decided in the present appeal.

6. The first point is as regards the interest awarded by the commissioner against the defendants. It appears that account was taken for the period from 1310 to 1331 Fasli. In calculating the income from the milkiat properties the method adopted by the commissioner was that; he found the total income of all the mouz is in the year and deducting therefrom collection charges at 10 percent and the total expenses found to have been incurred by the joint family in the year, he divided the balance equally between the plaintiffs and the defendants and charged interest at one per cent per mensem from the and of each year upon what he considered to be the plaintiffs'' share of the same. In this way interest has been calculated and awarded to the plaintiff''s upon their share of the net income of the milkiat properties, after the expiry of each year from 1310 to 1331 Fasli. Similarly, in dealing with the bonds the commissioner awarded to the plaintiffs interest as against the defendant on such sums as he found had been realized from the debtors by defendant 1 from the date of such realization up to 1331. The objection taken on behalf of the appellant is that the commissioner was wrong in awarding interest to the plain tills on the income of each year and also on the sums realized by defendant 1 under the bonds from debtors. It is contended that the nature of the account which a karta of a joint Hindu family is liable to render at the time of partition of the joint family properties is not trio same as an account which an agent or a trustee is liable to render. The question was considered by the Calcutta High Court in the case of Parmeshwar Dube v. Gobind Dube [1916] 43 Cal. 459 where Fletcher, J., after considering all the authorities on the point, observed as follows:

The result of these authorities I think is that in an ordinary suit the partition in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible. The parties have no right to look bacK and claim relief against past inequality of enjoyment of the members or other matters.

His Lordship then proceeded to observe:

But of course this does not mean that the parties are bound to accept; the statement of the karta as to what the properties consist of. That would not be an account at all. The karta is the accountable party and the enquiry directed by the Court must be conducted in the manner usually adopted to discover what in face the property not what the karta says it now consists of.

7. This case of Parmeshwar Dube v. Gobind Dube [1916] 43 Cal. 459 came up to

this Court after the final decree had been made in the suit and the judgment of this Court is reported in Gobind Dubey and Others Vs. Parmeshwar Dubey and Others, . Their Lordships referred to the observations of Fletcher, J., quoted above and observed as follows:

The karta of a joint Mitakshara Hindu family is not accountable for the rants, issues and profits, which came into his hands during his management of the properties as karta. But he is till bound to keep true and correct accounts and to show the savings effected from the income of the joint family properties.

8. And as regards the nature of the account which the karta is liable to render, their Lordships observed that; although a karta is neither a trustee nor an agent in the strict sense of those terms, but, as it is his duty to conserve the joint family properties and to disclose those properties to the members of the joint family at the time of partition, there is no reason why the rule charging a trustee for his tortious acts should not be applied to a karta who by his tortious acts, had made it impossible for the plaintiffs to discover his properties. This Court, therefore, in the case cited above held that the nature of the account which a karta is liable to render is not an account "which a trustee or an agent is liable to render but the object of the taking of the accounts is to discover what are the joint family properties liable to be partitioned.

9. The case now before us previously came before a Division Bench of this Court in connxion with the question as regards the court-fee payable by the appellants on the memorandum of appeal and the decision is reported in Jyotibati Chowdharain v. Luchhmeshwar Prasad AIR 1930 Pat. 1. There also it was held that no member of a joint family can ask for an account as against the karta of the family of a proceeding period, except for the purpose of determining the properties including cash in the hands of the karta so as to be available for partition.

10. It is thus clear that the principle upon which the commissioner and the Subordinate Judge have proceeded in awarding interest against defendant 1 on the annual savings is not a correct one. This principle presupposes that each member of a joint Mitakshara Hindu family was entitled to ask the karta to hand over to him his share of the savings of the joint family property at the end of each year. The effect of the decree made by the Subordinate Judge allowing interest against the karta from the end of each year amounts to saying that there was a partition of the joint family properties in the year 1310 and that at the end of that year defendant 1 was liable to make over to the plaintiffs their share of the savings, and that as he failed to do so, he was liable to pay interest thereon. This view is clearly wrong; and Mr. Janak Kishore on behalf of the respondents fairly concedes that he is not entitled to interest from the end of the year 1310. His contention, however, is that the family became separate either on 31st August 1911 when the previous suit for partition was instituted by defendant 1, or, in any event, on 19th November 1917 when the present suit for partition was instituted. He contends that the institution of the suit by defendant

1 in August 1911 had the effect of bringing about a separation and the joint family ceased to exist from that date, and, therefore, the plaintiffs became entitled to receive their share of the income of the joint family properties from that date, and as the defendant withheld such income from the plaintiffs he was liable to pay interest upon that sum from that date. He refers to the observations of the Privy Council in Kawal Nain v. Budh Singh AIR 1917 P.C. 39 where it was held that the institution of a suit for partition by one of the members of a Hindu joint family governed by the Mifcakshara Law amounted to an unequivocal desire of the plaintiff for separation, and effected his separation from the joint family, and ''that it was immaterial in such a case whether the cosharers assented thereto; and Viscount Haldane in delivering the judgment of the Board observed that

a decree may be necessary for working out the result of the severance, and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequently judgment or not.

11. There can be no doubt that the institution of the suit of 1911 did in law operate as a cessor of the joint family. It is, however, not open to the plaintiffs in the present appeal to contend that the family ceased to be a joint family in the year 1911. Para. 5 of the plaint to which I have already referred clearly state that:

Defendant 1, the eldest of all the brothers, was during the lifetime of the plaintiffs'' father and even after his death, has been up to the present day the head member and the manager of the joint family.

12. Furthermore, the preliminary decree made by the Subordinate Judge in the present suit proceeded on a clear finding that the plaintiffs and defendant 1 party were still joint. It is not open to the plaintiffs now to go behind the preliminary decree. They are bound by that decree, and it must be held that the plaintiffs and defendant 1 were members of the joint family up to the date of the institution of the present suit. It is noteworthy that in the appeal to this Court against the preliminary decree the contention of the defendant was that the family was no longer a joint family and this contention was not accepted by the present plaintiffs then. However, the preliminary decree in the present suit operates as a bar to the plaintiffs claiming that there had been a separation in the year 1911. The plaintiffs are, therefore, not entitled to interest on the savings of the joint family income from the year 1911. As regards the contention of the respondents that in any event separation took place on 19th November 1917 when the present suit was instituted, it is sufficient to say that although separation in law took place on the institution of the present suit, the defendant is liable to pay interest only on the sum that, may be found due from him after taking of accounts, viz., from the date of the decree. Therefore the first contention of the appellant must prevail, and it must be held that the defendant is not liable to pay interest on the savings from the milkiat properties from the

end of each year from 1310 to 1331 Fasli as has been done by the commissioner and affirmed by the Subordinate Judge.

13. The next point relates to the interest on the bonds realized by defendant 1. Here also the commissioner has fallen into the same error. It is clear that the sums realized by defendant 1 as the karta of the joint family were realizations on behalf of the joint family. In this case there is no allegation of any misappropriation or fraud against the karta as regards the income of the milkiat property or of the sums realized by him from debtors under bonds, and for the reasons given above the karta is liable to interest only on the total amount found in existence at the date of the partition decree and he cannot be made liable for interest on the sums realized by him from the debtors. In taking the final account therefore the Court below will only determine the amount in the hands of the karta from the actual income and no interest will be allowed against him except on the total sum that may be found payable by him to the plaintiffs as their share of the joint family properties.

14. The next point raised on behalf of the appellant is as regards the expenses. He concedes that the total receipts as found by the commissioner must be accepted as correct but he contends that in making deduction for expenses the commissioner disallowed certain items without assigning any reason therefor. Here also it is to be noted that in taking an account from the karta of the joint family for the purposes of partition it is not open to any member of the family to assert that any particular item of expenditure incurred by the karba was improper. What can only be shown is that no such expenditure was as is matter of fact incurred. The propriety of the expenditure cannot be questioned by any member of the joint family. The commissioner was therefore not justified in disallowing items of expenditure apparently on the supposition that such expenditure was not proper or legitimate expenditure. The expenses shown by the karta in his accounts must be taken to be proper expenses and the plaintiffs will be entitled to ask the Court to disallow any particular item of expenditure only on the ground that such expenditures was not as a matter of fact incurred.

15. The next point taken by the learned advocate for the appellant is that the commissioner was wrong in disallowing Government revenue and other public charges simply on the ground that the challans in respect thereof had not been produced. This contention also appears to be sound. It must be presumed that the karta of the family paid all the Government demands in respect of the properties in his hands otherwise the properties would have been sold for realisation of those demands. The mere fact of the karta not being able to produce the challans in respect thereof was not sufficient for disallowing those items. The Government revenue and other public demands will be presumed to have been paid by the karta and expenses on those accounts must be deducted from the income of of the property.

16. The next objection relates to certain barred debts. It appears that certain debts due to the joint family had not been recovered by the karta and became

time barred. The commissioner as well as the Subordinate Judge have made the defendant liable therefor. Having regard to the nature of the account which the defendant was liable to render it is clear that it was not open to the plaintiffs to ask relief against the karta on account of such, barred debts. There is no allegation of any fraud or dishonesty on the part of the karta and the karta cannot be made liable for such barred debts and no share on those barred debts can be decreed to the plaintiffs against defendant 1. The same observations apply to decrees obtained by the joint family but not realized by the defendant and no decree can be made in the present suit in favour of the plaintiffs for their share of the sums alleged to be due under those decrees.

17. The observations made above as regards interest on the savings from the milkiat income and on the sums realized from debtors under bonds apply to the sums withdrawn by defendant 1 from Bankers with whom money used to be kept in deposit. The commissioner has calculated interest as against defendant 1 on each sum withdrawn by defendant 1 from the Bankers from the date of such withdrawal. It is clear that this is wrong and the defendant was not liable to pay interest to the plaintiffs on the sums withdrawn by him from the Bankers.

The next point taken on behalf of the appellant is that the Commissioner took into account the money due under three bonds (Nos. 4, 5 and 7) although suits had been instituted on the basis of those bonds, decrees obtained and properties purchased in execution of those decrees and the parties were in possession of such purchased properties.

18. The learned Subordinate Judge in dealing with this objection observes that it appears that plaintiff has no share in the purchased properties. If the purchased properties form part of the joint family properties which have been partitioned between the parties then it is clear that the sums covered by those bonds Nos. 4, 5 and 7 cannot be taken into account over again. If he finds that no properties were purchased in execution of the decrees upon those bonds or that no share has been allotted to the plaintiff''s in the properties purchased in execution of those decrees then a share must be given to the plaintiff. If, however, properties were purchased in execution of those decrees and those properties form the subject matter of the partition the plaintiffs cannot be allowed to claim the money covered by those bonds over again.

19. The next point taken on behalf of the appellant is that the bonds which have been partitioned between the parties must be presumed to have been taken for sums advanced out of the savings of the milkiat income and so the total amount covered by the bonds should ''be deducted from the income of the milkiat properties. It is pointed out by the learned advocate for the appellant that the income from the milkiat properties as found by the commissioner for the period from 1310 to 1331 Fasli, is Rs. 23,352 and odd, the interest on bonds comes to Rs. 4,377 and odd and the principal amount of debt realized from debtors was Rs. 8,021 making a total income of Rs. 30,751. and the total amount of investments under the bonds was Rs. 22,252. It is, therefore, argued that this

sum of Rs. 22,252 must be presumed to have been advanced to debtors out of the income of Rs. 30,751 in the period from 1310 to 1331 Fasli. It is contended on behalf of the appellant that it is not suggested that the family had any other source of income, and the only legitimate inference that can be drawn is that the savings were invested in the bonds. Reference is also made to the observations contained in the order of remand of this Court where it is stated that if the commissioner finds that on the dates of the bonds there were funds in the hands of the defendant out of which the money in respect of the bonds could have been advanced then he will report that those bonds are a part of the joint family assets. Now, it is not contended by the appellant that the commissioner in taking the account has disallowed any item on the expenditure side which related to moneys advanced under bonds. The observations in the order of remand did not relate to this matter, but to the contention of the defendant that the bonds were executed in his favour after institution of the previous suit and that they ought to be excluded from partition. As it has not been shown that the sums advanced under the bonds were out of the savings from the income of the joint family which had not been taken into account it is clear that this contention of the appellant cannot prevail.

20. These are all the objections taken on behalf of the appellant and with the exception of the last mentioned objection they are bound to prevail. The result is that the decree of the Subordinate Judge will be set aside and the case remanded to him for taking of a fresh account in terms of the observations made above. The suit was instituted so far back as November 1917 and it is desirable that the Subordinate Judge should proceed to dispose of the case with as much expedition as possible.

21. The appellant is entitled to the costs of this appeal. Costs of the Court below will abide the result.

Courtney-Terrell, C.J.

22. I agree.

