(2008) 11 AHC CK 0068

In the Allahabad High Court

Moti Lal and Others APPELLANT

Vs

Suresh Chandra Jain and Others RESPONDENT

Date of Decision : 15-11-2008

Acts Referred:

Arbitration Act, 1940 — Section 20, 6, 8

Citation : (2008) 6 AWC 6313

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.U. Khan, J.—Heard learned Counsel for the parties.

This is defendants'' First Appeal arising out of O.S. No. 72 of 1974 filed by respondent No. 1 Suresh Chandra, son of Babu Lal against 23 persons for partition. Additional District Judge, Lalitpur through judgment and decree dated 30.03.1984 dismissed the suit against the defendant No. 21 and 22. However, the suit for partition was decreed against defendant Nos. 1 to 20. Plaintiff''s share was declared to be 1/15 in the properties mentioned in Schedule A and B annexed to the plaint. Suit for partition of agricultural properties was dismissed.

2. The relevant pedigree is given below in two parts:

Part A Hazarilal | -- | | | Motilal Phool Chand Babu Lal

Part B

Motilal --- | | | | | | Kundanlal Kapoor Chand Prakash Chand Raj Kr. Sheel Chand Veerendra Kr. | | | | | | Mahendra | Sushil Kr. | | --------------------------- | | | Rakesh Kr Papu Pawan Manoj

Phool Chand | Chhedi lal

Babulal -- | | | | | Suresh Chandra Prem Chand Subhash Chand Ravi Susheel Chand (plaintiff)

Hazarilal died in or about 1943 and left behind some properties movable as well as immovable. Immovable properties consisted of four houses and about 50 acres of agricultural land situated in village Bacharabani.

3. According to Para 2 of the plaint Hazarilal died as member of joint family and after his death his aforesaid three sons became joint owners in possession. According to para 3 of the plaint after the death of Hazarilal his aforesaid three sons remained joint and Motilal being eldest and more clever acted as Karta of the joint family. According to para 4 of the plaint Babulal father of the plaintiff joined Government service in 1945 and Motilal and Phool Chand looked after the family business (Babulal father of the plaintiffs was alive when the suit was filed and decided).

4. It has further been alleged in the plaint that inspite of the fact that Babulal was in Government service, income and expenses of all the three brothers remained joint and all the three constituted Joint Hindu Family; property and the business remained joint and from the joint funds a house bearing No. 35 Colonelganj, Lalitpur in the name of all the three brothers was purchased on o 27.09.1961.

5. It was further alleged in the plaint that the joint family in partnership with Gokul Das defendant No. 21 and MotiLal, son of Bihari Lal defendant No. 22 started the business in the name of Kalu Ram Raghunath Das in Lalitpur and the amount which was invested therein was of the joint family. It was further alleged that Babulal father of the plaintiff invested some amount which he had saved from his salary in the said firm from time to time and that Phoolchand on behalf of the joint family looked after the business of the said firm. In para 5 of the plaint plaintiff claimed that he had 1/21 share in the joint family properties given in schedule ''Aa'', ''Ba'' and ''Sa'' at the bottom of the plaint.

6. In para 6 of the plaint, it was stated that agricultural properties had been got partitioned through suit No. 29 of 1969-1970 decided on 29.08.1970, hence no relief was being sought for the partition of the agricultural properties.

7. At the time of institution of the suit and its decision all the three brothers i.e. Motilal, Phoolchand and Babulal were alive and impleaded as defendants in the suit.

In para 7 of the plaint it was stated that Motilal and Phoolchand became dishonest and started misappropriating the property of the joint Hindu family and on the instance of father of the plaintiff they agreed for partition of the family properties in 1965, however, thereafter, they refused to partition the properties and Phoolchand manipulated the documents of the shop/business which was being run in the name and style of Kalu Ram Ragunath Das and withdrew a lot of money from the business of the said firm and took away several documents from the said firm.

8. It was further stated that the earning of the firm were shown to have been deposited in the name of fake persons and were withdrawn by Phoolchand and plaintiff came to know about that when Phoolchand filed suit against other persons and entered into compromise in the said suit (O.S. No. 33 of 1969). It was further alleged that similarly Madanlal also sold remaining immovable properties of the joint family and retained the money with him and Madan Lal and Phoolchand withdrew the moneys from the joint family account and misappropriated them and Phoolchand from the joint family income purchased a plot situate at Station Road Lalitpur and thereafter sold the same and plaintiff is entitled to get share from the said amount also.

9. In para 8 of the plaint it was stated that in the firm Kalu Ram Ragunath Das which was started in or about 1950, an amount of Rs. 24,000/- was invested on behalf of the joint Hindu family. It was further stated that according to plaintiff''s estimate income of the joint Hindu family from the said firm was about 75,000/- for which even the other two partners of the firm i.e. defendant No. 21 and 22 were liable to give accounts as they were having accounts of the partnership.

10. In the relief Clause partition of plaintiff''s 1/21 shares was sought and accounting from defendant No. 21 and 22 was also sought.

11. In the entire plaint it was nowhere stated that the properties left behind by Hazarilal or any part thereof were inherited by Hazrilal from his father. The defence of Motilal and Phoolchand was that entire properties left behind by Hazarilal were his self acquired.

Phoolchand and Motilal filed different written statements. Phoolchand stated that complete pedigree was not given in the plaint however this fact was admitted that Haziralal had only three sons Motilal, Phoolchand and Babulal. Phoolchand further stated that plaintiff had not included huge property of his father Babu Lal and had also not shown the property and income of Ravi General Store, Llitpur.

12. It was further stated that Phoolchand had filed suit for partition of the house No. 35 Colonelganj, Lalitpur being O.S. No. 31 of 1968 and that the said house was not purchased from the joint family funds. It was further stated in para 31 of the written statement by Phoolchand that financial condition of his father Hazarilal was not much good and during his life time partition had taken place between him and his three sons and thereafter Phoolchand came to Lalitpur and from his own efforts he established the business and he invested his self earned money in the firm Kalu Ram Ragunath Das and no income of the joint family properties was invested in the said firm. Phoolchand further stated that since the life time of his father he completely separated himself from his brothers.

13. Motilal also filed written statement almost on the same pattern. He also stated that during the life time of Haziralal the three brothers had separated and Haziralal did not leave behind much property. Motilal denied that any immovable

property was left behind by Haziralal in the form of pronotes, ornaments and animals etc. It was specifically denied that all the three brothers ever constituted any joint family .

14. Babulal father of the plaintiffs completely supported his son by admitting the plaint case. Motilal had further stated that Babulal had got his signatures on some blank papers.

15. Learned Counsel for defendant appellant has mainly argued that first of all it has not been shown that Hazarilal had inherited from his father any of the properties left behind by him at the time of his death, hence no coparcenary came into existence even if the allegations made in the plaint are taken to be correct. In this regard it has further been argued that in the absence of coparcenary property, plaintiff cannot have any share as his father was alive till the decision of the suit. The second important argument is that even if it is assumed that there was a coparcenary still no such nucleus has been proved which could be sufficient to provide the initial alleged investment of Rs. 24,000/- in the firm.

16. As many as 25 issues were framed by the trial court. However, the main issue was issue No. 4 to the effect that whether properties mentioned in Schedule Aa, Ba and Sa are joint Hindu Family properties or joint ancestral properties as mentioned in the plaint. The said issue was tried alongwith issue n.13 which was to the effect as to whether partition had taken place among the three sons of Hazarilal during the life time of Haziralal as alleged in para 22 of written statement by defendant No. 1.

17. The trial Court has mentioned that there is no dispute that initially there was no joint Hindu Family which had joint ancestral property. Motilal and Phoolchand had alleged some partition in 1941-42 which could not be proved. The trial court placed reliance upon certain orders of 1962 and 1966 passed under Rent Control Act and an agreement of 22.04.1966 containing signatures of Motilal, Phoolchand and Babulal. Copy of an application u/s 20 of Arbitration Act which was registered as suit No. 24 of 1966 before District Judge Jhansi was also filed. In the said application the three brothers had agreed for referring the dispute to arbitrator.

18. However the trial court in respect of business carried out from the firm held that it was not started with the fund of joint Hindu Family or income from Joint Hindu Family property.

19. Hindu Succession Act, 1956 as amended from time to time particularly the amendment of 2005 has brought about some radical changes in the law of succession, particularly Sections 6 & 8 thereof. However, as in the instant case Hazari Lal, the common ancestor died in the year 1943, hence matter is governed by Classical Hindu Law un-affected by Hindu Succession Act, 1956.

20. A Hindu Coparcenary is a much narrower body than the joint family. It

includes only those persons, who acquire by birth an interest in the joint or coparcenery property (?211, Mulla''s Hindu Law, 20th Edition, 2007). In the same article, in the next paragraph, it has been stated as under:

To understand the formation of a coparcenery, it is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father''s father or father''s father''s father is ancestral property. Property inherited by him from relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grand sons or great grand sons, they become joint owner''s coparcenary with him. They become entitled to it due to their birth.

21. For these principles, reference may also be made to AIR 1969 SC 1330 C.N. Arunachala Mudaliar Vs. C.A. Muruganatha Mudaliar and Another, (Son can assert an equal right with the father only when the grand-father''s property has devolved upon his father and has become ancestral property in his ends) and the authorities mentioned in the aforesaid Article 211 of Mulla''s Hindu Law. It is also stated in the aforesaid Article 211 as follows:

Ancestral property is species of coparcenary property. As stated above, if a Hindu inherited property from his father, it becomes in his hands as regards his son. In such a case, it is said that the son becomes a coparcener with the father as regards the property so inherited and the coparcenary consists of the father and the son.

22. In view of the above, it is quite clear that unless it is held that the properties, left behind by Hazari Lal and inherited by his three sons on his death, were inherited by Hazari Lal from his father, the plaintiff cannot be said to be member of the larger Joint Hindu Family consisting of Hazari Lal and all his sons, grand-sons and great-grandsons. In view of other eventuality, plaintiff will be a member of narrower Joint Hindu Family consisting of his father and all the sons and grand-sons of his father. Accordingly, the suit is liable to fail unless it is proved that Hazari Lal inherited the properties from his father. If it is assumed that Hazari Lal left behind only self-acquired property, which was in possession of Motilal and Phool Chand, then only Babu Lal father of the plaintiff can have a right to seek partition but not his son, i.e. plaintiff.

23. Neither in the plaint nor in the oral statement of plaintiff, there is a single word to the effect that the properties mentioned in the different schedules of the plaint were inherited by Hazari Lal from his father. In this regard, the main emphasis of the plaintiff was and is on the fact that Moti Lal and Phool Chand in their written statements and oral statements admitted partition of some properties during the life time of Hazari Lal. In my opinion, this is not an admission of the fact that the properties mentioned in the plaint were inherited by Hazari Lal from his father.

24. Moreover, said assertion of partition was disbelieved by the trial court.

25. In this regard, learned Counsel for the plaintiff has invited the attention of the Court to certain parts of oral statement of Phool Chand as well as DW-3 Ram Charan and DW-4 Panna Lal. Phool Chand stated that total ancestral property was not with him as it had been divided and he was having only that property, which came to his share. The other two witnesses stated that all the three brothers had 40-50 acres of land.

26. Learned Counsel for the plaintiff has also placed reliance upon an agreement, which is stated to have been arrived at in between three brothers in early 1960s regarding partition of movable and immovable properties. It appears to be an agreement for appointment of arbitrator to divide the properties. It further appears that arbitrator did not divide all the properties particularly the movable.

27. If the three brothers agreed to divide the properties among themselves without mentioning that it was coparcenery property, it amounts to admission that property was joint but not coparcenery property. At that time all the three brothers were having sons, hence properties, if they were coparcenery properties, could not be divided among them per stripe. Every member of coparcenery including sons, grand-sons and great-grandsons have got right in the coparcenery property per capita and no one has got right per stripe. In a coparcenery property until partition, no member of coparcenery has got a definite share. The share varies on every death and birth.

28. It is also important to note that plaintiff was born after 5 or 6 years of death of Hazari Lal, his grand-father. He could not have any knowledge about the movable properties left beind by his grand-father. It was only his father, who could have such a knowledge. He did not opt to file the suit for the reasons best known to him.

29. The sole evidence on behalf of the plaintiff to prove that the properties included in the plaint were left behind by Hazari Lal was the above alleged agreement of the three brothers.

30. If the statement of the other two sons of Hazari Lal, i.e. Moti Lal and Phool Chand that partition took place is taken to be an admission of coparcenery in between Hazari Lal and his three sons, then it should be taken as a whole. Normally, admissions cannot be bifurcated and either they must be taken as a whole or not at all. If such statement amounts to admission of coparcenery, then if shall be taken along with its adjunct, i.e. partition. After partition coparcenary ceases to exist.

31. Accordingly, in my opinion, suit filed by the plaintiff was not maintainable.

Learned Counsel for the defendants Moti Lal and Phool Chand has also argued that plaintiff claimed 1/21 share, however without any reason the court below granted larger share, i.e. 1/15th share to the plaintiff.

32. As far as cross-objections are concerned, they are liable to be dismissed on the above findings. Plaintiff has not at all been able to prove that he has a birth

right in the entire property left behind by Hazari Lal.

33. As far as house situate in Colonel Ganj, Lalitpur is concerned, court below rightly held that the three brothers purchased it, hence it was joint property and not coparcenery.

33. It has been held in Chattanatha Karayalar Vs. Ramachandra Iyer and Another, and G. Narayana Raju Vs. G. Chamaraju and Others, that there is no presumption under Hindu Law that a business standing in the name of any member of the joint family is a Joint Family business even if that member is the Manager of the Joint Family, unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the property or Joint Family funds or with the earnings of the business with the Joint Family estate. The business remains free and separate.

35. In Municipal Council, Mandsaur Vs. Fakirchand and another, it has been held that if three brothers filed suit claiming to be owners of Joint Hindu Family property and it is alleged in the plaint that the brothers became owner only on death of their father then it indicates that property was not coparcenery but was undivided property of joint owners, who had inherited father''s interest.

36. In N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh, it has been held that a Hindu Coparcenery is a much narrower body than the Hindu Joint Family.

37. As far as decision of the trial court regarding partnership business and its profits are concerned, no appeal has been filed by the plaintiff against the said part of the decision. Only cross objections have been filed. Supreme Court in Pannalal Vs. State Bombay and Others, has held that the rule that respondent may urge cross-objections as against the other respondents only by way of exceptional case could apply among other cases in those and in which the appeal by some of the parties opens out questions, which could not be disposed of completely without matters being allowed to be opened up as between co-respondents. In this appeal, the only question involved is as to whether Hazarilal and his sons constituted coparcenary or not.

38. Whether this question is decided one way or the other, it will not affect the decision of the trial court in respect of partnership business and its profits. Even if appeal is dismissed holding that there was coparcenary and plaintiff had birth right in the properties left behind by Hazarilal, the decision of the trial court court in respect of partnership business will remain intact.

39. Accordingly, appeal is allowed. Judgment and decree of the trial court in so far as it decrees the suit of the plaintiff is set aside.

Cross-objection is dismissed and judgment and decree passed by the trial court in so far as it dismisses the suit in respect of partnership business and share of the plaintiff in the profits thereof is maintained. The result is that the whole suit is dismissed.

