

(2013) 02 DEL CK 0223

In the Delhi High Court

Case No : C.S. (OS) 231/2013 and I.As. 1958-1961/2013

Mr. Sulabh Puri and Another

APPELLANT

Vs

Mr. Sudhir Puri and Others

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Citation : (2013) 02 DEL CK 0223

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Judgement

Manmohan, J.—Present suit for partition has been filed by the children of Defendant no. 1 seeking partition of property bearing No. I-35, Jangpura Extension, New Delhi admeasuring 200 sq. yd., which is a three storied house and which was initially allotted to the great grandfather of the plaintiffs in lieu of ancestral property left behind by him in Pakistan. It is stated in the plaint that plaintiffs are estranged from their father, namely, defendant no. 1 herein and it is only on 26th May, 2012 that they came to know about pendency of a suit for partition between their father and his brother as well as sister, namely, defendant nos. 2 and 3 herein. It is further stated in the plaint that subsequently, plaintiffs learnt that on 30th July, 2010 this Court in a suit for partition being CS(OS) 136/2009 filed by the defendant no. 3 had passed a preliminary decree holding each of the defendants no. 1, 2 and 3 to be entitled to one-third share.

2. It has been asserted in the plaint that as the suit property had been treated as coparcenary property, plaintiffs being other members of the family had acquired their rights in the said property by birth.

3. It is pertinent to mention that plaintiffs? first cousin defendant no. 4, that means son of plaintiffs? uncle/defendant no. 2 had filed a suit being CS(OS) 2954/2011 for partition, declaration and permanent injunction against defendant nos. 1, 2 and 3. On 10th April, 2012, the said suit was dismissed by another learned Single Judge of this Court. Even an appeal filed by defendant no. 4 being RFA(OS) 51/2012 was dismissed by a Division Bench of this Court vide order

dated 16th May, 2012. The relevant portion of the Division Bench's order is reproduced hereinbelow:-

5. The learned Single Judge has noted that the appellant was admittedly residing with his father and has thus concluded that the appellant would be aware of the earlier suit filed by his aunty in which his father was a party. Learned Single Judge has noted that in view of Section 6 of the Hindu Succession Act, 1956, as amended in the year 2005, Sugandha Sethi would have 1/3rd share in the property.

6. We are not inclined to interfere with the impugned order for the reason as per Hindu Law applicable to Punjabi Hindus, no son can maintain an action during the lifetime of his father with respect to an alleged claim of a property being ancestral.

7. Suffice would it be to state that appellant's father has not contested Sugandha's claim of being 1/3rd owner of the property. A preliminary decree has already been passed in a previous suit inter-se the three siblings. The said suit has to be taken to its logical conclusion and we are satisfied that the appellant is unnecessarily trying to put spokes in the wheel.

(emphasis supplied)

4. Faced with the aforesaid judgment and order, learned counsel for plaintiffs drew this Court's attention to paragraph 19 of the plaint to contend that present suit for partition was not based on the fact that suit property was ancestral but premised on the basis that suit property was a coparcenary property. Paragraph 19 of the plaint is reproduced hereinbelow:-

19. That as is evident from the terms of the aforesaid judgment, although the Suit property has been treated as a co-parcenary property i.e. HUF property this Hon'ble Court has on the basis of amended Sec. 6 of the Hindu Succession Act held Smt. Sugandha Sethi entitled to 1/3rd share in the Suit property. It is however respectfully submitted that Sec. 6 of Hindu Succession Act as amended vide the 2005 amendment would have no application to partition of the Suit property since the succession opened in the year 1990 i.e. upon the demise of Sh. Bipan Chand Puri. Further, in any event, the effect of Sec. 6 of the Hindu Succession Act is only that the daughter of a coparcener acquires an interest in his share in the joint family property upon his demise. It does not divest the other members of the coparcenary of their respective shares. Thus, in view of Sec. 6 of the Hindu Succession Act as amended vide the 2005 amendment, Smt. Sugandha Sethi acquired an equal right in the share of her father vis-à-vis her brothers. However, the other members of the coparcenary who had acquired their rights in the Suit property by birth, including the Plaintiffs herein, were not divested of their rights in the Suit property.

5. In this connection, learned counsel for plaintiffs Mr. Mohan relied upon a judgment of Division Bench of this Court in Om Prakash Gulshan Vs. J.D. Gulshan

and Others, wherein it has been held as under:-

14. We may at this stage appropriately refer to a Division Bench decision of this Court in Suit No. 2365/2000 disposed of on October 19, 2000 titled Master Aditya Murgai v. Ashok Murgai, and the order passed by the Division Bench on the appeal taken [FAO(OS) No. 553/2001], which was disposed of on November 1, 2002. The issue that arose for consideration in the said case was whether on disruption of coparcenary by partition, individual coparcener takes his share as exclusive property or as a separate coparcenary with his male lineal descendants. The Division Bench held that the family arrangement determines the rights and liabilities between the parties thereto at the time of settlement, but it cannot be said that the same would determine the rights of male lineal descendants of individual coparceners nor the same could operate to extinguish the rights of their male lineal descendants which they acquire under the law on their birth. In Mulla on Hindu Law, Eighteenth Edition, Vol. I, at page 383, the learned author has to say as follows:-

(4) Share allotted on partition - The share, which a coparcener obtains on partition of ancestral property, is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate, and if the coparcener dies without leaving a male issue, it passes to his heirs by succession....

15. In FAO (OS) 553/2001, Master Aditya Murgai v. Ashok Murgai, disposed of on November 1, 2002, it was observed by the Division Bench that it is settled law that on partition of a coparcenary property, the property falling into the share of each coparcener assumes a dual character. It was further observed that it becomes his separate and individual property qua other coparceners with whom partition has taken place, but as regards his own male lineal descendants it retains the character of ancestral property and, therefore, a son, grandson born before/or after partition, take a share in the property by birth. Therefore, even assuming that the property is HUF property, whatever share the applicant may have in such joint family property, the same could be claimed only through his father, the appellant herein.

16. Therefore, in the light of the aforesaid discussion and the aforesaid decision of this Court, the application which is filed by the applicant under Order I Rule 10 of the CPC is held to be not maintainable and cannot be entertained in the present appeal. The stand of all the parties in the appeal are that the property is a self acquired property. This position was not only accepted but fully acted upon by all the legal heirs of late Shri Manak Chand Gulshan. The applicant, Manoj Gulshan, has also accepted this position and assisted his father in pursuing the claim made on such basis. The present application is clearly malafide and an abuse of the process of law. We, therefore, hold that the applicant has no right to fill the application and is not a necessary party to the present proceedings.

6. Mr. Mohan also relied upon a judgment of the Supreme Court in Sheela Devi and Others Vs. Lal Chand and Another, wherein it has been held as under:-

12. The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property, and thus such a person would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten (See C. Krishna Prasad Vs. Commissioner of Income Tax , Bangalore,). But once a son is born, it becomes a coparcenary property and he would acquire an interest therein.

xxxx xxxx xxxx xxxx

16. Although in 1927, Babu Ram had no son and the property at his hands became a separate property. But, in view of the well-settled principles of Hindu law, as soon as a son was born to him the concept of the property being a coparcenary property in terms of the Mitakshara school of Hindu law revived. The law in this behalf has succinctly been stated in Mayne's Hindu Law & Usage, 14th Edn., at pp. 627-28 and 641, in the following terms:

Where ancestral property has been divided between several joint owners, there can be no doubt that if any of them have male issue living at the time of the partition, the share which falls to him will continue to be ancestral property in his hands, as regards his male issue, for their rights had already attached upon it, and the partition only cuts off the claims of the dividing members. The father and his male issue still remain joint. The same rule would apply even where the partition had been made before the birth of male issue or before a son is adopted, for the share which is taken at a partition, by one of the coparceners is taken by him as representing his branch. It was held by the Andhra Pradesh High Court that where a father divided the family property between him and his sons, the share obtained by him was his self-acquired property which he could bequeath to his wife?.

* * *

Coparceners may hold property separately.--An examination into the property of the joint family would not be complete without pointing out what property may be held by the individual members as their separate property. All property which is not held in coparcenary is separate property and Hindu law recognises separate property of individual members of a coparcenary as well as of separated members. (1) Property which comes to a man as obstructed heritage (sapratibandhadaya) is his separate property. It is not self-acquired property within the meaning of Hindu law, though in their incidents, there may be no difference between the two species.

7. Keeping in view the judgment in the suit for partition filed by defendant no. 4,

this Court is of the view that the present suit for partition is not maintainable as neither the suit property is ancestral nor a coparcenary property. In fact, in the year 1990 when grandfather of the plaintiffs died, the property devolved upon defendant nos. 1, 2 and 3 as their personal/individual property. Also, from the affidavits in support of the plaint, it is apparent that both the plaintiffs were born much after the Hindu Succession Act 1956 came into force. Moreover, the plaintiffs do not challenge the findings of this Court in CS (OS) 136/2009 that there had been no partition prior to the preliminary decree being passed in the said suit on 30th July, 2010. Consequently, defendant nos. 1, 2 and 3 do not hold the suit property as ancestral property.

8. In *Yudhishter Vs. Ashok Kumar*, the Supreme Court has held as under:--

10. This question has been considered by this Court in *Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others*, , where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as karta of his own undivided family but takes it in his individual capacity. At pages 577 to 578 (of SCC) : (at p. 1760 of AIR) of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn., pages 924-26 as well as Mayne's on Hindu Law, 12th Edition pages 918-19. Shri Banerji relied on the said observations of Mayne on Hindu Law", 12th Edn., at pages 918-19. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn., page 919. In that view of the matter, it would be difficult to hold that property which devolved on a Hindu u/s 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-?-vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house.

(emphasis supplied)

9. Another learned Single Judge of this Court in *Pradeep Malhotra Vs. Kailash*

Chander Malhotra (Deceased) Through LRs & Ors., CS (OS) 1252/2008 decided on 4th February, 2013 has succinctly dealt with the concept of ancestral property vis a vis the Hindu Succession Act and held as under:-

5. The grandfather of the plaintiff having died after coming into force of the Hindu Succession Act, 1956, the property inherited by the father of the plaintiff from the grandfather of the plaintiff, would be held by the father of the plaintiff as his personal/individual property and the plaintiff will not have any right or share therein. It was so held in Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, , Bhanwar Singh Vs. Puran and Others, and Yudhishter Vs. Ashok Kumar, and recently reiterated by this Court in Mrs. Premwati and Others Vs. Mrs. Bhagwati Devi and Others Master Daljit Singh and Others Vs. S. Dara Singh and Others, , Bharat Bhushan Maggon Vs. Joginder Lal and Others, and Pratap Vs. Shiv Shanker, .

10. Even, in Sheela Devi and Others (supra), the Supreme Court held that as the younger son of the deceased had been born after coming into force the Hindu Succession Act 1956, the said Act would prevail over the old Hindu law of coparcenary property as applicable in Mitakshara School of Hindu law. In the said judgment, it was also held that as the eldest son was born prior to coming into force of the Hindu Succession Act 1956, the principle of coparcenary as enshrined in Mitakshara School of Hindu law would apply. The relevant paragraphs of the aforesaid judgment are reproduced hereinbelow:-

21. The Act indisputably would prevail over the old Hindu law. We may notice that Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted the Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of the Amendment Act, 2005 would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, the proviso appended to sub-section (1) of Section 6 of the Act creates an exception. First son of Babu Lal viz. Lal Chand, was, thus, a coparcener. Section 6 is an exception to the general rules. It was, therefore, obligatory on the part of the respondent-plaintiffs to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the second son, Sohan Lal is concerned, no evidence has been brought on record to show that he was born prior to coming into force of the Hindu Succession Act, 1956.

22. Thus, it was the half-share in the property of Babu Ram, which would devolve upon all his heirs and legal representatives as at least one of his sons was born prior to coming into force of the Act.

(emphasis supplied)

11. This Court is also of the view that the present suit is another attempt to go behind the consensual preliminary decree in CS (OS) 136/2009 inasmuch as

once again averments in para 19 of the present plaint have been made to the effect that Section 6 of the Hindu Succession Act as amended by 2005 amendment would have no application to the present suit since succession opened in the year 1990 that means upon demises of plaintiffs? grandfather i.e. Mr. Bipin Chand Puri.

12. In any event, a similar argument of coparcenery was rejected by another learned Single Judge of this Court in CS (OS) 2954/2011 filed by plaintiffs? first cousin i.e. defendant no. 4. The relevant observations of the learned Single Judge are reproduced hereinbelow:-

20. After having gone through the contents of the plaint as well as the averments made in the application, I am of the considered view that the application filed by defendant No. 1 Smt. Sugandha Sethi is liable to be allowed for the following reasons as the suit filed by Sugam Puri is barred by law:

a) A preliminary decree in the CS(OS) No. 136/2009 was passed on 30.07.2010. The main allegation of the plaintiff Sh. Sugam Puri is that the property of his grandfather Sh. Bipan Chand Puri was ancestral property. He along with his two sons constituted co-parcenary and the father and two sons under Hindu law became entitled 1/3rd share. However, the plaintiff does not challenge the finding of this Court or admission of the parties that there had been no partition. In view of Section 6 of the Hindu Succession Act, 1956 as it was substituted in 2005, the position of Smt. Sugandha Sethi would be that she is entitled to 1/3rd share which cannot disputed under these circumstances... ..

(emphasis supplied)

Consequently, present suit and applications are dismissed as not maintainable, but with no order as to costs. Registry is directed to prepare a decree sheet accordingly.