
(2009) 05 CHH CK 0012
In the Chhattisgarh High Court
Case No : F.A. No. 411 of 1996

N. Shriram Naidu and Others	Vs	APPELLANT
Smt. B. Leelawati and Others		RESPONDENT

Date of Decision : 14-05-2009

Acts Referred:

Hindu Succession Act, 1956 — Section 19, 23
Limitation Act, 1963 — Article 110, 65

Citation : (2009) 4 MPJR 105

Hon'ble Judges : N.K. Agarwal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

N.K. Agarwal, J.—This appeal is directed against the judgment and decree dated 31-07-1996 passed by 5th Additional Judge to the Court of District Judge, Bilaspur in Civil Suit No.28-A/89 whereby the suit has been decreed in favour of the plaintiff/respondent No.1 and the plaintiff has been declared to be entitled to 1/10th share in the suit property and also 1/10th share in the rent received from the tenants and accordingly preliminary decree has been passed.

2. Undisputed facts of the case are that the suit property was self-earned property of late N.V. Ratnam. N.V. Ratnam died on 1-1-68. He was having 3 wives and at the time of his death, only 3rd wife Amlai Bai @ Raghav Amma was alive, who also died in August, 1975. Amlai Bai, third wife had withdrawn the amount deposited by N.V. Ratnam in banks and also taken ornaments with her which were in her possession and she went along with her only son N.V. Ramarao defendant No. 10 to Nagpur after the death of N.V. Ratnam. Plaintiff's and defendants are legal representatives of late N.V Ratnam. Parties are Hindu by religion and are governed by Mitakshra Shakha of Hindu Law.

3. The plaintiff filed a suit for partition and separate possession on 5.1.88 of 1/10th share of suit property on the ground that all brothers and sisters were having equal shares in the property. The suit property was never partitioned

earlier. The plaintiff was receiving the share in the rent received from tenants of a portion of the suit house. But since 1987, the defendant No.1 started keeping whole rent with him and refused to give share in the rent. In the month of November, 1987, when plaintiff and other legal representatives assembled on marriage of daughter of defendants N.3, then the plaintiff and defendants No.5 to 9 claimed their share in the suit property from defendants no.1 to 4. which for the first time, they refused to give on the ground that the sisters have no right of partition.

4. As per plaintiff, earlier defendant no. 10 was living with his mother in the portion of the suit house described in the plaint map by blue colour. After withdrawing the amount deposited in the bank, she left with defendant no. 10 to Nagpur by relinquishing her right in the suit property.

5. Defendants no.1, 2, 4, 5 and 10 (hereinafter referred to as the "contesting defendants") filed joint written statement and pleaded that at the time of death of V Ratnam in the year 1968, the suit property stands mutated in the name of five sons and widow Raghav Amma of N.V Ratnam. At that point of time, the five brothers and mother Raghav Amma denied all the sisters any share in the suit property. Thereafter, after the death of Smt. Raghav Amma, the suit property was partitioned between five brothers with the assistance of defendant no.5 Kamla Bai and two others N.Venkatarao and G.N.J. Stephen on 16.1.1976 and since then all five brothers are in separate possession of their respective shares in the suit property, described in the map annexed with the written statement. In the year 1987, the defendant no.3 encroached upon the share allotted to defendant no. 10. Sisters were coming and living with brothers in family functions but they were never in possession of the suit property. The suit property stands recorded in the name of five sons and mother jointly and they were paying municipal tax.

6. According to them, the sisters including plaintiff were denied any share in the suit property by the brothers openly in the year 1968 and in the 1976, the suit property has been partitioned between them, therefore, the suit for partition brought after a period of 12 years is barred by limitation and liable to be dismissed.

7. Defendants No. 3, 7 and 9 filed separate joint written statement and have materially accepted the facts averred in the plaint. As per them, the suit property was never partitioned. They are not bound by the mutation proceedings. In fact, in main bungalow, the defendant No. 3 was alone in possession along with his family members and the defendant No. 1 came to Bilaspur in the year 1985 and defendant No.2 in the year 1986 after their retirement. Earlier the defendant No. 3 used to keep account of rent received from tenants. He also objected the mutation proceedings initiated by other brothers before the Municipal Corporation. They supported the plaintiff's claim.

8. On the pleading of parties, several issues have been framed by learned trial

Court. The appellant is assailing mainly the finding recorded by learned trial Court on Issue No. 12 i.e." whether the plaintiff's suit is time barred as the defendants were ousted openly from the suit property by brothers and mother ?

9. The trial Court on appreciation of pleading, evidence led oral and documentary by the parties, recorded a finding that the property was never partitioned, the suit was within time and passed a preliminary decree of partition declaring the plaintiff entitled for 1/10 share in the suit property, and 1/10th share in the rent received from tenants.

10. Shri Somnath Verma, learned counsel appearing for the appellant assailed the finding recorded by the learned trial Court on two ground (1) the daughters of N.V. Ratnam including plaintiff were ousted from possession of the suit property openly in the year 1968 at the time of death of late N.V. Ratnam and thereafter, the suit property was partitioned between all 5 sons of late N.V. Ratnam in the year 1976 and therefore, the suit for partition filed by the plaintiff is time barred under Article 110 of the Limitation Act and liable to be dismissed on this count. The second ground urged was that u/s 23 of the Hindu Succession Act, a daughter shall be entitled to right of residence only in the dwelling house and cannot claim partition of the dwelling house at her own and, therefore, the suit for partition is liable to be dismissed.

11. Regarding first contention, Shri Verma drew attention of this Court towards paras 12, 23 and 30 of the statement of P.W. 1 B. Leelawati and Para 10 of statement of P.W. 2 G. Shankar Rao and contended that the plaintiff and other daughters were ousted from the suit property way back in the year 1968 and thereafter the property was partitioned between brothers and therefore the suit filed by the plaintiff was time barred and is liable to be dismissed on this count. In support, Shri Verma placed reliance on Para 4 of judgment of Supreme Court in Puttarangamma and Others Vs. M.S. Ranganna and Others, .

12. The second contention raised by Shri Verma is that u/s 23 of the Hindu Succession Act, 1956, the female heir cannot claim partition in dwelling house and on this count also, the suit was liable to be dismissed as not maintainable. In support, Shri Verma placed reliance upon the judgement of Supreme Court in case of Narashimaha Murthy Vs. Smt. Susheelabai and others, . No other point was raised by the learned counsel for the appellants.

13. Per contra, Shri Sanjay S. Agrawal, learned counsel for the respondent No. 1 supported the decree passed by the trial Court and contended that the judgment and decree passed by the trial Court is well reasoned, passed after taking into consideration all aspects of the matter and, therefore, the appeal is liable to be dismissed.

14. I heard learned counsel for the parties, perused the evidence led, documents filed and also the impugned judgment and decree.

15. It is not in dispute that the suit property was self-acquired property of late

N.V. Ratnam, who died on 1-1-68 i.e. after coming into force of the Hindu Succession Act, 1956 and the plaintiff and the defendants are legal representatives of deceased N.V. Ratnam. According to Section 19 of the Hindu Succession Act, the plaintiff and the defendants shall take the property as tenants-in common and not as joint tenants.

16. A careful reading of the pleadings of the parties would reveal that the only defence taken by the contesting defendants was that the plaintiff and other daughters were ousted from the suit property openly within their knowledge in the year 1968 and brothers were in exclusive joint possession, which was adverse to the sisters and therefore, the suit which was filed after 12 years of such ouster is barred by limitation. It was therefore, incumbent upon the said defendants to prove the plea of ouster by leading cogent evidence and by placing the relevant material on record, as burden lies on them to prove such facts. As per para 12 of the statement of P.W. 1 B. Leelawati, the total suit land is 33,000 Sq.Ft., house is constructed on 6,000 Sq.Ft., and remaining land is vacant. On some portion of the land, N.L. Swami/ defendant No.3 constructed poultry farm and on some vacant land, Prakash Rao constructed residential house after 1980 but this fact was not within her knowledge. In para 23, she said that after the death of father, they were receiving Rs. 150-200/- as rent. After the death of mother, they have not taken any rent. In para 36, she said that they have not sent any demand notice to tenants. In para 5, she said that they were receiving a part of rent and some part of rent was used for maintenance of the house, the rent was being recovered earlier by defendant No.3, and thereafter by defendant No. 4 and now defendant No. 1 is receiving the same, after his retirement, when he came from Chakradharnagar and started living at Bilaspur, since then, payment of part of rent to her was stopped. In para 8, she stated that the suit house was never partitioned after the death of father and she used to demand part of rent by sending letters of defendants No.3 and 4. In para 9, she stated that when in the year 1987, they assembled to attend marriage of daughter of defendant No. 3, then they showed their interest for partition of suit property. The plaintiff further denied any partition between the brothers in the year 1976 and also denied that brother denied them any share in the property.

17. P. W. 2, plaintiff G. Shankar Rao Naidu in para 4 of his statement stated that his wife and other sisters were receiving 150-200/- per month as part of rent received from the tenants and it was being paid to them as and when they used to come to Bilaspur. It was further stated by him that they always used to come to Bilaspur to attend family functions and used to stay in the house constructed over the suit property. They were not aware about any mutation in the revenue records. In para 11, he stated that because they were receiving the rent regularly, so they have not tried for recording his daughters' name in the revenue records. In para 15 of his statement, he denied the fact that because they were well placed so they have not claimed any share in the suit property and have relinquished their right.

18. A careful reading of above quoted paras of statements of P.W.1 and P.W.2, is not indicative of the fact that the sisters have been ousted from the property and brothers have perfected the title over the suit property by way of adverse possession by afflux of statutory period of 12 years. This position is further fortified by para 22 of statement of defendant N. Ganpat Rao, who was examined by the contesting defendants, in which he categorically admits that in the year 1987, when the sister came to Bilaspur to attend the marriage of daughter of defendant No.3, then he and other brothers have denied the share in the suit property to the sisters. This is the admission of the fact that in the year 1987, brothers have denied the share in the property to the sisters.

19. Statement of defendant No.3 N.L. Swami also supports the contention of the plaintiff on all force that the property was never partitioned between the brothers. By way of family arrangement, they may be living separately, but the property remained joint and no partition took place and only in the year 1987, for the first time, the contesting defendants denied share to the sisters. The correspondence between brothers which have been filed by the plaintiff as Ex. P-1 to P-8 also support the fact that the property was never partitioned. Even defendant No.3 objected the mutation in Municipal Corporation vide notice Ex. P-9, i.e. the date after institution of the suit meaning thereby that the suit property was not separately recorded in brothers' name before institution of the suit.

20. In view of the pleading taken by the contesting defendants, it is clear that the case would be covered by Article 65, and not by Article 110 of the Limitation Act. Although the contesting defendants have raised a plea in their written statement that the sister have been ousted from the suit property in the year 1968, but they have said nothing in their statement in this regard. On the other hand, the witness of the contesting defendants i.e. N. Ganpat Rao admitted that the partition was claimed by the sisters in the year 1987. In this view of the matter, on going through the record, it is crystal clear that the defendants have utterly failed to prove the defence taken by them. Therefore, the suit property being held by the plaintiffs and defendants as tenants in common, remained joint and the learned trial Court has rightly passed the decree for partition.

21. The ratio laid down by Supreme Court in case of Puttrangamma (supra) that "a member of joint Hindu family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty and for that, it is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status" is not applicable in the facts and circumstances of the present case.

22. Coming to the next contention raised by Shri Verma regarding maintainability of the suit in the light of Section 23 of Hindu Succession Act. Section 23 of the Hindu Succession Act reads as under:-

23. Special provision respecting dwelling houses.- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heirs to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

23. A bare perusal of the above provision would reveal that this section applies to a dwelling house which is wholly occupied by member of his or her family. On going through the facts of this case, it is not in dispute that the suit property is comprising of dwelling house of which major part has been given on rent to several tenants and therefore, the house is not wholly occupied by the members of the family and therefore, it cannot be said that u/s 23 of the Hindu Succession Act, daughter is not entitled to claim partition in the property. It is further clear from averment of the contesting defendants that have expressed their intention to partition regarding suit property and are living separately. In case of Narshimaha Murthy (supra), Hon''ble Supreme Court has held that Section 23 of the Hindu Succession Act applies and prohibits partition of dwelling house of the deceased Hindu male or female intestate, who left surviving sole male heir and female heir / heirs and the right to claim partition by female heir is kept in abeyance and deferred during life of the male heir of till he partitions or ceases to occupy and enjoy it or lets it out or till at a partition action, equities are worked out. Applying the ratio as enunciated by the Supreme Court in the judgment cited hereinabove in the facts and circumstances of the present case, in which it is not in dispute that a major portion of the suit house has already been given on rent to various persons, it is clear that bar to claim, partition u/s 23 of the Hindu Succession Act comes to and end an is not applicable in the instant case.

24. The Apex Court in the case of Madhusudan Das Vs. Smt. Narayanibai (Deceased) by Lrs. and Others, , held that the findings of the trial court are entitled to great weight.

25. In the present case, the findings of the trial Court are mainly based upon the pleadings of the parties, oral testimony coupled with overwhelming documentary evidence in favour of the plaintiff's case. In such event, these findings are entitled to respect as per the law laid down in the case of Madhusudan Das (Supra). No infirmity or perversity could be pointed out by learned counsel for the appellants in the findings recorded by the trial Court.

26. In the result, the appeal fails and is hereby dismissed.

27. However, in the facts and circumstances of the case, the parties shall bear

their own costs.