

(2010) 12 CHH CK 0006
In the Chhattisgarh High Court
Case No : First Appeal No. 243 of 1993

Narbada Prasad Kateliha

APPELLANT

Vs

Smt. Shakuntala Swarnkar and Others

RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Hindu Succession Act, 1956 — Section 6

Citation : (2011) 2 CG.L.R.W. 40

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Advocate : Ravish Chand Agrawal, with Mr. Sanjay Shyam Agrawal, for the Appellant; Manoj Paranjpe for the Respondents No. 1(c) to (f), Shri Ashish Shrivastava for the Respondents No. 2-A(a) to (f) and Shri B.P. Sharma for the Respondent No. 3, for the Respondent

Judgement

T.P. Sharma, J.—By this appeal u/s 96 of the Code of Civil Procedure, 1908, the appellant has challenged legality & propriety of judgment & decree dated 29-9-1993 passed by the 2nd Additional District Judge to the Court of District Judge, Bilaspur in Civil Suit No. 10A/92, whereby learned Additional District Judge has decreed the suit filed on behalf of respondents No. 1 (a) to (h) herein against the appellant herein/defendant No. 1, Narayan Prasad (since deceased) & Shanti Bai for partition and separate possession. As per pleadings of the parties, Sarju Prasad Kateliha was father of Bhagwandeem Kateliha (plaintiff), Narbada Prasad Kateliha (defendant No. 1), Narayan Prasad Kateliha (defendant No. 2) & Shanti Bai (defendant No. 3). The appellant herein & respondent No. 3 herein Shanti Bai are son & daughter of Sarju Prasad through second wife Sundar Bai, respectively. One house situate at Sadar Bazaar Ward, Bilaspur was owned by Sarju Prasad, his two brothers, mother and father. Suit property i.e. the house was given in registered partition dated 28-9-48 to Sarju Prasad. Sarju Prasad died in the state of joint-ness over the property and after death of Sarju Prasad, the aforesaid suit property held jointly was succeeded by his wife, three sons and

one daughter. The appellant herein was residing separately. Shanti Bai was residing in her in-laws' house and other members were residing together. Suit was filed by the plaintiff for partition and separate possession. On the date of filing of suit, market value of the suit property was Rs. 85,000/-.

2. By filing written statement, the appellant herein has admitted joint ownership over the suit property and has specifically alleged that Sarju Prasad-father of the appellant herein, who was competent to effect partition has effected partition in the month of August, 1966. Suit property is smaller in size and partition by metes and bounds was not possible. Therefore, after assessing market value of suit property as Rs. 40,000/-, 1/5th share was given to the appellant herein and for payment of Rs. 8,000/- to the appellant herein as his share in the property, Sarju Prasad has deposited Rs. 10,000/- before Kamta Prasad with a view that he will pay Rs. 5,000/- to the appellant & Rs. 5,000/- to another son Narayan Prasad, thereafter, Sarju Prasad will pay remaining amount of Rs. 3,000/- to each in two installments. However, Kamta Prasad has spent Rs. 10,000/- and has not paid any money to the appellant herein. Sarju Prasad has informed same thing to the appellant herein, Narayan Prasad & Kamta Prasad by issuance of notice dated 25-8-67. After effecting partition, status of joint-ness over the property came to an end. Suit filed after lapse of 12 years was time barred. Sarju Prasad has executed will in favour of his wife i.e. mother of the appellant, and mother of the appellant has executed will in favour of defendant No. 1 Narbada Prasad. On the basis of partition will, Narbada Prasad alone is owner of the suit property, plaintiff Bhagwandeem Kateliha is not entitled for any share upon the suit property and the suit filed on behalf of Bhagwandeem Kateliha was time barred.

3. By filing separate written statement, defendant No. 2 Narayan Prasad has also admitted the allegations made in the plaint and has claimed partition of the suit property.

4. After affording opportunity, of hearing to the parties, learned Additional District Judge has decreed the suit for partition and separate possession of the suit property in favour of the plaintiffs/LRs of Bhagwandeem Kateliha on account of death of Bhagwandeem Kateliha during the pendency of suit.

5. I have heard learned counsel for the parties, perused the judgment & decree impugned as also the record of the trial Court.

6. Mr. Ravish Chand Agrawal, learned Senior Advocate appearing on behalf of the appellant, vehemently argued that as per admitted facts, Sarju Prasad-predecessor-in-title of the parties i.e. father of the appellant herein, Bhagwandeem Kateliha, Narayan Prasad & Shanti Bai, was Karta of the family. The property was ancestral property. Size of the house was very small and physical partition by metes and bounds was not possible. Father was competent to effect partition without consent of his children. Sarju Prasad-father of the parties, by exercising his paternal power/fatherly power i.e. patria potestas has

effected partition of the house which was not devisable by metes and bounds. Sarju Prasad while exercising his right of patria potestas has assessed market value of the house in the year 1966 as Rs. 40,000/- and has allotted Rs. 8,000/- to each shareholder. He has deposited Rs. 10,000/- to one Kamta Prasad for the appellant herein & Narayan Prasad (Rs. 5,000/- each) and also decided to give remaining amount of Rs. 3,000/- each in two installments. By serving notice dated 25-8-67 Ex. 1-D-14, Sarju Prasad has clearly informed Bhagwandeem & Narayan Prasad that after assessing market value of the house, he has effected partition and he has deposited the installment of share of Bhagwandeem & Narayan Prasad before one Kamta Prasad, who will give Rs. 5,000/- to each and that he will pay remaining amount of Rs. 3,000/- each in two installments. Sarju Prasad has also informed that instead of Rs. 5,000/-, Narayan Prasad has taken the entire amount of Rs. 10,000/- and, therefore, he will pay the share of Bhagwandeem and remaining amount of Narayan Prasad by installments. Bhagwandeem & Narayan Prasad have replied the notice vide Ex. 1-D-4 in which they have clearly admitted that they have received the notice, but their father has not assessed the market value of house properly, it was unfair and at that time, cost of the house was Rs. 60,000/-. It has also been mentioned in the reply that they are ready to retain the house after giving share of their father and another brother. It has been specifically mentioned in Ex. 1-D-4 that the partition effected by their father is not just and proper, and they are not agreed to such partition. This shows that the father has effected partition which has been acknowledged by Bhagwandeem in which he has specifically claimed that such partition is unfair and he is not bound by such partition effected by his father. Under the Hindu law, father is not bound to obtain consent for exercising such power. In case of unfair and unequal partition, plaintiff Bhagwandeem was having remedy of filing suit either for reopening of partition or for recovery of money that too within limitation, but the present suit filed after more than twelve years from the alleged partition was hopelessly time barred and the suit was not maintainable.

7. Mr. Ravish Chand Agrawal placed reliance in the matter of Apoorva Shantilal Shah, HUF Vs. Commissioner of Income Tax, Gujarat-I, Ahmedabad, , in which the Supreme Court has held that partition by father between himself and his minor sons does not become invalid on the ground that there has been no equal distribution amongst the co-sharers, Mr. Ravish Chand Agrawal further placed reliance in the matter of Charandas Haridas and Another Vs. The Commissioner of Income Tax, Bombay North, Kutch, Saurashtra and Ahmedabad and Another, in which the Supreme Court has held that father is having extraordinary power for partition of his own property, joint Hindu property or ancestral property and even father is entitled for partial partition of the property. Mr. Ravish Chand Agrawal also placed reliance in the matter of Kalyani (Dead) by Lrs. Vs. Narayanan and Others, , in which the Supreme Court has held that a Hindu father governed by Mitakshara Law has right to partition ancestral properties without consent of his sons. Mr. Ravish Chand Agrawal relied upon the matter of

Ratnam Chettiar and Others Vs. S.M. Kuppuswami Chettiar and Others, , in which the Supreme Court has held that where a partition effected between the members of the Hindu Undivided Family which consists of minor coparceners is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened. The Supreme Court has also held that properties not actually valued according to market rate but notional valuation given in the partition deed, valuation of property on the basis of purchase price or on the basis of the rent fetched by them which are almost equal, partition is not unfair or unjust. Mr. Ravish Chand Agrawal further relied upon the matter of Gurusamy Naicker and others Vs. G. Jayaraman and others, , in which the Madras High Court has held that in case of partition, unfair, unjust and partial partition would not be binding upon the parties.

8. Mr. Ravish Chand Agrawal, learned Senior Advocate appearing on behalf of the appellant, further argued that limitation for filing suit from receiving of notice on behalf of plaintiff Bhagwandeem and in any case maximum limitation was 12 years, but the present suit has been filed after lapse of 12 years and, therefore, the suit for recovery of money or reopening of partition was barred by limitation, but the trial Court has not considered the aforesaid law and has decreed the suit.

9. Mr. B.P. Sharma, learned counsel for respondent No. 3 supported the case of the appellant herein.

10. Mr. Manoj Paranjpe, learned counsel for respondents No. 1 (c) to (f), opposed the appeal and submitted that father of Bhagwandeem has not effected any partition in the year 1966, though father was having extraordinary right to effect partition even without consent of his children. In case of unequal, unfair and impartial partition effected by father, remedy available to the sons was reopening of partition. In case the property is not devisable by metes and bounds on account of specific feature or small size, the property is required to be valued at market rate for allotment of share. However, in the present case, Sarju Prasad-father of Bhagwandeem, has not effected any partition and there was no intention for effecting such partition. Recitals in Exs. 1-D-2, 1-D-4 & 1-D-14 do not support the factum of partition by father Sarju Prasad Exs. 1-D-2 & 1-D-14-notices issued by Sarju Prasad to Bhagwandeem, Narayan Prasad & Kamta Prasad, clearly show that Sarju Prasad has assessed market value of house as Rs. 40,000/- and in lieu of payment of share of Bhagwandeem & Narayan Prasad he has deposited Rs. 10,000/- to Kamta Prasad who was required to give Rs. 5,000/- each to Bhagwandeem & Narayan Prasad, but the entire amount was taken by Narayan Prasad and no amount was given to Bhagwandeem. Notices further reveal that father Sarju Prasad will give Rs. 8,000/- each to the shareholders. Ex. 1-D-4-reply to their father by Bhagwandeem & Narayan Prasad to the notice, clearly reveals that they have specifically informed their father that the alleged assessment of market value of the property is wholly unfair, alleged partition is not just, they are not agreed to the partition and they will pay the share of three persons & their relatives and will retain the house with them. After

receiving such reply, father Sarju Prasad has not acted upon in accordance with the notices Exs. 1-D-2 & 1-D-14, he has not paid any amount to Bhagwandeem or Narayan Prasad and he has not demanded his share or share of other two persons for leaving the house and relinquishing his claim. Before issuance of such notice, Sarju Prasad has executed will in favour of his wife i.e. mother of the appellant herein & Shanti Bai namely Sundar Bai on 21-11-66, vide Ex. 1-D-5. After service of aforesaid notices in the year 1966, on 22-3-74 Sundar Bai one co-sharer, has executed registered will (Ex. 1-D-12) in favour of the appellant herein in which she has specifically mentioned that her husband has executed will of the aforesaid property in her favour and as such, she became sole owner of the suit property and as a sole owner, she is executing will in favour of Narbada Prasad, the appellant herein. Sundar Bai has further executed will dated 3-4-79 (Ex. 1-D-13) in favour of the appellant herein which reveals that she has received the property from her husband as a testamentary successor after death of her husband and as such, she has executed will in favour of the appellant herein. These wills Exs. 1-D-12 & 1-D-13 executed by Sundar Bai i.e. wife of Sarju Prasad in favour of Narbada Prasad, the appellant herein, i.e. son of Sarju Prasad, who were shareholders according to the alleged partition, show that partition was never effected relating to this property, Sundar Bai has succeeded the property on the basis of testamentary succession and she has executed will in favour of Narbada Prasad. These documents also support the claim of Bhagwandeem that his father has never effected any partition and the suit property was still in the state of joint-ness. Suit by co-sharer is not barred by limitation in absence of any proof of ouster.

11. Mr. Manoj Paranjpe placed reliance in the matter of Chinthamani Ammal Vs. Nandagopal Gounder and Another, in which the Supreme Court has held that in case of partition of joint Hindu family property burden to prove partition is on the person who raised such plea, normal presumption is state of joint-ness. Mr. Manoj Paranjpe further placed reliance in the matter of M. Venkataramana Hebbar (D) by L.Rs. Vs. M. Rajagopal Hebbar and Others, in which the Supreme Court has held that before dismissal of suit for partition, the Court is required to arrive at finding that previous partition was effected by metes and bounds. The Supreme Court has further held that in absence of partition by metes and bounds or effective partition, co-sharers are entitled for complete partition.

12. Mr. Ashish Shrivastava, learned counsel for respondents No. 2-A (a) to (f), supported the case of respondents No. 1 (c) to (f).

13. As per pleadings, documentary evidence and oral evidence of the parties, suit property situate at Bilaspur was ancestral property of deceased Sarju Prasad and same was given in partition to Sarju Prasad by their coparceners. After falling in share of Sarju Prasad, his sons and Sarju Prasad were coparceners of the property. Sarju Prasad issued notices to Bhagwandeem vide Ex. 1-D-2 and to Narayan Prasad & Kamta Prasad vide Ex. 1-D-14, copy of which was also endorsed to Bhagwandeem on 25-8-67. Notices were replied by Bhagwandeem &

Narayan Prasad vide Ex. 1-D-4. Notices Exs. 1-D-2 & 1-D-14 reveal that father Sarju Prasad has effected partition after valuation of house and Rs. 8,000/- was allotted to each shareholder, and for payment of share to Bhagwandeem & Narayan Prasad, Sarju Prasad has deposited money before one Kamta Prasad, but Kamta Prasad has not paid money to Bhagwandeem, and Narayan Prasad has taken the entire money, thereafter, Sarju Prasad has decided to pay the share of Bhagwandeem in installments of Rs. 2,000/-. By replying to the notices issued by Sarju Prasad, vide Ex. 1-D-4 Bhagwandeem & Narayan Prasad have attacked upon valuation of property, manner of partition, fairness and justification of partition and have specifically mentioned that the alleged partition is not acceptable to them. They have also proposed that they are ready to give the share of other shareholders and keep the house with them. Thereafter, Sarju Prasad has not paid any amount to Bhagwandeem or Narayan Prasad.

14. As per evidence of Kamta Prasad (DW-2), Sarju Prasad has never deposited Rs. 10,000/- with him for payment of installment to Bhagwandeem & Narayan Prasad. He has, admitted that Sarju Prasad has served notice which he has replied. Copy of reply to notice was exhibited as proof and numbered as Ex. 2-D-27 which reveals that Kamta Prasad has replied the notice on 29-8-67 in which Kamta Prasad has specifically mentioned that Sarju Prasad has never deposited any money with him.

15. Parties have led another set of documentary evidence i.e. will deeds. As per Ex. 1-D-5, before such notices on 21-11-66 Sarju Prasad has executed registered will deed in favour of his wife Sundar Bai relating to the entire property. After death of Sarju Prasad his wife Sundar Bai has executed registered will deed on 22-3-74 relating to the entire property including the suit property vide Ex. 1-D-12. Sundar Bai has again executed registered will deed Ex. 1-D-13 on 3-4-79 relating to the suit property which she has received by testamentary succession on death of her husband on 3-6-74, who has executed will in favour of Sundar Bai on 21-11-66 which reveals that she has succeeded the entire house as sole owner in exclusion of other heirs. Both the will deeds (Exs. 1-D-12 & 1-D-13) have been executed in favour of Narbada Prasad-defendant No. 1. Narbada Prasad has produced these documents from his possession and same were duly proved by adducing witnesses on behalf of Narbada Prasad. These documents clearly reveal that they were within the knowledge of Narbada Prasad from their date of execution. Exs. 1-D-12 & 1-D-13 further reveal that in the light of registered will deed dated 21-11-66 executed by Sarju Prasad, the suit property i.e. the house was succeeded only by Sundar Bai as testamentary successor in exclusion of other non-testamentary successors including Narbada Prasad, defendant No. 1 and defendant No. 1 Narbada Prasad became owner of the suit property only on the basis of will and not on the basis of non-testamentary succession. In other words, as per these documents, Narbada Prasad has not succeeded any part of the house as non-testamentary heirs of Sarju Prasad, though as per Ex. 1-D-14-notice issued by Sarju Prasad, Sarju Prasad was agreed to pay the shares of Bhagwandeem & Narayan Prasad, and the property

has been retained by remaining three shareholders namely Sarju Prasad, his wife Sundar Bai and his son Narbada Prasad. These documents show that at the time of death of Sarju Prasad only 1/3rd share was available for testamentary succession to Sundar Bai and Narbada Prasad was having 1/3rd share over the property.

16. As has been held in the matters of Apoorva Shantilal (supra), Kalyani (supra), Ratnam Chettiar (supra) and Gurusamy (supra), father is having extra ordinary power i.e. paternal power termed as patria potestas and in exercise of such patria potestas, father has right to effect partition of joint property/ ancestral property/self-acquired property without consent of his children and in case of partial partition or unequal partition, the partition was not invalid. In case of unfair, unjust and unequal partition to minor children, minors are entitled to claim partition or reopen partition after attaining the age of majority. As has been held in the aforecited cases, burden to prove partition against normal presumption of joint-ness of joint property is on the person who claims such partition. In the present case, heavy burden was upon appellant Narbada Prasad who has claim and alleged partition.

17. As per evidence of both the parties, the house in question is smaller in size viz., length of land in which the house is situate is 61" and breadth is between 11" 4" & 12" 1" total area is 550 sq. ft. As per the map annexed to the plaint, the house consists of one shop, one store room, one kothar, one verandah and one courtyard. Definitely, division of property in five or more pieces would not be proper and would not serve any purpose. In these circumstances, the property was required to be valued at market rate and share as per market rate is required to be allotted to the persons in partition.

18. Reply to the notices Exs. 1-D-2 & 1-D-14 i.e. Ex. 1-D-4 reveals that father has not partitioned the property fairly and properly EX. 1 -D-4 further reveals that para 4 of Ex. 1-D-4 read thus,

19. Reply Ex. 1-D-4 also reveals that Bhagwandeem has not admitted the partition. He has attacked upon partition of property, valuation of property and its manner, and has also offered that he is ready to pay the shares of Sarju Prasad and his son Narbada Prasad. As per Exs. 1-D-2 & 1-D-14, Sarju Prasad has deposited Rs. 10,000/- before Kamta Prasad, but Kamta Prasad has not admitted these facts. This shows that Sarju Prasad has never deposited Rs. 10,000/- before Kamta Prasad for payment of shares of Bhagwandeem & Narayan Prasad. Oral evidence also reveals that Sarju Prasad has never paid Rs. 8,000/- to Bhagwandeem in installments of Rs. 2,000/-. All these documents clearly reveal that Sarju Prasad has informed Bhagwandeem relating to partition of aforesaid property while exercising his extraordinary power of effecting partition, but he has not deposited money before Kamta Prasad for payment of share to Bhagwandeem and he has not paid money to Bhagwandeem in installments which means that Sarju Prasad himself has not acted in compliance of such partition

since its inception. Factum of partition has been denied by his two sons Bhagwandeem & Narayan Prasad. Another son Narbada Prasad, the appellant herein, has alleged and claimed that the partition was effected by his father Sarju Prasad. However, by filing documentary evidence i.e. will deeds Exs. 1-D-12 & 1-D-13, which have been executed in favour of Narbada Prasad-the appellant herein, by his mother Sundar Bai, Narbada Prasad himself has not admitted any factum of partition and has claimed ownership over the entire property not on the basis of partition, but only on the basis of testamentary succession.

20. Best evidence i.e. interested person and party to the partition namely Sundar Bai has executed will deeds Exs. 1-D-12 & 1-D-13 which shows that she has succeeded the entire suit house from her husband by testamentary succession and was exclusive owner of the property. This also shows that no share was allotted to Narbada Prasad and her husband was only exclusive owner of the property.

21. Defendant No. 1 Narbada Prasad has claimed partition. He was under obligation to prove the fact that joint property was partitioned by his father. Plaintiff Bhagwandeem & defendant No. 2 Narayan Prasad have denied previous partition. Allegation of depositing money before Kamta Prasad for payment of share to Bhagwandeem and notices Exs. 1-D-2 & 1-D-14 were parenthesis facts, in the light of evidence of Kamta Prasad (DW-2) and reply to notice Ex. 2-D-27 given to Sarju Prasad. Sarju Prasad has not paid amount to Bhagwandeem and Narayan Prasad in installments. This shows his previous conduct before issuance of notice and subsequent conduct after issuance of notice that his intention was not to partition the property since inception. His aforesaid conduct clearly proves the fact that he has not partitioned the property may be on account of non-acceptance by Bhagwandeem of such offer of partition or rival claim of house in lieu of payment of their share. These documentary & oral evidence are sufficient to prove the fact that Sarju Prasad has never partitioned the house and the property was in joint ownership of all coparceners and sharers till the death of Sarju Prasad & Sundar Bai. In case of joint ownership without any evidence of ouster, presumption would be in favour of all persons that the person in possession of the property is in possession of the property on his own behalf and on behalf of other coparceners or persons entitled for share. Therefore, the suit filed for partition by Bhagwandeem was within limitation.

22. On the basis of aforesaid evidence, especially evidence adduced on behalf of Narbada Prasad i.e. defendant No. 1, the trial Court has rightly arrived at finding that Bhagwandeem is entitled for partition upon the joint property. During the life time of Sarju Prasad, Sarju Prasad and his three sons were coparceners and are entitled for 1/4th share each. During the life time of Sarju Prasad, he has executed will in favour of his wife Sundar Bai and, therefore, on the date of death of Sarju Prasad in terms of proviso to Section 6 of the Hindu Succession Act, 1956 before its amendment, in the light of notional partition; Sarju Prasad,

his three sons namely Bhagwandeem, Narayan Prasad & Narbada Prasad and his wife Sundar Bai were entitled for equal share i.e. 1/5th share each. In the light of will deed Ex. 1-D-5 executed by Sarju Prasad, 1/5th share of Sarju Prasad would fall upon the share of his wife Sundar Bai as testamentary successor. After death of Sundar Bai, in the light of will deeds Exs: 1-D-12 & 1-D-13, Narbada Prasad will get his 1/5th share, 1/5th share of his mother Sundar Bai and 1/5th share of his father received by Sundar Bai as testamentary successor. Therefore, Narbada Prasad would get 3/5th share, Bhagwandeem will get 1/5th share and Narayan Prasad will get 1/5th share.

23. On the basis of documentary and oral evidence, the trial Court has arrived at finding that Sarju Prasad has not effected partition and that Sarju Prasad & Sundar Bai have not executed any will. Finding of the trial Court relating to non-execution of will is not well founded.

24. For the foregoing reasons, finding of the trial Court relating to will and allotment of share is not based on evidence. Consequently, the appeal is partly allowed. Judgment & decree of the trial Court are modified and the suit is decreed in following terms:--

(1) Heirs of the deceased plaintiff i.e. respondents No. 1 (a) to (h) herein are entitled for 1/5th share upon the suit property.

(2) L.Rs. of Defendant No. 2 Narayan Prasad are entitled for 1/5th share upon the suit property.

(3) The appellant herein is entitled for 3/5th share upon the suit property.

(4) Respondent No. 3 herein Shanti Bai is not entitled for any share in the property in the light of testamentary succession, on account of death of her father Sarju & mother Sundar Bai.

(5) Considering the size of house and the fact that such small house is not devisable by metes and bounds, parties are entitled for cost of their share in terms of money.

25. The trial Court shall issue commission at the instance of respondents No. 1(a) to (h) herein for local inspection of the suit property for its valuation and for allotment of 1/5th share to respondents No. 1 (a) to (h) herein, in terms of money.

26. Parties shall bear their own costs.

27. Advocate fees as per schedule. Decree be drawn up accordingly.