
(2019) 03 MP CK 0026

In the Madhya Pradesh High Court

Case No : Second Appeal No. 373 Of 2001

Parmal Singh (Dead) Through Lrs. And Others

APPELLANT

Vs

Ghanshyam And Others

RESPONDENT

Date of Decision : 07-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 100

Citation : (2019) 03 MP CK 0026

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : P.C. Chandil, V.K. Bhardawaj, Rohit Batham

Final Decision : Disposed Off

Judgement

1. This Second Appeal under Section 100 CPC has been filed against the judgment and decree dated 25/7/2001 passed by the First Additional District Judge, Morena in Civil Appeal No.3A/2001, thereby dismissing the appeal filed by the appellants against the judgment and decree dated 22/12/2000 passed by the civil Judge, class-I, Jaura, District Morena in Civil Suit No.24A/1995.

2. The appeal has been admitted on the following substantial questions of law:-

"1. Whether the impugned judgment is bad in law due to the conflicting findings as regards existence of joint property in paragraph 11 of the impugned judgment and as regards the family settlement in paragraph 14 thereof?

2. Whether the Court below is unjustified in upholding alienation of a specific part of the undivided property by one of the co-sharers?"

3. The necessary facts for disposal of the present appeal in short are that the appellants/plaintiffs have filed a civil suit for declaration of title and permanent injunction pleading inter alia that survey no.707 area 1 Bigha 6 Viswa, survey no.165 area 1 Bigha 12 Viswa situated in village Jaura, District Morena (shall be referred to as "disputed land") is the joint property. No partition has taken place

and the plaintiffs and defendants are jointly cultivating the land and are taking crops. It was further pleaded that defendant no.1 has executed a sale deed in favour of defendant no.2 on 16/3/1995 in respect of the land admeasuring 15X50 sqft. forming part of survey no.165 area 1 Bigha 12 Viswa. It was pleaded that the said sale deed is a sham document and since the partition has not taken place, therefore, defendant no.1 had no right or title to sell the specific piece of land out of the joint property. It was further pleaded that during pendency of the suit, defendant no.2 has executed another sale deed in favour of defendant no.3 on 21/8/1997 and the defendant no.3 on the strength of the said sale deed is trying to get his name mutated and is also trying to take possession of the same. Since the defendant no.1 was never in the exclusive possession of the land in dispute, therefore, the sale deed executed by defendant no.1 is null and void. It was further pleaded that defendant no.1 is trying to sell other pieces of lands also and thus, it was prayed that the defendant no.1 may be restrained from alienating the property without getting it partitioned. The defendants no.1 and 2 filed their written statement and pleaded that survey nos.165 and 007 are not the joint property and it was never in joint possession, but in fact this is an Abadi land and the plaintiffs and defendants are in separate possession of the same and are using the same separately. The partition had taken place in Samvat 2049 and defendant no.1 is in possession of the land which had fallen to his share and he had sold 15X50 sqft. of land out of his share by sale deed dated 16/3/1995 executed in favour of defendant no.2. Since the defendant no.2 is in sole possession of the land in dispute, therefore, he is fully competent to sell the same. The defendant no.3 also filed his separate written statement and pleaded that mutual partition had already taken place between the plaintiffs and defendant no.1 in Samvat 2049 and thereafter, the plaintiffs/appellants have no right or title in the land in dispute. Defendant no.3 has purchased the land in dispute from defendant no.2 by registered sale deed dated 21/8/1997 after making payment of entire consideration amount and he has also been placed in possession.

4. The trial court on the basis of the pleadings of the parties, framed issues and after recording the evidence and hearing both the parties, came to a conclusion that the property in dispute is still joint in nature and partition has not taken place. However, has held that since the defendant no.1 has sold his share, therefore, the sale deed cannot be declared as null and void, but placed the burden on the plaintiffs to seek partition of the joint property and accordingly, it was held that the sale deed executed in favour of defendant no.2 and later on in favour of defendant no.3 cannot be declared as null and void.

5. Being aggrieved by the judgment and decree passed by the trial court the appellants filed an appeal, which too has suffered dismissal by judgment and decree dated 25/7/2001 passed by First Additional District Judge, Morena in Civil Appeal No.3A/2001.

6. It is submitted by the counsel for the appellants that once a concurrent finding

of fact has been recorded by both the courts below that the property in dispute is still joint and no partition has taken place, therefore, none of the parties has a right to sell a specific part of his share, thus, although the sale deed executed in favour of defendant no.2 by the defendant no.1 in respect of his share may not be null and void, but the defendant no.1 had no right or title to sell the specific portion of the land without getting it partitioned.

7. Per contra, it is submitted by the counsel for the respondents that the partition had taken place in Smavat 2049 and the defendant no.1 was in possession of the property in dispute in his exclusive ownership rights and accordingly, he had full right to execute a sale deed in respect of a specific piece of land.

8. Heard learned counsel for the parties.

9. The second substantial question of law framed by this Court is dependent upon the outcome of the first substantial question of law. Both the courts below have given a concurrent finding of fact that the property in dispute is still joint in nature and no partition has taken place. This concurrent finding of fact has not been challenged by the defendant no.1 by filing a cross-objection. Now the only question for consideration is that when the property in dispute is joint in nature, then whether the co-owner can sell a specific portion of the said property or he can sell only to the extent of his share and whether the purchaser can taken possession of the specific portion of the property without getting it partitioned?

10. The Supreme Court in the case of Subhodkumar and others Vs. Bhagwat namdeorao Mehetre and others reported in (2007) 10 SCC 571 has held as under:-

"13. In Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh this Court vide paras 9 and 11 has held as follows: (AIR pp. 490-91)

"9. It is true that under the Mitakshara law, as it is administered in the State of Bihar, no coparcener can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparceners; but although a coparcener is incompetent to alienate voluntarily his undivided coparcenary interest, it is open to the creditor, who has obtained a decree against him personally, to attach and put up to sale this undivided interest, and after purchase to have the interest separated by a suit for partition.

* * *

11. 'Civil Appeals Nos. 54 and 55 of 1951'. Coming now to the money appeals, the point for consideration is a short one. The suits out of which these appeals arise were instituted by the plaintiff in the partition suit against the first party defendants for recovery of his 4 annas share of the income or profits of the properties specified in the schedules to the plaints and which were included admittedly in his purchase, on the allegation that the defendants first party appropriated the entire profits to themselves and refused to give the plaintiff his legitimate share. The High Court has held that this claim of the plaintiff must fail.

All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion, this is the right view to take and Mr Daphtary, who appeared in support of the appeals, could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase. The result is that these appeals are dismissed with costs."

The Supreme Court in the case of *M.V.S. Manikayala Rao v. M. Narasimhaswami and others* reported in AIR 1966 SC 470 has held as under:-

"5.Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period when a specific allotment was made in his favour": *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain*. It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras Full Bench case of *Vyapuri v. Sonamma Boi Ammani*."

11. Thus, it is clear that when the property in dispute is joint in nature, then although the co-sharer can sell the property to the extent of his share, but he cannot sell the specific piece of land. A co-sharer can alienate the property only to the extent of his share and alienation of the property beyond his share is void. However, in the present case, there is no averment that the defendant no.1 has alienated the property beyond the extent of his share. Therefore, the sale deed executed by defendant n.1 in favour of defendant no.2 and, thereafter by defendant no.2 in favour of defendant no.3 cannot be said to be void. Accordingly, this court is of the considered opinion that the findings of the trial court that the sale deeds executed in favour of defendants no.2 and in turn, defendant no.3 cannot be said to be void is correct and is accordance with law.

12. Now the question for consideration is that whether the defendant no.1 could have sold the specific portion of the land without partition or not?

13. It is well established principle of law that unless and until the property is partitioned, the co-sharer can only sell to the extent of his share, but he cannot sell any specific portion of the land. Accordingly, it is directed that in case if defendants no.1, 2 and 3 files a suit for partition within a period of three months from today, then the purchaser shall continue to remain in possession of the land

purchased by him by sale deed dated 21/8/1997, till the actual partition is done. The specific piece of land would be decided only after the partition is done between the defendant no.1 and the plaintiffs.

14. With aforesaid modifications, judgment and decree dated 25/7/2001 passed by the First Additional District Judge, Morena in Civil Appeal No.3A/2001 and the judgment and decree dated 22/12/2000 passed by the civil Judge, class-I, Jaura, District Morena in Civil Suit No.24A/1995, are hereby affirmed.

15. The appeal is, accordingly, disposed of.