

(2008) 02 PAT CK 0078

In the Patna High Court

Case No : Misc. Appeal No's. 275 and 320 of 2003

Ram Niwas Agarwal and Another and Md. Nazre Alam

APPELLANT

Vs

Manoj Kumar Agarwal and Others

RESPONDENT

Date of Decision : 12-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2008) 56 BLJR 1514 : (2008) 2 PLJR 416

Hon'ble Judges : Rekha Kumari, J

Bench : Single Bench

Advocate : Umesh Prasad Singh, for the Appellant; Pramod Kumar Gayadutta and Umesh Prasad Singh, in M.A. No. 275 of 2003, for the Respondent

Judgement

Rekha Kumari, J.—Since both these appeals are directed against the order dated 28.6.2003 passed by the learned Subordinate Judge III, Patna City, in Title Suit No. 13 of 2003 whereby he has restrained the appellants (defendants first party) of Misc. Appeal No. 320 of 2003 from alienating the suit property, detailed in Schedule I to IV, they have been heard together and are being disposed of by this common judgment.

2. The plaintiffs-respondents have filed the above title suit for 1/3rd share in the suit property and for injuncting the defendants from selling the immovable properties and for withdrawing cash from the Bank account etc.

3. The case of the plaintiffs-respondents Manoj Kumar Agrawal and his minor son, in the plaint, is that Late Jairamdas Goenka had four sons, namely, Kanhaiyalal Goenka, Late Jhavarmal Goenka, Late Musaddilal Goenka and Govind Prasad Sultania. They were all members of a joint Hindu family governed by Mitakshara School of Law. Out of four sons of Jairamdas Goenka, Kanhaiyalal Goenka died issueless. His wife had predeceased him and so, his branch became extinct. Govind Prasad Sultania was adopted by one Ram Chandra Prasad Sultania and so, he severed connection with the family of his natural father. Jhavarmal had, in fact, three sons, Ram Niwas Agrawal, Gopichand Goenka and

Bajrang Prasad Agrawal. Late Musaddilal Goenka had no issue. So, he adopted Gopichand Goenka. Hence, after this adoption, Jhavarmal Goenka had only two sons Ram Niwas Agrawal (appellant No. 1-defendant No. 1) and Bajrang Prasad Agrawal (defendant No. 3). Ram Niwas Agrawal was married to appellant No. 2 Smt. Sumitra Devi. The couple, however, did not have any child for a long time after marriage. So, they adopted Manoj Kumar Agrawal as their son on 10.2.1970, though after a year or two of the adoption, two daughters were born to them.

4. The further case of the plaintiff is that Jairam Das Goenka was Karta of the family comprising of himself and his sons. After his death, Kanhaiyalal Goenka became the Karta. Sometime after the death of Kanhaiya Lal, two brothers Jhavarmal Goenka and Musaddilal Goenka separated in mess, business and residence. They, however, remained partners in the joint family business run by them. After partition Musaddilal left "Goenka Sadan" (Schedule I property) leaving the families of Ram Niwas Agrawal and Bajrang Prasad Agrawal.

It is further said that the business in which Ram Niwas Agrawal and his wife are partners, they are carrying on business from ancestral assets and the said business are joint in between the plaintiffs and defendants 1st set. They are described in Schedule II.

5. There was another firm M/S. Mahabir Steel Rerolling Mills, now M/S. Dina Mahabir Rerolling Mills Private Limited which was under the partnership of Ram Niwas Agrawal, Bajrang Prasad Agrawal, Musaddilal Goenka, Sultania and Kamalia families. Ram Niwas Agrawal and Bajrang Prasad were representing the branch of Jhavarmal in the capacity of partners. On partition the factory with shed and machines were given to Kamalia family and the branches of Jhavarmal, Musaddilal and Govind Prasad Sultania were given vacant land in the south of the factory premises (Schedule III property) and in that land the share of the branch of Ram Niwas Agrawal comes to 6 kathas 12 dhurs.

6. Then, from the family property and fund, 461/4 decimals of land at Fatwah (Schedule IV property) was purchased in the name of defendant No. 2-appellant No. 2 over which the factory of M/S. J. M. G. Steel Private Limited is running.

7. There is a Saving Bank account in the name of defendant Nos. 1 and 2 (described in Schedule V) which is also a joint family property. The other joint movable properties are described in Schedule VI of the plaint.

8. The case of the plaintiffs-respondents, hence, is that as Manoj Kumar Agrawal was adopted by the appellants, he has got 1/3rd share in the above properties which are ancestral properties and as on demand the appellants refused to partition the properties, the plaintiffs- respondents were compelled to file the suit.

9. After the filing of the suit, the plaintiffs-respondents filed a petition under Order 39 Rules 1 and 2 and Section 151 of the CPC stating therein that appellant No. 1 in league with the other appellant has been withdrawing money and

operating the bank accounts in order to deprive the plaintiffs from the cash amount. They in league with defendant No. 3 also want to alienate the suit land described in lot No. 2 of Schedule II and for that they have entered into an agreement with one Md. Nazre Alam. The plaintiffs, hence, prayed in the petition for restraining the defendants from selling, alienating, encumbering with the immovable properties and withdrawing cash from the Bank accounts and from operating the locker and for maintaining status quo with respect to the suit properties in Schedule I to VI of the plaint.

10. The appellants contested the application of the respondents for ad interim injunction. Their case, as it appears from the written statement and the show cause to the above petition filed, inter alia, is that plaintiff Manoj Kumar Agrawal was never adopted by them as son. There was, in fact, no occasion for the same. The properties in Schedule I to VI are the self acquired properties of the appellants. The land at Fatwah shown in Schedule IV of the plaint was purchased from the streedhan and personal fund of appellant No. 2 and is her personal property. There was no joint family business. The firm M/S. Patna Wire and Wire Products, M/S. Suresh Aluminium Works, M/S. R.D. Steel and Sri Mahabir Industries are partnership business governed by the Indian Partnership Act and are not ancestral business nor carried by ancestral assets. M/S. Suresh Aluminium Works (described in Schedule II) is closed since 1992. In relation to this firm, there was old dues for which the District Industry Centre, Patna threatened to file certificate case. The firm M/S. Patna Wire and Wire Products was under huge liability. The State Bank of India, hence, also gave threats to take legal recourse. Hence, to save and relieve the family from the litigation, it was necessary to raise money by sale of land of M/S. Suresh Aluminium Works and, therefore, the agreement was entered into with Nazre Alam. The proposed sale, therefore, is for legal necessity.

11. The contention of the appellants, hence, is that the properties in suit are not the joint family properties or business and that the plaintiff No. 1 is not the adopted son of the appellant. Therefore, the plaintiffs have no prima facie case. They would also not suffer irreparable loss and the balance of convenience does not lie in their favour.

12. The learned Subordinate Judge after considering the documents filed, and hearing the parties held that the plaintiffs have been able to establish a prima facie case that plaintiff No. 1 is an adopted son of the defendant first party. He further held that the concerned firms, though constituted under the Indian Partnership Act, are partnership firms of joint family and other properties are joint family properties. Therefore, there is a prima facie case that the plaintiffs have share in the properties and that irreparable loss would be caused to them if the injunction is not granted. He accordingly, by the impugned order restrained the appellants from alienating the suit property detailed in Schedule I to IV rejecting the prayer of the plaintiffs with respect to the Bank accounts and the movables.

13. Learned Counsel for the appellants submitted that the respondents plaintiffs have failed to show that plaintiff No. 1 is the adopted son of the appellants and that, in fact, the suit has been filed at the instance of Gopinath Goenka, the real father of appellant No. 1. The date of adoption has not been given. On the other hand the appellants have filed documents to show that the plaintiff No. 1 is the son of Gopichand Goenka and remained his son through out. Therefore, no question of injunction arises in this case.

14. He further submitted that there is no prima facie case that the above firms are joint family business or are being carried on joint family funds. Therefore, the plaintiffs- respondents have no right in the same. His submission also is that the above agreement of sale was executed after receiving substantial amount as consideration, much prior to the filing of the suit, and the prospective purchaser has been given possession. Then, even if it be assumed that the business is a joint family business, appellant No. 1 being Karta had right to sell the property for legal necessity. Therefore, the balance of convenience does not lie in favour of the plaintiffs in respect of this sale. He then submitted that so far the land shown in Schedule IV is concerned, it is admittedly in the name of appellant No. 2 and the same was purchased from streedhan. Therefore, it cannot be a subject matter of partition in this suit.

15. Learned Counsel for the respondents, on the other hand, defended the impugned order. He submitted that the documents filed clearly show that the plaintiff No. 1 is the adopted son of the appellants. The impugned order clearly shows that the properties are joint family properties. It is also the duty of the Court to preserve the subject matter of litigation and one co-sharer cannot deprive another co-sharer from the enjoyment of the joint family property. Therefore, the Subordinate Judge was correct in allowing the petition for injunction and passing the impugned order.

16. It is an admitted position that the plaintiffs/respondents have not filed any document relating to adoption. But to prove adoption it is not necessary that there must be any such document. They have, however, filed a number of documents in support of their case in this regard. Among them, the copy of School Leaving certificate shows that the plaintiff No. 1 was admitted in Rajkiya Marwari School where his father's name was recorded as Ram Niwas Agrawal. He was admitted in that school in 1981 much before any dispute arose between the parties. The partnership deed dated 26.7.1994 of M/S. Ram Chandra Govind Prasad in which plaintiff No. 1 was partner shows that his father's name has been recorded as Ram Niwas Agrawal. The deed has been witnessed by Ram Niwas Agrawal. The annual returns of J.M.G. Steel Pvt. Limited for the years 1994, 1995, 1996, 1997, and 1999 filed in this Court show that in all of them Manoj Kumar Agrawal (plaintiff No. 1) has been shown as son of Ram Niwas Agrawal (appellant No. 1) and all the returns have been signed by Ram Niwas Agrawal as Managing Director. The Minutes Book of M/S. J.M.G. Steels also shows that Manoj Kumar Agrawal has been described therein as son of Ram

Niwas Agrawal, and Ram Niwas Agrawal has signed it as Managing Director. The copy of plaint of Title Suit No. 24 of 1998 filed by M/S. Jairam Engineering Works against Ram Niwas Agrawal and others show that Manoj Kumar Agrawal has also been added as a defendant in that suit and he was described as son of Ram Niwas Agrawal. There is nothing to show that Ram Niwas Agrawal raised any objection in showing Manoj Kumar Agrawal as his son. The learned trial court has rightly observed that this also shows that the strangers recognized Manoj Kumar Agrawal as son of Ram Niwas Agrawal. These documents apart from other documents mentioned in the impugned order go to show atleast, prima facie, that Manoj Kumar Agrawal was adopted as son by Ram Niwas Agrawal. Manoj Kumar was a natural born son of Gopi Chand Goenka. So, when in some documents he was described as son of Ram Niwas Agrawal and those documents have been witnessed and signed by Ram Niwas Agrawal, an inference may be drawn that Manoj Kumar Agrawal was the adopted son of Ram Niwas Agrawal.

17. The appellants have also filed various documents as mentioned in the impugned order in which after the alleged adoption, the name of father of Manoj Kumar Agrawal is mentioned as Gopichand Goenka. Among those documents, in the Income Tax return for the assessment years 1999-2000, 2000-2001, Manoj Kumar Agrawal, has shown him as son of Gopichand Goenka. In the PAN card of Income tax, Deed of Retirement of some partners of M/S. Ram Chandra Govind Prasad also he has given his father's name as Gopichand Goenka. In the Will said to be executed by Jhavarmal dated 3.1.1998 he has been shown as son of Gopichand Goenka. But admittedly he is the natural born son of Gopichand Goenka. So, if for any reason, even after adoption, Gopichand Goenka has been shown as father of Manoj Kumar Agrawal in the above documents, that is not so unusual as when he has been shown as son of Ram Niwas Agrawal.

18. Therefore, I agree with the learned court below that the plaintiffs-respondents have been able to establish, prima facie, that the plaintiff Manoj Kumar Agrawal is the adopted son of appellant Ram Niwas Agrawal.

19. The question then is whether the landed properties and firms shown in the Schedules are joint family properties and business.

20. In this connection, as regards the property mentioned in Schedule I, it is not disputed that "Goenka Sadan" is ancestral property of the appellants.

21. As regards the firms mentioned in the Schedules, the plaintiffs-respondents have not filed any document to show that they are joint family firms. There is also no presumption that a business standing in the name or started by even a manager is joint family business. But if the joint family funds are utilized in starting the business, the same would be regarded as joint family business. Therefore, the point is whether the firms grew from the nucleus of the joint family.

22. In this regard from the deed of Retirement of Gopichand Goenka dated 8.10.2001 from M/S. Patna Wire and Wire Products, Moghalpura, Patna City, it

appears that Gopichand Goenka, Ram Niwas Agrawal and Smt. Shakuntala Devi were partners and the partnership agreement was executed on 26.7.1994. The appellant Ram Niwas Agrawal was in a position to file the original agreement to show whether joint family fund was utilized by him in this partnership business but this has not been done by him. The appellants, however, in this Court have filed an audit report of the firm which indicates that Ram Niwas Agrawal was a partner in the firm in the capacity of a member of HUF (Hindu Undivided Family). Therefore, from this a prima facie case is made out that this business shown in Schedule II, lot I is a joint family business of the appellants in which other persons are also partners.

23. As regards the firm M/S. Suresh Aluminium Works shown in lot No. II of Schedule II, the case of the plaintiffs is that they and defendant Nos. 1 and 2 (appellants) have 50% share in the name of Ram Niwas Agrawal. According to the appellants, it is a separate business constituted under the Indian Partnership Act. The plaintiffs have not filed any document, nor has shown sufficient joint family nucleus to prove prima facie that it is a joint family business or that the joint family fund of Ram Niwas Agrawal was utilized by him in this firm. According to the written statement of the appellants, the business is closed since October, 2001 and that in the firm there were three partners, namely, Ram Niwas Agrawal, Bajrang Prasad Agrawal and Smt. Chandrakala Devi and among them Chandrakala Devi retired. So, according to the appellants themselves Ram Niwas Agrawal is a partner in the firm. But a member of the joint family can be a partner in a business in his individual capacity. Hence, in absence of any material to show that he is a partner of this firm as a representative of the joint family, it is not, prima facie, proved that this is a joint family business of the plaintiffs and the defendants and that the plaintiffs have any share in it.

24. So far as the firm M/S. Ram Chandra Govind Prasad mentioned in lot No. III of Schedule II of the plaint, copy of the deed of retirement dated 8.10.2001 of Bajrang Prasad Agrawal filed in this Court shows that Musaddilal Goenka, Bajrang Prasad Agrawal and Manoj Kumar Agrawal (plaintiff No. 1) as son of Gopichand Goenka are partners in the firm. Therefore, Ram Niwas Agrawal through whom the plaintiffs claim share is neither a partner in this firm nor he has any share in it. So, even if plaintiff No. 1 is a partner in the said firm, he cannot claim share in this firm as an adopted son of Ram Niwas Agrawal. It may, however, be mentioned here that according to the written statement of the appellants, Jharmal Goenka had given fund to his brother Musaddilal for starting the business but this is not enough to show that this is a joint family business or the branch of Ram Niwas Agrawal has any share in it.

25. With regard to Schedule III land measuring 17 katha 10 dhurs 1 dhurki, the case of the plaintiffs is that there was a firm M/S. Mahabir Rolling Mills Private Limited (now M/S. Dina Mahabir Re-rolling Mills (P) Limited) which was running under the partnership of Ram Niwas Agrawal and Bajrang Prasad Agrawal and others and Kamalia family and that Ram Niwas Agrawal and Bajrang Prasad

Agrawal sons of Jhavarmal Goenka were representing the Branch of late Jhavarmal in the capacity of partners. On partition, the factory with shed and the machines were given to Kamalia family and the then branch of Jhavarmal Goenka and Musaddilal Goenka along with Govind Prasad Sultania were given the above vacant land in the south of the boundary of the premises.

26. The appellants have denied in the written statement that Ram Niwas Agrawal and Bajrang Prasad Agrawal were representing the branch of Jhavarmal Agrawal as partners. Their case is that appellant Ram Niwas Agrawal and the defendant Jhavarmal Goenka were partners in their individual capacity.

27. There is no evidence so far that Ram Niwas Agrawal was a partner in representative capacity, so, there is no prima facie case that the property is a joint family property of the appellants.

28. As regards the land at Schedule IV, the same is admittedly registered in the name of defendant No. 2. The case of the plaintiffs-respondents is that this property was purchased from the income of joint family property and fund of the appellants and the respondents. The appellants, however, have denied it and have stated that the property was purchased by defendant No. 2 from her separate fund. She is an old assessee under the Income tax Act and Wealth Tax Act. She has substantial income through shares and debentures etc.

29. In view of the above averments of the parties, as the property stands in the name of appellant No. 2, in the absence of evidence that the same was purchased from the joint family fund, it is not prima facie proved, at this stage, that this property is a joint family property.

30. In view of the above discussions, I find that though the plaintiffs have been able to show prima facie that plaintiff No. 1 Manoj Kumar Agrawal is the son of the appellants, except the property mentioned in Schedule I and the firm mentioned in lot No. 1 of Schedule II, they have failed to prove, prima facie, that the other firms mentioned in Schedule II and the landed properties mentioned in Schedule II and IV are joint family business and properties and can be a matter of partition. Therefore, the learned Subordinate Judge should not have issued injunction in respect of these properties and business also.

31. As regards the properties mentioned in Schedule I and the firm mentioned in lot I of Schedule II, as the plaintiffs have been able to show prima facie that they belong to the joint family comprising of the plaintiffs and the defendants 1st set, they would suffer irreparable loss, if the appellants are allowed to alienate them. The balance of convenience also lies in not alienating the properties.

32. Thus, the impugned order of injunction barring the properties mentioned in Schedule I and lot No. 1 of Schedule II, is set aside. It may also be mentioned here that no observation made in this order would have any bearing during trial of the suit in the court of the learned Subordinate Judge.

33. With the above observation, Misc. Appeal No. 320 of 2003 is allowed in part

as indicated above.

34. Misc. Appeal No. 275 of 2003 has been filed by one Md. Nazre Alam challenging the above order of grant of injunction by the court below on the ground that defendant No. 2-appellant No. 2 has executed an agreement for sale in respect of lot No. 2 of Schedule II in his favour. A further prayer has also been made to direct the trial court to implead him as a defendant in the suit.

35. As he is not a party to the suit or appeal, his appeal is dismissed as being not maintainable. The appellant, if so advised, may file a petition for being added as a party in the court below which would be considered and disposed of by that court in accordance with law.