

(1968) 04 PAT CK 0032
In the Patna High Court
Case No : S.A. No. 671 of 1964

Rampadarath Singh and Others	Vs	APPELLANT
Mahanth Sampat Kumar and Another		RESPONDENT

Date of Decision : 29-04-1968

Acts Referred:

Hindu Succession Act, 1956 — Section 14

Citation : (1969) 17 BLJR 451

Hon'ble Judges : S.C. Misra, J;Kanhaiyaji, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.C. Misra, J.—This is an appeal by the plaintiffs, who brought the suit for declaration that 2 bighas 11 kathas and 1 dhur of land mentioned in Schedule B to the plaint, lying in village Garha, Police Station Runisainpur, District Muzaffarpur, were not liable to be attached and auction sold. This property was said to be sold in execution case No. 20 of 1956, which arose out of a decree passed in Title Suit No. 66 of 1953 in the court of the Subordinate Judge, Muzaffarpur.

2. The plaintiffs pleaded that they were not bound by the auction sale in its entirety, or, in any case, after the amendment of the plaint, it was mentioned that the plaintiffs were not bound by it at least to the extent of their three-fourth share. Plaintiff No. 1 was the Karta of the joint family - of the plaintiffs. Rambilas Singh, defendant second party, was brother of plaintiff No. 1 and had been living separately from the plaintiff, both in mess and property, since the year 1950. There was ill-feeling between Rambilas Singh and the plaintiffs' father, mother and the plaintiffs. In the circumstances, Rambilas Singh was separated from the family and there was a partition made by the panches by which the share of Rambilas Singh was set apart from the shares of the plaintiffs both in respect of Kasht and Bakast lands together with all family debts. But actually Rambilas did not get any immovable property in his share, and he was given in lieu Rs. 900/-

in cash and allowed to remain in the residential house, so long as he did not build his own separate house. By virtue of this partition, the plaintiffs were entitled to the entire family properties and hence the decree obtained by the defendant first party, Mahanth Sampat Kumar Dass, did not bind the other members of the family. The decree was obtained by the Mahanth in Title Suit No. 66 of 1953 in the court of the Additional Subordinate Judge, Muzaffarpur, against defendant Rambilas Singh, who was alleged to have looted away the idols of the temple and taken forcible possession of the temple, along with other persons. The Mahanth brought a suit for recovery of possession which was decreed on the 23rd of January, 1956, and that decree was being executed in respect of the decree for costs being a sum of Rs. 394.45 Paise. 2 Bighas 11 kathas 1 dhur of land, as mentioned in Schedule B to the plaint, were attached. Plaintiff No. 1 accordingly filed a petition under Order XXI, Rule 58 of the Code of Civil Procedure, in the executing court, which was numbered as Miscellaneous Judicial Case 4 of 1957. During the pendency of the proceeding, however, the suit land was auction sold on the 23rd March, 1957, and was purchased by the decree-holder himself for a consideration of Rs. 300/- only. The Miscellaneous Judicial Case was also dismissed on the 4th December, 1957. It was further alleged that the plaintiffs, in any case, were not liable to pay any amount, in respect of the decree passed against Rambilas Singh, because that related to the criminal acts done by him. Hence a declaration was sought for in the reliefs prayed as aforesaid.

3. The defence case, apart from taking a plea in regard to the suit being not maintainable, substantially was that the defendant second party was joint in mess and property with the plaintiffs and he was the Karta of the family. All allegations regarding partition were unfounded. The defendant second party contested the title suit for the benefit of the family. The suit was brought in reality by Rambilas Singh himself in the name of the plaintiffs, in order to deprive the decree-holder-auction purchaser of the property purchased by him. The property sold was not worth more than Rs. 300/-. Defendant No. 2 was, in fact, impleaded in title suit No. 66 of 1953 in the capacity of the manager of the family and hence the entire family was liable for paying the decretal dues.

4. The courts below have concurrently found that the decree passed in the previous suit in favour of the defendant first party was against Rambilas Singh in his personal capacity. Since the properties, which were purchased at auction by defendant No. 1, were the joint family properties, the defendant first party could not be taken to have purchased any interest apart from the interest belonging to the judgment-debtor, Rambilas Singh. Coming to this conclusion, however, the two courts below decreed the suit to the extent of two-thirds interest of the plaintiffs in the suit property, upholding the right of the auction-purchaser to the extent of one-third only in the property sold.

5. In the appeal preferred to this Court by the plaintiffs, the only question raised is with regard to the quantum of the share of Rambilas Singh, as to whether it

would be one-third in the joint family property or one-fourth, allowing one share to the mother, who is alive. It may be stated that plaintiff No. 2, Rampadarath Singh, and defendant No. 2, Rambilas Singh, are sons of Sarjug Singh, plaintiff No. 1. It may also be stated that during the pendency of the suit itself, Sarjug Singh died and his widow, Shrimali Parmeshwari Devi was brought on the record in his place. Apart from that, Shrimati Janki Kuer, the daughter of Sarjug Singh, was also brought on the record along with the mother. The trial court decreed the suit of the plaintiffs to the extent of two-thirds, but dismissed it in respect of the share of Rambilas Singh, which, according to that court, would be one-third, because when the purchase was made by the defendant first party of the property in suit at auction, the persons interested in the property would be only the father and the two sons.

6. It may be stated that the learned Munsif has stressed at more than one place in his judgment the fact that the plaintiffs could claim only two-thirds share in the disputed property because it was conceded by learned lawyers on behalf of both the parties that in the event of the court coming to the conclusion that the case of the plaintiffs that Rambilas Singh had no interest in the suit property was not acceptable, the share of Rambilas Singh will be one-third and the shares of Sarjug Singh and his other son will be two-thirds. In appeal, however, the learned Subordinate Judge came to the same conclusion, affirming the judgment of the trial court, not on the ground of any concession having been made before the learned Munsif by the learned lawyers appearing for the parties, but on the merits of the matter. In this appeal, Mr. Janardan Sinha has urged that the judgment of the courts below can not stand in so far as it has been held that the share of Rambilas Singh would be one-third in the suit property.

7. Mr. Shrinath Singh has taken us to the question whether the appellants could raise this question in a second appeal. He has urged that because (he learned Munsif has mentioned that the point was conceded by the learned Counsel for the parties, it was not open to the plaintiffs in an appeal arising out of that judgment to press for a larger share than what was allowed by the trial court. It is true, no doubt, that the lower appellate court has not proceeded upon the footing of any concession having been made by the learned lawyer for the parties, or, for the matter of that, learned lawyer for the plaintiffs, but it was not so because the lower appellate court -came to the same conclusion in agreement with the trial court on merit of the matter and it was not necessary for the lower appellate court, therefore, to scrutinise the question as to whether any concession was made by the learned lawyer for the plaintiffs in the trial court.

8. Mr. Janardan Sinha has, however, drawn our attention to the grounds of appeal presented by the plaintiff-appellants in the court of the District Judge. There it has been specifically stated that the learned Munsif was in error in mentioning this fact in his judgment that any concession was made by the learned Counsel for the plaintiffs as to the quantum of the share to which Rambilas Singh would be entitled and the share to which his father and his

brother would be entitled.

9. There has been some discussion at the Bar on this point, Mr. Shrinath Singh has sought to draw support for his contention from a decision of their Lordships of the Supreme Court in the case of the Bank of Bihar v. Mahabir Lal 1964 BLJR 1 in which, no doubt, Mudholkar, J. has laid down a proposition that if the lawyer appearing for a party in the Supreme Court challenged the recital in the judgment of the High Court to the effect that learned Advocate for the Bank conceded certain point which, in fact, was not conceded, then the proper procedure for the party was to raise that question in the High Court itself at the time of the judgment being delivered, because that court was in a better position to judge whether the fact inserted in the judgment as to the concession having been made was actually there or not. It appears, however, that their Lordships observed on this point as follows :

In our opinion, where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. If the High Court had proceeded on an erroneous impression that Mr. De had conceded that the money was taken along with him by Ram Bharosa Singh to Patna, there was nothing easier for the Bank than to prefer an application for review before the High Court after the judgment was pronounced or if the judgment was read out in court immediately drawing the attention of the Court to the order in the statement.

It may be stated that so far as judgments in courts in Bihar are concerned, including judgments of the High Court, the entire judgment is ordinarily not read out. It may be, however, that when an error is discovered by way of wrong recital in the judgment by the party concerned, he may seek his remedy for rectifying the error by filing an application for review. That, however, is not the only procedure open, because in the special circumstances of the case it was pointed out that in such a situation "it ought not ordinarily to be permitted to be challenged". Their Lordships did not lay down that in no case such a situation can arise. Moreover, that was a case of an appeal to the Supreme Court from a judgment of the High Court, so in the Supreme Court the question could well be agitated in the manner decided by their Lordships in this decision. In the present case, however, the question was properly raised before the lower appellate court. If that court has not referred in the judgment to any concession having been made before the learned Munsif by the lawyer for the plaintiffs, no assistance can be derived by Mr. Shrinath Singh in support of his contention from any observation made in (his judgment. Moreover, with reference to the application for amendment of the plaint having been filed by the plaintiffs it appears that in the plaint as it was originally filed nothing was specified as to the quantum of share in the event of the court coming to the finding that Rambilas Singh had some interest in the suit property. After the arguments were over, however, an

application for amendment was filed on the 8th of August, 1961, stating in clear terms that in view of the fact that the mother of Rambilas Singh was alive, the mother would be entitled to a share, in a suit by the auction-purchaser of the joint family property, and as such Rambilas Singh's interest in the suit property would be only to the extent of one-fourth and not one-third. The position, as it appears from the judgment of the learned Subordinate Judge, is quite intelligible on the background of this application having been filed after the arguments were over. The only error in the judgment of the learned Munsif appears to be that while he allowed the amendment to this effect being made, he was still under the impression that it was the plaintiffs' case that Rambilas Singh would be entitled to one-third share. This wrong impression, however, was not in the mind of the lower appellate court. In view of the amendment having been allowed in effect, all concessions having been made at earlier stage automatically disappeared. That is obviously a reason why the statement in the Judgment of the learned Munsif being erroneous, the learned lower appellate court proceeded to a decision on merits and neither side can take any advantage on account of any concession having been made by the learned Counsel for the parties in the trial court. In that view of the matter it is not necessary to refer to another decision relied upon by the learned Counsel in the case of Madhu Sudan chowdhri and Ors. v. Chandrabati Chowdhrair AIR 1917 PC 30. It may, however, be stated that in that case the view taken by their Lordships was that in the special circumstances of that case they were unable to accept the contention that the actual judgment was given some 14 days after the hearing of the appeal, and, therefore, the learned Judges might have misunderstood the action of the lawyer in the conduct of the case, Their Lordships observed accordingly if that was the position, the proper procedure to be followed was to draw the attention of the court to the error, when the matter was still fresh in the mind of the Judges. This decision also, therefore, is not of any particular value in so far as the contention of Mr. Shrinath Singh is concerned.

10. Mr. Janardan Sinha has drawn our attention to a number of decisions, but he has relied mainly upon two cases, one being a decision of a Full Bench of the Bombay High Court in the case of Parappa Ningappa Khaded and Another Vs. Mallappa Kallappa and Others, . In that case also the question for consideration was where the joint family property was sold by a coparcener to an outsider, as is permitted in Bombay, the purchase made by the vendee would be to the extent of the interest of his vendor only and that would be determined, if the mother would be alive, in the light of the fact that such purchase would amount to a claim for partition and the mother would be entitled to a share, according to the well established principles of the Hindu Law that when the sons divide their interest, the mother also is entitled to a share apart from the interest to which the father would be entitled. Mr. Shrinath Singh has seriously contended that the decision of the Full Bench of the Bombay High Court is incorrect and it is not in consonance either with the provisions of the Hindu Law or the decisions in the cases of Mossamat Bhiwra v. Mossamat Renuka AIR 1962 Nag 215 and AIR 1936

20 (Privy Council) Sellammal Vs. Periammal, and S.S. Munna Lal Vs. S.S. Rajkumar and Others, Mr. Janardan Sinha, however, has urged that none of these decisions runs counter to the pronouncement of the Full Bench of the Bombay High Court, It is no doubt, there is a cryptic passage which has been quoted in by Mitter, J. from the Hindu Law text that at the time of the partition of the family property between the father and the son, the mother also is entitled to a share. Since the original text is in general terms, the question of the result of the litigation arising did not arise, because that would be a case when the purchaser would obviously take possession when actual division of the share by metes and bounds would be made by the members of the Hindu joint family. The Full Bench of the Bombay High Court has adopted the view that it is not that the right of the mother arises only when there is partition by metes and bounds in a partition suit, but as soon as a decree is passed. That was the narrow proposition for consideration before their Lordships. Neither the decision of the Nagpur High Court in AIR 1962 Nag 215 nor the decision of the Privy Council in⁵, had been taken into consideration. In the Privy Council decision the question was if a mortgage decree was passed against the other members of the joint family without impleading the mother, whether the decree might be reopened by claiming a share by the mother. The principal question, therefore, was the validity of a decree in a redemption suit without impleading the mother and whether the other, members of the joint family would be taken to represent the interest of the joint family or not. The specific question, which the Full Bench of the Bombay High Court had to consider did not fall for determination by their Lordships of the Judicial Committee in the aforesaid case. In that case also, no doubt, it was observed that severance of title of a member of the joint family does not effect the severance of the mother's share in the same way as it does of a male coparcener, even a preliminary decree for partition does not have that effect. Her rights do not vest until the property has actually been divided. But, their Lordships observed that the proper place to declare and define the mother's share is the preliminary decree. It can, of course, be amended from time to time as circumstances alter, but that is the proper place and time for the necessary declaration. This judgment also, therefore, is in consonance with the view of their Lordships of the Full Bench of the Bombay High Court and does not lead support to the contention of Mr. Shreenath Singh that unless there is actual partition by metes and bounds among the members of the joint family consisting of father and sons, the mother is not entitled to any share. It is true, no doubt, that this judgment has given a theoretical analysis of the nature of the share of the male members as also the share of the mother in a Hindi joint family, but, beyond that, as I have already said, this is also consistent with the. view that the mother's share is defined as soon as the preliminary decree is passed.

11. The only question left for consideration is whether, when the share of a member of a Hindu joint family is purchased at auction sale which is valid in regard to a Mitakshare Hindu joint family, it effects a notional partition and when the mother is alive at the time, although she may have no pre-existing right, the

auction purchaser would be deemed to proceed on the footing that he can only assert his right to such property by bringing a suit for partition and that being so his right must be subject to the right of the mother, if she is alive. This proposition finds clear support from the decision of their Lordships of the Judicial Committee in the case of Baboo Hurdey Narain Sahu v. Pundit Baboo Booder Perkasli Misser IV. I.A. 26. In that case, the main question for consideration was as to the rights in a joint family estate, which under the Mitakshara law accrue to the purchaser of the father's right, title and interest therein sold in satisfaction" of debts incurred by the father, and, it was held that where the purchaser got auction sold the right, title and interest of the father in the joint family estate, he took the right which the father would have had to a partition and the share which would have come to him on a partition being made. Their Lordships relied on the decision in the case of Deendyal Lal v. Jagdeep Narain Singh LR 4 IndAp 247 and observed as follows :

According, therefore, to the authority of Deendyal Lal v. Jagdeep Narain Singh LR 4 IndAp 247 the present appellant became entitled only to the one-third, treating" it as if the sale was to operate as a partition at that time.

In view of this clear pronouncement of the Privy. Council, it is difficult to accept the contention urged on behalf of the respondents. , In this decision also, apart from the fact that it does not bear upon the question of the right of a purchaser of the interest of a member of a Hindu joint family under the Mitakshara law, but, in so far as it can refer to such a family, the law laid down is that till actual division on partition of the joint family estate a wife or mother shall not be recognised as the owner, but that rule cannot, in the judgment of their lordships, apply after the enactment of the Hindu Succession Act. So their Lordships also held that in terms of Section 14. even in respect of such a property a right acquired by a Hindu female would be that of an absolute owner in the property. This decision, however, as I have already said, does not bear upon the exact question for determination in this appeal, i.e., the effect of the purchase of the interest of a member of the joint family by an outsider.

12. In the result, therefore, it must be held that the judgments of the two courts below cannot stand in so far as they have held that the plaintiff-appellants would be entitled only to two-third interest and the defendant-auction purchaser would be entitled to one-third interest. The decree should be substituted like this that the plaintiffs would be entitled to three-fourth interest in the suit property and the defendant-auction purchaser would be entitled to one-fourth only. The appeal is, therefore, allowed to this extent, but, in the peculiar circumstances of this case, it is also ordered that the parties shall bear their own costs throughout.

Kanhaiyaji, J.

13. I agree.