

Vineeta Sharma Vs. Rakesh Sharma and ors.

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Court : Delhi

Decided On : Oct-29-2013

Judge : M. L. Mehta

Appellant : Vineeta Sharma

Respondent : Rakesh Sharma and ors.

Advocate for Def. : Mr. Subhasish Mohanty

Judgement :

* THE HIGH COURT OF DELHI AT NEW DELHI + CS (OS) 267/2002 Date of Decision:

29. 10.2013 VINEETA SHARMA ...PLAINTIFF Through: Mr.K.K.Bhuchar, Advocate. Versus ...DEFENDANTS RAKESH SHARMA AND ORS. Through: Mr. Subhasish Mohanty, Advocate. CORAM: HONBLE MR. JUSTICE M.L. MEHTA M.L. MEHTA, J.

1. The plaintiff has filed this suit for partition against her brothers and mother in respect of built up premises A-53, South Extension, Part II, New Delhi.

2. The undisputed facts are that the suit premises was purchased and built up by the plaintiffs father, wherein he along with his family stayed for some time and also let out a portion thereof to the tenants. He died on 11.12.1999, leaving behind the plaintiff and three sons namely the defendants No.1, 2, Dr. Shailendra Sharma

(since deceased) and wife (defendant No.3). Dr. Shailendra Sharma also expired on 01.07.2001. The plaintiffs case is that since her father and brother died intestate, she is entitled to one-fourth share in the suit premises. She states that she is also in possession of the suit premises as some of her goods/movable assets are lying there and that, whenever she visits her paternal home, she stayed there in the suit premises. She states that on 21.07.2001, it was orally decided with the defendants No.1 and 2 that the suit premises will be divided by metes and bounds and that in case, it could not be divided, she would be given the entire Barasati floor with roof rights as towards her one-fourth share. She alleges that the defendants No.1 and 2 had been avoiding to give her due share and thus, she got issued a notice dated 17.10.2001, calling upon them to partition the suit premises, and which notice was replied by them on 13.11.2001, alleging that the suit premises was HUF property and the father had executed a Will in their favour; but the said Will was not traceable now. The plaintiff avers that the suit premises were never treated as HUF property and no Will was ever executed by their father. She has valued the suit premises at Rs. 40 lakhs and states that as she is in possession thereof, the court fee of Rs. 19.50 only was payable for the relief of partition.

3. The defendants No.1 and 2 contested the suit. They filed separate written statements on identical lines. Their case is that the plaintiff being the married daughter, had only restricted rights in the suit premises and could not seek its partition. They denied the plaintiff to be in possession of any portion of the suit premises and state that the suit being not properly valued, was liable to be dismissed. They aver that the plaintiff is also not entitled to any share, as the suit premises was a HUF property, and was so assessed by the Income Tax Department as also the Wealth Tax Authorities. It is averred that after the death of their father, their mother (defendant No.3) had been residing with defendant No.2 and whenever the plaintiff visited her mother, she returned back to her matrimonial house on the same day. They denied their having had a meeting on 21.07.2001 or having agreed to the partition of one-fourth share of the plaintiff, as alleged. They aver that they were told about the Will by Sh. B.D.Sharma, the elder brother of their father in the presence of the plaintiff, but, he died before handing over the said Will to the defendants and so the said Will could not be made available to

them. Defendant No.1 also states having substantially contributed in the acquisition and development of the suit premises, as he paid Rs. 11000/- to his father for repayment of the loans taken for construction of the premises.

4. On the pleading of the parties, the following issues were framed for trial on 08.12.2003:

1. Whether the suit is properly valued for the purposes of Court Fee and whether proper court fee has been affixed on the plaint in light of the plaintiffs claim that she is in constructive possession of the suit property?.

2. Whether the suit property is self-acquired/HUF property of the father?.

3. Whether the property was settled by way of oral partition dated 21st July, 2001 and whether the same was acted upon by the parties?.

4. Whether the suit is maintainable in view of Section 23 of the Hindu Succession Act?.

5. To what shares are the parties entitled to?.

6. Relief.

5. The plaintiff examined herself as PW1 and the defendants examined themselves as DW1 and DW2.

6. My findings on the above issues are as under. Issue No.1 7. The plaintiff herself had valued the suit premises at Rs. 40 lakhs, but has affixed the court fees of Rs. 19.50/-. She has affixed this court fees on the ground that she is in possession of one room on the ground floor of the suit premises, where she is keeping her goods/movable assets and used to reside whenever she visited. On the other hand, it was the categorical assertion of the defendants No.1 and 2 that she was never in possession of any portion of the suit premises, particularly, a room on the ground floor, which has been in the possession of defendant No.2 and wherein, their mother was residing. Both the defendants have stated and maintained that the plaintiff whenever visited her mother, used to return to her matrimonial house and never stayed therein. They denied the plaintiff to be in possession of the suit

premises, constructive or otherwise. Except this bald assertion of the plaintiff, there is no cogent evidence led by her to substantiate her plea in this regard. That being so, the court fees that is filed is apparently deficient. As per Section 7 of the Court Fees Act, the plaintiff is required to pay the court fees on one-fourth share claimed by her. Thus, the plaintiff was required to pay the court fees at Rs. 10 lakhs being one-fourth of the value of the suit premises. The issue is decided accordingly. Issue No.2 8. As per the plaintiff, the suit premises is self-acquired property of their father, whereas as per defendants No.1 and 2, though, it was the self-acquired property of their father, but the later had thrown it in the hotchpotch of HUF.

9. The law relating to blending of separate property with joint family property is well settled. Property, separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property, if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein, but to establish such abandonment a clear intention to waive separate rights must be established.

10. The contention of the learned counsel that in the absence of there being any joint family property, the separate property of the plaintiffs father could not be impressed with the character of joint family is noted for rejection. The law in this regard is well settled. Reference can be made to the decision of our High Court in Dr.Keswal Krishan Mayor Vs. Kailash Chand Mayor and Ors., 1977(1) 2 Delhi 97, wherein it was held thus:

As I understand the law laid down by the Supreme Court, it does not lay down that a separate property could not be impressed with the character of joint Hindu family property in the absence of the existence of a joint family or coparcenary property. The existence of joint family property is not necessary before a member of the family throws his self-acquired property in the common stock. The existence of a joint estate is not an essential requisite to constitute a joint family and a family which does not own any property, movable or immovable, may, nevertheless be joint. If the existence of the coparcenary property is considered as a pre-requisite for throwing the property into the common hotchpotch or common stock, then, only

those joint families who are already possessed of ancestral property, can receive self-acquired properties of coparceners. If the arguments is taken to its logical conclusion, it will lead to absurdities or a situation that no joint Hindu family which does not own any ancestral property can ever acquire any property from any individual coparcener who intends to impress the self-acquired property with the character of a joint family property. The term blending may suggest the existence of a nucleus but that does not mean that it is not possible to conceive of coparceners impressing their self-acquired properties with the status of the joint family property unless it is shown that the joint Hindu family is already possessed of a nucleus or ancestral stock or ancestral property. There is no reason to limit the cases of blending to only those families owning coparcenary property. Throwing the self-acquired property in the common stock or hotchpotch is a well-recognized incidence of the joint Hindu families.

11. The plaintiff deposed that her father acquired the suit premises from his own earnings, savings and loans and had constructed the same in March, 1966, when all the defendants were studying and could not have contributed to the construction expenses. She stated that even at the time of substitution of LRs in the eviction case, filed by their father against Bank of Baroda, there was no mention of the suit premises being HUF. She stated that the Sale Deed dated 23.02.1995 would evidence the suit premises having been purchased by their father in his own name. She also relied upon the property tax notice issued by MCD in the name of her father and not in the name of HUF. On the other hand, the defendants stated that their father had abandoned his individual rights in the suit premises by making a declaration on affidavit dated 23.05.1966, submitted by him with the Income Tax Department, and which was accepted as HUF property vide Assessment Order dated 31.03.1976 for the Assessment Year 1972-73. They stated that from the Assessment Year 1972-73 to 1988-90 and until the demise of their father, the premises had been assessed to Income Tax as well as Wealth Tax, as HUF under the provisions of Income Tax Act as well as Wealth Tax Act.

12. Learned counsel for the defendants placed reliance on the cases of Andhra Pradesh High Court in Gundlapalli Mohan Rao and Others v. Gundlapalli Satyanarayana and Others, Appeal Nos. 430/1965 & 254/1966, decided on

30.07.1970, wherein it was observed thus:

..that it was manifest from the conduct of 1st defendant, in the absence of any explanation, that the statement in the return was deliberately made out of his own volition abandoning or giving up his interest in the self-acquired property and impressing it with the character of joint family property, and the fact that the Income-Tax Officer did not accept his statement was of no consequence.

13. The defendants also relied upon the judgment of Calcutta High Court in Commissioner of Income-Tax v. Bhikraj Jaipura, decided on 21.02.1978, wherein it was observed as under:

This appeared to be an unequivocal declaration by the assessee touching his properties and assets, whereby they had been impressed with the character of joint family property. This was further supported by the recorded overt act, viz., that of a division of a part of the said properties between the members of the family. The joint family and also the properties could be identified from the declaration. When the assessee proceeded to draw up the declaration, at that point of time the properties in question assumed the character of joint family property and when the deed was actually drawn up it recorded a pre-existing fact that the assessee threw his properties into his joint family hotchpot. The Tribunal was right in holding that the assessee had thrown all his self-acquired properties into the common hotchpot of the HUF and was not the sole owner of the assets, income from which was included in his assessment for the assessment years concerned in the status of an individual.

14. Further, the decision of Orissa High Court in Commissioner of Income Tax, Orissa v. Harish Chandra Gupta, decided on 02.02.1981 was relied upon by the learned counsel for the defendants, wherein, it was held as under:

The separate property of a Hindu ceases to be separate property and acquires the characteristics of a joint family or ancestral property not by any physical mixing with his joint family or his ancestral property but by his own volition and intention by his waiving and surrendering his separate rights in it as a separate property. The act by which the coparcener throws his separate property in the common

stock is a unilateral act. There is no question of either the family rejecting or accepting it. By his individual volition, he renounces his individual right in that property and treats it as a property of the family. No sooner than he declares his intention to treat his selfacquired property as that of the joint family property, the property assumes the character of joint family property. The doctrine of throwing into the common stock is a doctrine peculiar to the Mitakshara school of Hindu law.

15. From the rival submissions, the question for consideration would be as to whether in the given facts and circumstances, the suit premises which was initially the self-acquired of the plaintiffs father, was abandoned by him and thrown in the hotchpotch of HUF.

16. From the Assessment Order dated 31.03.1972 of the Assessment Year 1972-73, it is seen that the plaintiffs father had declared some income from the suit premises in the status of HUF. It is also seen therefrom that the HUF came into existence under the assessee's declaration made on 23.05.1966 on an affidavit. The Income Tax record of the subsequent year upto the Assessment Year 1999-2000 would evidence that the plaintiffs father had been filing Income Tax Returns and been assessed to Income Tax as Karta of HUF. The incomes received from the suit premises was being declared by the plaintiffs father as of HUF and was assessed as such during all these years. The Assessment Order under the Wealth Tax Act of the years 1977-78 onward would also evidence the suit premises having been assessed as HUF for the purpose of Wealth Tax. From all this record, it would leave no manner of doubt that the plaintiffs father, for all purposes, had consciously abandoned his individual rights in the suit premises to HUF with effect from 23.05.1966. The affidavit filed by the plaintiffs father with Income Tax Department declaring the suit premises as HUF on 23.05.1966 was not the solitary step taken by him, but, he continued to maintain the HUF status of the suit premises till he died. In view of all this, even the payment of property tax by the plaintiffs father in his name and not that of HUF or even for that matter, filing of eviction case against tenant Bank of Baroda in his own name than that of HUF would not make any difference. There is no dispute that the suit premises was initially acquired by the plaintiffs father in his own name and it was in those

circumstances that the suit premises continued to be assessed to property tax in his individual name than that of HUF. The payment of property tax by any means does not create any right or title in the name of the assessee. Filing an eviction case by the plaintiffs father in his own name instead of the HUF, can also be said to be only for the convenience. In any case, the partition could only be filed by him in his name, being the Karta of HUF. The conclusion comes out to be that the suit premises was the HUF property of the plaintiffs father, with he being the Karta thereof till his death. The issue is decided accordingly. Issue No.3 17. This was also the plaintiffs bald assertion that on 21.07.2001, the defendants No.1 and 2 had agreed to partition the suit premises and give one-fourth share therein to her and in the event of a partition being not possible, to give her entire barsati floor with the roof rights. This was categorically denied by the defendants. The onus of this issue was upon the plaintiff, which she has not been able to discharge satisfactorily. Thus, the issue is decided against the plaintiff and in favour of the defendants. Issue No.4 18. Learned counsel for the defendants has submitted that succession opened on the death of the plaintiffs father on 11.12.1999, which was prior to the amendment of the Act in 2005, and the rights of the defendants had already crystallized on the death of their father and the amended provision could not undo the same retrospectively.

19. The law with regard to the share of the daughter in the property of her father is no longer res-integra. The Apex Court in the case of Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr., 2011 9 SCC788 had the occasion to deal with the Hindu Succession (Amendment) Act, 2005. The Apex Court in Para 11 and 12 held as under:

11. The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from 9-9-2005, the daughter is

entitled to a share in the ancestral property and is a coparcener as if she had been a son.

12. The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before 20.12.2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this Section shall not apply to the partition which has been effected before 20.12.2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to subsection (5) of Section 6, for determining the nonapplicability of the Section, what is relevant is to find out whether the partition has been effected before 20.12.2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on 19-3-1999 and amended on 27-09-2003 deprives the appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed.

20. The case of Ganduri Koteswaramma (supra) was relied upon by this court in Rakhi Gupta v. Zahoor Ahmad & Ors., CS (OS) 1147/2012, decided on 29.11.2012 (MANU/DE/6313/2012) wherein it was observed as under:

8. From the above judgment it is quite clear that this right accrues to the daughter born in Mitakshara family only "on and from" the commencement of the amendment Act i.e. 9 September 2005. The basis of the right is, therefore, the commencement of the amended Act. This is the natural ingredient of a coparcenary interest that a coparcenary interest is acquired by virtue of birth and

from the moment of birth. This acquisition (not devolution) which until the amendment Act was the right and entitlement only of a son in a coparcenary property, by the amendment has also been conferred on the daughter of the Joint Hindu Family. The words on and from show and suggest that, on a date prior to the Act coming into force the daughter would not be included as a coparcener. Consequently, all daughters born to the coparceners in the Joint Hindu Family would from the date of amendment of Section 6 become a coparcener, with same rights and liabilities at par with the sons. The aforesaid section was enacted for removing the gender discrimination and the provisions are not expressly made retrospective by the legislature.

21. Again, the case of Ganduri Koteshwaramma (supra) was also relied upon by this court in Manoj Jain v. Smt. Krishna Jain & Ors., CS (OS) No.2413/2007 decided on 04.10.2012, wherein, it was held thus:

17. Section 6 as amended by Act 39 of 2005 specifically brought in an explanation which was added below subSection 5. In terms of this explanation only those partitions which were through a registered partition deed or by a decree of a Court, were saved from the application of Section 6(1). Therefore, the legislature by conscious language has made Section 6(1) prospective only under certain facts, situations and retrospective under other facts situations i.e where there is no registered partition deed or decree of a Court the provision of Section 6(1) will be retrospective. The categorical intention so expressed by the legislature has to be abided to. Since the judgments of the Supreme Court in the cases of Sheela Devi(supra) and G. Sekar (supra) are based in ignorance or overlooking the explanation added below sub-Section 5 of Section 6, these judgments in view of the ratio in the Division Bench judgment of three Judges in Rattirams case cannot be treated as binding precedents. Thus it will be the judgment in Ganduris case which will hold the field.

22. In the aforesaid case of Manoj Jain (supra), this court discussed the law laid down in the case of Sheela Devi & Ors. v. Lal Chand & Anr., 2006 (8) SCC581 and G.Sekar v. Geetha & Ors., 2009 (6) SCC1999 and observed thus:

8. If we see the observations made in Sheela Devis (supra) case and G.Sekars (supra) case, the observations do speak of the 2005 Act not re-opening the vested rights where succession had already taken place. However, the question is, are those observations made by the Supreme Court in Sheela Devis (supra) case and G.Sekars (supra) case the ratios of the said cases.

9. In order to appreciate what is the ratio of a case, it is apposite to refer to the observations of the Constitution Bench of the Supreme Court in the case of Padma Sundara Rao (Dead) & Ors. v. State of Tamil Nadu & Ors., 2002 (3) SCC533 The Supreme Court in this judgment has categorically observed that ratio of a case is dependent on the facts of a case, and even one single different fact can make a difference to the ratio of a case. Para 9 of the said judgment reads as under:

9. Courts should not place reliance on decisions without discussion as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington v. British Railways, Board*. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

10. The aforesaid observations in Padma Sundara Raos (supra) case clearly hold that judgments of Courts should not be read like a statute, and ratio of a case has necessarily to be understood only with reference to the facts of that particular case. Padma Sundara Raos (supra) case has been followed in other judgments of the Supreme Court including *Krishna Mochi & Ors. v. State of Bihar*, 2002 (6) SCC81 and *Charan Singh & Ors. v. State of UP*, 2004 (4) SCC205

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