

Jagannath and Others Vs. Ramu and Others

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Court : Mumbai Nagpur

Decided On : Dec-23-2014

Judge : Z.A. HAQ

Appeal No. : Second Appeal No. 43 of 1995

Appellant : Jagannath and Others

Respondent : Ramu and Others

Judgement :

1. Heard Shri R.L. Khapre, the learned Advocate for the appellants and Shri S.R. Deshpande, the learned Advocate for the respondent no.2(A).
2. The appeal is filed by the original defendant nos.1, 2 and 4 challenging the judgment and decree passed by the subordinate Courts granting decree in favour of the original respondent no.1/plaintiff upholding his entitlement for 1/9th share in the suit property.
3. The original respondent no.1/plaintiff filed the Civil Suit contending that Shri Balaji Sadashiv had two wives Sundarabai and Ginabai, Balaji had five sons and four daughters out of which the respondent no.1/plaintiff, the respondent no.2/original defendant no.3 and the respondent no.3/original defendant no.5 were from Sundarabai and rest of the brothers and sisters were from Ginabai. The original respondent no.1/plaintiff pleaded that his father died intestate. It was pleaded that in the partition between Balaji Sadashiv, Digambar original defendant

no.2, Jagannath original defendant no.1 and Vishwanath original defendant no.4 in 1976, Shri Balaji Sadashiv was allotted the suit property. It was pleaded that after Balaji Sadashiv, original respondent no.1/plaintiff succeeded to 1/9th share in the suit property, he demanded partition accordingly from the defendants, however, his request was not acceded to and the suit was filed praying for decree for partition and separate possession in respect of 1/9th share of the suit property.

4. The original defendant nos.6, 7 and 8 did not defend the Civil Suit and remained absent in spite of service and the trial Court proceeded ex parte against them. During the pendency of the Civil Suit, the original defendant no.9 died.

5. The original defendant nos.3 and 5 filed their separate written statements. The original defendant nos.1, 2, 4 and 9 had filed their common written statement. The contesting defendants admitted the relationship between the original plaintiff and the original defendants. However, they opposed the claim of the plaintiff as made in the Civil Suit. The defendants denied that the suit property was owned by Shri Balaji Sadashiv. The defendants pleaded that the suit property was the subject matter of Regular Civil Suit No.139/1957, in which a partition took place as per the compromise and the suit property was allotted to their branch. The learned trial Judge proceeded with the Civil Suit and by the judgment dated 6th July, 1993 concluded that the original plaintiff proved that the suit property was separate property of deceased Balaji Sadashiv having been allotted in the family partition. The learned trial Judge concluded that the suit property was allotted to the branch of original defendant no.1 in Regular Civil Suit No.139/1957, including the share of Balaji Sadashiv. The learned trial Judge held that the original plaintiff is entitled for 1/9th share in the suit property and granted decree for partition and separate possession.

6. The appellants filed the appeal before the District Court challenging the judgment and decree passed by the trial Court. The learned Additional District Judge by the judgment dated 30th November, 1994 maintained the findings recorded by the trial Court and after independently considering the pleadings and evidence on the record held that the original plaintiff proved that he is entitled for 1/9th share in the suit property. The learned Additional District Judge dismissed

the appeal filed by the appellants.

The appellants being aggrieved by the judgment and decree passed by the subordinate Courts have filed this appeal.

7. This Court had issued notice in 1996 and granted stay as prayed for by the appellants. The appeal came to be admitted by the order dated 15th January, 1998 and interim order was continued.

When this appeal was called out for final hearing, I noticed that the substantial questions of law are not formulated. After hearing the learned Advocates, the substantial questions of law were formulated on 11th September, 2014 as follows:

(i) Whether the respondent no.2(A) being the son of Balaji and class-I heir, is entitled for share in the suit property according to proviso below Section 6 (unamended) of the Hindu Succession Act?

(ii) Whether the respondent no.2(A) having admittedly separated himself from the coparcenary in view of the decree passed in Regular Civil Suit No.139/1957, is disentitled from claiming the share in the property of Balaji as per the explanation 2 below Section 6 (unamended) of the Hindu Succession Act?

(iii) Whether the alleged partition deed dated 16th May, 1974 (Article 'A') is admissible in evidence?

(iv) Whether Article 'A', if admissible in evidence, can be considered as Will?

and with the consent of the learned Advocates for the parties, the appeal was taken up for final hearing.

8. Shri Khapre, the learned advocate for the appellants submitted that the original respondent no.1/plaintiff has separated himself from the coparcenary in 1976 as per the compromise decree passed in Regular Civil Suit No.139/1957 and this was much before the death of Shri Balaji Sadashiv and, therefore, in view of explanation 2 below Section 6 of the Hindu Succession Act, 1956, as it stood prior to the amendment of 2005, the original respondent no.1/plaintiff could not have made any claim for his share in the suit property. It is submitted that Section 6(5)

of the Hindu Succession Act, 1956 (as amended by Act of 2005) and the explanation below it makes it clear that the respondent no.1/original plaintiff is not entitled for the claim as made by him in the suit property. It is submitted that Section 6(5) of the Hindu Succession Act, 1956 (as amended by Act of 2005) lays down that the amended Section 6 shall not apply to a partition which has been effected before 20th December, 2004. The explanation below sub-section (5) of Section 6 of the Hindu Succession Act (as amended by Act of 2005) lays that partition for the purposes of Section 6 means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or by the partition effected by the decree of Court. ShriKhapre, the learned advocate has submitted that in the present case undisputedly there was a partition amongst the members of the coparcenary in 1976 as per the compromise decree in Regular Civil Suit No.139/1957 and, therefore, the original respondent no.1/plaintiff cannot make any claim on the basis of Section 6 of the Hindu Succession Act, 1956.

The learned advocate has submitted that the partition deed dated 16th May, 1974 (Article A) on which the original respondent no.1/plaintiff relied is not registered as required by Section 17 of the Registration Act and, therefore, it is not admissible in evidence and it cannot be accepted that there was a partition on 16th May, 1974 as shown in the partition deed (Article A) . Alternatively, it is submitted that even if the partition deed dated 16th May, 1974 (Article A) is admissible in evidence the last paragraph of the document has to be construed as a Will granting 1/3rd share in the suit property to each of the appellant no.1, appellant no.2 and appellant no.4 and the original respondent no.1/plaintiff does not get any share according to that document also. The learned advocate has submitted that the partition deed dated 16th May, 1974 (Article A) is a composite document and part of it has to be construed as a Will which does not require registration. It is submitted that the part of the document Article A which does not require registration can be considered for collateral purposes as per the proviso below Section 49 of the Registration Act. In support of the submission, the learned advocate has relied on the judgment given by the Hon'ble Supreme Court in the case of MathaiSamuel and Ors. V/s. Eapen Eapen (Dead) by LRs. And Ors. reportedat **AIR 2013 SC 532**. The submission on behalf of the appellants is that the original respondent no.1/plaintiff is not entitled for any share in the suit property and the judgment and decree

passed by the subordinate Courts is unsustainable and has to be set aside.

9. Shri Deshpande, the learned advocate for the respondent no.2(A) has submitted that by the order dated 29th March, 2012 the appeal filed by the appellants is dismissed as abated against the respondent no.5 for not bringing his legal representatives on the record. It is submitted that by the order dated 2nd May, 2013 the appeal is dismissed against the respondent no.3 as abated as legal representatives are not brought on the record. The learned advocate has submitted that the appeal having been dismissed as abated against the respondent nos.3 and 5, the judgment and decree passed by the subordinate Courts against them has become final and, therefore, the judgment and decree cannot be interfered at the behest of the appellants. Shri Deshpande, the learned advocate for the respondent no.2(A) has submitted that the claim for partition as made on behalf of the original respondent no.1/plaintiff is properly granted by the subordinate Courts in view of the proviso below Section 6 of the Hindu Succession Act, 1956 (as it stood prior to the amendment of 2005). It is submitted that the original respondent no.1/plaintiff being the son of Shri Balaji Sadashiv is entitled for the share in the property of Shri Balaji Sadashiv as the Class-I heir specified in the schedule. Shri Deshpande, the learned advocate has submitted that the entitlement of the original respondent no.1/plaintiff for his share in the property of Shri Balaji Sadashiv is as per the general rules of succession provided by Section 8(a) of the Hindu Succession Act, 1956. It is submitted on behalf of the respondent no.2(A) that the appellants admitted in their written statement that the suit field was allotted to Shri Balaji Sadashiv in the partition and, therefore, it being the property of Shri Balaji Sadashiv, the respondent no.1/original plaintiff being his son is entitled for his share in the suit property.

It is submitted that the name of Shri Balaji Sadashiv is shown in the revenue records as the owner of the suit field and, therefore, the burden was on the defendants to show that the suit property was not owned by Shri Balaji Sadashiv and the defendants have failed to discharge the burden and, therefore, it has to be considered that the suit property was owned by Shri Balaji Sadashiv. It is submitted that the arguments as made on behalf of the appellants that the partition deed dated 16th May, 1974 (Article A) can be construed as a Will cannot be

accepted inasmuch as there are no pleadings to that effect before the subordinate Courts and no evidence has been led by the defendants in this context. It is pointed out that the respondent/ no. 3/original defendant no.5 admitted the claim of the original plaintiff in his written statement.

ShriDeshpande, the learned advocate has submitted that the original plaintiff is entitled to claim share in the father's property though the explanation 2 below Section 6 of the Hindu Succession Act, 1956 (prior to amendment of 2005) debars the plaintiff from claiming the share in joint family property. It is submitted that in the present case the plaintiff claims share in the property owned by Shri Balaji Sadashiv and not in the property of the joint family and, therefore, the reliance placed on the explanation 2 below Section 6 of the Hindu Succession Act (prior to amendment of 2005) by the appellants is misdirected. Shri Deshpande, the learned advocate for the respondent no.2(A) has relied on the judgment given in the case of Basavalingamma (deceased by L.R's.) and others V/s. Shardamma reported at **AIR 1984 Karnataka 27** and on the judgment given in the case of Gurupdkhandappa Magdum V/s. Hirabai Khandappa Magdum and others reported at **AIR 1978 SC 1239**. It is prayed that the appeal be dismissed and the judgment and decree passed by the subordinate Courts be maintained.

10. The submission made on behalf of the respondent no.2(A) that the appeal having been dismissed against the respondents 3 and 5, the judgment and decree passed by the subordinate Courts cannot be interfered, cannot be accepted in the facts of the present case. The learned advocates for the respective parties have submitted that the respondents 3 and 5 had not contested the civil suit. Therefore, in view of the provisions of Order XXII Rule 4(4) of the Code of Civil Procedure, the appellants were not under an obligation to bring the legal representatives of respondents 3 and 5 on the record. It is submitted on behalf of the respondent no.2(A) that the appellants are not exempted from bringing the legal representatives of respondents 3 and 5 on the record and they have to file an application seeking the exemption and the Court may, considering the facts of the case, grant exemption. It is submitted that in the present case the respondents 3 and 5 have not made such application and, therefore, it cannot be said that the appeal can be heard and decided on merits though the legal representatives of the

respondents 3 and 5 are not brought on the record.

The submission as made on behalf of the respondent no.2(A) is required to be considered in terms of the proviso of Order 41 Rule 4 of the Code of Civil Procedure. The Hon'ble Supreme Court in the judgment given in the case of MahabirPrasad V/s. Jage Ram and others reported at **AIR 1971 SC 742** has laid down in paragraph no.5 as follows:

No distinction in principle may be made between Ratan Lal Shah's case (1970) 1 SCR 296 = (AIR 1970 SC 108) and the present case. Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record power of the appellate court under Order 41 Rule 4 to vary or modify the decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The view taken by the High Court cannot therefore be sustained.

Thus, the appeal cannot be dismissed on the ground that it is dismissed as abated against the respondents 3 and 5, considering the provisions of Order XXII Rule 4(4) and Order 41 Rule 4 of the Code of Civil Procedure.

Reliance placed on behalf of the respondent no.2(A) on the judgment given by the Hon'ble Supreme Court in the case of RameshwarPrasad and others V/s. Shambhari Lal Jagannath and another reported in **AIR 1963 SC 1901** is misplaced in the facts of the present case.

11. After hearing the learned advocates for the respective parties and examining the record, I find that there was a partition as per the compromise decree passed

in Regular Civil Suit No.139/1957 and as per this partition the original respondent no.1/plaintiff separated from the coparcenary. At the time of this partition, Shri Balaji Sadashiv (father) was alive. Even the original respondent no.1/plaintiff has not disputed this fact. The contention of the original respondent no.1/plaintiff is that the suit property was given to Shri Balaji Sadashiv in the partition which took place amongst the appellants and Shri Balaji Sadashiv on 16th May, 1974. To substantiate the fact of partition of 1974, the respondent no.1/plaintiff relied on the document Article A. The partition deed dated 16th May, 1974 (Article A) being unregistered document, the claim as made by the original respondent no.1/plaintiff that there was a partition cannot be accepted. The claim as made on behalf of the original respondent no.1/plaintiff in respect of the suit property is based on the partition deed (Article A) and it being not registered as required by Section 17 of the Registration Act, it cannot be accepted that the partition had taken place between Balaji Sadashiv and the appellants in 1974. The evidence on the record is not sufficient to hold that there was a partition between Shri Balaji Sadashiv and the appellants in 1974 and that the suit property was held by Shri Balaji Sadashiv as the exclusive owner. Consequently, it has to be held that the suit property continued to be the property of the coparcenary as per the partition effected pursuant to the compromise arrived at in the Regular Civil Suit No.139/1957. The explanation 2 to Section 6 of the Hindu Succession Act, 1956 (prior to amendment of 2005) debars the original respondent no.1/plaintiff from claiming any share in the suit property as the original respondent no. 1/plaintiff had separated himself from the coparcenary before the death of Shri Balaji Sadashiv.

12. In view of the above, I find that the judgment and decree passed by the subordinate Courts is unsustainable and is required to be set aside. Consequently, the appeal is allowed. The judgment and decree passed by the Civil Court in Regular Civil Suit No.69/1988 on 6th July, 1993 and upheld by the District Court in Regular Civil Appeal No.126/1993 on 30th November, 1994 is set aside and the Regular Civil Suit No.69/1988 filed by the respondent no.1/plaintiff is dismissed. In the circumstances, the parties to bear their own costs.