

Ramnath Narayan Pai and Another Vs. Eknath Narayan Pai and Others

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Court : Mumbai Goa

Decided On : Sep-16-2015

Judge : F.M. Reis & K.L. Wadane

Appeal No. : First Appeal No. 146 of 2010

Appellant : Ramnath Narayan Pai and Another

Respondent : Eknath Narayan Pai and Others

Judgement :

K.L. Wadane, J.

1. The present appeal is preferred by the original defendant nos. 1 and 2 against the judgment and decree passed by the Civil Judge Senior Division, Vasco, in Special Civil Suit No. 20/2005/A dated 26.07.2010 by which the learned Judge has decreed the suit. Hence, the appeal.

2. The description of the suit property is mentioned in para 15-B and business mentioned in para 15-C of the plaint are the suit property and herein after referred to as the suit property?.

3. The parties are referred to their original status.

4. The claim of the plaintiffs as can be seen from the pleadings is that one Narayan Pai having four sons and seven daughters out of which one son namely

Srinath died. The plaintiff nos. 1, 3 and defendant no.1 are the sons of Narayan and plaintiff no.2 is wife of plaintiff no. 1 and plaintiff no.4 is the wife of plaintiff no.3. The defendant no.2 is the wife of defendant no.1. Defendant nos. 3 to 9 are daughters of deceased Narayan Pai.

5. The defendant nos. 10 and 11 are the purchasers of the one of the property sold by the defendant no.1. Mr. Narayan Pai died in the year 1974 and his wife Saraswati died in the year 1993.

6. The parents of the plaintiffs and defendants were originally hailing from Honnavar from Karnataka State. The father of the plaintiffs and defendants namely Narayan Pai came down to Goa and settled during the Portuguese regime prior to the liberation of Goa. All the children were born and brought up in Goa.

7. During the Portuguese regime, Narayan Pai purchased immovable properties i.e. surveyed under chalta Nos.46, 47, 48 and 56 of P.T. Sheet No. 91 in the name of the defendant no.1. The suit property was originally belonged to the Comunidade of Mormugao and in possession and enjoyment of the family of the plaintiffs and defendants since 1955. During the land survey, when the notice was issued by the survey authorities in the name of the father of the plaintiffs, at that time the father had expired in the month of (August 1975). After the death, the mother was attended by the defendant no.1 as other sons were minors and presently the name of the defendant no.1 is recorded in the entire suit property.

8. During the life lime of Narayan Pai, he set up a family business i.e. grocery shop however it was closed after liberation of Goa. Thereafter, Narayan set up another business at Mundvel under the name and style as M/s Canara Timbers Depot where all types of mangalore tiles were available and such business was flourished. Besides the above business, the family has big house which was rented to the different persons at different point of time. The above referred business and the income from the rented house was looked after by Narayan and after his death all the properties and business was managed by the sons of Narayan. However, the funds were exclusively handled by the defendant no.1 who was the elder brother. After the death of the father, all the brothers were jointly took another plot at Vasco in the year 1976 or thereabout and the old business

under name and style M/s Canara Timber was shifted to Vaddem and it was started in the name of the mother i.e. M/s Saraswati Timber and Tiles Depot and the entire business from Mundvel was shifted to Vaddem. The business was looked by all four brothers and it was sometime called as partnership business but basically it was a family business.

9. It is further contended by the plaintiffs that they have family property at Honnavar allotted on the rental basis of Rs.3000/- per month.

10. From the family funds, the family members had purchased 9000 square metres plot at Old Goa through defendant no.1 and the title document is in possession of the defendant no.1. Likewise, another plot at Dabolim was purchased from the funds of joint family. In the year 1990 another flat was acquired at Margao and it was purchased from the family funds. In short, all the immovable properties mentioned in the plaint at para 15-B are purchased through the family funds. Therefore, the plaintiff nos. 1 and 3 and defendant nos.1 and 3 to 9 have equal shares in it as they are governed under the Hindu Law.

11. The plaintiffs and defendant no.1 to 9 are the members of HUF governed by the provisions of Hindu Law as applicable to the State of Karnataka. They are not governed by the Law of Succession as applicable to the State of Goa. This is because the father of the plaintiffs was born and married in Karnataka. During the life time Narayan was karta of Hindu Joint Family and after his death the defendant no.1 being the elder son become a karta of Hindu joint family. The suit properties were purchased with the common funds of the joint family and thus it is a joint family property purchased on behalf of the members of the joint Hindu family.

12. It is further contended by the plaintiffs that the plaintiff nos.1 and 2 are having joint 1/10th share, the plaintiff nos. 3 and 4 are having 1/10th share, defendant no.1 and 2 are having 1/10th share whereas the defendant nos. 3 to 9 are having 1/10th share each. So also the defendant nos.1, and 2, plaintiff nos. 3 and 4 and plaintiff nos. 1 and 2 are having 1/3rd share each in the business of the joint family namely (1) M/s Saraswati Timber and Tiles Depot, Vaddem, (2) M/s Narayan Road and (3) M/s Canara Timbers, Vasco. The family business namely M/s

Narayan Road Line includes trucks, tempos etc. , but subsequently all the vehicles were sold and money was collected by the defendant no.1 on the pretext of paying the bank installments and said money is still not added in the family income nor paid to the plaintiffs.

13. It is further contended that the defendant no.1 was interfering with all the business and in order to avoid family dispute and the mismanagement of the joint family income, the plaintiff nos.1 and 3 and defendant no.1 entered into an agreement of settlement, original of which was taken by the defendant no.1. However, no settlement was taken place thereafter as contemplated under the said agreement. The said settlement was signed by all the brothers and their Advocate Mr. D'souza.

14. In the year 2001 a deed of dissolution was executed between the plaintiff no.3 and defendant no.1 however nothing came pursuant to the said document. The defendant no.1 was mismanaging the family affairs and the family funds to suit his own end and he is trying to get unjust enriched at the cost of the other family members. The defendant no.1 has started grossly mismanaging the funds and the same is working to the disadvantage of all. Therefore, the plaintiffs were intending that all the properties and business should be separated as the same are belonging to their parents. Therefore, the plaintiffs have requested the defendant no.1 orally to settle the dispute amicably but the defendant no.1 did not pay any heed to the plaintiffs' request.

15. The plaintiffs state that although the defendant no.1 was handling the affairs, all the brothers have participated in the entire family business soon after the death of their father. Now the defendant no.1 wants to grab all the family properties for himself without making the partition. The family business of the plaintiffs and the defendants was shifted to Vaddem at that time the plaintiff no.3 was a minor. The business namely M/s Saraswati Timber was and is of joint family business set up from the joint family funds. During the pendency of the suit, the plaintiffs came to know that the defendant no.1 sold the plot referred to in para 13 to the defendant no.10 despite notice of pendency of the suit. Hence, the defendant nos.10 and 11 are made parties to the suit. In short, it is the contention of the plaintiffs that the

entire suit property is joint family property and therefore its members are having equal shares as per the succession of the Hindu Law and therefore, the plaintiffs have prayed for partition and separate possession of the suit property and thus have filed the suit.

16. The defendant no.1 contested the suit by filing his written statement at Exhibit 14 and he has denied almost all contents of the plaint. It is further the case of the defendant no.1 that no properties were acquired by the parents however the property surveyed under Chalta Nos. 46, 47, 56 of PT sheet no.91 were acquired by his father in his name and for his benefit. So the defendant no.1 is sole owner of that property. The defendant no.1 has denied that the joint family property and the business is joint family business. During the life time of the father, there was only one house consisting of 16 rooms rented to Tereza High School for the rent of Rs.4000/- per month and it was for the benefit of the defendant no.1.

17. After the death of the father, the defendant no.1 took charge of the entire property and he was looking after the same. The plaintiffs or the mother never managing the properties or business. The plaintiff no.1 and the deceased brother Srinath have decided to set up a joint business of timber and jointly acquired a plot at Vaddem and started M/s Saraswati Timber in the year 1980. One plot at native place Honnavar was in the name of the grand mother of the defendant no.1 who bequeathed it to the defendant no.1 and now it is exclusively belonging to the defendant no.1. The suit property particularly the property at Old Goa, Dabolim, Vaddem, i.e. flat, shops and building consisting of 15 flats were purchased by the defendant no.1 out of his own earning and it has nothing to do with the family business or family income.

18. The plaintiff no.1 was residing in one flat as gesture of goodwill. So in short it is the case of the defendant no.1 that the entire suit property is the exclusive property which he has purchased from his own earning and the plaintiffs or other defendants have no concern whatsoever with the same. Along with the written statement, the defendant no.1 has filed counter claim against the plaintiff nos. 1 and 2 and thereby claimed relief of eviction of the plaintiff no.1 from flat.

19. In order to establish the claim of the plaintiffs, the plaintiff no.1 has adduced his oral evidence at Exhibit 59 and relied upon the relevant documents at Exhibit 62 i.e. deed of partnership, deed of lease at Exhibit 63, agreement of settlement at Exhibit 64, deed of retirement at Exhibit 65, deed of dissolution at Exhibit 66, copy of the IT returns at Exhibit 67, statement of accounts at Exhibit 68. The plaintiff no.2 deposed at Exhibit 86. The witness Mr. D'Souza, Advocate at Exhibit 91.

20. As against this, the defendant no.1 entered into the witness box and filed his affidavit at Exhibit 104. Besides the above oral as well as documentary evidence, other documents i.e. Form D at Exhibit 114, Form I and XIV at Exhibit 115, deed partnership dated 4.9.1980 at Exhibit 116, Form I and XIV at Exhibit 117 and statement of income of house property at Exhibit 123 is produced on record.

21. Considering the rival pleadings of the parties, the learned Civil Judge Senior Division, has framed 10 issues and after hearing both the sides decreed the suit as referred to above.

22. We have heard the arguments of Mr. N. Sardessai, learned Senior Counsel appearing for the defendant nos. 1 and 2/appellants and Mr. Timble, learned counsel appearing for plaintiff nos. 1 to 4 and defendant no.3 to 9/respondents.

23. Considering the pleadings of the parties, evidence on record and upon hearing the learned counsel appearing for both the sides at length, the following points arise for our determination :

	POINTS FOR DETERMINATION	FINDINGS
1	Whether the plaintiffs and the defendant no.3 to 9 are entitled for the partition and separate possession?	Yes
2	Whether the defendant no.1/appellant proves that the suit property is self acquired property?	No

3	What order?	Appeal is dismissed with costs.
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24. During the course of the arguments Mr. Sardessai, the learned Senior Advocate, appearing for the appellants has argued that only one property was purchased by the father of the defendants in the name of defendant no.1. Therefore, defendant no.1 has become the absolute owner of that property. The defendant no.1, by his own earnings, subsequently has acquired various properties to which, other defendants and the plaintiffs have no concern. The plaintiffs have not proved that the suit property is acquired by the defendant no.1, was purchased from the joint nucleus. Therefore, it cannot be said that the suit property is belonging to the Hindu undivided family. The business run by the plaintiff no.1 and the defendant no.2 was in the partnership. It does not mean that the business was of a joint family business. He further argued that the business run by the defendant no.1 and the plaintiff no.1 was dissolved subsequently. So, looking to the arguments advanced by Mr. Sardessai, the learned Senior Advocate appearing for the appellants, it appears that, whatever the properties acquired by the defendant no.1 are his self-acquired property, therefore, entered in revenue record in his name.

25. As against this, Shri Timble, the learned Advocate appearing for the respondents, has argued that admittedly, the parties are governed by Hindu Law. Therefore, basically the property purchased by Narayan Pai in the name of the defendant no.1 is Hindu Joint Family property. Therefore, unless and until, the partition between coparceners are effected and proved, it is to be presumed that the properties i.e. movable and immovable held by each of the coparceners is the property of Hindu Joint Family. The learned Advocate further argued that one of the plaintiffs was accepting rent of six flats; whereas the defendant no.1 was accepting rent of remaining six flats and one of the plaintiffs was residing in one flat. So, by referring the evidence to that effect, Mr. Timble has argued that all the evidence on record shows that whatever the properties acquired by the defendant no.1 is the properties belonging to HUF and it is purchased from nucleus of HUF. Therefore, the plaintiff nos. 1, 3, defendant no.1 and defendant nos. 3 to 9 are having equal share in the suit property, hence, the plaintiffs are entitled for the partition and separate possession being coparceners.

26. Keeping in mind the arguments advanced by both the sides, it is necessary to refer to the certain basic principles of law relating to Hindu and its succession. Admittedly, the parties are governed by Hindu Law.

27. By the amendment to the Hindu Succession Act 2005, now, the daughter of the coparcener is also a coparcener, in her own right and, in the same manner, as a son. So, after the amendment of 2005, the status of the daughters are equated with the sons. So also, there is a presumption of the Hindu Joint Family, unless a severance is proved, but such presumption is not regarding Hindu Joint Family property.

28. There is no escape from the Joint Hindu Family. May be in one generation, it is broken it is brought to end by partition, but again in the next generation it comes into existence automatically. For example, father dies then his sons and daughters constitute a Hindu Joint Family automatically. The death of the common ancestor does not mean that the joint family will come into an end. Upper links are removed and lower ones are added and in this manner, so long as the line does not become extinct the joint family continues and can continue indefinitely, almost till perpetuity.

29. This is referred to, as the father of the defendants died some time in the year 1975 and prior to that even according to the the defendant no.1, the property at Vadeem i.e. Chalta no.91 was purchased by his father but in his name. Therefore, sons and daughters of the deceased Narayan became members of the joint family.

30. Further, it is necessary to mention here that the settled law governing Hindus that there is no presumption that a family because it is joint possessed of joint property and therefore, the person alleging the property to be joint has to establish that the family was possessed of some property with the income and which the property could have been acquired. But such a presumption is a presumption of the fact which can be rebutted. But, where it is established and admitted that the family which possessed joint property which from its nature and relative value may have formed sufficient nucleus from which the property in question may have been acquired, the presumption arises that it was the joint property and the burden shifts to the party alleging self-acquisition to establish the affirmatively that the

property was acquired without the aid of joint family.

31. In the present case, there are two aspects to be taken into consideration. First is that, it is the case of the plaintiffs that the entire suit property is the joint family property purchased from the nucleus of HUF. So also, the business was belonging to the HUF. So, initial burden is upon the plaintiff to establish and if they succeeded in establishing such aspect, then burden shifts upon the defendant no.1 to establish that the suit property is self-acquired property. In this context, it is for the defendant no.1 to show and prove that he had an independent source of earning, besides the earning from the property purchased by his father. If he is in a position to show, then it can be said that he has discharged his burden.

32. Character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act, it is not open to any member of the joint family to convert into joint family property into his personal property.

33. In the light of the above principle, now, it is necessary to scrutinize the evidence of parties.

34. To discharge the initial burden, the plaintiff no.1-Eknath s/o Narayan Pai filed his affidavit in view of his oral evidence under the provisions of Order XVIII Rule 4 of the Code of Civil Procedure and has reiterated all the contents of the plaint.

35. During the cross-examination, the plaintiff no.1 has stated that besides the document at Exh. Nos. 67 and 68 he has no other proof to support his claim of HUF. He was born in the year 1956 in Goa. The construction licence to construct 14 flats was in the name of the M/s. N.R. Pai and Sons, a partnership firm. This basically shows that the construction was in a partnership firm consisting of defendant nos. 1 and the plaintiffs. This is one of the circumstances to indicate that the co-sharers or members or the sons were doing the activities of a business in common. No doubt, the members of Hindu Joint Family can do the business of partnership provided that they should establish that they have contributed a

particular capital according to the terms and conditions of the partnership. In that event, it can be said that even a member, who are separated from the Joint Hindu Family are doing the business in the partnership.

36. Exh. 62 is the Deed of Partnership dated 22.11.1979 regarding the business in the name and style of M/S. SARASWATI TIMBER and TILES DEPOT? at Vaddem. It was between the plaintiff no.1, defendant no.1 and Shri Srinath and profit and loss was 33.1/3rd percent. Another Deed of Retirement-cum-reconstruction is at Exh. 35 dated 1.4.1989 by which the plaintiff no.1 Eknath, Srinath retired from the partnership and the plaintiff no.1 was inducted to continue in the business with defendant no.1.

37. The next very important document is an Agreement of Settlement is at Exh.64. According to the plaintiffs, it was/is family arrangement between the plaintiff and the defendant no.1 to look after the family business.

38. On perusal of the document (Exh.64) it appears that it is the settlement between four brothers, namely: plaintiff no.1, plaintiff no.3, defendant no.1 and Srinath and in the second paragraph itself there is mention as follows:

WHEREAS both the parties are brothers till date they have been residing in the ancestral house and attending to the common business and have at present acquired certain assets?.

AND WHEREAS the said business was expanding till the date and have acquired following assets which they would amicably like to partition between the parties?.

Then the list of the properties is mentioned i.e. the suit property. Further, it is mentioned that both the parties being unable to carry on the business. Therefore, they have amicably opted for partition the assets and liabilities, on the terms and conditions and description of the properties are mentioned in the agreement itself.

39. It is pertinent to note that on perusal of the contents of this document, it is apparently seen that four brothers i.e. plaintiff no.1 and 3 and defendant no.1 and Srinath have amicably partitioned the suit property. However, it is surprise to note that the parties have not acted as per the terms and conditions of the Deed (Ex.

65).

40. The defendant no.1 admitted during the cross-examination stated as follows:-

It is true that there are properties enlisted in the said agreement which have been mentioned as common properties in the agreement, however, I say that all the said properties are belonging to him. It is true that in the agreement it is stated that all the properties enlisted in the agreement would be partitioned amongst all four brothers in the manner set out in the agreement. I say that pursuant to the said agreement the movables were partitioned in the manner set out in the agreement each party to take possession of the movables allotted to his share.

41. However, the defendant no.1 has further candidly admitted as follows:-

I say that the immovables have not been partitioned though mentioned in the agreement. I say that we did not proceed with the partition of immovables as with the money earned from the properties of movables, the plaintiff nos.1 and 2 started spending money on vices. I say that in view of vices to which the plaintiffs have resorted to, they are not entitled to partition of the immovables?.

42. All the above admissions are very material by which one can say that there was no partition between the co-sharers after the death of Narayan.

43. It is the case of the defendant no.1 that his father purchased property in his name and therefore, he became the absolute owner. We are unable to accept this proposition because it has come in the evidence that the father Narayan came from Karnataka to Goa in Portuguese regime and at the relevant time outsiders were not allowed to take/purchase immovable property. It has also come on record that the defendant no.1 and other sons and daughters born and brought up at Goa. Therefore, it appears that Narayan purchased the property in the name of defendant no.1 because of the rider. Therefore, it cannot be said that merely because the property was purchased in the name of the defendant no.1 he become sole and absolute owner.

44. Further it is seen from the record that the father Narayan was running certain business and during his life-time it was expanded. Such business was expanded

under the name and style of SARASWATI TIMBER and TILES DEPOT? at Vaddem. It has also come on record the property purchased by Narayan was a house consisting of 16 rooms and it was let out to one school at the monthly rent of Rs. 1400/-. Further, it is seen from the record that after the death of Narayan, the defendant no.1 was looking after the entire business and if he has expanded business to certain extent from the income of the joint family, then the extended business has to be termed as joint family business.

45. There is no pleading and evidence on record, that even though the plaintiffs and defendant no.1 were having certain properties still the defendant no.1 was doing separate and independent business by which he was earning. If, it was so then, definitely even a member of a joint family can earn separately besides the income of joint family and if from such separate income one of the coparcener expanded the business to the large extent, then it can be termed as self-acquired property.

46. Here, in the present case, there is no pleadings of the defendant no.1 that he had any source of income, besides earning of rent from the school and from such earning he has expanded business and acquired the suit property.

47. So, looking to the contents of the agreement of settlement (Ex.64) it appears that the parties have not been acted upon this document.

48. Mr. Sardesai, the learned Senior Advocate appearing for the appellants has argued that the plaintiffs are not entitled to seek relief for specific performance as the agreement of settlement dated 18.6.1989 for want of limitation. We do not agree with the submission of Mr. Sardesai, because on the basis of agreement the plaintiffs are not entitled to seek relief of specific performance.

49. In-spite of execution of the document (Exh. 64) no partition of family took place. Therefore, the plaintiffs can asked for partition and separate possession of the properties independently.

50. Defendant no.1 has admitted during the cross-examination, that his father expired on 11/11/1974 and all his children are residing in the house constructed by

his father in the year 1963 at Mundvel bearing Chalta no.46, 47, 48 and 56 of PT Sheet no. 91. Again, it is made clear that the father constructed the house in 1963 on the land purchased in the name of defendant no.2 and all the children were residing in the said property. This is an additional circumstance to indicate that this property at Mundvel is a joint family property and subsequently development of business and acquisition of certain property are from the earning of the income from the rent house. So, basically, there is nothing on record to show that the defendant no.1 had any independent business or earning or any source of income. There are other circumstances on record to show that some of the plaintiffs and defendant no.1 were doing the business in partnership. They were accepting the rent in equal proportionate which shows the status of the family of the plaintiffs and the defendants become HUF.

51. Another one of the witnesses Advocate D'souza has been examined who drafted the agreement of settlement. He also supports the case of the plaintiffs.

52. The plaintiffs have proved that there was no partition of the suit property and the defendant no.1 failed to prove that the suit property is self-acquired property. Hence, Point nos. 1 and 2 are answered accordingly.

53. In view of the above, we are of the opinion that after the death of Narayan Pai, the coparceners are entitled to have equal shares in the joint family property i.e. suit property.

Hence, Point nos. 1 and 2 are answered accordingly.

Therefore, we pass the following order:-

ORDER

The appeal is dismissed with costs.

54. At this stage, learned Counsel appearing for the appellants seeks for a stay of the operation of the impugned judgment so that no third party rights are created in respect of the suit property. The impugned judgment of the Trial Court has only directed that a preliminary decree be drawn. The partition, if any, as such cannot

be effected immediately. Hence, the prayer stands rejected.

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