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Mukesh Kumar and Another Vs. Pavitra and Another

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Court : Delhi

Decided On : Aug-30-2016

Judge : Valmiki J. Mehta

Appeal No. : RSA No. 12 of 2016 & C.M. Appl. No. 1118 of 2016

Appellant : Mukesh Kumar and Another

Respondent : Pavitra and Another

Judgement :

Valmiki J. Mehta, J. (Oral)

1. This Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugning the concurrent Judgments of the courts below; of the Trial Court dated 21.12.2013 and the First Appellate Court dated 16.9.2015; by which the courts below have dismissed the suit filed by the appellants/plaintiffs/sons for cancellation of the Sale Deed dated 15.12.2004 executed by their father/defendant no.2/respondent no.2 in favour of their mother defendant no.1/respondent no.1. The courts below have dismissed the suit as being barred by limitation which was the subject matter of issue no.2 by holding that the Sale Deed which is sought to be cancelled is dated 15.12.2004, and the suit is filed on 24.2.2009, i.e after a period of three years and hence the suit is barred by limitation. Since the Sale Deed dated 15.12.2004 was registered on 4.1.2005, the courts below have held that there is deemed notice of this registered

sale deed to the plaintiffs/appellants and suit filed three years after 4.1.2005 is barred by limitation.

2. The facts of the case are that the appellants/plaintiffs are the sons of defendants/respondents. There are disputes and differences between defendant no.1/wife and defendant no.2/husband as defendant no.1 claims that she and her daughters are being harassed and tortured by defendant no.1. The suit was said to be filed in collusion between the plaintiffs/sons and defendant no.2/father. It is pleaded by defendant no.1/respondent no.1/wife that the suit property was purchased by the sale deed by paying valuable consideration to respondent no.2/defendant no.2/husband. The case of the appellants/plaintiffs was that defendant no.2/respondent no.2 could not have executed the Sale Deed dated 15.12.2004 in favour of respondent no.1/defendant no.1 as the suit property being a built up property admeasuring 325 sq. yards of Khasra no.146, Old Lal Dora of Village Burari, Delhi is an ancestral property.

3. In the plaint the cause of action pleaded by the appellants/plaintiffs/sons is that the suit property is an ancestral property andtherefore appellants/plaintiffs/sons have a right in the same. The relevant paragraphs in the plaint are paragraphs 4, 5, 9 and 10 and which paragraphs read as under:-

4. That the above said suit property is ancestral property and other properties are not divided till today between the defendant no.2 and his brother between the defendant no.2 and his brother namely Dev Dutt including agricultural land. All the properties have not divided/shared/partition till today between the defendant no.2 and his brother.

5. That the grand father of the plaintiffs were two real brother one brother was issueless and one brother have two issues i.e. defendant no. 2 and Dev Dutt. The issueless grand father executed the will in favour of the defendant no. 2 and his brother Sh. Dev Dutt during his life time. Till today no partition have arrived between the parties. Due to the said reason and circumstances the defendant No. 2 have no right to sell, transfer or execute any documents in favour of any one.

xxxxx xxxxx

9. That defendant no. 2 has no right, title or interest to execute the sale deed in favour of the defendant no. 1 or in the name of any other person. This is a ancestral property and all of the them equal rights of the ancestral property.

10. That defendant no.1 has no right to transfer or sell or dispose off the suit property to any other person.

4. Dehors the aspect of whether the subject suit has been dismissed by the courts below as being barred by limitation, I exercise my powers under Order XLI Rule 24 CPC for deciding this Second Appeal on an issue which is not considered by the courts below. This I am doing so in view of the ratio of the judgment of the Supreme Court in the case of Lisamma Antony and Another Vs. Karthiyayani and Another (2015) 11 SCC 782 which holds that once the record of the trial court is complete, the appellate courts should not remand matters but should decide the cases themselves on the basis of record. Remand is only if the suit is decided on a preliminary issue or if additional RSA evidence has to be led before the trial court. The relevant paras of the judgment in the case of Lisamma Antony (supra) are reproduced herein under:-

14. Rule 23 of Order 41 of Code of Civil Procedure, 1908, (for short "the Code") provides that where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

15. Rule 23A of Order 41 of the Code provides that where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the appellate court shall have the same powers as it has under Rule 23.

16. Rule 24 of Order 41 of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.

5. The issue which arises is that even if the suit property is an ancestral property whether appellants/plaintiffs/sons have a right in the sameas coparceners. This issue is no longer res integra in view of the judgments of the Supreme Court in the cases of Commissioner of Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, (1986) 3 SCC 567 and Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204 and the relevant para 10 of the judgment in the case of Yudhishter (supra) reads as under:-

10. This question has been considered by this Court in CWT v. Chander Sen: (1986) 3 SCC 567 where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well

as Mayne's Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne Hindu Law, 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house. (emphasis is mine)

6. A reading of the ratio of the judgment of the Supreme Court in the case of Yudhishter (supra) shows that inheritance of ancestral property after passing of the Hindu Succession Act, 1956 will not mean that the sons/children of the persons who inherited the property will have a right in the same on the ground that the ancestral property is an HUF property. Ancestral property when inherited by a person after passing of the Hindu Succession Act becomes self acquired property in the hands of a person who inherits the same.

7. I have examined this issue, as also the ratio of the judgment of the Supreme Court in Yudhishter (supra) s case, in the case of Sunny (Minor)and Anr. Vs. Sh. Raj Singh and Ors., 225 (2015) DLT 211 and have held that merely because a person claims that the property is an ancestral property, no right will accrue to claim partition of the property because a property which is inherited only before passing of the Hindu Succession Act as an ancestral property will give a right to seek partition of the same as an HUF property. The relevant paragraphs of the judgment in the case of Sunny (Minor) and Anr. (supra) are paragraphs 5 to 11 and 14 and the same read as under:-

5. Issues no. 1 and 2 can be taken together as the main issue to be decided is whether there existed a Hindu Undivided Family and the suit properties are HUF properties to which the father of the plaintiffs late Sh. Harvinder Sejwal had a 1/5th ownership right and which 1/5th ownership right on the death of the father Sh. Harvinder Sejwal devolved upon the plaintiffs, who are the children of late Sh. Harvinder Sejwal. Related issue to be considered will also be as to whether there was a family settlement as alleged by the plaintiffs as per which their father received certain properties.

6. At the outset, it is necessary to refer to the ratio of the judgment of the Supreme Court in the case of Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204 and in para 10 of the said judgment the Supreme Court has made the necessary observations with respect to when HUF properties can be said to exist before passing of the Hindu Succession Act, 1956 or after passing of the Act in 1956. This para reads as under:-

10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v.Chander Sen and Ors. MANU/SC/0265/1986MANU/SC/0265/1986 : [1986]161ITR370(SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said

observations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house. (emphasis is mine)

7(i). As per the ratio of the Supreme Court in the case of Yudhishter (supra) after passing of the Hindu Succession Act, 1956 the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest from the latter s paternal ancestors upto three degrees above, has come to an end. Under the traditional Hindu Law whenever a male ancestor inherited any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him had a right in that property equal to that of the person who inherited the same. Putting it in other words when a person A inheritedproperty from his father or grandfather or great grandfather then the property in his hand was not to be treated as a self-acquired property but was to be treated as an HUF property in which his son, grandson and great grandson had a right equal to A . After passing of the Hindu Succession Act, 1956, thisposition has undergone a change and if a person after 1956 inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of the person who inherits the same. There are two exceptions to a property inherited by such a person being and remaining self-acquired in his hands, and which will be either an HUF and its properties was existing even prior to the passing of the Hindu Succession Act, 1956 and which Hindu Undivided Family continued even after passing of the Hindu Succession Act, 1956, and in

which case since HUF existed and continued before and after 1956, the property inherited by a member of an HUF even after 1956 would be HUF property in his hands to which his paternal successors-in-interest upto the three degrees would have a right. The second exception to the property in the hands of a person being not self-acquired property but an HUF property is if after 1956 a person who owns a self-acquired property throws the self-acquired property into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. In order to claim the properties in this second exception position as being HUF/Joint Hindu Family properties/properties, a plaintiff has to establish to the satisfaction of the court that when (i.e date and year) was a particular property or properties thrown in common hotchpotch and hence HUF/Joint Hindu Family created.

(ii) This position of law alongwith facts as to how the properties are HUF properties was required to be stated as a positive statement in the plaint of the present case, but it is seen that except uttering a mantra of the properties inherited by defendant no.1 being ancestral propertiesand thus the existence of HUF, there is no statement or a single averment in the plaint as to when was this HUF which is stated to own the HUF properties came into existence or was created ie whether it existed even before 1956 or it was created for the first time after 1956 by throwing the property/properties into a common hotchpotch. This aspect and related aspects in detail I am discussing hereinafter.

8(i). A reference to the plaint shows that firstly it is stated that Sh. Tek Chand who is the father of the defendant no.1 (and grandfather of Sh. Harvinder Sejwal and defendants no.2 to 4) inherited various ancestral properties which became the basis of the Joint Hindu Family properties of the parties as stated in para 15 of the plaint. In law there is a difference between the ancestral property/properties and the Hindu Undivided Family property/properties for the pre 1956 and post 1956 position as stated above because inheritance of ancestral properties prior to 1956 made such properties HUF properties in the hands of the person who inherits them, but if ancestral properties are inherited by a person after 1956, such inheritance in the latter case is as self-acquired properties unless of course it is shown in the latter case that HUF existed prior to 1956 and continued thereafter. It

is nowhere pleaded in the plaint that when did Sh. Tek Chand father of Sh. Gugan Singh expire because it is only if Sh. Tek Chand father of Sh. Gugan Singh/defendant no.1 had expired before 1956 only then the property which was inherited by Sh. Gugan Singh from his father Sh. Tek Chand would bear the character of HUF property in the hands of Sh. Gugan Singh so that his paternal successors-ininterest became co-parceners in an HUF. Even in the evidence led on behalf of the plaintiffs, and which is a single affidavit by way of evidence filed by the mother of the plaintiffs Smt. Poonam as PW1, no date is given of the death of Sh. Tek Chand the great grandfather of the plaintiffs. In the plaint even the date of the death of the grandfather of the plaintiffs Sh. Gugan Singh is missing. As already stated above, the dates/years of the death of Sh. Tek Chand and Sh. Gugan Singh were very material and crucial to determine the automatic creation of HUF because it is only if Sh. Tek Chand died before 1956 and Sh. Gugan Singh inherited the properties from Sh. Tek Chand before 1956 that the properties in the hands of Sh. Gugan Singh would have the stamp of HUF properties. Therefore, in the absence of any pleading or evidence as to the date of the death of Sh. Tek Chand and consequently inheriting of the properties of Sh. Tek Chand by Sh. Gugan Singh, it cannot be held that Sh. Gugan Singh inherited the properties of Sh. Tek Chand prior to 1956.

(ii) In fact, on a query put to the counsels for the parties, counsels for parties state before this Court that Sh. Gugan Singh expired in the year 2008 whereas Sh. Tek Chand died in 1982. Therefore, if Sh. Tek Chand died in 1982, inheriting of properties by Sh. Gugan Singh from Sh. Tek Chand would be self-acquired in the hands of Sh. Gugan Singh in view of the ratio of the Supreme Court in the case of Yudhister (supra) inasmuch as there is no case of the plaintiffs of HUF existing before 1956 or having been created after 1956 by throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gugan Singh/defendant no.1. There is not even a whisper in the pleadings of the plaintiffs, as also in the affidavit by way of evidence filed in support of their case of PW1 Smt. Poonam, as to the specific date/period/month/year of creation of an HUF by Sh. Tek Chand or Sh. Gugan Singh after 1956 throwing properties into common hotchpotch.

(iii) The position of HUF otherwise existing could only be if it was proved on record that in the lifetime of Sh. Tek Chand a Hindu Undivided Family before 1956 existed and this HUF owned properties include the property bearing no.93, Village Adhichini, Hauz Khas. However, a reference to the affidavit by way of evidence filed by PW1 does not show any averments made as to any HUF existing of Sh. Tek Chand, whether the same be pre 1956 or after 1956. Only a self-serving statement has been made of properties of Sh. Gugan Singh being ancestral in his hands, having been inherited by him from Sh. Tek Chand, and which statement, as stated above, does not in law mean that the ancestral property is an HUF property.

9. Onus of important issues such as issue nos.1 and 2 cannot be discharged by oral self-serving averments in deposition, once the case of the plaintiffs is denied by the defendants, and who have also filed affidavit of DW1 Sh.Ram Kumar/defendant no.2 in the amended memo of parties for denying the case of the plaintiffs. An HUF, as already stated above, could only have been created by showing creation of HUF after 1956 by throwing property/properties in common hotchpotch or existing prior to 1956, and once there is no pleading or evidence on these aspects, it cannot be held that any HUF existed or was created either by Sh. Tek Chand or Sh. Gugan Singh. In my opinion, therefore, plaintiffs have miserably failed to discharge the onus of proof which was upon them that there existed an HUF and its properties, and the plaintiffs much less have proved on record that all/any properties as mentioned in para 15 of the plaint are/were HUF properties.

10. While on the aspect of properties mentioned in para 15 of the plaint, it bears note that defendants have categorically denied that there are any properties of the family which are found at serial nos.(c), (e), (f) and (g) of para 15 of the plaint either in the name of defendant no.1 or of any of the defendants and that in fact no such properties exist. Once that is so there does not arise any question of partition of such imaginary properties. This Court notes that the properties at serial nos.(c), (f) and (g) being of 200 sq. yds plot in Ber Sarai Extension, New Delhi, Ballabhagarh in Faridabad and Kotputli, Rajasthan are wholly vague and without any details of the municipal numbers or agricultural khasra numbers and therefore it cannot be said that any of the said three properties exist, and are thus available

for partition. The defendants have further denied that the defendants have ever owned even a single flat, much less four flats, at Village Adhichini, Hauz Khas, New Delhi as mentioned at serial no.(e) of para 15 of the plaint. This Court further observes that the details given of even the last two properties in para 15 of the plaint being vehicles and personal belongings including bank accounts are again wholly vague and are thus incapable of being understood and hence partitioned, because what are the bus and tempo numbers are not stated and nor are the bank accounts details given of the alleged accounts in Allahabad Bank and Punjab National Bank and there is no proof on record that these properties are in the name of defendant no.1 or in the name of any member of the family. Therefore, qua all such vague/non-existent properties there does not arise any issue of passing any vague decree of partition having vague and incomplete particulars.

11. I must, at the risk of repetition, note that there exists the legal requirement of discharge of the onus of proof by atleast leading some credible documentary evidence in a case where partition is sought of valuable immovable properties, and oral evidence is not to be treated by courts as sufficient, inasmuch as, rights in immovable properties of defendants cannot be destroyed on account of self-serving oral statements and stand of the plaintiffs that there existed an HUF and HUF had various properties which are mentioned in para 15 of the plaint.

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14. Plaintiffs thus have failed to prove that there existed an HUF before 1956 on account of Sh. Tek Chand having inherited properties before 1956 and that the plaintiffs have further failed to prove that HUF was created after 1956 on account of throwing of property/properties into common hotchpotch either by Sh. Tek Chand or by Sh. Gugan Singh/defendant no.1. Accordingly, it is held that there is no HUF and there are no properties of HUF in which late Sh. Harvinder Sejwal had a share. The entire discussion given above for existence/creation of HUF and plaintiffs failing to discharge the onus of proof upon them will similarly apply qua the alleged family settlement pleaded by the plaintiffs because once again no credible evidence has been led except selfserving statements and which cannot

be taken as discharge of the onus. In his cross-examination on 01.04.2013, the defendant no.3 as DW1 has denied the suggestion that there was any family settlement. It is therefore held that plaintiffs have failed to prove issue nos.1 and 2. (underlining added)

8. In the present case there is no pleading and no evidence led on behalf of the appellants/plaintiffs that the suit property was inherited by defendant no.2/father before passing of the Hindu Succession Act i.e, it is not pleaded in the plaint that Sh. Bishamber Dayal, father of defendant no.2/Sh. Ram Kumar died before 1956 and Sh. Ram Kumar therefore inherited the suit property from Sh. Bishamber Dayal before 1956. Thus, there is no pleading or evidence that defendant No. 2/Sh. Ram Kumar inherited the suit property from Sh. Bishamber Dayal before 1956. Once that is so, thus taking that the suit property is inherited after 1956, the suit property cannot be said to be an HUF property for the appellants/plaintiffs to claim right of partition of the same.

9. I may note that there is some confusion in the plaint because the plaint does seem to suggest that the suit property was inherited by respondent no.2/defendant no.2/father from his uncle Sh. Bishan in terms of Will dated 1.7.1977, however, counsel for the appellants/plaintiffs states that really the case as per the plaint is that not only the properties inherited by respondent no.2/defendant no.2/father from his uncle Sh. Bishan were ancestral properties but the suit property is a property which is not inherited by defendant no. 2/respondent no.2 from his uncle Sh. Bishan in terms of Will Ex.PW1/10 dated 1.7.1977 but is otherwise an ancestral property and therefore since the suit property was ancestral in the hands respondent no.2/defendant no.2/father therefore appellants/plaintiffs/sons have a right in the same as coparceners of HUF.

10. In my opinion the fact of the matter is that even if respondent no.2/defendant no.2/father inherits the suit property as ancestral property, the appellants/plaintiffs/sons will have no right in the same unless appellants/plaintiffs/sons would have pleaded and proved that the suit property was inherited by respondent no.2/defendant no.2/father from his father Sh. Bishamber Dayal before 1956, and which the appellants/plaintiffs have not done.

11. In view of the above, I do not find any merit in this second appeal and the same is accordingly dismissed. No order as to costs.

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