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Court : Patna

Decided On : Dec-16-1997

Judge : S.J. Mukhopadhaya, J.

Appeal No. : A.F.O.D. 991 of 1970

Appellant : Gouri Shankar Mandal and ors.

Respondent : Bindeshwari Mandal and ors.

Disposition : Appeal Allowed

Judgement :

S.J. Mukhopadhaya, J.

1. This appeal was originally preferred by Defendant No. 1, appellant (Hansu Mandal), against the judgment and decree passed by the learned Subordinate Judge, Madhipura dated 31st July, 1970 in Title Suit No. 50 of 1964. During the pendency of the appeal, the sole appellant (Hansu Mandal) died and his heirs were substituted.

2. The main issue to be determined, whether the suit land is still joint family property and the plaintiff-Respondent No. 1 (now deceased and substituted by her heirs) is entitled for 1/3rd share over the same.

3.The Title suit aforesaid was filed by original plaintiff-Respondent No. 1 for partition of the lands shown in Schedule-A to the plaint.

4. Admittedly, the plaintiff-Respondent No. 1, original Defendant No. 1, appellant and deceased father of Defendant Nos. 2 to 6 were full brothers. According to the plaintiff, they were members of joint family and suit lands were purchased out of the joint family funds in the name of different members of the family. The deceased father of Defendant Nos. 2 to 6 died in jointness with his brothers. The plaintiff and the defendants were in joint possession over the suit lands. The defendant No. 1, appellant being the Karta and Manager of the joint family was misappropriating the family income and evaded rendering accounts to the plaintiff in one or other pretext and so the plaintiff demanded partition. The defendants having not partitioned the suit land, the matter was referred to the Arbitrator and as it was not complete, the suit was filed and plaintiff claimed 1/3rd share on the suit lands.

The Defendant No. 1-appellant and rest of the Defendants 2 to 6 appeared and filed separate written statements. According to Defendants 2 to 6, their grandfather i.e. father of plaintiff and Defendant No. 1 (Govind Mandal) was a resident of Village Navtolia in Sonbarsa P.S. All the lands possessed by him were sold and then he settled at Kishanganj with his sons. He possessed no property and maintained himself and the sons by working at places. After death of Govind Mandal, all the three sons separated and subsequently they acquired individual lands by purchase and settlement. The lands purchased by father of the defendants 2 to 6, was in his name and exclusively belong to them. Neither the plaintiff nor the Defendant No. 1 have any concern with such self-acquired property of father of Defendant Nos. 2 to 6.

Similarly, they have no concern with the individual lands acquired by plaintiff and/or Defendant No. 1 being their self-acquired property, they denied the statement made by the plaintiff.

In the written statement filed by original Defendant No. 1-appellant, while he denied the jointness and took similar stand relating to his father Govind Mandal, he also denied the fact that he was Karta of the joint family. According to original

Defendant No. 1-appellant, he was appointed as a Dresser-cum-Compounder in the Government Hospital in 1929 on monthly pay of Rs. 50 and also did private practice and derived income. He acquired different lands out of his own earnings, both in his name and in the names of Srothers and nephew. As the brothers were illiterate and were daily wage labourers, they were maintained by the Defendant No. 1. Their father, Govind Mandal left no property except a house on 4-5 Dhurs of land. There was separation between the brothers in the year 1942 and on compassion, he gave some lands to the brothers, though acquired by him and his wife. The lands so given to the brothers i.e. plaintiff and the father of Defendant Nos. 2 to 6 were in the village Shyam who went to live there. The lands at Kishanganj were retained for himself. Further, 7-1/2 Bighas of lands were taken in Sudhbharna for Rs. 750/- which was redeemed. On such redemption, the Defendant No. 1 paid certain amount to his brothers (plaintiff and father of Defendant Nos. 2 to 6) in equal share. The plaintiff acquired some lands purchased by him with that money, which lands have not been included in the Schedule of the Suit. After death of Damodar Mandal, the father of Defendant Nos. 2 to 6, a petition for mutation was filed by plaintiff with respect to the lands of Defendant No. 1 which was rejected. In the mutation application, the plaintiff filed a petition stating that lands had already been partitioned. There was a Panchayat in the year 1961 and the Panches confirmed the partition of 1942. The Defendant No. 1 planted Orchard and Banswari in some lands acquired by him after 1942. The Defendant No. 2 also similarly planted Orchard and Banswari in some lands acquired by them after 1942. In a proceeding under Section 144 Cr.P.C. filed by Defendant No. 2 it was decided against him.

5. After hearing the parties, the Court below framed the following nine issues:

1. Was the plaintiff any cause of action?
2. Is the suit as framed maintainable?
3. Is the suit barred by limitation and estoppel?
4. Is the suit bad for defect of parties?

5. Is the suit under-valued and is the plaintiff liable to pay ad valorem Court-fee?
6. Has the plaintiff any right, title and interest in the suit lands?
7. Were the suit lands partitioned in 1942 and 1961?
8. Are the suit lands still joint, and is the plaintiff entitled to 1/3rd share in them?
9. Is the plaintiff entitled to any relief?

6. After hearing the parties, the Court below decided all issues in favour of plaintiff by impugned judgment dated 31st July, 1970 in Title Suit No. 50/64.

7. When the case was taken up before this Court on 1st December, 1997, the Counsel for the substituted heirs of Defendant No. 1-appellant appeared and advanced arguments.

The contesting plaintiff-Respondent No. 1 having died during the pendency of this appeal, his heirs were substituted as Respondent Nos. 1 (i) to (viii). In spite of notice, the contesting Respondents have not appeared and no argument was advanced on their behalf.

8. After hearing the parties, the judgment was reserved, but subsequently, one T.S. Tatarvei, who initially filed Vakalatnama on behalf of original plaintiff-Respondent No. 1 mentioned the case and requested to hear him. According, the case was listed again on 2nd December, 1997 and he was heard. He stated that in spite of letter written by him, the substituted heirs of i.e. Respondent Nos. 1(i) to 1(viii), have not executed Vakalatnama in his favour, In this circumstances, therefore, I have not taken into note any submission made by Shri Tatarvei.

9. According to me, it is not necessary to go into the detailed facts, as the main issue to be determined is whether the suit lands are still joint family property and plaintiff was entitled to 1/3rd share in the same. This issue was framed as Issue No. 7 and the same has been discussed in detail by the Court below. From paragraph No. 10 of the impugned judgment, while I find that the issue was decided against the plaintiff, at the end of paragraph No. 15, after discussion of other evidences, a contradictory finding was given by the Court below in favour of

the plaintiff. This will be evident from the relevant extracts of Paragraph Nos. 10 and 15 of the impugned judgment, as extracted hereunder:

Para-10 It is therefore conclusively proved from this petition that the plaintiff separated from his brothers before 26.4.61, the date on which this petition was filed. I am, therefore, unable to accept the case of the plaintiff on this point and hold that he and defendants are not members of a joint family now and Hansu Mandal is not the Karta.

Para-15 In the circumstances, I hold that though parties appear to have been in separate possession, the suit lands have not been partitioned as yet. I, therefore, decide this issue in favour of the plaintiff.

10. It is settled law that in absence of evidence of partition, jointness is to be presumed in a Hindu family. But, if any property is acquired in the name of an individual and any person claiming the same as joint property then the person concerned is to prove that the same was purchased from joint family fund. In the present case, it is an admitted fact that the father of plaintiff and Defendant No. 1 was grand-father of Defendant Nos. 2 to 6, namely, Govind Mandal. He was a resident of Village Navtolia under Sonbarsa Police Station. He sold all the lands possessed by him and came to live at Kishanganj. While the Defendant Nos. 2 to 6 pleaded in the written statement that said Govind Mandal possessed no property at Kishanganj, Defendant No. 1 took the plea that he possessed only a house on 4 or 5 Dhurs of lands. The plaintiff made no statement nor introduced any evidence to show that Govind Mandal had any property and he left behind some joint family fund.

11. Admittedly, the lands, in dispute, were recorded in the name of one or other individual members of the family, including the plaintiff. Defendant No. 1, wife of Defendant No. 1 and father of Defendant Nos. 2 to 6. The individual lands belong to one or other parties have been shown at Schedule-I to the written statement filed by Defendant No. 1. The plaintiff and/or any of the defendants never brought to the notice of the Court through any evidence that there was a nucleus of joint family property out of which lands, in dispute, were purchased. The plaintiff in his petition at Ext. 'E' stated that there had been a partition between him and his

brothers.

12. In the aforesaid circumstances, the Issue No. 7 could not have been decided in favour of the plaintiff and no judgment and decree should have passed for further partition of the suit land.

13. Accordingly, I hold that the plaintiff failed to prove the jointness of the family and thus had no right, title and interest in the lands, which are recorded in the name of Defendant No. 1 or his wife or in the father's name of Defendant Nos. 2 to 6, except the lands recorded in the name of plaintiff himself.

14. In the result, this appeal is allowed. The judgment and decree dated 31st July, 1970, passed in Title Suit No. 50/64 are set aside and the suit is, accordingly, dismissed. However, in the facts and circumstance, there shall be no order, as to costs.

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