

Sadhanchandra Das Vs. Gaurishankar Das

Sadhanchandra Das Vs. Gaurishankar Das

SooperKanoon Citation : sooperkanoon.com/344939

Court : Mumbai

Decided On : Nov-30-1974

Reported in : (1978)80BOMLR328

Judge : Vaidya, J.

Appeal No. : First Appeal No. 324 of 1963

Appellant : Sadhanchandra Das

Respondent : Gaurishankar Das

Judgement :

Vaidya, J.

1. [His Lordship after stating the facts of the case and dealing with points not relevant to this report, proceeded.] The question so far as other properties are concerned is, whether they formed the estate of Durgacharandas when he died on November 11, 1956, so as to entitle the parties to succeed as tenants-in-common under Section 19(b) of the Hindu Succession Act. It is not challenged by Mr. Jhaveri that under the Dayabhaga law during the life time of the father the sons did not have any share in the ancestral property or the property of the father. What is contended by Mr. Jhaveri is that there is some difference between Dayabhaga law and Mitakshara law with regard to the burden of proof when the properties stand in the name of a son, as in the present case, as it is common ground that the

tenancies in Bombay and! the property at Navin Senapati Lane, Howrah, stood in the name of the defendant No. 1 during the life time of Durgacharandas. Mr. Jhaveri submitted that the onus of proving that the property purchased in the name of one of the sons, even though the father and the sons were living in it, was the property thrown into the common stock, or that they also contributed to the acquisition is on the other sons. He relied on para. 286 of Mulla's Hindu Law, 14th edn., at page 350, and *Sarada Prosad Ray v. Mahananda Ray* I.L.R (1904) 31 Cal. 448, on which the passage of Mulla is based.

2. In my judgment, these contentions of Mr. Jhaveri are really academic, because in the present case the plaintiff has led evidence and the defendant No. 1 has also led evidence to show that even though the tenancy rights of Bombay premises and the House in Howrah property stood in the name of the defendant No. 1, the properties were enjoyed by all the members of the family, during the life time of their father and they were subject to the control and authority of their father, which was never questioned by the defendant No. 1, during the life time of their father and further all these properties were acquired by the income of all the members of the family, who could earn, including the father and the defendant No. 1. All of them were sometimes running the business at Bombay which was the principal source of income of the family. The question in this appeal cannot be decided merely on the basis of burden of proof because the parties have discharged their burden and it is well settled that in a matter like this, the burden is not throughout on one party but it shifts according to the facts, circumstances and conduct of the parties in each case. In the instant case the plaintiff and! the defendants have led evidence on the point as to whether the acquisition of the tenancies in Bombay and the property in Howrah with the amalgamated and confused funds were made for the benefit of the family the head of which was Durgacharandas, and who controlled all the properties and enjoyed them even though he allowed the tenancies and the property at Howrah to stand in the name of the defendant No. 1. There is evidence also that the incomes arising from the principal source of income, namely, the business at Sheikh Memon Street which was earlier conducted in Hathi Building were spent for the joint family expenses and the balances were again mixed and used for acquiring properties, and this evidence will be discussed hereafter.

3. Moreover, Mr. Jhaveri is not right in his contention that there is some difference between Mitakshara law and Dayabhaga law with regard to the burden of proof when the property is standing in the name of an individual member of the Dayabhaga family is not separate property. In Bhattacharya's Tagore Law Lectures on 'Joint Hindu Family,' (1885) at pages 676 and 677, we find the discussion with regard to the exclusive property in Bengal in the Dayabhaga of Jimutavahana. It is stated (p. 676):

In the Dayabhaga of Jimutavahana, the subject of separate property has been discussed more at length than in any other treatise. He adopts the general rule, that what an individual member acquires by making use of his paternal property is to be shared by others; what is not so acquired belongs exclusively to him. The root of this distinction is, that in the case of common property not having been so used, the others have made no contribution to the acquisition, either by their wealth, or by their personal exertions; therefore they cannot claim a share.

4. In other words, whatever has been acquired with the substantial in help or assistance of joint property is to be shared amongst the rest.

5. Although the discussion by Jimutavahana may be more elaborate, there is no difference between the Dayabhaga law and Mitakshara law as to what constitutes separate property, because even according to Mitakshara school of Hindu law, self-acquired property means the property obtained by a Hindu without any detriment to ancestral property. (See Mulla's Hindu Law, para. 230, 14th edn., page 281). Bhattacharya himself has observed in the aforesaid book at p. 686 with reference to the presumption in Joint Hindu family as follows:

This part of the subject of the present course of Lectures has had its origin from the application of the principle of English Law of Evidence to the trial of suits involving questions of Hindu Law. Under the English Law of Evidence, the effect of legal presumptions is to shift the burden of proof, to answer the question, namely, who ought to give evidence, when a particular combination of facts arises in a suit. As regards a joint Hindu family, since the earliest days of Hindu Law being administered by British Judges, certain legal presumptions have been recognized as legitimately applicable to the case of a Hindu family.

6. Similarly, in Mitra on Tagore Law Lectures on 'Joint Property and Partition,' the learned author at p. 90 observed as follows: The question of the shifting of onus depends upon these presumptions. Thus, suppose a Court has to find whether two Hindu brothers are joint or divided. In the absence of any evidence one way or the other, the Court would be justified in presuming them to be joint; for, as we all know, in India living in joint families among brothers is the rule and separation is the exception. In the same way, in a joint family, all property in the possession of any member of the family should, in the absence of evidence one way or the other, be presumed to be the property of the family. But these are mere presumptions and they may be rebutted by proof. Thus, in the former case, if actual separation is proved, the presumption of a family continuing in its normal condition vanishes. So, in the latter case if the acquisition of the property is recent and it is proved, either, that at the time of the acquisition of the property, the family lived (from hand to mouth, upon the income of its new property, and that there were no savings wherewith the property in question could be acquired, or, that an individual member acquired the property from out of his own separate income, the presumption of the property being that of the family vanishes. In the latter case, should the party who benefits by the presumption show that the income of the family property was more than sufficient for the maintenance of the family and that savings were feasible, he would place the presumption on a firm basis,. It is very difficult to lay down precise rules on the question of the onus of proof. You should always distinguish what is common from what is rare, and base your presumptions accordingly.

7. He has further observed at p. 186 of the same book as follows:

The law of presumptions, as to (1) whether a family is joint or separate and (2) whether a particular property is the joint property of the family or the separate property of any of its members, is the same under the Dayabhaga as that under the Mitakshara. Here also, as in the Mitakshara, no inference can be drawn as to the ownership of any property from the fact of the title-deeds of such property standing in the name of any single member of the family.

8. These are, in my opinion, authoritative pronouncements with regard to the law in Bengal by very experienced and learned lawyers of Calcutta High Court, which deserve our respect.

9. It is true that in *Sarada Prosad Ray v. Mahananda Ray*, referred to' above, Hill and Stevens JJ. of Calcutta High Court laid down that the presumption of law that, while Hindu family remains joint, all the property including acquisitions made in the name of individual members, is joint property does not apply to the case of a joint family governed by the Dayabhaga. But this refers to Dayabhaga law being different as the case was with regard to some presumptions different from those which arise under the Mitakshara law which have been considered in the later decisions by the Judges who hail from Bengal. Thus, in *Hemchandra Ganguli v. Matilal Ganguli* I.L.R (1933) 60 Cal. 1253, relied upon by the learned trial Judge,. Guha and Bartley JJ. discussed the whole question as a rule of evidence, and observed:

Where no nucleus of joint property is admitted or proved, the onus is upon the party asserting 'that property was not the self-acquired property of an individual member of the family.

Property acquired by a member of a joint Hindu family, when there is no nucleus of joint property, is presumed to be his separate property, and the burden of proving, that he threw it into the common stock is upon those, who assert it.

10. In *Charandasi Debi v. Kanai Lal* : AIR1955 Cal206 , Guha and Mullick JJ. also applied the ordinary rule of evidence with regard to the presumptions and pointed out the difference between Dayabhaga law and Mitakshara law and at the same time considered the case as if it was a matter of the law of evidence.

11. In *Kunja Behari v. Gourhari Rana* : AIR1958 Cal105 , Mookerjee and Sarkar JJ. appear to have discussed the law exhaustively and observed (p. 108):

So far as a Dayabhaga family is concerned according to the original texts in the Dayabhagh the descendants had certain rights during the lifetime of the ancestor in the ancestral properties of the latter. The rights of the father were also

circumscribed to a certain extent. But the law as it now stands is that the Dayabhagh father has got an absolute right of disposal over the ancestral properties of his. There is no difference between ancestral and self-acquired properties. It is because of this new conception of absolute rights of the father in his ancestral properties that this Court held in *Sarada Prosad Ray v. Mahananda Ray*, that a family consisting of a person and his sons, though living jointly, if governed by the Dayabhagh law is not a true joint Hindu family.

The presumption with regard to a joint family and joint family property which applied to cases under the Mitakshara would seem to apply also to cases under the Dayabhaga but the difference is that when properties purchased by a son in his name in the father's lifetime there is no presumption under the Dayabhaga law that such property is a joint family property. The burden of proof in such a case lies on those, who deny the ownership of the son.

12. It is further observed (p. 109):

This is due to the fact that according to the interpretation as now accepted during the lifetime of a Dayabhaga father the sons have no right in the properties-held by the former, whether such property be his ancestral or self-acquired ones. There' can be no question of there being a coparcenary consisting of the father and his sons and grandsons. It has, therefore, been held in *Jasoda v. Lai Mohan* : AIR1926 Cal361 and in *Nanilal Das v. Nutbehari Das* (1934) 38 C.W.N. 861 that the presumption of Hindu Law that while a family remains joint all properties including acquisitions made in the names of individual members of the family are joint property does not apply to such a family.

The sons may acquire separate properties in such a family during the lifetime of the father. The onus in such a case to prove that the properties belonged to the father will be on the party who asserts it.

13. In an early case of *S.S. Dossee v. D. Mullick* (1857) 6 M.I.A. 526, which involved a question of construction of a will by Hindu in Bengal governed by Dayabhaga school, it is observed (p. 555):.The law does not treat the principal and the increment as undistinguishable in their nature, for there is no doubt they may

be severed, but it treats them as united for the purpose of dividing them equally amongst all the united family, that is, all the heirs; and if that entire equality cannot, as in the present case in consequence of the disposition of the Will it cannot, be attained, the partial attainment of it seems to us to be more in the spirit of the Hindoo Law, than its total rejection.

14. Again in *Rajani Kanta Pal v. Jaga Mohan Pal*, in a case from Bengal the Privy Council was called upon to decide the nature of the self-acquired property where a member of a joint Hindu family blended his self-acquired property with the property of the joint family, either by bringing his self-acquired property into a joint family account, or by bringing joint family property into his separate account, and the Privy Council laid down that the property so blended became the joint family property. Lord Buckmaster observed (p. 178): The real question for determination is what is the true conclusion to be drawn when people united, as the present parties were, by bonds of close relationship and living as a joint family, draw for the joint family expenses out of a fund enriched by other contributions?

15. The Privy Council relied upon the presumption that when the members of a joint Hindu family confused the incomes of their joint properties with their separate properties, their intention is that the properties acquired with such mixed-up funds are for the benefit of the joint family.

16. The Supreme Court has also considered in *Baikuntha Nath v. Sashi Bhusan* : AIR 1972 SC2531, a case from Bengal, the matter as one arising under the law of Evidence and observed (p. 2533): The High Court came to the conclusion that all the three brothers were participating in the management of the family properties. In reaching that conclusion it relied on Ex. 14 Series as well as other evidence. The family account-books have not been produced. The 1st defendant who says that he had his own income has also not cared to produce his own. account-books. Under these circumstances the finding of the High Court that the acquisitions standing in the names of the three brothers made prior to 1351 B.S. are family acquisitions is unassailable. When a joint family is found to be in possession of nucleus sufficient to make the impugned acquisitions than a presumption arises that the acquisitions standing in the names of the persons who

were in the management of the family properties are family acquisitions.

17. The Law is summarised by Debiprosad Pal J. in Lalbarani v. Bhutnath : AIR1974 Cal109 , in para. 4, at the end of which he has observed (p. III):.The doctrine of self-acquisition in connection with a Dayabhaga family is the same as in a Mitakshara family.

18. Having regard to the above authorities, the only question is whether the plaintiff and the defendants, other than the defendant No. 1, have discharged their burden of proving that the tenancy rights standing in the name of defendant No. 1 were in reality the properties of their father, Durgacharandas. The learned Judge has correctly framed the issues on this point as under:

(1) Whether the business of Durgacharandas and Sons was the business of defendant No. 1 alone? Was it the business of the joint family or of Durgacharandas?

(2) Whether the plaintiffs and the defendants are members of a joint Hindu family?

(3) Whether the plaintiffs and defendant Nos. 2 to 6 assisted in the business of Durgacharandas and Sons?

(4) Whether there was any joint family property? If so, what property is joint family property?

19. The parties and the counsel who appeared in the lower Court were fully aware of what they had to prove and what they had to meet, and the learned Judge after careful consideration of the oral and the documentary evidence on the record found that Items Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 12, 13 and 14 mentioned in the schedule A annexed to the plaint were proved to be the estate of the late Durgacharandas and after his death it was liable to be partitioned amongst his heirs. I, therefore, reject the argument of Mr. Jhaveri that the learned trial Judge has erroneously assumed that the presumptions under the Mitakshara law applied to the facts of the present case or ignored the presumptions which have to be drawn under the Dayabhaga law, as tried to be made out by Mr. Jhaveri.

[The rest of the judgment is not material to the report].

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com