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Court : Allahabad

Decided On : Mar-05-1926

Reported in : AIR1926All453; 94Ind.Cas.944

Appellant : Partap Narain Singh and ors.

Respondent : Ram Kumar Singh and ors.

Judgement :

Kanhaiya Lal, J.

1. The dispute in this case relates to some shares in certain pattis of the village Kartarpur, and the complaint of the plaintiffs is that in the course of a partition proceeding, instituted by Lachhman Das for the partition of his share of the said village followed by certain intermediate applications made by Ram Kumar Singh and Mahip Singh for the partition of what; they described as their share therein, an order was passed by the partition officer in his capacity as Assistant Collector on the report of the patwari of the village, directing the correction of certain entries in the khewat in a manner prejudicial to the rights of the plaintiffs. The facts of the case are some what complicated, and we had some difficulty in getting the right facts in consequence of the manner in which the case was presented to us. We give the facts as stated to us or as far as they could be ascertained from the papers laid before us for consideration.

2. The plaintiffs and the defendant Jadunandan Singh are the descendants of one Salhant Singh. The defendant Ram Kumar Singh is the son of Mahip Singh and the nephew of Mata Din, both of whom form a branch of the family from another branch of which Salhant; Singh was descended. The allegation of the plaintiffs was that they and their predecessor Salhant Singh were separate from Mahip Singh and Mata Din and also from Ram Kumar Singh, the present contesting defendant. Ram Kumar Singh however asserted that he and his father Mahip Singh and also his uncle Mata Din lived jointly with Salhant Singh and his descendants up to 1325 F. The dispute between the parties centered round certain acquisitions which had been made in the name of Salhant Singh in 1865, 1866, 1869 and 1894. There was also a dispute about certain property acquired in the names of the plaintiffs in 1901. By an order of the Assistant Collector passed on 26th September 1922, in the mutation proceeding, instituted on the report of the patwari above referred to, both branches were recorded as owners of the property purchased in the name of Salhant Singh.

3. The trial Court found in a judgment which itself is not free from inconsistencies, that the family was separate in mess and some cultivation, but in other respects it was joint. It proceeded to observe that while it could hardly be described as a joint family it was equally difficult to say that it was a separate family and the conclusion at which it ultimately arrived was that the separation would be deemed to have taken place in 1325 F. It further found that the plaintiffs had no cause of action against Mahabir and that Section 233(k) of the U.P. Land Revenue Act (III of 1901) barred the claim.

4. The lower appellate Court examined the evidence produced by the parties and came to the conclusion that though the evidence was not so clear as it might be the learned Subordinate Judge was right in holding that the family was not proved to have separated before 1325 F. In arriving at that finding it placed the burden of proof on the plaintiffs to establish that they had made the acquisitions while the family was separate, and since its finding was that a separation before 1325 F. had not been proved, it necessarily upheld the finding of the trial Court that acquisitions must be presumed to have been made from the joint funds. It is obvious that the burden of proof was erroneously laid on the plaintiffs, for the

allegation of both the parties was that the family was separate on the date of the suit. The question which the Courts below had to determine really related to the status of the family at the time when the acquisitions were made and it is manifest that if the family was admitted to be separate on the date of the suit, it was on the party that alleged that the acquisitions were made at a time when the family was joint to prove that they were so made. In *Banna v. Kashee Ram* (1877) 3 Cal 315 their Lordships of the Privy Council observed:

Where a party comes into Court claiming a share in a certain property it lies upon him to establish the foundation of this case namely that the property was joint property to which he as a surviving member was entitled. The presumption of jointness does not arise where it appears that before the suit there has been a division of the family property or a separation in the family all the members of which were living separately though the date of the separation might be unknown.

5. In *Bala Bux v. Bukhmabai* (1903) 30 Cal 725 it was held that if a person claimed to be entitled to a certain property on the death of one of the members of the family, another member of which had admittedly separated himself much earlier, and no agreement by the other members to remain united or to reunite, had been proved the ordinary presumption that a Hindu family was presumed to be joint could no longer be availed of to establish a right to that property, and it was the duty of the person claiming that right to establish the state of jointness necessary to make his claim successful. The presumption of jointness having been destroyed by the admission that the family was separate on the date of the suit, it is for the party which alleges separation or jointness on a particular date to entitle him to a particular right to establish the state of things which would give him that right.

6. On behalf of the defendants respondents reliance is placed on the decision in *Ramgulam Singh v. Rambehari Singh* (1896) 18 All 90, and that of *Bhagwani Kunwar v. Mohan Singh* AIR 1925 PC 182. But in those cases an attempt was made to establish that the family was joint when the right to sue accrued and the evidence went to show that there had been separation, though the actual date of separation was not ascertainable. In the present case the allegation of the

defendants was that a separation had taken place in 1325 F. and that of the plaintiffs was that it had taken place much earlier. The acquisitions made between 1865 and 1894 were made in the name of Salhant Singh and that in 1901 in the names of the plaintiffs, and inasmuch as the presumption of jointness was destroyed by the admission that there: had been a separation prior to the suit, it was for the defendants to establish that the, family was joint when these purchases were made or that the purchases had been made from the joint family funds.

7. As the lower appellate Court appears to have been Largely influenced in arriving at its finding by the question of burden of proof which was incorrectly thrown on the plaintiffs who had an ostensible title in the disputed property by virtue of the purchases which had been made in their names or in the names of their ancestor, it is difficult to act on that finding; and the only course open to us is either to send the case back to the lower Court for proper findings on the evidence adduced or to go into the evidence ourselves and to record a finding after hearing the parties. This litigation has been going on since 1923, and affects materially a partition proceeding now pending in the revenue Court, and we have considered it consequently desirable that we should examine the evidence ourselves and come to a finding on the main question upon which the determination of the title of either of the two contending parties must clearly rest. (His Lordship while discussing the evidence proceeded.) It not infrequently happens that where a family outgrows the conveniences at its disposal or some of the members have to go for their living or work elsewhere the messing becomes temporarily separate but for all other purposes the income of the entire family, or of the family property, remains in the joint stock to meet all common expenses.

8. As observed by their Lordships of the Privy Council in *Suraj Narain v. Iqbal Narain* (1913) 35 All 80 a separation in mess and worship may be due to various causes and yet the family may continue joint in estate. In other cases a separation may take place and yet a partition of the family property may be postponed. That was not, however the condition of this family, at the time. There was a joint cultivation, but a portion of the land was set apart for separate cultivation to meet the separate messing expenses of some of its members, or in other words, to

obviate inconveniences due to the growth of bifurcation of the family into several branches. The rest of the cultivation continued to be joint. The entire property was managed by a joint staff paid from a common fund. The collections made by the manager Ramghulam Singh were kept in a joint stock and the marriage funeral ceremonies of the entire family were met from that fund.

9. If there were any doubt about the status of the family in 1901-02, it is removed by the dastur dehi of the village Madasia, wherein it was stated that no division of properties was made between the co-sharers, because the members of the family lived jointly. Both the trial Court and the lower appellate Court have referred to the above document as establishing beyond doubt that the family was joint in 1901, and at no stage of the case it was ever disputed that the mahal and the dastur dehi relied on did not belong to the family or that the contending parties were not co-sharers therein. In fact the khewat of mahal Ramghulam Rai, also known as Ramghulam Singh, of the village Madasia is also on the record; and we have no hesitation in finding that up to 1901, at all events, the family was joint though for the sake of convenience, some of the members were messing separately, and met their expenses from some land, which had been allotted to each of them for their cultivation. This dastur dehi was verified in 1906. Reading it with the evidence of B. Sankata Prasad we can safely carry the period of jointness up to 1902, that is beyond the dates when the acquisitions in question were made.

10. On behalf of the plaintiffs-appellants our attention has been invited to the statement of Ramghulam Singh in a proceeding instituted by him under 8. 145 of the Code of Criminal Procedure against Fatch Bahadur Singh and others in 1921, wherein Ram Kumar Singh is said to have stated that he had separated from the plaintiffs at the time of the settlement, which took place in 1882 and the case of the present plaintiffs is said to have then been, that the property then in dispute, namely the village Uttargaon, had been acquired from the joint family fund. The deposition aforesaid was put to Ram Kumar Singh when he was examined in the present case; and the trial Court which recorded his statement observes that the witness resiled from it. Whether he did so or not both the parties in the present case are seeking to resile from the position which they had taken up in the criminal proceeding above referred to. Ram Kumar Singh now says that the family has

continued to be joint up to 1918, while the plaintiffs choose to affirm that it had separated very long ago.

11. Each party appears to have been anxious at the time to set up allegations which suited its case, regardless of the truth and the Courts below have in the face of the conflict rightly confined their attention to the more important of such independent evidence-oral and documentary-which was forthcoming in the case and we have done the same in arriving at the conclusion that the family was joint when the acquisitions in question were made. That being the position the plaintiffs and the defendant Ram Kumar Singh who is the heir of his father. Mahip Singh and his uncle Matadin must be treated to be the joint owners of the properties in dispute and the acquisitions must be deemed to have been made from the joint fund possessed by the family at the time. It is not disputed that the family had a nucleus of some ancestral property and some sale-deeds bear evidences of earlier loan transactions which were either credited towards or for which some money was left out of the sale consideration.

12. It is urged on behalf of the plaintiffs that there was a decision in 1882 between the present plaintiffs on the one hand and Ram Kumar Singh on the other which operated as *res judicata*, inasmuch as no title was set up by Ram Kumar Singh to any share in the property which the plaintiffs were then claiming. It appears that in 1864 a deed of mortgage was executed by some Pandey Brahmans in favour of Salhant Singh and a suit was brought in 1882 for the recovery of the money due on that mortgage by foreclosure. Ram Kumar Singh was added in that suit as a pro forma defendant by reason of his having asserted his title to a portion of the property by a purchase said to have been made in 1865. It was found in that case that the purchase was invalid and unenforceable, Ram Kumar Singh did not set up a joint right to the mortgage bond then in suit but it is possible that that mortgage may have been a separate transaction entered into by Salhant Singh on his own account. The decision in that case cannot in any case affect other property or the points in controversy in the present case.

13. It is also urged that the Courts below had erred in holding that there was no cause of action against Mahabir. We do not know whether the name of Mahabir is

recorded in the revenue papers. By the order passed in the mutation proceeding, which forms the subject of complaint in the present suit, we do not find that the name of Mahabir was directed to be recorded in respect of any portion of the patti Ram Kumar Singh. He is said to have made an intermediate application for the partition of his share: but we are not aware that any entry was made when the order complained of was passed which is really prejudicial to the rights of the plaintiffs. The appeal, therefore, fails and is dismissed with costs.

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