

Sri Narain Vs. Ram Narain

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Court : Allahabad

Decided On : Feb-14-1934

Reported in : AIR1934All704; 150Ind.Cas.751

Appellant : Sri Narain

Respondent : Ram Narain

Judgement :

Bennet, J.

1. This is a first appeal by the defendant, Sri Narain, against whom the Assistant Collector has granted a decree for profits to the extent of Rupees 3,107-10-9, for the years F. 1333, F. 1334 and kharif of F. 1335. The plaintiff sued also for the rabi of 1332 F. which was dismissed by the lower Court. The family pedigree is as follows:

Lakshmi Narain (died May or June, 1925)

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Sri Narain Kam Narain Padma Kamla

(eldest son) (plaintiff) Narain Narain

(defendant).

2. The plaint sets out that the plaintiff owned a quarter-share in the khewat No. 1 of mauza Nenkhera in Saharanpur District, and that the defendant was the lambardar and collector of the rent and had realized the entire rent from the tenants but that he did not have the entire realizations entered in the papers; that Lakshmi Narain died in May 1925, and from the date of his death the defendant used to make collections and pay revenue. The written statement set out that after the death of Lakshmi Narain the family of the parties continued to be a joint Hindu family and the plaintiff remained in charge and was manager and collected rents up to October 1926; that the plaintiff was general attorney of the defendant and that for these reasons the claim for 1333 F. and 1334 F. kharif should not be allowed: that the plaintiff as manager dispensed with the services of the former karinda and employees and appointed new servants Keshab Deo, Umrao Singh and others for realizing the arrears. They realized the arrears in respect of the village in question and other villages, but in the patwari's papers the realization was caused to be entered in the names of the defendant and Behari Lal wherein fact the rent was realized by the plaintiff; that in October 1926, the defendant took the management into his own hands because the plaintiff had failed to pay the Government revenue in September 1926, and the defendant himself had to pay it. It was further set out that under an arbitration award between the parties certain debts were to be paid and no income should be given to any of the sharers until the debts had been paid, and therefore the plaintiff was not entitled to any profits. It was denied that the amount alleged by the plaintiff had been realized by the defendant. The Assistant Collector framed only two issues:

(1) Can the plaintiff claim profits? and (2) what is the amount of profits due from the defendant if any

3. An application was made by the defence that two more issues should be added as to whether the plaintiff was manager in making collections up to October 1926, and whether the become was used for the joint business of the parties while the family was joint, and a claim therefore could not be brought for arrears of profits.

This application was not granted, The Court of first instance did not go into these matters and when the case came before this Court in appeal it was remanded for finding on three further issues as follows:

(1) Were the plaintiff and defendant members of a joint Hindu family up to July 1926? (2) during this period was the property managed by the plaintiff or by the defendant? (3) did the defendant in the years 1331 and 1335 Fasli pay off a portion of the debt due by the parties' father as required by the award dated 24th May 1927? If so, how much did he pay on that account

4. (His Lordship held on the first issue that the family remained joint till July 1926; on the second issue that the property was managed by the plaintiff up to that period, but he did not receive any collections and proceeded.) The third issue in my opinion does not require any finding of fact for the following reason. This is a suit for profits and the pleading appears to me to be in the nature of a set off. It is stated in the Agra Tenancy Act, 3 of 1926, Schedule 2, list 2, No. 10, in regard to Order 8, Rule 6, Civil P.C., as follows:

No set off shall be allowed in any suit under this Act except a sum due to the defendant on an unsatisfied decree under this Act or under any enactment hereby repealed.

5. The case for the defence on this issue was based on the award which provided in para. 12 as follows:

The deceased Dubey Lakshmi Narainji left some debts a portion of which has been paid off leaving about twenty thousand rupees or so yet due. Besides this there is a sum due to the wakf temple which Dubeji had borrowed at odd times and of which Rs. 1,736-13-9 was due on 10th February 1926, when the accounts were last made. Whatever sums are due from the estate, either to the temple or the others, shall be a charge on the joint landed property and division of profits shall be made after a suitable instalment has been paid.

6. On this provision it was argued that an amount of Rs. 2,900, alleged to have been paid by the defendant under a decree against the deceased Lakshmi Narain

should be set off against the claim of the plaintiff in the present suit. The award further provides in para. 2:

The accounts of the family are kept fairly systematically and as the parties can easily find out the income and expenditure relating to the period that has elapsed since the death of Dubey Lakshmi Narainji, they have told us that they would settle the accounts between themselves.

7. The accounts so far as they relate to this particular village Nenkhara are in issue in the present case. In my opinion it is clear that the claim of the defence amounts to a set off. I consider that technically this claim is barred by Schedule 2, Tenancy Act, Further I consider that it would be impossible to take this claim into account in a suit like the present which is for the profits of a single village. The arbitration award sets out in para. 5 that there are six villages. There was also house property. It would only be in a civil suit in which the whole of the profits were under consideration that there could be any fair decision between the parties as to what sum would remain payable to the plaintiff, if any, after the deductions had been made on account of payments of dues by the defendant. Therefore I consider that no finding should be made by this Court on the allegations of fact in regard to the payment of this Rs. 2,900, and that the matter should remain pending for the decision in a civil suit between the parties. The matter does not concern the present suit.

8. I now come to consider the effect of the finding on the first issue that the family remained joint till July 1926. The claim of the defence is not very clearly set out in the grounds of appeal, but it is to the effect that because the plaintiff and the defendant were members of a joint family for the period up to July 1926, therefore no suit could be brought by the plaintiff against another member of the joint family for a share of the profits during this period. There was a ruling of this Court on this subject reported in *Girdhari Lal v. Gobind Rai* : AIR1927 All810 , in which it was held that in a suit for profits under Section 164 of the old Tenancy Act, 2 of 1901, under Section 201(3) of the Act if the plaintiff was recorded as having a proprietary right entitling him to sue under Chap. 11, the Court shall presume that he has this right and that the words 'shall presume' in the section meant an irrebuttable and

conclusive presumption. The defendant's plea in that case was that the plaintiff had no right to bring a suit because he, the lambardar, was joint with the plaintiff. This Court held that the presumption in question prevented the Court from entertaining the plea of the defendant lambardar. Now, as learned Counsel points out there is no section in the present Tenancy Act, 3 of 1926, corresponding to Section 201(3) of Act 2 of 1901. His contention is therefore that the irrebuttable presumption laid down by the former section no longer exists and therefore that it is open to defence to prove, as has been proved in the present case, that the defendant and the plaintiff did form members of a joint family up to July 1926. I consider that this plea of the defence is correct and that the absence of any section from the present Tenancy Act, corresponding to Section 201(3) of Act 2 of 1901 enables the defence to establish a case that the parties were joint. Further I consider that when it is shown that the parties were joint no suit like the present will lie for the period during which they were joint. There are a number of rulings on the former Act, 12 of 1881, on the point.

9. Section 93(h) in that Act, provided for suits by recorded co-sharers for their recorded share of the profits of a mahal, or any part thereof, after payment of the Government revenue and village expenses or for a settlement of accounts. It will be noted that suits for profits both against co-sharers and against lambardars came under the same sub-section. The first of these rulings was reported in *Khushalo v. Ram Das* (1889) A.W.N. 171, in which it was held that the mere circumstance of the names of the plaintiff and the defendant being jointly recorded as co. sharers without specification of separate or fractional shares will not bar a suit under Section 93(h), N.W.P. Rent Act, 12 of 1881. The question however in that case which was before a learned single Judge of this Court was rather different because in that case the plaintiff was not a member of a joint Hindu family but was the widow of a joint Hindu family. The next two rulings on the points are reported in *Ghandi Prasad v. Jwala Prasad* (1899) A.W.N. 206. On p. 207 in a note there is a report of a judgment *Macca v. Thakuri* L.P.A. No. 3 of 1899, by a Bench of this Court, and in that it was laid down that:

So long as the family remained joint, the receipt of profits by the managing member of the family was equivalent to a receipt of profits by each individual

member. During the period of the union of family no individual member of that family could claim profits from any other member for a specific share. When a family is joint, and it is alleged that a member of that family owns a particular share, it is understood that he would be entitled to that share upon, partition, not that he can say of a specific share that it is his separate share. The fact of a partition subsequently taking place cannot have retrospective operation, and consequently no member of the joint family can claim profits against another member of that family for a period anterior to partition.

10. This ruling was followed in the ruling of Chandi Prasad v. Jwala Prasad (1899) A.W.N. 206, With that dictum of law I am in agreement. It consequently follows that the suit so far as it concerns the profits for the period up to July 1926, cannot be allowed. This period covers the year 1333 F. That Fasli year terminated on 30th July 1926, and the collections in question were made prior to that date. It was in July 1926, that the family separated by the filing of the partition suit. Accordingly in this appeal I would allow the appeal of the defendant so far as it concerns the amount decreed for 1333 F. That is given in the table printed on p. 43 of the paper book and is to the extent of Rs. 894.9-3 out of the total amount decreed of Rs. 1,930-5.0 (excluding arrears). As regards the rest of the appeal for the year 1334 P. and the kharif of 1335 P. I would dismiss the appeal. I would allow costs in both Courts in proportion to success and failure.

11. In regard to the decree of the lower Court awarding Rs. 1,177-5.9 for the previous years collected in the years in suit as stated on p. 16 of the printed book, learned Counsel for the appellant argued that those arrears may have been partly collected during the period prior to July 1926. We gave the parties an opportunity to examine the record and to say if there was any statement of the patwari to this effect or any evidence on the record. After that interval the parties are not able to point to any evidence on the point. I therefore in default of evidence have to fall back on any presumption to be drawn under Section 114, Evidence Act. The only ground from which a presumption can be drawn is the fact that such collections of arrears are improbable after the period of three years' limitation has expired. In regard to the arrears for the year 1330 F. this period would expire with the year 1333 and therefore I draw the presumption that the arrears for 1330 were collected

before 1334 F., that is, they were collected when the family was joint and therefore I allow the appeal in regard to these arrears for the year 1330 F. This sum is according to the table on p. 43, Rs. 249-12-0. In regard to the arrears for the years 1331 and kharif of 1332 F., no such presumption can be drawn because the period of limitation would not expire before 1334 F. in which the family became separate. Accordingly I do not draw the presumption in regard to the arrears for those years. In the result therefore I allow this appeal for the amount of Rs. 249-12-0, the arrears of 1330 F., and for the amount of Rs. 894-9-3, the amount for the year 1333 F.

Niamatullah, J.

12. I am in agreement with my learned brother in his conclusions and the reasons on which those conclusions proceed. I would like to make a few observations on the important question of law which he has dealt with. The question is whether a member of a joint Hindu family can recover profits from the lambardar who happens to be another member of the same family. Section 226, Agra Tenancy Act, 3 of 1926, provides for a suit by a 'cosharer' against a 'lambardar' for settlement of accounts and for his share of the profits of a mahal. 'Lambardar' is not defined in the Tenancy Act, but Section 4(3), Land Revenue Act, defines a lambardar to be a co-sharer of a mahal appointed to represent all or any of the cosharers in the mahal. The Board of Revenue has framed rules under Section 45, Land Revenue Act, defining the duties of a lambardar who has, among other things, to collect rents from tenants and to divide at the appointed times, such profits as may be divisible among the cosharers whom he represents, and to disburse such sums on account of village expenses as he may be authorized to disburse out of the profits coming into his hands. It will be seen that a person who occupies the position of a lambardar, pure and simple, is on the one hand not at liberty to spend the income of the mahal except on payment of Government revenue and charges incidental to the management of the mahal. On the other hand he is bound to render an account of his receipts and disbursements and to pay the profits to his cosharers according to their shares. Each cosharer is entitled to call upon the lambardar to render an account of what he has received and legitimately spent on purposes common to the proprietary body. The lambardar

may also be taken to task for negligence in the discharge of his duties and may be debited with amounts which he left uncollected through his negligence.

13. It is not possible to reconcile these rights and obligations with those existing between cosharers who are also members of a joint Hindu family owning a mahal of which one of them is the lambardar. Strictly speaking they are not cosharers in the sense in which that term is used in Sections 226 and 227, Agra Tenancy Act. They are coparceners collectively forming a unit. Where there are among the co-sharers of a mahal outsiders and members of a joint Hindu family the latter shall be considered to form collectively one cosharer vis-a-vis other cosharers. Inter se the relationship between the members of the joint family is of a different description, namely, the one contemplated by Hindu law which cannot be accurately described by the use of the word 'co-sharership' which implies tenancy in common as distinguished from joint tenancy which is one of the characteristics of a joint Hindu family.

14. In the well-known case of Appovier v. Rama Subba Aiyar (1866) 11 M.I.A. 75 (P.C.), at pp. 89 and 90, Lord Westbury, has explained the position which members of a coparcenary body occupy in relation to each other. It was observed as follows:

According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thence forth a definite and certain share, which he may claim

the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

15. Applying these principles to the case before us it is clear to me that unless the parties have agreed to hold village Nenkhora in defined shares as contemplated in the latter part of their Lordship's observation, it is impossible for the plaintiff to claim a fractional share of the profits collected in the year 1333 F., when according to our finding the family was joint. According to the true notion of an undivided family money must have been brought in that year to the common purse and spent not merely on payment of Government revenue and charges incidental to the management of the mahal, but also on a number of purposes on which the karta of the family could legitimately spend in the discharge of his duties as manager.

16. In cases arising under Act, 2 of 1901, it was not possible for the lambardar to plead that the plaintiff and he himself were members of a joint Hindu family and not cosharers in the sense in which that expression was used in Section 164 of that Act. Section 201(3), barred any plea which was in denial of the fact recorded in the khewat. In the case referred to by my learned brother, it was authoritatively laid down by a Full Bench of this Court that the Court before whom a suit for profits was laid was bound to make a conclusive and irrebuttable presumption that the entries in the khewat correctly represented the relationship between the cosharers therein shown. The Court was bound to presume that the plaintiff who claimed his share of profits according to the entries in the khewat was a cosharer having a defined share and that the defendant was a lambardar no more and no less. It was not permissible for the latter to plead that the parties being members of a joint Hindu family, the plaintiff was precluded from recovering his share of the profits for the simple reason that he had no defined share, and that if he had any, it had been received on his behalf by the karta of the family so that none was recoverable by him. This was ruled, in substance, by at least two Benches of this Court : see *Sheo Narain v. Bala Rao* A.I.R. 1922 All. 332 and *Girdhari Lal v. Gobind Rai* : AIR1927 All810 . There is nothing in these cases which can be construed as indicating the view that even if it had been permissible for the defendant lambardar to plead and establish that the family was a joint Hindu family the plaintiff would be entitled to claim profits. Those cases were based exclusively on Section 201(3).

There was no provision in Act 12 of 1881, corresponding to Section 201(3) of Act 2 of 1901. It was repeatedly held in cases arising under the former Act, that a member of a joint Hindu family could not successfully claim profits from another member of the same family. After the repeal of Act 2 of 1901 the state of law which existed before 1901 has been restored in this respect. There is no section in Act 3 of 1926 corresponding to Section 201(3) with the result that there is no conclusive presumption as regards the correctness of the entries in the khewats on which a suit for profits is founded.

17. It is open to the defendant lambardar to go behind those entries and to show that the parties, though recorded as co-sharers in the khewat, are in fact members of a coparcenary body and that none of them can claim a definite share of profits, nor can insist on payment being made to him after deduction only of the Government revenue and charges incidental to the management. It is open to him (the lambardar) to establish that having regard to the personal law of the parties the plaintiff is precluded from claiming any share of profits. I do not think that it has ever been held that Section 226 entitles a cosharer to sue the lambardar and necessarily to recover his share of profits regardless of obligations imposed by contracts entered into by him or of the personal law to which he is subject. A familiar instance of cases in which a co-sharer otherwise entitled to recover his share of the profits may be debarred from doing so, is where he has entered into an arrangement with the lambardar not to claim profits in consideration of something done by the lambardar. The position is not materially different where the disability arises not from his personal undertaking, but from the law to which he is subject. For the reasons stated above I concur with my learned brother in the order which he proposes to pass.

18. This appeal is allowed for the sum of Rs. 894-9-3, profits of 1333 F., and the sum of Rs. 294-12-0 profits, arrears of 1330 F. The appeal is otherwise dismissed. Parties will pay and receive costs in each Court in proportion to the amount allowed and of the amount which has been dismissed. The order of the lower Court in regard to the rates of interest is upheld.