

Devi Prasad Vs. Vishwa Nath Prasad (D) by L.Rs. and ors.

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Court : Allahabad

Decided On : Feb-14-2008

Reported in : 2008(2)AWC1521

Judge : Shiv Charan, J.

Appellant : Devi Prasad

Respondent : Vishwa Nath Prasad (D) by L.Rs. and ors.

Judgement :

Shiv Charan, J.

1. Both the above mentioned second appeals have been instituted against the judgment and decree dated 26.8.2006, passed by Addl. District Judge/Special Judge (E.C. Act), Azamgarh, in Civil Appeal No. 290 of 1993. As both the appeals have been filed against the Judgment of Civil Appeal No. 290 of 1993. Hence, both these second appeals are disposed of by a common order. The perusal of the pleadings and judgments of the court below shows that O. S. No. 76 of 1976 was instituted by Vishwa Nath Prasad and Mangal Prasad for partition of the property of Joint Hindu Family described in the schedule at the foot of the plaint. And it has been alleged in the plaint that there was joint family of the parties and Raghunath Prasad died about 30 years earlier that there was also a joint business of the family. That out of the income of the joint family, properties were purchased by the joint family and hence the entire property is joint. That defendants are not agreed

for the partition of the property, hence necessitated to file the suit. The defendants contested the suit and filed the written statement. And it has also been alleged that in between the plaintiffs and the heirs of Raghunath Prasad partition took place in the month of October, 1964 and since 1964 all the family members are residing separately and carrying on the separate business. That after the partition some of the properties were purchased by the defendants by their own income and hence the property is not joint. Both the parties produced the evidence documentary as well as oral in support of their contention before the trial court and vide judgment and decree dated 26.5.1986 the suit was decreed for partition of the property. Being aggrieved from the judgment and decree of the trial court Civil Appeal No. 290 of 1993, Ram Niwas v. Vishwanath Prasad, was instituted in the Court of District Judge and this appeal was decided by the appellate court vide judgment and decree dated 28.8.2006 and the appeal was dismissed with costs. And the appellants being aggrieved from the judgment and decree of the trial court and appellate court instituted the above mentioned second appeals.

2. I have heard learned Counsel for both the parties at length and perused the entire material on record including the judgments of the courts below and* pleadings of the parties. It has mainly been argued by the learned Counsel for the appellants of S.A. No. 998 of 2006, that earlier there had been litigation in between the parties in Suit No. 56 of 1976 and it was decided in the suit that the share of each of the sharer in the property is to the extent of 1/7 share. And that the judgment of O. S. No. 56 of 1976 shall be operated as res judicata. And the courts below committed gross illegality in not accepting the judgment of O.S. No. 56 of 1976 as res Judicata and now contrary finding was recorded that the share of the plaintiff is 1/2 the property in dispute. That partition took place in between the parties in the month of October, 1964 and since 1964 the parties have been living separately. And each of the member of the family had been carrying on separate business and out of the proceeds of their separate business certain members purchased the property and the courts below erred in holding that the entire property is joint. And that the substantial question of law is involved in this case that the courts below has not followed the principle of res Judicata.

3. The learned Counsel for the appellants of S.A. No. 1002 of 2006, Devi Prasad v. Vishwanath Prasad, further argued that there had been litigation in between the family members since the year 1971 and the appeal was also filed against the judgment and decree of Suit No. 56 of 1971. Under these circumstances after 1971 there was no question of any jointness of the family and there was also no question of joint fund of the joint family in order to purchase the property of Schedule Da. That this property was purchased in the name of Devi Prasad by Devi Prasad himself and this cannot be joint property. He also argued that inclusion of this property in the suit is also barred by Section 4 of the Benami Transactions (Prohibition) Act, 1988.

4. Learned Counsel for the respondents disputed the argument of the learned Counsel for the appellant and further argued that O. S. No. 56 of 1971 was not for the partition of the immovable property of the family. In that suit the dispute was regarding some payment of sales tax of joint business of the family and hence it was argued that there were 7 family members as partners in the business and each will have the share of 1/7. That in Suit No. 56 of 1971 there was no dispute regarding 1/7 share in the property in between the members of the joint Hindu family. That the so called documents of the partition of October, 1964 was not produced in Suit No. 76 of 1976. The appellant/defendant failed to prove that the property had been partitioned. It has also been argued that even after 1971 the business remained joint and the property was purchased in the name of Devi Prasad after 1971 also from the joint fund of the family. And as the family was joint hence Section 4 of the Benami Transactions (Prohibition) Act, 1988 is not applicable. He also stated that it came into operation in the year 1988 whereas the suit is pending since 1976 and it has not been provided that this Act will have a retrospective effect. He also argued that during the consolidation proceeding the partition of agricultural land took place and the plaintiff get 1/2 share in the agricultural land and the same principle is applicable in the immovable property shown in the schedule of the plaint. That no substantial question of law involved in both the appeals.

5. I have considered all the facts and circumstances of the case and argument of the learned Counsel for the parties. It is undisputed fact that earlier there was a

Suit No. 56 of 1971 in between the parties and this suit was instituted by Ram Newaj against Vishwanath and two others for recovery of Rs. 621.65 from each of the defendants. It was alleged in the suit that family used to run four joint firms in the names of Hanuman Prasad Raghunath Prasad in town Phoolpur. And the sales tax for these firms was assessed for the year 1963-64 Rs. 1,182.28, for the year 1964-65 Rs. 1,138.17 and for the year 1965-66 Rs. 1,834.97. It was also alleged that the partition took place in the family and each one got 1/7 share in accordance with the pedigree. That some of the sharers paid their share of sales tax out of Rs. 4,385.42 but the plaintiff and defendants did not pay the tax of their shares and as a result, the plaintiff was taken into custody on 18.2.1970 in connection with the recovery of tax. And hence he paid the entire tax. That the plaintiff also paid the tax of the share of defendants and the plaintiff is also entitled to receive the remaining amount of their share from the defendants. The defendants contested the suit and denied from the factum of partition in which 7 shares were allocated in the business. In the finding of issue Nos. 1 and 2 also trial court arrived at the conclusion that the evidence on record proves that partition took place in the family on 13.10.1964 and up to 13.10.1964 all the four firms were joint: Although it is a fact that Suit No. 56 of 1971 was regarding the recovery of the amount of taxes of the joint firms of the family and regarding share also in the family business was held 1/7 share of each of the member. Against the judgment of the trial court the appeal was also dismissed. But it is a material point that whether the judgment of Suit No. 56 of 1971 shall operate as res judicata in the present case. The main contention of the learned Counsel for the appellant is that as in Suit No. 56 of 1971 the share was determined 1/7 share of each of the sharer then in the present suit the courts below committed gross illegality in not accepting the judgment of the earlier suit as res judicata and it is wrong to determine the share 1/2.

6. A pedigree has been given in the plaint of Suit No. 56 of 1971 and according to pedigree the common ancestor of the parties was Hanuman Prasad. Although the pedigree included other members of the family but they were not member of the joint family of Hanuman. The dispute is in between the heirs of Hanuman. This pedigree has not been disputed by either of the parties. There were two sons of Hanuman namely Raghunath Prasad and Vishwanath Prasad. The plaintiff No. 1

was the son of Vishwanath Prasad and the defendants were the heirs of Raghunath Prasad. And according to this pedigree if there was joint family of Hanumant then naturally both the sons of Hanuman namely Raghunath Prasad and Vishwanath Prasad shall have 1/2 share each and not then 1/7 share of each of the sharer. That in these circumstances, if the devolution is to be accepted from Hanuman and each member of the joint family is being treated as having equal share to the extent of 1/2 share. It may be a different matter that all the members of the joint family were involved in the joint business of the family and each member shall have 1/7 share in the business of the family in view of mutual understanding. But it does not mean that each of the member shall have 1/7 share in the immovable property also. It is undisputed fact that in earlier Suit No. 56 of 1971 there was no dispute of the joint immovable property. The entire dispute was regarding the liability of the payment of tax of joint business of the family and as a matter of convenience the parties agreed that the share of each member in the joint business shall be to the extent of 1/7 share. Much has been argued by learned Counsel for the appellant that the partition took place in the year 1964 and from the judgments of the courts below it appears that some document was executed in between the members of the family regarding partition. But this document of the year 1964 has not been produced. And the courts below drew the adverse inference against the appellant for not producing the document of the partition. Moreover, this document is most material for proving the factum of partition in the year 1964. The learned Counsel for the appellant tried to persuade me to accept this contention on the face of it that in Suit No. 56 of 71 the share was held 1/7 and this finding recorded in the earlier suit must be accepted on the basis of it and it must be accepted as res judicata under Section 11 of the C.P.C. In order to show that in the earlier suit the matter in issue directly and substantially was the same as is in the present case then the document should have been filed. Because the averments of Suit No. 56 of 1971 shows that in that suit the dispute was regarding the liability of the payment of tax of the business of the joint family and the liability was decided to the extent of 1/7 share. As the document of the year 1964 was a most material document for the factum of partition. Hence, this was a material document to be produced in the proceeding of the case but this document has not been produced. Hence, it cannot be determined that the

partition took place in the year 1964. I also disagree with the argument of learned Counsel for the appellant that judgment of Suit No. 56 of 1971 shall operate as res judicata in this case. The partition of immovable property was not a fact in issue directly and substantially. In the earlier suit the dispute was regarding the liability of the payment of the taxes of the joint business of the family. And in my opinion the court below cannot be said acted illegally in not applying the principle of res Judicata in the present case. It has not been proved by the appellants that the property in suit was partitioned earlier, hence the suit is not maintainable. Whereas the plaintiff of the case proved that the property in dispute is joint and the share is 1 /2 of the heirs of Raghunath Prasad and Vishwanath Prasad each. And the heirs inherited accordingly. The courts below recorded a concurrent finding about the jointness of the immovable property of the family.

7. It has mainly been argued by learned Counsel for the appellant of Appeal No. 1002 of 2006 that in the year 1971 there was a litigation in between the parties and this litigation continued up to the year 1975. Hence, there was no question of joint fund of Hindu family and there is also no question of acquiring the property of Schedule Da which was purchased in the name of Devi Prasad. And as partition took place in between the members of joint family and Devi Prasad purchased the property in his own name. That this property cannot be said to have been purchased benami in the name of Devi Prasad. He also argued that in view of Section 4 of the Benami Transactions (Prohibition) Act, 1988, the burden of proof of this fact that the property is benami in the name of Devi Prasad lies on the person who is alleging this fact. And he also cited a judgment of this Court, Diwakar Sahakari Krishi Samiti Ltd. and Ors. v. State of U.P. and Ors. 1988 RD 208 and also Duvuru Jaya Mohana Reddu and Anr. v. Alluru Nagi Reddu and Ors. : AIR 1994 SC1647 . It is the fact that in view of Section 4 of the above Act the burden of proof of this fact that the property is Benami lies on the person who is alleging the property benami. But there is subsection (3) of Section 4 of this Act. It has been provided in Sub-section (3):

Nothing in the section shall apply:(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family, or....

8. Hence, in view of this Sub-section (3) of Section 4 of the Act, the Act is not applicable in the present case. Because it is a definite case of the respondents that there was joint family of the parties and no partition took place of the property of the joint family. Devi Prasad was one of the member of Hindu undivided family, hence in view of Sub-section (3) of the Section 4 the provision of this Act is not applicable. Much has been argued by learned Counsel for the appellant that when in the year 1971 there was litigation in between the parties and continued up to year 1975. In these circumstances it cannot be believed that there was joint business of the family and out of the joint fund of the family the property was acquired in the name of Devi Prasad as a member of Hindu undivided family. Although learned Counsel for the appellant may be justified in this contention. But sometime, facts are more strange than fiction and it may be possible that under some arrangement the property was purchased in the name of Devi Prasad out of fund of joint family. The court below recorded a concurrent finding of fact and it is settled position of law that the finding recorded by the courts below on facts irrespective of the fact that the finding is erroneous the High Court in second appeal cannot reverse this finding of fact and I am of the opinion that in the circumstances of the case, it cannot be said that substantial question of law is involved in these appeals. The courts below recorded the finding of fact and no question of law is involved.

9. For the reasons mentioned above, I am of the opinion that no substantial question of law is involved in both these appeals. The courts below recorded a finding of fact and there is concurrent finding of courts below. In my opinion there is no sufficient ground to admit these appeals for hearing and the appeals are liable to be dismissed summarily at this stage.

The abovementioned appeals are dismissed accordingly at the admission stage.