Brajamohan Das and ors. Vs. Radhamohan Das and ors.

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Court : Orissa

Decided On : Aug-11-1960

Reported in : AIR1961Ori41

Judge : S.P. Mohapatra and ;S. Barman, JJ.

Acts : Registration Act, 1908 - Sections 17; Hindu Law

Appeal No. : First Appeal No. 32 of 1955

Appellant : Brajamohan Das and ors.

Respondent : Radhamohan Das and ors.

Advocate for Def. : C.K. Ghosh and ;R.K. Patnaik, Advs.

Advocate for Pet/Ap. : L.K. Dasgupta, Adv.

Disposition : Appeal dismissed

Judgement :

Mohapatra, J.

1. The plaintiffs have brought this appeal against the judgment and decree passed by the learned! Subordinate Judge of Mayurbhanj, arising out of a suit for partition in respect of -/5/4 pies interest of the plaintiffs. One Raghunath Das had four sons, Radhamohan, Suryamani, Brajmohan and Madan-mohan. Plaintiff No. 1 is

Brajamohan, the third son. Plaintiffs Nos. 2 and 3 are the two sons of plaintiff No. 1. Defendant No. I is the eldest son of Raghunath. Defendant No. 5 is the last son of Raghunath, i. e. Madanmohan. Defendants Nos. 2 to 5 are the four sons of defendant No. 1, Radhamohan.

Defendant No. 7 is the widow of Suryamani who died in the year 1931, The 'A' Schedule properties admittedly are the ancestral properties which are nearly 100 mans, i. e. 62 acres. The properties described in Schedule (B) according to the plaintiffs' version were acquired from out of the joint family funds, they being in acreage nearly 100 acres. Schedule 'D' describes the moveables and schedule 'E' to the plaint describes the Mahajani business of the joint family as asserted by the plaintiffs.

Plaintiffs seek a partition on the ground that even though a few years prior to the institution of the suit there was a quarrel amongst the female members of the family on account of which parties separately possessed their lands there having been no partition by metes and bounds, the present suit has been brought for partition by metes and bounds and for separate possession in respect of one-third share of the plaintiffs.

The short defence is that the suit for partition is not maintainable as there was already a partition by metes and bounds in the year 1947 and the further defence is that the properties described in Schedule 'B' being owned as self-acquisition of the defendant No. 1 the plaintiffs are not entitled to any share in respect thereof. The description of moveables and mahajani business, as given in Schedules 'D' and 'E' was also disputed in the written statement.

2. The trial court found that there was a partition by metes and bounds in the year 1947 and, as such, the present suit is not maintainable. It is further found that the properties in dispute in Schedule 'B' are the self-acquisitions of defendant No. 1; in any event the plaintiffs are not entitled to any share in respect of the same. It is these two issues which are being contested before us in appeal.

3. The most important matter in controversy between the parties is whether there was a partition by metes and bounds as alleged by the defendants, so that the

present suit for partition is not maintainable at all or that there was mere severance of interest, that the parties enjoyed and possessed the lands separately for their convenience only, for a few years prior to the institution of the suit as alleged by the plaintiffs in which case, indeed, the suit for partition will lie and the further question will arise whether the properties described in Schedule 'B' are the self-acquisitions of defendant No. 1 or not.

Regarding the question of partition by metes and bounds, the defence version is that prior to 7-8-47 there was a quarrel amongst the female members of the family; some arbitrators were appointed as agreed upon by all parties, i.e. the three brothers, on the basis of a deed of agreement (Ext. 1) dated 7-8-47. Thereafter the arbitrators who intervened to effect a completed partition by metes and bounds did, in fact, effect a partition and the parties thereafter were completely separate.

Subsequently on 17-8-47 there was also a memorandum of the partition effected by the Bhadraloks and the document was also signed by all the parties concerned, i.e. the three brothers and also the arbitrators. There is no dispute over the position that on this question it is for the defendants to prove that there was a partition by metes and bounds. The defendants mainly rely upon the evidence of three of the Bhadraloks who had actually effected the partition and were examined on their behalf as D. Ws. 16, 18 and 21. Indeed, their names appear in the deed of agreement D/- 7-8-47.

The evidence of these three witnesses has got to be assessed in the light of a few circumstances that I am presenting immediately. The plaintiffs had given an inconsistent statement regarding the factum of partition even in their pleadings and the matter was still more exposed while evidence was led by the plaintiffs. In the earlier paragraphs of the plaint and also in evidence the plaintiff's version is that defendant No. 1 was a member of the Praja-sava in Mayurbhanj and the plaintiffs were given to understand that legislation Would soon come into force; that an individual cannot possess more than 33 acres of land.

Just in order to avoid this contingency he persuaded them to effect a partition deed which is merely a sham transaction and will never be acted upon. But in paragraph II of the plaint, it is pleaded that there was a proposal for partitton;

Bhadralogs were appointed but nevertheless as the arbitrators did not take into consideration that defendant No. 7 had a legal share in the properties in dispute and further that defendant No. 1 had no other separate business for making self-acquisition and as the arbitrators were bent upon giving a share to Rashamoni the concubine of Raghunath, the proposal for partition was dropped.

Manifestly, these are the inconsistent features on the side of the plaintiffs. On a persual of the entire evidence of the plaintiffs, we find that they had made statements that the partition deed was in fact executed, but it was a fraudulent transaction as they were given to understand that this was simply to avoid the position that an individual member of a family cannot possess more than 33 acres. This fraud, as stated by the plaintiffs, came to their knowledge in December, 1947.

They did not speak of this fraud to any one else nor did they take any steps before any authorities to redress this fraud. It is to be mentioned that the present suit was the first occasion when the plaintiffs ventilated their grievance and was filed in the year 1952. We will next take up this Ex. I, i.e. the deed of agreement signed by the three brothers on 7-8-47. The execution of this document is admitted. The plaintiffs' version is that on the basis of this agreement Bhadralogs were in tact appointed.

There is no rhyme or reason why a deed of agreement should be executed by the brothers if only a partition deed was to come into existence among the brothers to avoid the mischief of possession of 33 acres. The other important feature that has weighed with us is the admission of the plaintiffs on a previous occasion. In a criminal case, while making statement under Section 342 Cr. P. C. the plaintiffs had stated that the brothers were separate since 1947 and were cultivating lands separately; that the Arbitrators, Jagannath Patro, Tahsildar, Arjun Patnaik, Clerk, Brundaban Singh, Gopal Prosad Das, Mohan Dhal and Upendranath Ghosh had arbitrated and partitioned the land.

While being confronted in cross-examination, they made a clear admission that they had made that statement before the criminal court. On further scrutiny, Mr. Dasgupta appearing on behalf of the appellants acknowledges that the statement of the plaintiff was not for the purpose of obtaining an acquittal in that criminal

case. To us, this is a clear admission of the position that in fact arbitrators were appointed. They had partitioned the properties by metes and bounds and the partition so effected was accepted by the parties.

Accordingly, as admitted by the plaintiff on the previous occasion, the parties were in separate cultivating possession of the lands allotted to them. This admission gains strength also by reference to the statement of one of the witnesses for the plaintiffs themselves, i.e. P. W. 3. He also stated that the members of the Punchayat had partitioned the house & moveables & since then the parties are separately cultivating the lands of the family. In the state of the above circumstances, we now proceed to assess the value of the evidence of the three Bhadralogs, D. Ws. 15, 18 and 21.

The entire evidence of these witnesses was placed before us in extenso and Mr. Dasgupta was making his running comments. The names of these three persons appear in the deed of agreement the genuineness of which is admitted by the plaintiff No. 1 himself. They appear to be respectable persons of the locality and also independent. Such persons generally are called to arbitrate in the matter of partition of joint family. Indeed, while deposing as to the actual partition there are some discrepancies in the evidence of these witnesses. In our view, these discrepancies cannot be taken to be derogatory to the testimonial value of their evidence.

On the contrary, they indicate that they had come out to speak in a straightforward manner and naturally when they were speaking in detail, discrepancies are bound to occur. The learned Subordinate Judge who had the advantage of hearing these witnesses had also placed reliance on them. In our view, therefore, taking the entire evidence on record, we have no doubt to come to the conclusion that the factum of partition by metes and bounds has been sufficiently established in order to negative the plaintiffs' cliam for a further partition as laid in the present suit.

4. The partition deed was executed by the parties and the arbitrators on 17-8-47, This was filed in the court below. Nevertheless, the court below did not accept it as evidence as it was not a registered document. The learned counsel on behalf of the respondents has put in a petition under Order 41, Rule 27 C. P. C. to accept

this document as additional evidence. Following the general trend of evidence on record when the plaintiff and defendant No. 6 both admit that the arbitrators were appointed and the document was executed by them, formal proof of the document is not necessary.

Their only contest is that the document is a fraudulent and sham transaction. We may note that in the face of evidence on both sides, it will serve no useful purpose to send back the document for being formally proved before the court below when the execution of the document is admitted by the parties concerned. Now the question is as to admissibility of the document. The position in law is clear and to us appears to be beyond all doubt that if on the basis of this document partition is effected, the document does require registration under the provisions of Section 17 of the Indian Registration Act, but if the position is that the partition of the joint family is otherwise effected either by the parties or at the intervention of some independent Bhadralogs and a document is drawn up merely as a formal record or memorandum, in that event the partition which is otherwise effected, the document is not hit by the mischief of the provisions of Section 17.

On a careful perusal of the document as a whole, we feel convinced to note that the recitals go unmistakeably to point the position that the partition was in fact effected by the Bhadralogs which went on for several days and thereafter only this document was, executed. In our view, therefore, the document on a plain reading is a mere memorandum or record of partition of the joint family by metes and bounds which had been already effected by the intervention of the Bhadralogs as mentioned in the deed of agreement dated 7-8-47. The document, therefore is admissible.

Mr. Das Gupta, appearing on behalf of the appellants relies upon two decisions in support of his contention that the document should be thrown out as inadmissible, Ramayya v. Achamma, AIR 1944 Mad 550. This is a Full Bench decision which is being relied upon by Mr. Das Gupta for the position that the partition deed on the basis of which a suit for title was brought not being registered was found inadmissible by their Lordships of the Madras High Court sitting in the Full Bench and, as such, the plaintiffs suit was dismissed.

The judgment of the Chief Justice Leach clearly shows that the case before them was entirely different from the case before us. There, the plaintiff had brought a suit for declaration of title only on the basis of a deed of partition which was not registered. Accordingly, when the deed was the basis of title of the plaintiff, the document bore no registration and when the document was found inadmissible the plaintiff's suit for title and possession failed as against the defendants.

The point came up for discussion before their Lordships Kumaraswamy Sastri, J., sitting with Venka-tasubba Rao, J., in Ramu Chettv v. Panchanmal, AIR 1926 Mad 402. There, their Lordships held that where a partition had taken place under a deed and the deed could not be proved for want of registration, the fact of partition could be proved by other evidence. Whether that decision enunciated the correct proposition of law or not was the subject-matter of discussion before their Lordships of the Full Bench.

It is apparent that in the previous case reported in AIR 1926 Mad 402 the partition had taken place on the basis of the deed itself. On a careful perusal of the judgment of the Full Bench, we are definitely of the view that their Lordships did not lay down a principle which is to the effect that if the partition is effected otherwise than on the basis of a deed and the deed only serves as memorandum which has come into existence subsequently, the deed does require registration.

Mr. Das Gupta further relied upon a decision of the Supreme Court in Nani Bai v. Gita Bai, AIR 1958 SC 706. In that case, the daughter came on the basis of inheritance to the property of the father who had been a member of the joint family. The daughter claimed that as there was severance of interest of the joint family she was entitled to succeed to her father's interest in the property. She relied upon a deed which was not registered. Their Lordships laid down a principle which we should say rather confirmed the well-settled and accepted view throughout India, that a deed wherein there is only severance of interest does not require registration.

While enunciating the principle which was necessary for the purpose of that case, their Lordships also observed that if the partition by metes and bounds is effected on the basis of a deed, the document is compulsorily registrable. In our view none

of these two cases is inconsistent with the proposition of law that we have enunciated. On accepting this document the position is still further clarified that there was a completed! partition by metes and bounds which will non-suit the plaintiffs that a further suit for partition in face of a previous partition is not maintainable.

5. The second point urged by Mr. Das Gupta is whether the properties described in schedule 'B' can be taken to be self-acquisitions of the defendant No. 1. The position of law is equally well settled that simply because there is a joint family there is no presumption that the joint family possessed of any property. Moreover, if any property stands in the name of any memlxir of the family, there is no presumption automatically that the property is joint family property. The initial onus is undoubedly on the plaintiffs to prove that the joint family possessed of property and the properties were of such a nature that from out of the income of which the properties which are controverted to be self-acquisitions could be acquired.

In that event only when the plaintiffs have been able to place sufficient materials to the effect that the joint family fund was sufficient for the purpose of acquiring all the disputed items of property, then the onus will shift on the other side to prove that they were in fact the self-acquisitions as claimed. Here, the ancestral nucleus is only 60 acres and the properties which are claimed as joint family properties are nearly 100 acres. Indeed, there is some evidence to the effect that Raghunath had purchased some lands during his life-tune. There is no evidence what kind of lands these purchased lands of Raghunath were.

It is also in evidence that Raghunath during his life-time had some money-lending and paddy-lending business. The materials are insufficient to indicate how far these money-lending and paddy-lending business with the 60 acres of land would be sufficient in their nature for the acquisition of the properties described in Schedule 'B'. On the contrary, it is admitted even from the plaintiffs' side that defendant No. 1 had his own separate business. There is no clear proof that the joint family also were carrying on joint family business in such a large scale from out of which this 'B' schedule properties were acquired.

The learned trial court has found, on a careful discussion of the evidence, that the surplus during Raghunath's time from out of the usufruct of the ancestral land would be nearly 10 poutis of paddy i.e. 30 maunds. In our view, this will not be taken to be quite sufficient for the purpose. Moreover, the family was growing and in fact, the defendant had as many 4 sons and the plaintiff also had two sons, apart from other dependent members oY the family. The evidence on record, therefore, is not sufficient for the purpose of shifting the onus on the defendants to prove self-acquisitions. As such, the properties described in schedule 'B' have rightly been held by the learned! trial court as the sell-acquisitions of defendant No. 1 and, as such, not partible. In conclusion therefore, the appeal fails and is dismissed with costs.

Barman, J.

6. I agree.