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Court : Orissa

Decided On : Apr-03-1974

Reported in : AIR1975Ori97

Judge : K.B. Panda, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 6, Rule 2; Hindu Law; Contract Act, 1872 - Sections 16; Evidence Act, 1872 - Sections 114

Appeal No. : First Appeal No. 45 of 1967

Appellant : Harekrishna Sahu and anr.

Respondent : Bhagirathi Sahu and ors.

Advocate for Def. : A.K. Padhi and ;H.K. Jena, Advs.

Advocate for Pet/Ap. : R.N. Sinha, Adv.

Disposition : Appeal dismissed

Judgement :

K.B. Panda, J.

1. The original plaintiff-appellant, now dead and substituted by his legal representatives, lost his suit for partition of his half share in the disputed 52.031/2 acres of land described in Schedule 'Kha' of the plaint.

2. The admitted genealogy is that one Naran Sahu had three sons, namely, Jagabandhu, Madhaba and Sadhu in order. The deceased plaintiff Chandra Sekhar is the son of Madhab. The contesting defendant No. 1. Bhagirathi is the son of Jagabandhu. The third son Sadhu died issueless while joint with his brothers. The plaintiff's father Madhaba died after Sadhu. Jagabandhu the father of defendant No. 1 therefore being the eldest member of the family was the Karta and after him defendant No. 1 became the Karta. Other defendants (Nos. 2 to 4) are the sons of defendant No. 1.

3. The plaintiff's case was that the 'Kha' schedule properties are all joint family properties though acquired mostly in the names of defendant No. 1. Some are also in the names of plaintiff's wife and his sons as well as the son (D.2) of D. 1. Yet all are joint family property having been acquired from joint family nucleus. Admittedly the ancestral property was about 21 acres and the rest have been acquired by defendant No. 1.

4. It is alleged in the plaint that defendant No. 1 being the Karta of the family and much senior in age, the plaintiff not only respected him but stood in fear of him. In 1959, defendant No. 1 proposed to the plaintiff to create a nominal deed in respect of their properties to save them from the impending Land Reforms Act. So a registered deed was executed (Ext. 3 = Ext. A) though the family continued in mess and property joint as before. A few days before the filing of the suit, there was a quarrel between the female members in which defendant No. 1's wife is said to have given a threat to drive the plaintiff's family from all lands. This made the plaintiff suspicious. So he went to Balasore, took a copy of the registered deed and discovered that defendant No. 1 had created fraudulently a partition deed without giving proper share to him. Thereafter the plaintiff suggested for a fair and amicable partition by metes and bounds to which defendant No. 1 did not agree and hence the suit.

5. Defendant No. 1's positive case was that the registered partition deed (for A.41.40 decimals') has been executed with the consent of the plaintiff and had been acted upon. The plaint allegation that it was a nominal one to defeat the provisions of Land Reforms Act was denied. Further, it was asserted that lots 19 to

23 of the schedule 'Kha' were not joint family properties as they had been purchased in the names of plaintiff's wife and defendant No. 1's sons out of their separate funds. Also it was alleged that certain properties had been excluded from the partition deed since they were acquired after the said partition. Lots 25, 26 and 28 were kept out of the partition deed as they were dedicated to the family deity (Baraha-Bigraha). Also certain properties mentioned in the written statement, were not partitioned, such a residential house, for reasons stated therein. It was specifically pleaded that all the joint family properties available for partition had been divided by metes and bounds with the help of Bhadralogs and therefore there cannot be a partition for second time.

6. The learned lower Court partially decreed the suit on the finding that there had been a partition by metes and bounds between the brothers as per Ext. 3 -- Ext. A dated 13-1-1959 and hence there cannot be second partition. It further held that the partition deed was not a product of fraud and so ordered that properties not included in Ext. A be partitioned.

7. There are three witnesses on the plaintiff's side out of whom P.W. 3 is the plaintiff and there are five witnesses on the side of the defendants of whom D. W. 1 is defendant No. 1. D. W. 3 is a Bhadralog who effected the partition of the moveable and also an attesting witness to Ext. A the deed of partition. D. W. 4 is the scribe of the document, the partition deed. D. W. 2 is the Chaukidar who speaks about the separate possession and payment of separate chaukidari tax (Exts. Z-1 to Z-3) D. W. 5 is defendant No. 2.

The evidence of the two witnesses for the plaintiff, namely, P.Ws. 1 and 2 is inconsequential. They merely state that there has been no division by metes and bounds but the parties are posseting their lands for convenience. P.W. 1 has little knowledge about the lands belonging to the family. Similarly, P.W. 2 says that he cannot say if the parties have been divided by metes and bounds, He is a labourer and admits that he has no knowledge about the specific lands of the parties. The plaintiff as P.W. 3 states in his chief--

'In 1959, there was a share (sham) deed to avoid the provisions of the Land Reforms Act. I executed it under the advice of my brother D. 1 in order to avoid the

provisions of Land Reforms Act. I did not go through the contents of the deed. I have full confidence in my brother since I have great regard for him. No moveable property of our joint family has been got (?) divided among us.'

As against this, the evidence on the side of the defendants is quite specific. The scribe and the attesting witness deposed how the contents of the partition deed were read over and explained and thereafter both the parties signed it. Two copies of the same were prepared, registered and each party got one.

8. The execution of the partition deed is not denied. It is only challenged on the ground of fraud.

9. Mr. Sinha, learned Counsel for the plaintiff-appellant contended that--

'..... this document was a nominal one and executed in order to avoid the enactments which was expected to be enforced regarding land Reforms and that it was never acted upon, but the defendant who was admittedly the Karta of the joint family and was more than 20 years elder than the plaintiff had exercised his undue influence in getting the document executed, as contemplated under Section 16 of the Contract Act, and that the defendant had fraudulently got the document executed with the assistance of his people, the scribe and the attesting witness.'

Citing the case law reported in AIR 1923 PC 73 he submitted--

'True it is, the onus is on the person who alleges fraud, and suspicion and surmise and conjecture are not permissible substitutes for these facts or these inferences but that by no means requires that every puzzling artifice or contrivance resorted to by one accused or fraud must necessarily be unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many clever and dexterous knave would escape.....'

10. It needs no saying that the onus lies heavily on the party who alleges fraud. The mere allegation would not suffice but it must be pleaded as to how fraud was practised and that must be also substantiated. True, positive evidence of fraud need not be sought for and the same can be inferred if circumstances are there to warrant the same. In the case of Bishundeo Narain v. Seogeni Rai, reported in AIR

1951 SC 280 their Lordships have laid down thus:--

'Though pleas of undue influence and coercion may overlap in part in some cases, they are separable categories in law and must be separately pleaded.

In cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case-can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Ct. ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion.

In the case of coercion when a Ct. is asked to find that a person was threatened with death it is necessary to give particulars as to the nature of the threat, the circumstances, the date, time and place in which it was administered and the name of the person threatening. In the absence of such particulars it would be impossible to reach a proper conclusion.'

11. The case has to be judged from the above standpoint.

Mr. Sinha vehemently urged that fraud has to be inferred from--

(a) unequal distribution of shares;

(b) exclusion of some properties from partition; and

(c) disparity in age between the plaintiff and defendant No. 1, the latter being the karta and thus in a position to dominate over the will of the plaintiff.

12. As already indicated the evidence on the side of the plaintiff is not at all helpful to further the case of the plaintiff of fraud. Mere unequal share in a partition does not ipso facto prove fraud. The plaintiff admits and his case also in the plaint is that defendant No. 1 told him that in view of the approaching Land Reform Regulation, they should execute a document. If so, the only document that could be created to circumvent land legislation was a division of the lands. From this, it is clear that even if the plaintiff's case is accepted there was no misrepresentation. He was made aware that a partition of the landed properties was going to be effected. The

plaintiff was then about 34 years old and thus sufficiently old to realise its implication. On his own pleading he was a party to the fraud -- if there was at all any--to out-wit land legislation. Again the allegation that a nominal deed was executed is somewhat incompatible with a plea of fraud in the sense that he knew that it was a nominal deed meant not to be given effect to. It was a sham document and he knew it to be so. That apart the evidence of the scribe (D. W. 4) and the arbitrator, D. W. 3 (the other two arbitrators are dead) is specific and nothing having been elicited from them that negatives the suggested inference of any fraud or undue influence. The very fact that in this suit for partition there is not a single item of movable property sought to be partitioned is also indicative of the fact that there had been a partition already. A prosperous family which had more than 50 acres of land, houses and business should have no moveable properties for partition is really hard to believe. The reference to Section 16 of the Contract Act made by Mr. Sinha to establish how defendant No. 1 was in a domineering position to prevail upon the plaintiff appears immaterial for consideration, since it is not a contract between the parties where there was offer, acceptance and passing of consideration to invoke the provisions of the Contract Act while judging the genuineness or otherwise of the registered deed of partition. So concurring with the learned lower court, I would hold that the registered deed of partition (Ex. 1--Ext. A) is not a product of fraud practised by D. 1 on the plaintiff. .

13. The next point urged by Mr. Sinha is the unequal distribution of the landed properties between the plaintiff and the defendant which is, according to him, an indication of fraud. In this context Mr. Sinha laid great stress on the alleged 'Jesthansa' given to defendant No. 1. For this Mr. Sinha laid great emphasis on the law laid down by their Lordships of the Supreme Court in AIR'1968 SC 1299 where allocation of unequal share has been deprecated. It says--

'Doctrine of 'Jesthansi' or 'Jeshthabhagam' is now absolute and unenforceable. Equality of division is principle of Hindu law and exceptions to this rule have almost disappeared. One of such exceptions was in favour of the eldest son, who was originally entitled to a special share on partition. But unequal partition of ancestral or joint property was from early times condemned. As between brothers or other relations, absolute equality is now the invariable rule in all the States,

unless perhaps, where some special family custom to the contrary is made out. .....'

14. Thus Jesthansa given to an elder brother in partition though does not find favour from judicial pronouncements, yet it cannot be laid down as a general principle for striking down any deed of partition if there is any inequality of share, for any reason. There may be various reasons why any member is given a bigger slice. It may be due to the incapacity of the member to earn; it may be by agreement between the parties fo-some consideration, such as, better earning capacity of others, in recognition of his unique services or contribution to the joint family property and the like. Mere 'Jesthansa' as such de hors of any other consideration, has no sanction of law; but inequality of shares should not be equated with 'jesthanasa' to afford a ground 1.0 impeach a partition deed otherwise valid. In the instant case there is not a whisper in Ext. 1 that the bigger share given to D-1 was towards his 'Jesthansa'. On the contrary it lays down in clear terms that some more lands are allotted to D-1 in view of his services in augmenting the assets of the joint family as decided by Bhadralogs and agreed to by parties. It also stipulates that this being with the acquiescence of the parties, later, they would be debarred from questioning it. Under this deed (Ext. A -- Ext. 1) plaintiff got 16.84 acres whereas D.1-24.56 acres totally 41.40 acres. It is explained why the balance immovable property remained undivided. In short, the partition deed having been held valid, it is binding on the parties thereto. Incidentally it may be mentioned here that there is no prayer for declaration that Ext. 1 is fraudulent and hence void and inoperative. In the absence of such a prayer the partition deed blocks the way for a second partition, at least so far as the plaintiff is concerned.

15. It was next argued by Mr. Sinha that the minor sons of the plaintiff are not bound by Ext. 1 to which plaintiff is only a party. True it was open for the successors of the plaintiff to challenge Ext. 1 on the ground of inequality of shares. But that is not the case here. The minor sons or the successors have not brought the suit. They have merely been substituted on the death of the original plaintiff. So they only step into the shoes of the plaintiff and pursue the same cause of action and not a different one which necessarily involves a new line of attack. So

this point raised by Mr. Sinha also fails.

The next question that arises for consideration is about the partition of the properties not included in the deed (Ext. 1). The learned Lower Court has dealt with each lot included in the suit but not included in the partition deed (Ext. 1). It is unnecessary to repeat the same here. Generally speaking some of the lots such as lot No. 20 was purchased by the son of the defendant No. 1 on 5-5-1960 under Ext. D.1 and thus it could not have been there for partition in 1959. Lot No. 19 has been purchased exclusively in the names of two sons of defendant No. 1 and a son of the plaintiff (now appellant) each having 1/3rd share. Lot No. 21 has been similarly purchased. Lot No. 8 has been kept joint being the house site. Lot No. 22 has been purchased in September, 1963 long after the partition in 1959. Lot No. 23 has been purchased in the name of the plaintiff's wife as admitted by him. Lot Nos. 25, 26 and 28 of Baripada had been kept separate for the family deity (Baraha-Bigraha). The learned Lower Court has rightly directed partition of those properties and hence has decreed the suit partially. Since some of these properties not included in the partition deed have been purchased exclusively in the names of some members of the joint family, there is no presumption that they are the joint family properties or have been purchased from joint family funds. Rather the presumption is otherwise and who challenges the same on the ground of Benami it is on him to prove the same (See AIR 1965 SC 1364). In this case there has been no evidence to show that they are Benami and further more, some of the properties have been purchased in the names of the plaintiff's wife and the son also that is indicative of the fact that different members had separate properties. It is a significant fact that the lands purchased from 1931 under Ext. C upto Ext. S in 1953 though all have been purchased in the name of defendant No. 1 alone, yet he has fairly put them in the hotchpotch for partition. Ext. W is aHukumnama in favour of defendant No. 1 alone granted by Maharaja Pratap Chandra Bhanja Deo in the year 1935 for 2.77 acres and even that has been put in hotchpotch for partition. These are factors to show that defendant No. 1 was fair in his deal and in fact had more than doubled the family assets which were originally 20 acres and odd.

That apart law is clear that merely because some properties have not been partitioned will not justify reopening of the partition. It has been held under Article 339 of Mulla's Hindu Law thus:

'Where a portion of the joint property has been excluded from partition by mistake, accident or fraud, such portion continues to be the joint property of the family, and it must be divided amongst the persons who took under the partition. It is not necessary in such a case to reopen the original partition.'

So agreeing with the learned Lower. Court I would hold that the lots dedicated to the deity and not included in Ext. A to be partitioned since the plaintiff Is not desirous of making dedication and further Lot No. 8 the homestead be also partitioned. I agree with the learned Lower Court that Ext. 1 is not a fraudulent deed nor it was nominal: It has been fully acted upon and as such there cannot be a re-partition.

In the result, therefore, all the points raised on behalf of the appellant by Mr. Sinha having been decided against him, the appeal fails and is hereby dismissed with costs. Hearing fee Rs. 50/- (Fifty).

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