

Kamini Bewa Vs. Srimati Dei and ors.

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SooperKanoon Citation : sooperkanoon.com/526021

Court : Orissa

Decided On : Aug-28-1989

Reported in : AIR1990Ori155; 69(1990)CLT41

Judge : G.B. Patnaik, J.

Acts : [Partition Act, 1893](#) - Sections 4; Hindu Women's Right to Property Act, 1937

Appeal No. : Second Appeal Nos. 360 and 361 of 1981

Appellant : Kamini Bewa

Respondent : Srimati Dei and ors.

Advocate for Def. : P. Kar, Adv.

Advocate for Pet/Ap. : S.S. Basu, Adv.

Disposition : Appeal allowed

Judgement :

G.B. Patnaik, J.

1. Defendant No. 3 in Title Suit No. 58/13 of 1971/74 is the appellant in Second Appeal No. 360 of 1981 and plaintiff No. 1 in Title Suit No. 71 of 1971 is the appellant in Second Appeal No. 361 of 1981.

2. One Basu Sahu who is the common ancestor had five sons and Kamini, the widow of Manmohan -- one of the five sons of Basu is the plaintiff in Title Suit No. 71 of 1971. Srimati who is wife of Nrusinha, son of Anadi -- another son of Basu, is plaintiff No. 1 in Title Suit No. 58 of 1971. Kamini filed Title Suit No. 71 of 1971 for a declaration that the partition deed dated 5-4-1952 was illegal, invalid and not binding on her and for a further declaration that Kabala dated 14-4-1960 executed by Bana (defendant No. 3 in Title Suit No. 71 of 1971) was illegal, void and further prayed for injunction against defendants 2 and 3. Srimati along with her husband Nrusinha filed Title Suit No. 58 of 1971 for eviction of Kamini and for recovery of possession with damages and for permanent injunction in respect of the house property standing over an area of Ac.0.18-5 kadis. The genealogy of the family is not disputed, which is given hereunder:--

Basu Sahu

Banamali

Anadi

Ghanashyam

Manmohan (w) Kamini

Alekh

Nrusinha

Surendra

(w) Srimati Bairagi

Kulamani

Musi

In the suit filed by Srimati and Nrusinha (T.S.58/13) of 1971/74) it was alleged that the five sons of Basu separated from each other in mess and property according to the allotments made in the partition deed dated 5-4-1952 and the suit property fell to the share of Benamali who was in exclusive possession and enjoyment of the same. Benamali sold the land to plaintiff No. 1 by a registered sale deed dated 14-4-1960 and delivered possession of the same and plaintiff No. 1 continued to remain in possession till 10-5-1971, when defendant No. 1 forcibly broke open the lock and enjoyed the suit house and threatened the plaintiffs for dismantling the existing house and to make a pucca construction in its place. It was also further stated that said defendant No. 1 (son of Manmohan and Kamini) had himself filed a title suit being Title Suit No. 96 of 1964 under Section 4 of the Partition Act which was dismissed and has become final. In view of the aforesaid possession of defendant No. 1, plaintiffs claimed damages at the rate of Rs. 2/- per day. Kamini, the mother of defendant No. 1, was arrayed as defendant No. 3 and Benga, the wife of defendant No. 1 was arrayed as defendant No. 2.

3. Defendant No. 1 filed a written statement stating that the sons of Basu were occupying different portions of the suit premises according to convenience and Alekha, one of the sons of Basu, transferred his share to Anadi, who raised a pucca structure and is occupying the same. Banamali and defendant No. 1 had common courtyard and there had been no actual division by metes and bounds of the homestead of Basu Sahu. Since Banamali had no issue, he was living together with defendant No. 1. Taking advantage of Banamali's simplicity, the plaintiffs obtained some documents. It was also averred that in the so-called partition deed, there had been unequal division and the partition deed had not been acted upon. It was also alleged that the partition was invalid as defendant No. 3 who had an interest in the joint family property was not made a party nor any share had been allotted in her favour.

Defendant No. 2 filed a separate written statement and also challenged the maintainability of the suit.

Defendant No. 3 took the plea that the so-called partition was illegal and invalid since she was not made a party to the deed nor any share had been given to her

and, therefore, the allotment made as per the partition deed did not confer any title of the parties.

4. In Title Suit No. 71 of 1971, which was filed by Kamini, wife of Manmohan, the prayer was for a declaration and injunction on the allegation that the suit property measuring 121 decimals had the residential houses of sons of Basu and after the death of Basu, though there had been separation in mess and property between his sons, Banamali and Manmohan were living together and had put up a combined compound wall, Anadi and Alekha were living together. Manmohan died in the year 1941 leaving his widow who is the plaintiff and his minor son Surendra (defendant No. 7) and Banamali was looking after the plaintiff as well as defendant No. 7. The registered partition deed was executed on 5-4-1952 by exercising undue influence on Banamali, Ghanashyam and Surendra who was a minor, and the plaintiff, a post. Act widow had not been given any share in that partition and accordingly the partition was invalid in the eye of law and the suit house, therefore, remained undivided joint family homestead. The registered sale deed executed by Banamali in favour of Srimati and Nrusinha on 14-4-1960 was invalid, inoperative and did not confer any title on Nrusinha or Srimati. After the filing of the earlier suit by Nrusinha and Srimati as Kamini felt the necessity of filing the present suit for a declaration that the deed of partition was illegal, invalid and inoperative, she filed the present suit.

5. Defendants 1 to 3 filed their written statement denying the allegations made in the plaint and according to them the registered deed of partition was executed on 5-4-1952 and allotments were made in accordance with the shares of the different branches and parties remained in possession as such. Since the property that fell to Banamali's share was being exclusively occupied by him and for necessity he sold the same to defendant No. 1 under a registered sale deed dated 14-4-1960, defendant No. 1 had acquired valid title in respect of the same. It was also stated therein : that the son of the plaintiff had filed a Suit T.S. 96 of 1964 under Section 4 of the Partition Act as well as under Section 44 of the Transfer of Property Act and having failed in that suit, the present suit by the mother is merely to harass the defendants and was liable to be dismissed.

6. In both these suits several issues have been framed but the common issue which is necessary for the disposal of the present second appeal is whether the partition deed dated 5-4-1952 is illegal, invalid and has been obtained by misrepresentation and by practising fraud and whether the same has been acted upon or not.

7. In Title Suit No. 58 of 1971 that had been filed by Nrusinha and Srimati, the trial Court found that it was clear from the deed of partition (Ext. 1) that shares allotted to different brothers were unequal and there was no explanation for the same. Kamini was a post-Act widow and being a post-Act widow was entitled to a share in the partition. Ext. 1 was a fraudulent document and Kamini who was legally entitled to a share but was omitted and deprived of her legitimate share, was entitled to reopen the partition and she was not bound by such partition deed (Ext. 1). The so-called admission of Surendra in Title Suit No. 96 of 1964 would not bind Kamini who was not a party to the said suit. The trial Court further found that there was no partition by metes and bounds as alleged by the plaintiff and the partition deed was fraudulent and invalid and had not been acted upon, So far as the sale deed (Ext. 2) is concerned it was held that the sale deed (Ext. 2) in favour of Srimati was invalid and did not convey any title in her favour. On the question of possession it was found that the plaintiff did not possess the suit house and the premises after the alleged purchase nor was there any evidence available to show that defendant dispossessed the plaintiffs on 10-5-1971. It was also found that Banamali not having been added as a party the suit was bad for non-joinder. In view of these findings, the plaintiffs' suit was dismissed.

On appeal, the lower appellate Court reversed the decision on a finding that the properties of Basu had been divided between the 5 sons of Anadi and since Kamini's son Surendra got one share, she could get the same from her son Surendra and the partition could not be held to be invalid. The lower appellate Court also reversed the finding of the trial Court that the partition deed was tainted with fraud, misrepresentation and was not acted upon. So far as the sale deed executed by Banamali in favour of Srimati is concerned, the lower appellate Court disagreeing with the trial Court held that the said sale conferred a valid title on Srimati. On these findings, the judgment and decree of the trial Court were set

aside and plaintiffs' suit was decreed.

8. So far as Title Suit No. 71 of 1971 filed by Kamini is concerned, the trial Court found that Kamini was a post-Act widow and the partition effected on 5-4-1952 was invalid since though Kamini had a share in the property, yet she had not been given any share nor her consent had been taken in the partition deed and the partition deed was a fraudulent one. It was further found that defendants 1 and 2 having obtained unfair advantage in the division of the property over the other coparceners, the plaintiff was at liberty to reopen the partition. On the question of the sale deed dated 14-4-1960, it was found that the said sale was void and Banamali had no legal necessity and could not have sold the property in question without the consent of the other co-sharers. Therefore, Srimati did not get title nor possession over the disputed suit house. On these findings the suit filed by Kamini was decreed and the sale deed dated 14-4-1960 was declared to be invalid.

On appeal, the lower appellate Court reversed the findings and dismissed the plaintiff's suit.

9. Mr. Basu, the learned Counsel for the appellant in both these appeals raises the only contention that the partition effected by means of a partition deed dated 5-4-1952 is invalid in the eye of law since Kamini, the widow of Manmohan being a post-Act widow was entitled to a share in the family partition and yet no share had been given to her nor she had given consent to the partition. He further contends that once the partition is held to be invalid, Banamali could not have transferred a specific property in favour of Srimati or Nrusinha and more so when there was no legal necessity for the same and, therefore, the said sale does not confer any right, title or interest on Srimati and Nrusinha.

Mr. Kar, the learned Counsel for the respondents, on the other hand, contends that in the absence of the father Surendra must be held to be the Karta of the family and, therefore, as Karta he having been given the due share in the partition, the partition cannot be held to be invalid even if unequal shares were given to different coparceners. He further contends that a widow cannot be held to be a coparcener and, therefore, a partition in the family without the widow cannot be held to be invalid.

10. So far as succession among Sapindas is concerned, it is too well-settled that after 14th of April, 1937, a widow takes the same share as a son. In a suit for partition the plaintiff is bound to implead as defendants (i) the heads of all branches; (ii) females who are entitled to a share on partition; (iii) the purchaser of a portion of the plaintiffs share, the plaintiff himself being a coparcener; and (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor. All of them are necessary parties and if any of them is not joined, the suit is liable to be dismissed (see, Mulla's Hindu Law, Article 333). Admittedly, Kamini, the widow of Manmohan, was a necessary party to the partition deed that was effected on 5-4-1952 and Surehdra was a minor at that time. Non-inclusion of Kamini in the deed and non-allotment of a share in her favour vitiates the entire partition and it must be held that there was no partition in the eye of law. The Hindu Women's Right to Property Act (hereinafter referred to as the 'Act') introduced important changes in the law of succession. The measure was intended to redress disabilities and to give better rights to women. It was ameliorative in nature and enacted to carry out important social reform. It introduced far-reaching changes in the law of succession and was obviously intended to give better rights to women by recognising their claim to fair and equitable treatment in certain matters of succession. In view of the provisions of the said Act, in case of separate property, the widow along with the sons is entitled to the same share as the son, and in case of a Mitakshara joint family, the widow takes the place of her husband. Even though the Act puts the widow of a member of the joint family in the place of her husband and husband's interest in the joint family though undefined vests upon the widow, but the widow is not called a coparcener. Her position in the joint family in many respects is analogous to that of any undivided male coparcener but yet she does not by operation of law become a coparcener. It is well-settled that her interest under the Act is neither inchoate nor imperfect and she becomes entitled to the undivided interest of her deceased husband and takes the same interest as her husband and when the deceased leaves a son, the widow becomes entitled, to be in the same position as the son. The minor son of the deceased in the presence of the widow cannot be said to be the Karta of the family. Even a Karta also is not competent to make a gift of a property belonging to the family though he is entitled to exercise his ordinary powers under the ordinary law and a widow

can challenge any unjustified alienation if her interest is defeated by the alienation. The interest of the widow arises not by inheritance nor by survivorship but by statutory substitution. A widow is invested by the Act with the same interest that her husband had at the time of his death in the property of the coparcenery and she is thereby introduced into the coparcenery and between the surviving coparceners of the husband and the widow surviving her husband there arises a community of interest and unity of possession. The widow, therefore, is undoubtedly entitled to a share of the joint family property as at the date of demand by her for partition or at the date of partition at the instance of any coparcener, as the case may be and not a share of the property as at the date of the death of her husband. This being the position of law and the interest of a widow after the Act comes into force, any partition without giving the widow her legitimate share in the property must be held to be invalid, inoperative in the eye of law.

Since admittedly Kamini was not an executant in the deed of partition and since no share had been given to Kamini under the partition deed, the said partition is wholly illegal, inoperative and invalid and does not confer any right on the respective parties to the deed. Consequently disagreeing with the lower appellate Court, I would hold that there was no partition in the eye of law between the members of the joint family and the partition deed dated 5-4-1952 does not in any way bind Kamini. Mr. Basu's contention, therefore, must be upheld.

Once the partition is held to be invalid, the subsequent sale by Banamali in favour of Srimati and Nrusinha in respect of a specified property does not confer any title particularly when the said sale is not for necessity and, therefore, the said sale in question must be held to be invalid. In this view of the matter, Title Suit No. 71 of 1971 is decreed and Title Suit No. 58 of 1971 is dismissed.

11. Both the second appeals are allowed, but in the peculiar facts and circumstances of the case, parties would bear their respective costs of this Court.