

Pratap Vs. Shiv Shanker

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Court : Delhi

Decided On : Nov-11-2009

Reported in : 164(2009)DLT479

Judge : Hima Kohli, J.

Acts : [Hindu Succession Act, 1956](#) - Sections 8; Hindu Law; Code of Civil Procedure (CPC) - Order 7, Rule 11

Appeal No. : RFA No. 651/1998

Appellant : Pratap

Respondent : Shiv Shanker

Advocate for Def. : Dinesh Goyal, Adv.

Advocate for Pet/Ap. : Rabindra Singh, Adv. and; Party-in-Perso

Disposition : Appeal dismissed

Judgement :

Hima Kohli, J.

1. This appeal arises from the judgment dated 31.07.1998 passed by the trial court, dismissing a suit for partition instituted by the appellant, Shri Pratap against his father, Shri Shiv Shanker (defendant in the court below). In the plaint, the

appellant sought a decree against the respondent in respect of his one half share in a residential premises bearing No. 486, Bhola Nath Nagar, Shahdara, Delhi, constructed on a plot of land measuring 125 square yards. The case of the appellant, as set out in the plaint was that the aforesaid property was an ancestral property, which the respondent had got in partition amongst his other brothers and that the appellant, being the son of the respondent, was a coparcener in the suit property and thus, entitled to a decree of partition to the extent of the half share therein. It was also averred that the respondent had deserted his wife, Smt. Sukh Devi, who is the mother of the appellant and the appellant and that he was threatening to sell the suit property, thus compelling the appellant to institute the aforesaid suit for partition.

2. After entering appearance, the respondent controverted the stand of the appellant and contested the suit. Apart from raising preliminary objections with regard to maintainability of the suit on account of improper valuation, non-payment of proper court fee and want of pecuniary jurisdiction, the respondent denied that the suit property was ancestral in nature or was obtained by him by partition with his other brothers. He submitted that the suit property measured 80 square yards and was got constructed by him from his own funds. He disputed the fact that the appellant was his son, or a co-parcener with him in the suit property. After the pleadings were completed, the trial court framed the following five issues:

1. Whether the suit is bad and not maintainable in view of preliminary objection No. 1 taken in W/S? OPD.
2. Whether the suit has not been properly valued for purposes of court fee and jurisdiction as pleaded in preliminary objection No. 2 of the W/S? OPD
3. Whether in view of preliminary objection No. 3 taken in W/S, this Court has no jurisdiction to entertain the present suit? OPD
4. Whether the plaintiff is entitled to the partition of the suit property? OPP
5. Relief.

3. While issues No. 1 to 3 were answered in favour of the appellant, issue No. 4 in respect of which, burden of proof was placed on the appellant, was decided against him by holding that there existed no coparcenery and no H.U.F. and hence, the suit property was held to be a self-acquired property of the respondent. Consequently, the suit of the appellant was dismissed. Aggrieved by the said dismissal order, the appellant has preferred the present appeal.

4. Counsel for the appellant submits that the impugned judgment is based on wrong appreciation of facts and circumstances of the case and is not sustainable. It is also stated that the findings of the trial court as to the nature of the suit property are contrary to the very concept of succession laid down in Hindu Law.

5. The entire issue that arises for consideration in the present case hinges on the effect of Section 8 of the [Hindu Succession Act, 1956](#) (hereinafter referred to as 'the Act'). The Act lays down rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II, in the manner as stipulated in Section 8 of the Act. Sub-section (a) of Section 8 of the Act provides that the property of a male dying intestate shall devolve firstly upon the heirs, being the relatives specified in class I of the Schedule. Class I of the Schedule reads as below:

Heirs in Class I

Son; daughter; widow; mother; son of a pre deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre deceased son of a pre-deceased son; son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a predeceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a predeceased son.

6. The heirs mentioned in Class I of the Schedule shows that the list includes sons, daughters etc. as also son of the pre-deceased son, but does not specifically include the grandson, being the son of a living son. Under the Hindu Law, the

moment a son is born, he gets a share in his father's property and becomes a part of the coparcenery. Such a right accrues in favour of the son by virtue of his birth and not on the date of demise of the father or inheritance from the father. However, it is no longer *res integra* that under Section 8 of the Act, the property which devolves on a Hindu would not be HUF property in his hand, vis-a-vis his own sons. The aforesaid conclusion was drawn by the Supreme Court in the case of *Commissioner of Wealth-tax, Kanpur etc. v. Chander Sen etc.* reported as : AIR 1986 SC 1753, wherein after taking note of the divergent views expressed on the said issue by the Allahabad High Court, Full Bench of Madras High Court, Madhya Pradesh and Andhra Pradesh High Courts on the one side, and the Gujarat High Court on the other, it was observed as below:

19. It is necessary to bear in mind the Preamble to the [Hindu Succession Act, 1956](#). The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

20. In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family.... It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF property in his hand vis--vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis--vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc.

21. xxxxxxxx

22. The express words of Section 8 of The [Hindu Succession Act, 1956](#) cannot be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law.

With that background the express language which excludes son's son but included son of a predeceased son cannot be ignored.

7. The aforesaid judgment was referred to and relied upon by the Supreme Court in a subsequent judgment entitled *Yudhishter v. Ashok Kumar* reported as : AIR 1987 SC 558. In the aforesaid judgment, it was held as below:

10. This question has been considered by this Court in *Commr. of Wealth Tax, Kanpur v. Chander Sen* : (1986) 3 SCC 567 : AIR 1986 SC 1753, where one of us (Sabyasachi Mukharji, J.) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally therefore, whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the [Hindu Succession Act, 1956](#) and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity.... This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court.... In that view of the matter, it would be difficult to hold that property which devolved on a Hindu under Section 8 of the [Hindu Succession Act, 1956](#) would be HUF in his hand vis--vis his own sons. If that be the position then the property which devolved upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellant authority was right in holding that the respondent was a licensee of his father in respect of the ancestral house.

8. A Single Judge of this Court in the case of *Rahul Behl and Ors. v. Smt. Ichayan Behl and Anr.* reported as : DRJ 1991 (21) 205 followed the aforesaid judgments

of the Supreme Court and rejected the plaint of the plaintiffs therein, who had filed a suit for declaration against their grandmother and their father on the ground that a residential house situated in Greater Kailash Part-I was a self- acquired property of their grandfather and upon his demise, the property fell into the Hindu Joint Family and became a coparcenary property, thus resulting in the plaintiffs acquiring a share therein as coparceners on their birth. On an application filed by the defendants therein seeking rejection of the plaint under Order 7 Rule 11 CPC, the Court held that the father of the plaintiffs acquired a share in the suit property in his individual capacity as a heir of his deceased father and not as coparcenary property. Thus, by applying the provisions of Section 8 of the Act, the Single Judge held that defendant No. 2 therein alone inherited the property to the exclusion of his sons because the said property devolved on him in his individual capacity and became his self-acquired property, and therefore would not form a part of or become a coparcenary property.

9. The aforesaid principle of law is squarely applicable to the facts of the case in hand. It is held that the trial court did not err in arriving at a conclusion that upon the demise of his father, grandfather of the appellant, the suit property devolved on the respondent in his individual capacity and thus, had to be treated as self-acquired property in his hands. The appellant failed to establish that there existed any coparcenary, in which the appellant and the respondent were coparceners or there existed any HUF of which, the respondent was a Karta. Therefore the claim of the appellant for partition of the suit property on the ground that the same was ancestral, was rightly turned down. The suit property has to be treated as self-acquired property in the hands of the respondent. The appellant cannot claim any share therein on the ground that the said property is ancestral in nature.

10. For the reasons stated above, this Court finds no reason to interfere in the impugned judgment dated 31.07.1998. The same is therefore upheld. The appeal is dismissed with no orders as to costs. Trial court records be released forthwith.