

Maliram and ors. Vs. Jagmohan and ors.

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Court : Rajasthan

Decided On : Sep-10-1971

Reported in : 1971WLN632

Judge : C.B. Bhargava, J.

Appeal No. : S.B. Civil Regular First Appeal No. 9 of 1968

Appellant : Maliram and ors.

Respondent : Jagmohan and ors.

Disposition : Appeal dismissed

Judgement :

C.B. Bhargava, J.

1. This is a defendant's appeal against the judgment and decree dated 14th October, 1967, of the Senior Civil Judge, Sikar.

2. Prom the evidence on record, the following pedigree showing the relationship of the defendants with the vendors emerges:

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Raghunath Doongarsidas

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Ramprasad Ramdeo |

| (Deft. 1) |

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Kedranath Ramkishore (Adopted by Doongardidas)

(Vendors) |

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Maliram Prabhudaya Banshidhar Madanlal

(Deft. 2) (Deft. 3) (Deft. 4) (Deft. 5)

By a sale-deed dated 18th August, 1953, Kedarnath and Ramkishore said half specified portion of the Haveli and the Nonra described in para 1 of the plaint situated in Shri Madhopur along with their properties namely two shops & their apartments on the old Haveli in consideration of Rs. 20,000/- to the plaintiff Jagmohanlal who is also their brother in-law, that is sister's husband. Jagmohanlal plaintiff's case in the lower court was that after the execution of the sale-deed, Kedarnath and Ramkishore delivered possession of their half specified share of the Haveli and Nohra to him and that possession continued till the year 1953 when Ramdeo defendant took that portion of the Haveli and the Nohra excepting the

room marked 'M' of the Haveli for using it temporarily for the marriage of his son. After the conclusion of the marriage, Ramdeo did not deliver back possession of the disputed Haveli and Nohra inspite of repeated demands and so the present suit had to be instituted for recovery of possession and for mesne profits at the rate of Rs. 20/- P.M. In the alternative it was prayed that in case the court found that the said Haveli and Nohra had not been partitioned by metes and bounds between Keiarnath, Ramkishore and Ramdeo, a decree for partition may be passed in his favour and half the share of the disputed properties be allotted to him and possession over the same may also be delivered.

3. The suit was contested by all the defendants excepting Midanlal & their main plea was that a partition took place between them and Kedarnath Ramkishore in 1950 in which the entire disputed Haveli and Nohra was allotted to their share. It was stated that after the said partition. Kedarnath and Ramkishore had no interest left in the disputed property and were not entitled to transfer it to the plaintiff. It was also stated that Kedarnath and Ramkishore never remained in possession of the disputed property and that the alleged sale was without consideration. They also denied their having taken the disputed portions of the Haveli and the Nohra for use for the marriage of one of them. Right or the plaintiff to claim partition was also denied. It was stated that the plaintiff was not entitled to any mesne profits and that the suit was time barred. Objection regarding non-joinder of necessary parties that is Kedarnath and Ramkishore was also taken.

4. On the above pleadings, the lower court framed the following issues:

1. Whether Kedarnath & Ramkishore were the owners of half of the Haveli and Nohra as described in para No. 1 of the plaint and whether they sold the disputed property to the plaintiff and executed a sale deed in his favour on 18-8-1953 and delivered possession of the property to the plaintiff?

2. Did the defendant Ramdev in connection with the marriage of his son Banshidhar defendant No. 4 obtain temporarily permissive possession over half of the disputed Haveli and Nohra from the plaintiff in the year 1959?

3. Whether the plaintiff is entitled to obtain a decree for possession over the disputed Haveli and Nohra and for arrears of mesne profits amounting to Rs. 720/- at the rate of Rs. 20/- p.m. from the defendants?
4. Whether the plaintiff is entitled to get the disputed Haveli and Nohra partitioned and to obtain possession of half of that Haveli and Nohra?
5. Whether the suit is within limitation?
6. Whether Kedar Nath and Ram Kishore are necessary parties to the suit?
7. Relief.

In support of these issues, plaintiff Jagmohan Lal gave his own statement and examined Kedarnath P.W. 2 Jagannath P.W. 3 Tagdish Narain P.W. 4. Shrinarain P.W. 6, Shivdayal P.W. 6, Rampratap P.W. 7, Shivdayal P.W. 8, Laduram P.W. 9, Moolchahd P.W.10 and Hazarilal P.W. 11. Maliram defendant gave his own statement in rebuttal.

5. The learned Senior Civil Judge on a consideration of the evidence came to the finding that Kedarnath and Ramkishore had half share both in the disputed Haveli and the Nohra and that they had executed the sale-deed in favour of the plaintiff on 18th August, 1953. He also found that the defendants have failed to prove that any partition of the property took place in 1950 and that in that partition the entire disputed Haveli and the Nohra were allotted to their share. He further found that the plaintiff after having purchased the disputed property remained in its possession and that in the year 1959 Ramdeo took possession over it with the permission of the plaintiff for using it at the time of his son's marriage. The Court, however, held that though Kedarnath, Ramkishore and Ramdeo had half share each in the disputed Haveli and Nohra, it had not been partitioned between them by metes and bounds. He, therefore, did not pass a decree for possession in favour of the plaintiff, but holding that whatever interests Kedarnath and Ramkishore had in the disputed property was transferred to the plaintiff by virtue of the sale-deed Ex. 1 passed a decree for partition and separate possession of half the disputed property. A preliminary decree under Order 20 Rule 18 C.P.C., was

passed declaring that the plaintiff had half share to the dispute property with a further direction to appoint a Commissioner to effect a partition by metes and bounds. The plaintiff was also held entitled to separate possession after the partition. Plaintiff's claim for mesne profits was dismissed, but the parties were directed to file the account of expenditure incurred from 1959 to the date of the decree in connection with the disputed property. Aggrieved by this order, the defendants have come in appeal, and their learned Counsel has contended firstly that disputed property was a coparcenary property and the transfer by Kedarnath and Ramkishore of their undivided share was void and by virtue of the sale-deed the plaintiff did not get any interest in the said property. Secondly, plaintiff's remedy, if at all, was to claim a general partition of all the coparcenary properties and the lower court was in error in directing partition of the disputed properties only and thirdly that the plaintiff at best can get half share in the specified portion which they have purchased and are not entitled to half share in the whole of the Haveli and the Nohra.

6. As for the first contention it may be stated at once that the defendants did not take the plea that there was any coparcenary in possession of the disputed property or other properties. It was not the defendant's case that they and Kedarnath and Ramkishore or their father Ramprasad constituted a joint Hindu family. It was not even their case that Ramprasad and Ramdeo constituted a joint Hindu family. On the other hand, their case was that a partition had taken place between them in 1950 wherein all the joint properties were divided and the disputed Haveli and Nohra was exclusively allotted to them. Learned Counsel has tried to build his argument on stray bits of evidence which have appeared in the statements of witnesses. The argument is that according to the plaintiff and his witnesses, the disputed Haveli was constructed in Samvat Year 1996 or 1990 by Ramprasad and Ramdeo. He says that it should be presumed that Ramprasad and Ramdeo being brothers were joint. It is further argued that Maliram defendant has stated that the business of their old firm Doongarsidas Raghunathdas continued upto Smt. 1997. It should, therefore, further be presumed that the disputed Haveli was constructed from the funds drawn from the firm of Doongarsidas Raghunathdas. However, the evidence on both these points is totally absent. Even Maliram has not said that the Haveli was constructed from the

funds of their old firm Doongarsidis Raghunathdas. He has also not stated that Ramprasad and Ramdeo were joint. On the other hand, Kedarnath has stated that the old Haveli had been partitioned before his birth and that Ramdeo and Ramprasad used to keep separate mess in the old Haveli from before he came to understanding. Maliram has said that the disputed Haveli was constructed by Ramdeo and Kedarnath from 1995 to 1996 and that Nohra was built in Smt. 2000 by Ramdeo and Kedarnath. Even though the plaintiff and his witnesses have stated that the Haveli was built by Ramprasad and Ramdeo, Maliram himself says that it was constructed by Ramdeo and Kedarnath. So in the absence of any plea or evidence in that behalf, it cannot be held that the disputed Haveli and Nohra was a coparcenary property and the transfer of half undivided share by Kedarnath and Ramkishore in favour of the plaintiff is void.

7. Now for the second contention in those parts of India that is Bombay and Madras States where a coparcener may sell, mortgage or otherwise alienate for valuable consideration his undivided interest in coparcenary property without the consent, of the other coparceners or in other States of North India where the undivided interests the coparcener, has been purchased at an auction-sale there is a conflict of judicial opinion whether the remedy of the purchaser is only to file a suit for general partition. In some cases it has been held that it is competent to the purchaser of property belonging to a joint Hindu family to have, if he so desires, a portion only of the property which he has purchased partitioned and he is not bound to file a suit for general partition. It is pointed out in these Cases that although the ordinary rule is that a suit for partition must embrace all joint properties owned by the parties thereto, there is also the complementary rule that the suit for partition cannot include properties in which each of the parties has now claimed any interest See *Ram Mohan Lal v. Mul Chand* ILR 28 All. 39, *Ramcharan v. Ajudhia Prasad and Jasodha* ILR 28 All. 50, *Ramcharan v. Mahima Chandra* AIR 1916 Cal. 891, *Tarinicharan Chakrabarti v. Debendralal De* ILR 62 Cal. 655, *Delar Singh v. Jagdip Singh* AIR 1948 Pat. 317, and *Narasimhaish v. Chikkathimmaish* : AIR1954 Kant115 . But in the present case, we are not dealing with the case of a purchaser of an undivided share of a coparcener and therefore, the question whether a suit for general partition or only in regard to the specific property alienated is maintainable is besides the point. In the present case all that

can be assumed is that the persons either Ramprasad or Ramdeo or Kedarnath who constructed the Haveli and the Nohra were its co-owners and it is not disputed even by the defendants that each of them had half share in it. The defendants case, as already stated in the lower court was that though in the year 1950 Kedarnath and Ramkishore had half share in the disputed Haveli and Nohra but at the time of partition the entire Haveli and Nohra was allotted to the defendant's share, in lieu of certain other properties which were given to Kedarnath and Ramkishore. Even Ramdeo did not enter the witness box to support this plea. The lower court found against the defendants on this point and the learned Counsel for the appellant has not thought it worthwhile to press this plea in this Court. It is also not established that in the year 1953 A.D when Kedarnath and Ramkishore transferred their share of the disputed Haveli to the plaintiff, there was any other joint family property in existence which could be included in a suit for partition. Therefore even Kedarnath and Ramkishore were competent in the year 1953 as co-owners of the property to institute a suit for partition relating to the disputed property.

8. Section 44 of the Transfer of Property Act lays down that:

Where one of two or more co-owners of immovable property competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, & so far as is necessary to give effect to the transfer, or the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

The plaintiff who is a transferee of the share of Kedarnath and Ramkishore is entitled to enforce a partition of the same. It is held in *B.M.A. Samad v. Shahid Hussain* : AIR1963 Pat375 that:

The rule that the suit for partition must cover the entire property held jointly by the parties is merely a rule of equity and convenience. A suit for partition must embrace only the property in which the parties have community of interest and unity of possession. There is substantially no difference in respect of the subject-

matter of a suit for partition amongst Muslim co-owners or Hindu co-owners, where they hold property as tenants in common and a suit for partition of even one item of such property is maintainable, provided that the partition can be effected without much inconvenience to the other co-owners. In other words, in the case of tenants in-common, whether such tenants are Mahommadans or Hindus, one of them is not obliged to sue for the partition of all the items of the property in which they are interested, in as much as each of them is entitled to his definite share in every item of the property, unless the partition sought for results in inconvenience to the other tenants in common.

I therefore, hold that the lower court was not wrong in directing a partition of the disputed property. In fact looking to the finding of the court, plaintiff was entitled to a decree for possession of the disputed property because the court found that though there had not been a partition by metes and bounds of the disputed Haveli and Nohra between Kedarnath, Ramkishore and the defendants, they were in separate possession of specific portions. It also found that after the sale, Kedarnath and Ramkishore transferred possession over their share to the plaintiff and thereafter since 1959 defendants' possession over it was permissive. Having found all three facts in favour of the plaintiff, a decree for possession of that specific portion could have been granted in his favour, But after going through the evidence I do not agree with the above finding of the lower court.

9. Plaintiff's statement regarding his having obtained possession of the property is very shaky. He could not even file a correct map of the apartments over which he is said to have obtained possession from Kedarnath and Ramprasad. The other witnesses who have deposed that possession was delivered to the plaintiff have admitted that they were not present at the time of delivery of possession. In my view no physical possession was delivered to the plaintiff after the sale and the plaintiff's case that the defendants' possession was permissive since 1959 was also not tenable because he himself was not in possession of any specific portion of the disputed property. The lower court, was, therefore, right in decreeing the plaintiff's suit for partition declaring that he had half share in the disputed Haveli and Nohra.

10. Now it was very strenuously contended by Mr. Agarwal that at the partition, plaintiff would only get half of what he had purchased, that is to say half of the specified portion mentioned in the sale-deed,

11. It would not be out of place to mention here the recitals of the sale-deed in regard to the sale of the disputed Haveli and the Nohra. The description is given thus.

,d gosyh eq[krk mRrj ,d dkaLrh ,d eafty dh ftles 1@2 fgLlk gekjk gS fd tks lknqjke flyhxj rd dk gS ekg o ukSgjk vke iw.kZ dk dkaLrk ftles ls gekxk 1@2 ;kus vk/ks fgLlk nf[ku dks rd ls eksqjhyky dqVsVk ds cjkj dk gS A ekSg ;kus [ke ukSgjk dk ulQ fgLLs dk erCkk es ge fjk;r es fn;k gS gosyh ds vkxs pcwrjk iq[rk gS uksgjk ds vkxs pcwrjk vke gS tks Hkh gS fn;s gS& L;wc vjck gosyh mRrj es jkLrk vke nf[ku es uksgjk etwdj iwoZ es edku vke yknqjke lhoyhxj if'pe es eq[rk nqdkur cktkj fjaDI [kqn vjck ukSgjk ds ;g gS mRrj es gosyh vtwdj nf{k.k es gosyh iq[rk eksqjhyky NqVsVk dk gS A iwoZ es pkSd if'pe es nqdkur iq[rk vkdkj jhxZI gS o eUnj vyxgqj Hkh eks;unklh

12. It would be seen from the above recital that what has been sold is half share of the vendors in the Haveli and Nohra though its situation has also been mentioned. The boundaries recited are not of the specified portion of the Haveli and Nohra but of the whole. If the above recitals are compared with the recitals of other properties conveyed by the sale-deed, it will be seen that all the parts of the old Haveli in which the vendors had one-fourth share have been mentioned in detail whereas no details of the parts of the disputed Haveli and Nohra are mentioned. It cannot, therefore, be rightly contended that the vendor did not convey their half share in the Haveli and Nohra to the plaintiff. There can be no doubt that by the sale-deed the vendors conveyed their entire half share though its situation is also described therein.

13. On a fair construction of the deed, I am inclined to hold that what the vendors intended to convey and actually conveyed was their half share in the disputed Haveli and Nohra. It might be that they specified that portion because it might have been in their occupation not due to partition but by mutual arrangement between the co-owners. The plaintiff by virtue of the sale deed acquired the entire share of

the vendors in the disputed Haveli and Nohra and on a partition they are entitled to claim the same share. In the case of a purchaser of undivided interest of a coparcener, it is well settled that he can enforce his rights by means of a partition and the court will no doubt set apart the property alienated for the alienating coparceners' share if it can be done without any injustice, to the other coparcener and such property will be allotted to the transferee in the partition suit. Some cases have also taken the view that the doctrine of substituted security is equally applicable to such cases; but no decision has been cited to show that on a partition the transferee of a co-owner cannot even claim that share or portion which has, been transferred to him.

14. Learned Counsel placed strong reliance on Venkatachella Pillay v. Chinalya Mudliar 5 Mad. High Court Report 166. But that decision does not support the contention. In that case one Subbaraya Mudali had alienated the whole village of Valuthalacudi whereas he had only half share in it and the joint family was possessed of other estate besides that village. The other coparceners of Subbaraya Mudali brought a suit to recover a moiety of village and the plaintiff's claim for that moiety was decreed. It was held that the transfer was valid to the extent of the beneficial state of the undivided coparcener with the incidental right of partition and the transferee was not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale. It was contended on behalf of the alienee that the plaintiff had succeeded as heir to the share of Subaraya in the rest of the family property and he was, therefore, liable to make good to the appellant out of such share half the purchase money of the village with interest. But the Court did not accept the plea saying that that matter could not be dealt with as aground of defence in the present suit. The court further observed that:

Had the 1st defendant's father in making the purchase of the village been deceived by misrepresentation or, dishonest conduct of any kind on the part of Subbaraya or the plaintiff's father or had any portion of the purchase money been received by the plaintiff's father or been expended on his account or for the benefit of the joint estate, the plaintiff's legal right to possession right upon equitable grounds have been decreed subject to the refund of half the purchase money, but

nothing of the kind has been shown It is therefore only in his representative character as heir that the plaintiff can be made liable to such refund, and that liability depends, it appears to us upon whether there was an implied contract of warranty or indemnity as to the title co sell the village between Subbaraya and the 1st defendant's father. That is a question which must, we think, be left for determination in another properly framed suit, should the 1st defendant be advised that the liability exists. We give no opinion upon the point.

15. The principle of the doctrine of substituted security in the case of a purchaser of specific item of family property was Considered in Sitamahalakshmi v. Ramachandra Rao AIR 1957 A.P. 572. There one of the learned Judge & constituting the Bench after discussing a good number of decisions of the various High Courts came to the conclusion that:

The doctrine of substituted security which applies to the case of a mortgage by a co-sharer of a specific item of joint property, is equally applicable to the case of a transfer by a co-sharer of a specific tem of property. The right of the alienee from a coparcener is mainly based on equity and the theory of 'amends' and there is no reason why the doctrine of substituted security should be confined to mortgages and not extended to purchasers at a private sale.

16. Finally it was contended that the plaintiff being a stranger is not entitled to have any share in the dwelling house that is the Haveli. No such objection was taken in the court below and it has not been shown the disputed Haveli is the family dwelling house. Besides this, the plaintiff is a near relation of the parties. He is the husband of the daughter of Ram Prasad who was Ramdeo's brother According to the Hindu Succession Act, a brother's daughter is an heir of class II and cannot be regarded as a stranger to the family.

17. The appeal has, therefore, no force and is dismissed with costs.