

Hanuman and ors. Vs. Hari Ram and ors.

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Court : Rajasthan

Decided On : Oct-09-1985

Reported in : 1986(1)WLN677

Judge : Dinkar Lal Mehta and; Inder Sen Israni, JJ.

Appeal No. : D.B. Civil Special Appeal No. 115 of 1974

Appellant : Hanuman and ors.

Respondent : Hari Ram and ors.

Advocate for Def. : Shri. H.C. Rastogi

Advocate for Pet/Ap. : Mr. Patodiya

Disposition : Appeal allowed

Judgement :

1. This is a special appeal against the judgment of learned Single Judge in S.B. Civil Regular First Appeal No. 94/68 dated 23rd July, 1973 whereby the judgment and decree of the learned Additional Distt. Judge, Sikar, was set-aside and a preliminary decree in favour of the plaintiffs-appellants was passed holding him to be entitled to 1/7th share of the properties.

2. Dissatisfied with the judgment of learned Single Judge, the defendant appellants have filed this special appeal.

3. A suit was filed regarding partition of 3 properties situated at Sikar, in which the plaintiff filed a suit for partition of the joint family properties. The plaintiff stated that Goru Ram had six son; eldest being Ridh Karan. He died in the year 1965 before filing of the suit. Second son was Hanuman, defendant No. 1/3rd Son was Kanhaiyalal, defendant No. 2. Plaintiff Subkaran was 4th son and 5th son was Raghunath, who was deaf and dumb and he is defendant No. 3. Youngest son was Devi Dutt, defendant No. 4. It was further stated that the members of the family were engaged in the vocation of tailoring. The plaintiff's case in short was that though he had started living separately and so had his brothers Hanuman, Kanhaiyalal, Raghunath and Devi Dutt since Samvat Year 2011 even while the plaintiff's father was alive because it became necessary to avoid quarrel and frictions between the women folk, yet there was no partition of the immovable properties. Since the defendants declined to have the property divided by metes and bounds, the plaintiff had to file the suit for partition. Goru Ram died in Samvat Year 2012 Jeth Vadi 11 equivalent to 1955.

4. The defendants contested the suit and filed joint written statement and denied that the property continued to be the joint property. According to them Goru Ram during his life time had affected partition of the property between his sons in Samvat Year 2026 corresponding to the year 1949. The details of the partition alleged to have taken place were also mentioned in the written statement. Some of the defendants had put up certain construction in the share of property in their possession. It was also pleaded that one Ram Swaroop and others mentioned in para 2 of the additional pleas were the necessary parties to the suit. After framing the issues and recording evidence of the parties, the learned District Judge came to the conclusion that the property had been divided by metes and bounds and consequently it did not remain the joint property any more and the suit was dismissed.

5. The plaintiff came up in appeal to this Court. Learned Single in the appeal felt that it was necessary, just and proper to frame the issue on the point whether any partition of the joint family property had taken place between the parties in Samvt Year 2006. The burden of proof was kept on the defendants. After framing of this additional issue the matter was remitted to the trial court for affording fresh

opportunity to the parties to produce their evidence and to record findings with reasons and then to submit the same to this Court. Learned Additional Distt. Judge after recording evidence of the parties and considering the documents produced by the parties and hearing the arguments held that the partition of joint family property had taken place between the parties to the suit and after giving this finding submitted the same to this Court.

6. Learned Single Judge after considering all the documents on record gave a detailed judgment by which the judgment and decree of learned Additional District Judge, Sikar was set-aside and it was held that no partition had taken place between the parties. As directed by the learned Single Judge, the learned trial court took steps to frame final decree which we are informed has been framed.

7. We have heard learned Counsel Mr. D.D. Patodia appearing for the appellants and Shri J.S. Rastogi and Shri H.C. Rastogi appearing for the respondents and also perused the documents on record and gone through the statement on file.

8. Learned Counsel for the appellants has assailed the judgment on the ground that it was not proper for the learned Single Judge to have framed additional issue on 24-4-1972 regarding factum of partition and to have remitted the same for recording of evidence of both the parties and findings on the same by the learned trial court. He has further stated that the issues framed covered this point of partition also and some evidence regarding this had also taken place, therefore, it was not necessary to have framed additional issue and to have remitted the same to the trial court.

9. Learned Counsel for the respondents have argued that the issue framed by the trial court did not cover this point of partition and more so, after remitting of the same the appellants participated in the proceedings, got their evidence recorded and when the finding of the trial court came in their favour no objection to the same was raised by the appellants. It is further argued that now that the learned Single Judge has reversed the finding, therefore, the appellants have raised these objections.

10. We think the appellant cannot raise any such objection now because they had an opportunity to oppose the order of learned Single Judge dated 24-4-1972 by which an additional issue was framed and the matter was remitted for recording evidence, giving findings and then submitting the same to this Court. Since no appeal against the same was filed and the appellants participated in the trial court and produced their evidence and were happy to have findings of learned Additional District Judge in their favour, now it does not lie in their mouth to raise objection against the same in this appeal.

11. Mr. Patodiya, learned Counsel for the appellants has also argued that the learned Single Judge has erred in holding that the partition between the parties had not taken place and has misread the evidence on record. He has further stated that the evidence produced by the defendants has not been properly appreciated and that the evidence of the plaintiff respondent has been relied upon wrongly.

12. Learned Counsel for the respondent has pointed out that the scope of the special appeal is limited and even though it is open to the court to examine the findings of fact but the law requires that it should be done sparingly and only in glaring circumstances. In the case of Kripal Singh v. Kartaro 1982 RLW 284, it has been stated that when the finding is essentially a finding of fact even though it is open in special appeal to examine even findings of fact, but unless there are glaring circumstances to warrant interference with finding of fact arrived at by the learned Single Judge, it would ordinarily be not justified in special appeal Under Section 18 of the High Court Ordinance to reappreciate the evidence. In this case also the learned Single Judge after discussing the evidence in detail and referring to various documents placed on record by both the parties has given a very reasoned and balanced judgment and has come to a firm finding that the partition between the parties had not taken place as alleged by the appellants.

13. Learned Single Judge discussing all the relevant evidence has come to a finding that the partition between the parties had not taken place and this is essentially a finding of fact. We are, therefore, of the considered opinion that we do not find any error or mis-direction in appreciation of evidence by the learned

Single Judge and, therefore, are not inclined to interfere with the same.

14. Learned Counsel for the appellants has drawn our attention that some of the parties had filed a compromise dated 16-8-1983 in this Court and that all parties are now bound with the terms of the compromise. The signatories on the said compromise have also filed an application dated 17-8-1983 in this appeal praying for dismissal of the suit out of which this special appeal has arisen. It will be seen from the compromise that respondent Ram Narain, Atma Devi and Maya Devi have not affixed their signatures on the same. Again Satyanarain who has signed the compromise is a minor. It is, therefore, clear that all the parties have not signed the above mentioned compromise.

15. In the case of Mathura Singh v. Deodhari Singh : AIR1972 Pat17 the Division Bench of Patna High Court has held that 'under Order 38, Rule 3 also compromise disposing of bulk of properties in a partition suit, is not binding on defendants, who were not parties to the compromise petition and never consented to the compromise arrived at between the plaintiffs on the one hand and some of the defendants on the other. The suit cannot be disposed of in terms of compromise even so far as the parties to the compromise are concerned'. It was further held that 'when in the suit in which minor is party, the father is appointed as guardian of the minor, the father cannot compromise on behalf of the minors unless the court expressly accord sanction to compromise the suit on behalf of the minors.'

16. In the case of Nityamoni Dasi v. Gokul Chandra (1911) 9 Indian Cases 210, a partition suit was disposed of in terms of compromise as against those who were parties to the compromise and ex parte against non-consenting party. The Calcutta High Court set-aside the entire decree with the following observations:

the decree of the Subordinate Judge must be set-aside and the whole case retried because as this is a suit of partition of joint property, a decree by consent amongst some only of the parties cannot possibly be maintained.

17. We are in respectful agreement with the aforesaid observations, which correctly laid down the law on this point. It is evident that the compromise affects the interest of not only those who have affixed their signatures on it, but also of

those who are not the parties to the same. In this case one of the signatories is minor whose signature has to be ignored and four of the parties have not signed the said agreement. In view of the position of law discussed above, the compromise is ineffective and cannot be enforced.

18. In view of the above discussions, we dismiss the special appeal, uphold the judgment and decree passed by the learned Single Judge. The parties shall bear their own costs.

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