

Ramswaroop Vs. Rameshwarlal and ors.

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Court : Rajasthan

Decided On : Dec-19-2001

Reported in : RLW2003(3)Raj1524; 2002(4)WLN576

Judge : Prakash Tatia, J.

Acts : [Hindu Succession Act, 1956](#) - Sections 6

Appeal No. : S.B. Civil First Appeal No. 194 of 1997

Appellant : Ramswaroop

Respondent : Rameshwarlal and ors.

Advocate for Def. : G.R. Singhvi and; Om Mehta, Advs.

Advocate for Pet/Ap. : Champalal Soni and; Rameshwar Hedau, Advs.

Judgement :

Tatia, J.

1. Heard learned counsel for the appellant as well as learned counsel for the respondents.

2. This is an appeal against the judgment and decree dated 22nd Sept. 1997 passed by the learned Addl. District Judge No. 1, Jodhpur in Civil Original Suit No. 11/94 by which the learned trial court decreed the plaintiff's suit for partition by

passing preliminary decree holding that plaintiff and defendant No. 1 and 2 each is having 6/20th share in the disputed property whereas defendants No. 3 and 4 are having 1/20th share each in the property.

3. The appellant has challenged the allocation of share in the property by the trial court only on the ground that as per the provisions of Section 6 of the Hindu Succession Act, the admitted position is that the property in dispute was belonging to deceased Radhakishan, who belonging to deceased Radhakishan, who died long ago and Munilal, the son of Radhakishan, died on 7.2.82 at Jodhpur. The plaintiff and defendant No. 1 are the two sons of deceased Munilal whereas defendant No. 2 Smt. Indra Devi is the widow of Munilal (mother of the plaintiff and defendants No. 1, 3 and 4). According to learned counsel for the appellant the allocation of share made by the trial court is absolutely illegal because of the fact that as per the explanation (1) of the Section 6 of the Hindu Succession Act the property of the deceased Munilal stand divided between the Hindu Mitakshara coparcenery immediately before the death of Munilal and as per the law, the property of Munilal will be deemed to have been divided in coparcenery which was consisting of coparceners only plaintiff Rameshwarlal and defendant Ramswroop and, thereafter, Munilal, each will get 1/3rd share in the property. No share can be allotted to Smt. Indra w/o Sh. Munilal because she is also female member of the family and cannot be a coparcener.

4. According to learned counsel for the appellate, only 1/3rd share stands allotted and deemed to have been allotted to deceased Munilal, then only this this share will be available for partition among all the descendants of the deceased Munilal, who are plaintiff defendants No. 1,2,3 and 4. According to learned counsel for the appellate, therefore, this 1/3rd share, which deemed to have been allotted to Munilal as per the Explanation (1) of Section 6 of the Hindu Succession Act, if divided among all the descendants, then plaintiff and the defendants No. 1 to 4 all will get equal share, which will come to 1/5th of 1/3rd of the property of deceased Munilal, which will be only 1/15th to defendants No. 2, 3 and 4 (female heirs and the total share of the plaintiff and defendant No. 1 will be 1/3rd + 1/15th. Therefore, the trial court has committed a serious illegality in allotting share 6/20th each to plaintiff and defendant No. 1 and 2; and 1/20th to defendants No. 3 and 4.

5. Appellant also filed an application under Order 41 Rule 22. CPC and sought permission to place on record the certified copy of the Patta issued for the house in dispute in favour of Radhakishan, who is grand-father of the plaintiff and defendant No. 1, to show that property in the hands of Munilal was ancestral property. The appellant also filed an application under order 6 Rule 17 CPC for seeking amendment in the written statement to incorporate that the disputed property was originally belonging to Sh. Radhakishan, the grand-father of the plaintiff, and defendants No. 1,2,3 and 4 and in view of the death of Munilal on 7.2.82 the plaintiff and defendant No. 1 each will get half share in the property of deceased Munilal and defendants No. 2 to 4 will have no share in the property.

6. Learned counsel for the respondent pointed out that plaintiff in his statement before the trial court itself admitted this fact that property was belonging to deceased Radhakishan and this is an ancestral property. Therefore, the amendment is necessary because there is no dispute with respect to the fact of ownership of the property vesting in Sh. Radhakishan. The Patta of the property is also not in dispute. Therefore, in either case it will no effect the merit of the case because all the parties to the suit admitted the property as ancestral property.

7. In view of the above submissions, there is no force in the application under Order 6 Rule 17 CPC because the fact is already an admitted fact and the suit of the plaintiff is founded on the basis of having the property being ancestral. Therefore, the application under order 6 Rule 17 CPC is dismissed. So far as application under Order 41 Rule 22 CPC is concerned, a document, which is relevant for just decision of the suit or appeal can be taken on record, but when the fact is in not disputed with respect to the ownership of the property vesting in Radhakishan, there is no reason for allowing the above application. Even if the application is allowed, it will not effect the merit of the case and the document which is sought to be produced, only to prove the ownership of Radhakishan, which is an admitted fact. Therefore, the application under Order 41 Rule 22 CPC is also dismissed.

8. So far as allocation of share is concerned, learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court delivered in the case of

Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and Ors. (1), and learned counsel for the respondent also admitted that the partition takes place immediately before the death of Munilal as per the Explanation (1) of Section 6 of the Hindu Succession Act among the coparceners and as per the provisions of Hindu Law, when partition among coparceners taken place, the share is also allotted to the widow of the deceased provided she is alive at the relevant time. Therefore, according to learned counsel for the respondent though the coparcenery consists of only male members, but in partition among the coparceners, share is allotted to the widow also and, therefore, before the death of Munilal in deeming partition, there will four shares. Therefore, in entire property Munilal (deceased), the plaintiff, the defendant No. 1 and the defendant No. 2 (wife of Munilal) will get $\frac{1}{4}$ share. Only $\frac{1}{4}$ share of Munilal will be available for further partition among all the total five members of family, who are plaintiff and defendants No. 1 to 4. Therefore, each out of five members (plaintiff and defendants No. 1 to 4) will get $\frac{1}{5}$ share of $\frac{1}{4}$ share of deceased Munilal, which is $\frac{1}{20}$ of the entire property. Therefore, the plaintiff ($\frac{1}{4}$ in deeming partition + $\frac{1}{20}$ of the entire property from the share of Munilal), the defendant will get same share as of the plaintiff and the defendant No. 2 will also get the same share as of the plaintiff and defendant No. 1; whereas the defendants No. 3 and 4 will get only $\frac{1}{20}$ share only.

9. I considered the rival submissions and in view of the law laid down by the Hon'ble Apex Court delivered in Gurupad Khandappa magdum case (supra). The reliance was place upon the above judgment applies with full force in the facts of this case. Hon'ble Apex Court very specifically considered the facts and law, which are relevant to be quoted here:

'9. The next step, equally important though not equally easy to work out, is to find out the share which the deceased had in the coparcenery property because after all, the plaintiff has a $\frac{1}{6}$ th interest in the share. Explanation 1 which contains the formula for determining the share of the deceased creates a fiction by providing that the interest of a Hindu Mitakshara Coparcener shall, be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death. One must, therefore, imagine a state of

affairs in which a little prior to Khandappa's death, a partition of the coparcenary property was effected between him and other members of the coparcenary. Though the plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his two sons, she would be entitled to receive a share equal to that of a son. (see Mulla's Hindu Law, 14th Edition Page 403, para 315). In a partition between Khandappa and his two son, there would be four sharers in the coparcenary property, the fourth being Khandappa's wife, the plaintiff. Khandappa would have therefore got a $\frac{1}{4}$ th share in the coparcenary property on the hypothesis of a partition between himself and his sons.

10. Two things are thus clear; One, that in a partition of the coparcenary property Khandappa would have obtained a $\frac{1}{4}$ th share and two, that the share of the plaintiff in the $\frac{1}{4}$ th share is $\frac{1}{6}$ th, that is to say, $\frac{1}{24}$ th. So far there is no difficulty. The question which poses a somewhat difficult problem is whether the plaintiff's share in the coparcenary property is only $\frac{1}{24}$ th or whether it is $\frac{1}{4}$ th plus $\frac{1}{2}$ th, that is to say, $\frac{7}{24}$ th. The learned trial just, relying upon the decision in Shiramabai (AIR 1964 Bom. 263) which was later over ruled by the Bombay High Court, accepted the former contention while the High Court accepted the latter, The question is which of these two views is to be preferred.

11. We see not jurisdiction for limiting the plaintiff share to $\frac{1}{24}$ th by ignoring the $\frac{1}{4}$ th share which she would have obtained had there been a partition during her husband's lifetime between him and his two sons. We think that in over looking that $\frac{1}{4}$ th share, one unwittingly permits one's imagination to boggle under the oppression of the reality that there was infact no partition between the plaintiff's husband and his sons. Whether a partition had actually taken place between the plaintiff's husband and his sons is beside the point for the purposes of Explanation 1. That Explanation compels the assumption of a fiction that in fact 'a partition of the property had taken place', the point of time of the partition being the one immediately before the death of the persons in whose property the heirs claim a share.'

In view of the above facts, (which gives complete answer to the question raised by the learned counsel for the appellant) the Hon'ble Apex Court, after considering the entire provision of law on the point observed, which is as under;-

'What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.'

In view of the above facts and circumstances of the case, it is clear that the property of Munilal will stand divided as per the Explanation (1) of the Section 6 irrevocably and the only 1/4th share of Munilal is further required to be divided among plaintiff and defendants and, therefore, the calculation made by the plaintiff in the plaint, which was accepted by the trial court is in accordance with the provision of law applicable to the parties and, therefore, there is no force in the submission of learned counsel for the appellant that simply because wife of

Munilal is female heir, therefore, she will not be given share in deeming partition of the property of Munilal. It is also relevant to mention here that learned counsel for the appellant also tried to submit that it widow is allotted share then this share can be allotted to only widow of Radhakishan and not Munilal. This submission of learned counsel for the appellant is absolutely devoid of force because the suit for partition was filed after the death of Munilal and the property, which as available to the joint family was in the hands of Munilal and coparceners and undivided family of Munilal and not of Radhakishan. This was not a partition sought by Munilal of his father's property. Therefore, this submission of the learned counsel for the appellant has no application to the facts of the present case.

10. No other point was present by the learned counsel for the appellant.

11. Therefore, the appeal of the appellant is dismissed.

12. Respondent No. 2, 3 and 4 filed the cross-objections challenging the finding of the trial court on issue No. 3, which was decided while deciding issue No. 1. According to learned counsel for the respondents, the respondents placed on record the sale deed executed by the defendants No. 2, 3 and 4 in favour of plaintiff Respondent No. 1 and pleaded that share of the defendants No. 2, 3 and 4 was purchased by the plaintiff by registered sale deed and this fact has been admitted by the defendants No. 2, 3 and 4 in their written statements before the trial court. This fact was also taken note by the trial Court in para No. 6 of its judgment, even then the trial court held that plaintiff failed to prove the sale of the property in favour of the plaintiff. According to learned counsel for the respondents when the property has been admitted to be sold to the plaintiff by the sellers, who were party in the suit then it requires no further evidence and nobody has right to challenge the sale deed, which has been admitted by the seller.

13. I perused the facts mentioned in the plaint as well as in the written statement and when the defendants No. 2 to 4 admitted that they sold the share of the property in dispute by registered sale deed dated 30th May, 1990 in favour of the plaintiff then the trial court should not even have to frame any issue with respect to the sale in favour of the plaintiff. In a suit for partition the parties are concerned with their own share as heir in this case only contesting the defendant No. 1

appellant. If it is held that property is not sold by defendants No. 2 to 4 in favour of the plaintiff even then the defendant No. 1 appellant will not get any relief. It is also relevant to mention here that in suit for partition plaintiff and defendants are treated as plaintiff, therefore, if the plaintiff claimed right over the share of the other defendant that other defendant is required to contest the claim of the plaintiff. Therefore, in the facts of this case the admission of the defendants No. 2 to 4 were sufficient to hold that plaintiff acquired the share of the defendant No. 2 to 4.

14. Therefore, the cross-objection of the respondents No. 2 to 4 is allowed. The finding recorded by the trial court on issue No. 4 while deciding issue No. 1 is set aside and it is held that the plaintiff is entitled for the 6/20th share, defendant No. 1 is entitled for the 6/20th share and since defendants No. 2 to 4 have sold their share in the property in favour of the plaintiff, therefore, the plaintiff is also entitled for the share of the defendants No. 2 to 4. The decree passed by the trial court is, therefore, modified as mentioned above.

15. No order as to costs in appeal as well as in cross-objection.