

Mahadev Missir and ors. Vs. Basudev Missir and ors.

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Court : Kolkata

Decided On : Jul-09-1980

Reported in : AIR1981Cal9

Judge : Chittatosh Mookerjee and ;B.N. Maitra, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 1; ;[Evidence Act, 1872](#) - Sections 101 to 104

Appeal No. : A.F.O.D. No. 1014 of 1964

Appellant : Mahadev Missir and ors.

Respondent : Basudev Missir and ors.

Advocate for Def. : Basanta Kumar Panda and ;Sontimoy Panda, Advs.

Advocate for Pet/Ap. : R.N. Mitra and ;Himangshu Kumar Basu, Advs.

Disposition : Appeal dismissed

Judgement :

B.N. Maitra, J.

1. The plaintiff's have alleged that defendant No. 1, Mahadev Missir, is the elder brother of plaintiff No. 1, Basudeb. They hail from U.P. About 30 years ago, the plaintiff No. 1 and defendant No. 1 came to Kharagpur in the district of Midnapore

in search of employment. They settled there, lived in joint mess and jointly dealt in ready-made garments, blankets, clothes etc. Mahadev was the karta of the joint family and he used to supervise the business. Subsequently, their business flourished. Out of the Ejmali fund, Basudeb and Mahadev Missir acquired properties from time to time. Some of the acquisitions were made in the name of Basudeb Missir, some in the name of Mahadev Missir, some in the name of plaintiff No. 2, son of plaintiff No. 1, and some in the names of defendants Nos. 2 and 3, sons of Mahadev. But all the properties listed in the schedule to the plaint are joint family properties. About five or six years ago, plaintiff No. 1 and Mahadev Missir fell out. Mahadev disclosed that all the properties were his self-acquired ones and the plaintiff's had no right therein and also asserted that the properties had been recorded in his name in the R.S. Khatian. So the plaintiff's asked for partition. No partition was effected by the defendants. Hence, the suit for partition regarding the plaintiff's 8 annas share.

2. Defendant No. 1 has filed a written statement denying the plaintiff's allegations. He has stated that though he came to Kharagpur, the business carried on by him and by Basudeb were separate ones. The plaintiff's have no interest therein. He derived income from his own business and acquired the properties from his own fund.

3. The learned subordinate Judge accepted the plaintiff's version. He stated that the properties in question were the joint family properties of the parties and they were not separately acquired by the defendant No. 1, as alleged. Excepting the land of Khatian No. 251, the suit was decreed. So, this appeal by the defendants.

4. It has been contended on behalf of the appellants that P.W. 1, Basudev Missir, plaintiff No. 1, has not stated that he brought any money from U.P. When he came down to Kharagpur. There is no evidence that there was any nucleus with which the alleged acquisition could have been made. Basudeb has stated that there are no accounts of his separate business. The learned Subordinate Judge ought not to have accepted the plaintiff's version. P.W. 2 Dhanu, and P.W. 3, Ashu Dolai, are unsummoned witnesses. D.W. 1 Mahadev Missir, defendant No. 1, has stated that he had his separate licence. Moreover, a fundamental mistake was made by the

court below because the onus on the important point of joint acquisition was misplaced. The plaintiff's are bound to prove their own case. Since the plaintiff's failed to substantiate their allegations, the suit is bound to be dismissed. Moreover, paragraph 1 of the plaint indicates that the parties are possessed of some properties in U.P. But those properties have not been brought into the hotch-potch. So the suit is not maintainable because it is bad for partial partition.

5. The first question arises whether the suit is bad for partial partition. No issue was framed on this and no such evidence was adduced. It appears from the judgment that the Issue No. I relating to the maintainability of the suit was not pressed. Law in respect of partial partition is well settled after the Bench decision of *Rajendra v. Brajendra* in 37 Cal LJ 191 : (AIR 1923 Cal 501). Sir Ashutosh Mookerjee speaking for the bench has stated that in a suit for partition all the properties must be brought into the hotch-potch. But there are exceptions, i.e., when the properties are situated in different districts, there is different law for the property which is distantly situated, when the property is not partible and when the property is not in possession of the coparceners and may consequently be deemed to be really not available for partition. This principle has been followed in the bench case of *Kasiswar v. Nakkuleswar* in : AIR 1952 Cal 738 . At all events the plaint indicates that there were properties in a different State, i.e. in U.P. The suit is not hit by the doctrine of partial partition.

6. In the case of *Lala Kalyan Das* reported in 22 Cal WN 866 at pages 870 and 871: (AIR 1918 PC 53), Lord Sumner has stated that when a point was not pressed in the lower court, in the absence of evidence that the judgment was erroneous on the point, the appellants must accept that position and cannot raise the same in appeal before the Judicial Committee against the decision of the High Court because that is a point which they elected not to advance in the High Court. There is nothing to show that the decision of the trial court in this regard is erroneous. Hence, this submission cannot be accepted.

7. Then about the question of onus. Both the parties adduced evidence in this case. In the case reported in AIR 1959 SC 31 at p. 38, it has been stated that the question of onus at the end of a case when both the parties have adduced

evidence is not of any importance and the court has to decide on the materials available on the record. In the case of Sime, Darby & Co. Ltd., reported in AIR 1928 PC 77, it has been stated that when all the circumstances have been ascertained so far as the parties have thought fit to ascertain them, discussion on the question of onus becomes immaterial. That question becomes important if the circumstances are so ambiguous that a satisfactory conclusion is impossible without resort to it.

8. The normal state of every Hindu family is that it is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption. This presumption is stronger in the case of brothers than in the case of cousins. The principles of the cases of Neelkisto v. Beerchunder in (1867-69) 12 Moo Ind App 523 (PC) and Nageswar v. Ganesha in 47 Ind App 57: (AIR 1920 PC 46) decided by the Judicial Committee and by the Supreme Court in : [1951]2SCR603 and AIR 1971 SC 996 may be cited. The presumption of joint family and joint family property of Mitakshara Law applies to Dayabhag Law as well, vide the bench case of Charan Das v. Kanailal in : AIR1955 Cal206 .

9. Proof of existence of a joint family does not lead to the presumption that the property held by any member of the family is joint and the onus is primarily on him who claims a particular property to be joint family property. But where that family possessed some joint property which may have formed the nucleus from which the property may have been acquired, the onus shifts to the person who claims it as his self-acquired property, vide the cases in 52 Cal WN 505: (AIR 1947 PC 189) and : [1955]1SCR1 .

9A. After the arguments were advanced in part on behalf of the appellants, we asked them to submit a list to show which of the properties described in the schedule of the plaint were acquired by whom and when. The appellants did not comply with our verbal direction and submit any such list. It is true that there is no direct evidence that defendant No. 1 brought any money from Rae Bareilly in U.P. or there was any nucleus of the alleged joint family. But there are certain circumstances which clearly show as to whose version is the true one.

10. The P.W. 1 Basudeb, plaintiff No. 1 and P.W. 2 Dhanu and P.W 3 Ashu have been examined to support the plaintiff's version.

11 Ext. 1 is the certified copy of the registered sale deed dated 18th January, 1946, regarding a property appertaining to Khatian No. 71 of Mouza Sonamukhi. This document stands in the name of plaintiff No. 1. But this item of property was sold by defendant No. 1 to one Ram Prosad. There is no satisfactory explanation on behalf of the appellants as to how such sale could be made by the elder brother, i.e., by defendant No. 1 to Ram Prasad. This transaction made long before the dispute arose is consistent with the plaintiff's case and inconsistent with the defendants' version.

12. Next comes the certified copy of the registered kobala dated 21st November, 1945. Ext. 1 (b). This document shows that the purchase was made by plaintiff No. 2 and by defendant No. 2. As stated before, defendant No. 2 is the son of Mahadev Missir and plaintiff No. 2 is the son of plaintiff No. 1. It is the common ground that when the property was acquired in 1945, both plaintiff No. 2 and defendant No. 2 were minors. There is no evidence that they had any separate fund. So, this purchase is incongruous with the defence version that there was no such joint family. That fact goes a long way to prove that there was a joint family and such acquisition had been made from the joint fund and Basudeb and Mahadeb were possessed of an ejmali fund with which acquisition was possible.

13. The next document is Ext. 2 (a) which is the certified copy of the property appertaining to Khatian No. 71. The kobala, Ext. 1, shows that this property was purchased by Basudeb. So it ought to have been recorded in his name, But it was recorded in the name of the defendant No. 1. In such circumstances, the trial court made no mistake in stating that circumstances showed that defendant No. 1 was the karta of the joint family and that he looked after the joint family properties.

14. The aforesaid presumption of joint-ness has not been rebutted. In the case in : [1964]2SCR172 and : [1968]3SCR464 , it has been stated that separate property of a member will become joint property if it be thrown by the owner into the common stock with the intention of abandoning the separate claim therein. It has already been indicated that there is no explanation how the property covered by

the registered kobala dated 18-1-1946 Ext. 1, standing in the name of plaintiff No. 1 could be sold by defendant No. 1 to the stranger, Ram Prosad. Of course, no case of blending has been made out in the pleadings. But the facts and circumstances clearly establish that there was a joint family, which was possessed of joint fund and joint family property. There was sufficient nucleus with which the acquisition could have been made and Mahadev Missir, defendant No. 1, was the karta of the joint family. We find accordingly. It is thus clear that there are materials to arrive at a conclusion without reverting to the question of onus. The plaintiff's version is thus accepted. Hence, the argument advanced on behalf of the appellants cannot be sustained.

15. The learned Subordinate Judge has stated that the properties of Khatian No. 251 were sold on 23rd July, 1952 by the Kobala Ext. 1 (d), to the sons of Niranjan Das after the suit was filed. The plaintiff's and the defendants have no subsisting interest in that property. The learned Subordinate Judge excluded that property from the purview of the claim for partition. No grievance has been made in this regard.

16. The appeal is, therefore, dismissed. There will be no order as to costs.

17. Let the records be sent down as early as possible.

Chittatosh Mookerjee, J.

18. I agree.

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