

Upendra Nath Das and anr. Vs. Chintamoni Devi and ors.

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Court : Kolkata

Decided On : Jan-24-1962

Reported in : AIR1963Cal22

Judge : S.K. Sen and ;Amaresh Roy, JJ.

Acts : [Hindu Succession Act, 1956](#) - Sections 3, 3(1), 3(3), 4 and 23; ;Hindu Women's Right to Property Act,

Appeal No. : A.F.O.D. No. 99 of 1960

Appellant : Upendra Nath Das and anr.

Respondent : Chintamoni Devi and ors.

Advocate for Def. : Jitendra Kumar Sen Gupta and ;Rabi Ranjan Das Gupta, Adv.

Advocate for Pet/Ap. : Rajendra Bhushan Bakshi and ;Sailendra Bhushan Bakshi, Adv.

Disposition : Appeal dismissed

Judgement :

Amaresh Roy, J.

1. This appeal arises out of a suit for partition instituted by the present respondent No. 1, Ghinta-moni Devi, in which a preliminary decree has been passed by the learned Subordinate Judge. The plaintiff is the widow of one Mahendra Nath Das who died on 12th June, 1956 leaving as heirs besides the plaintiff, two sons Upendra and Keshab by another predeceased wife. The plaintiff instituted the suit on 6th May, 1957 and claimed partition of the property mentioned in the schedule of the plaint. Those properties included certain agricultural lands, three dwelling-houses, one at Jalpaf-guri town and two in village Jorepakri. There was also a vacant plot of land in Jalpaiguri town. Besides these immoveable properties there were also other properties in the form of tea shares, three iron safes and one gun, the licence of which stood in the name of Mahendra Nath Das; but after his death the gun was surrendered and thereafter Upendra took out the licence in his own name and was possessing that gun. The plaintiff claimed one-third share of all those properties.

2. Defendants 1 and 2 contested the suit and raised several pleas. To meet some of the objections raised in the written-statement the plaint was amended by adding some parties and also by including in the Schedule of the plaint some immoveable properties. Evidence was led on both sides and on consideration of that evidence the learned Subordinate Judge held that as Mahendra Nath Das died on 12th June, 1956, that is, five days before the Hindu Succession Act, Act XXX of 1956, came into force, succession to his estate will be governed by the Hindu Women's Right to Property Act, that is, Act XVIII of 1937, which was the law then prevailing. In that view, the learned Subordinate Judge held that the plaintiff would not be entitled to any share in the agricultural lands.

3. About dwelling houses, the learned Subordinate Judge held that the plaintiff is entitled to one-third share of those but it was pleaded on behalf of the defendants that in view of Section 23 of Act XXX of 1956 the plaintiff would not have unrestricted right of partition. This contention was pressed by reference to section 4 of Act XXX of 1956. The learned Subordinate Judge overruled that contention upon his view that the language in Section 23 of Act XXX of 1956 mentions 'a dwelling house' but in the present case there were as many as three dwelling houses. Upon that reason he held that Section 23 was not applicable and passed

a decree in favour of the plaintiff in respect of the dwelling houses and also vacant plot of land in the Jalpaiguri town mentioning of course that the division should be made by adherence to the equitable principle of respecting possession of a sharer and if necessary by compensating by payment of money in the form of owelty money. He also allowed one-third share of tea shares and one-third of the three iron safes which he held to be the property of deceased Mahendra Nath Das. Against that preliminary decree passed in the partition suit this present appeal has been preferred by the two sons of Mahendra Nath Das who are defendants 1 and 2.

4. Mr. Rajendra Bhusan Bakshi appearing in support of the appeal has raised several points, the principal point being that under Section 23 of Hindu Succession Act (Act 30 of 1956) the plaintiff is not entitled to have partition of the dwelling houses until the male heirs, the defendants, chose to divide their respective shares therein and she is only entitled to right of residence. Mr. Bakshi contended that the learned Subordinate Judge has erred in interpreting that section by holding that it applies only when there is 'a dwelling house' and does not apply when there are more than one dwelling houses. Mr. Bakshi points out that in interpreting the statute, singular includes the plural and the restriction imposed by section should apply even when there are more than one dwelling house wholly occupied by members of the family.

5. In answer Mr. Jitendra Kumar Sen Gupta for the plaintiff respondent contended that succession opened on 12th June 1956, that is before the Act 30 of 1956 came into force on 17th June, 1956 and therefore the rights of the plaintiff must be governed by Act XVIII of 1937. He relies on Section 3(3) of that Act by which unrestricted right to have the properties partitioned was given to female heirs under that Act. Mr. Sen Gupta also contended that Section 23 of Act 30 of 1956 will not apply to the present plaintiff because she became an heir to her husband in 1/3rd share of the properties left by him under the Hindu Women's Right to Property Act (Act XVIII of 1937) and is not an 'heir' as defined in Section 3(f) of Act 30 of 1956, by which

' 'Heir' means any person male or female, who is entitled to succeed to the property of an intestate under this Act.'

According to Mr. Sen Gupta's contention therefore Section 23 of Act 30 of 1956 which opens with the words

'Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule.' cannot apply to the present plaintiff because she is not an 'heir' as defined in that Act and not an 'heir' specified in class I of the schedule of that Act but is an heir to her husband under the provisions of Act XVIII of 1937, although its succession opened after Act 30 of 1956 came into force., she would be an heir mentioned in class I of the schedule of that Act.'

6. Another argument of Mr. Sen Gupta is that 'a dwelling house' occurring in Section 23 in the context that phrase has been used in that section can only mean the particular dwelling house where the parties lived with members of his or her family and no other dwelling house. This meaning, according to his contention can only fit with 'a right of residence therein' given by that section, and ' the dwelling house' mentioned both in substantive part of the section and the proviso thereto.

7. First question therefore is whether on the facts of the present case Section 23 of Act 30 of 1956 will be applicable. If so, then only the other part of the question need be considered for the decision in the present case.

8. As I have mentioned above Mahendra died on 12th June. 1956 and therefore succession opened before Act 30 of 1956 came into operation. On that relevant date the Hindu Women's Right to Property Act (Act XVIII of 1937), was in force and held the field. The plaintiff therefore became an heir to her late husband along with his two sons in equal shares on that date, that is 12th June 1956. That Act XVIII of 1937 had been a piece of legislation by the Central Legislature and by the decision of the then Federal Court of India reported in Hindu Women's Right to Property Act, 1937. In the matter of , it has been held not to operate to regulate succession to agricultural lands in the territories within the then Governor's Provinces. The plaintiff on 12th June, 1956 therefore did not succeed to the agricultural lands left by her husband but did succeed as heir under that Act XVIII

of 1937 in respect of the three dwelling houses, and properties other than agricultural land. That law continued in force even after Constitution of India was promulgated by dint of Article 372 of the Constitution and any change in the legislative competence of the Parliament or State legislatures that may have been brought about by particular entries in the lists in seventh schedule of the Constitution did not alter the effect of that law as interpreted by the decision above referred to. It is beyond doubt therefore that the plaintiff is an heir to the estate left by her husband except agricultural lands under Act XVIII of 1937. Section 3(3) of that Act provided that:

'Any interest devolving on a Hindu widow under the provisions of this section shall be limited interest known as a Hindu Woman's estate, provided however that she shall have the same right of claiming partition as a male owner.'

By that provision therefore the plaintiff had an unrestricted right of claiming partition of all properties to which she inherited including dwelling houses. Has that right been affected or taken away by any provision in the Act 30 of 1956?

4. 'Overriding effect of Act--(1) Save as otherwise expressly provided in this Act.-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holding.' The particular provision regarding right of claiming partition by female heir in that Act is Section 23 which provides.

23. 'Special provision respecting dwelling houses.--Where a Hindu intestate has left surviving him or her both male and female heirs specified in class 1 of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.'

9. This section in its terms mentions 'female heirs specified in Class I of the Schedule' and deals with 'the right of such female heir.' It does not provide for curtailment of any right that may have been acquired by her as an heir under any other law, to wit Act XVIII of 1937. In respect of such female heirs who have inherited by dint of Act XVIII of 1937 therefore, Section 23 of Act 30 of 1956 does not make any provision affecting right to claim partition. That being so, in our view Section 4 of Act 30 of 1956 has not overridden the right that the plaintiff acquired by Section 3(3) of Act XVIII of 1937 in respect of the dwelling houses she inherited from her husband under Section 3(1) of that Act

10. In this view we are further confirmed because of the particular language used in the definition of 'heir' in Section 3(f) of Act 30 of 1956 which I have already quoted above. The use of the words 'Under this Act' in that definition clearly indicates to our mind that 'heir' in Section 23 must be understood to be those heirs who succeed by intestate death after the commencement of Act 30 of 1956. We may also mention that only other section in Act 30 of 1956 making provision for property possessed by a female Hindu is Section 14. That section envisages property 'acquired before or after the commencement of this Act.' The right acquired by inheritance under Act XVIII of 1937 is thus clearly visualised by Act 30 of 1956 in Section 14, yet in Section 23 only 'female heirs specified in Class I of the Schedule' are mentioned and in the definition in Section 3(f) 'heir' means a person entitled to succeed 'under this Act' only. We have therefore reached the

conclusion that by combined effect of the definition in Section 3(f) and the terms of Section 23, the restriction imposed by Section 23 of Act 30 of 1956 has no application to the female heir who has inherited under Act XVIII of 1937.

11. In view of that conclusion of ours the other question whether the restriction imposed by Section 23 shall operate when there is only one dwelling house or it would operate also when there are more than one dwelling houses included in the property left by intestate or if all or any, and if so which of the several dwelling houses shall be affected by that restriction need not be decided in the present case, and we express no opinion thereon. We affirm the decision of the learned Subordinate Judge on the question of plaintiff's right to claim partition of the dwelling houses though on different reasons than his.

12. Mr. Bakshi also urged that the shares in the joint stock companies doing business of tea gardens are 'agricultural land' and therefore those could not have been inherited by the plaintiff under Act XVIII of 1937 as interpreted by the Federal Court decision reported in above referred to. In support of that contention of his Mr. Bakshi relied on Section 8(2) of Bengal Agricultural Income-tax Act and also to Rule 24 of the Indian Income Tax Rules framed under section 59 of Indian Income-tax Act, wherein income of tea gardens are treated as 'agricultural income.' But we do not find anything in those provisions that would induce us to hold that the shares in joint-stock companies which are not even immovable property would come within 'agricultural land' and we have no hesitation in rejecting Mr. Bakshi's contention in that respect. (His Lordship then discussed the evidence relating to the iron safe, gun and the expenses incurred for the repairs of a dwelling house and upheld the findings of the lower Court.)

16. In the result the appeal fails and is dismissed. The preliminary decree passed by the learned Subordinate Judge is affirmed. We make no order as to costs.

Sen, J.

17. I agree.

