

Om Parkash Vs. Sarvjit Singh

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Court : Himachal Pradesh

Decided On : Dec-31-1993

Reported in : AIR1995HP92

Judge : Devinder Gupta, J.

Acts : Hindu Law; ;[Succession Act, 1925](#) - Section 191

Appeal No. : Regular Second Appeal Nos. 145 and 146 of 1984

Appellant : Om Parkash

Respondent : Sarvjit Singh

Advocate for Def. : K.D. Sood, Adv.

Advocate for Pet/Ap. : Pandit Om Parkash, Adv.

Disposition : Appeals dismissed

Judgement :

Devinder Gupta, J.

1. Both these appeals preferred by the plaintiff arise out of the judgment and decree passed on 15th June, 1984 by District Judge, Kangra at Dharamsala, dismissing the suit of the plaintiff-appellant and partly allowing the appeal of defendant-respondent, thereby modifying the judgment and decree passed by

Sub-Judge, Kangra dated 23rd February, 1981.

2. The admitted facts are that one Gauri had two sons Santu and Vishnu. Santu died issueless on 22nd February, 1920. Vishnu had two wives, Godavari and Dharmi Devi. Plaintiff Om Parkash is Vishnu's son out of Godavari. Respondent Sarvjit Singh is also Vishnu's son out of Dharmi Devi. Chandermu was the mother of Vishnu.

3. It is the plaintiff-appellant's case that the suit property, namely, the agricultural land, as described in para I-A of the plaint and houses described in para 1 -B of the plaint was a coparcenary joint Hindu family property of the plaintiff, defendant Sarvjit Singh and their father Vishnu. The entire property was ancestral in the hands of Vishnu, who was also the Karta and Manager of the Joint Hindu Family. Since the entire property was earlier held by Gauri, who was succeeded by his two sons, Santu and Vishnu on the death of Santu, his estate devolved upon Vishnu, who died on 21st September, 1960 and on his death, his estate devolved upon his mother Chandrmu, widow Dharmi Devi and two sons, plaintiff and defendant Sarvjit Singh. It is also alleged that Vishnu was a spend-thrift and without any legal necessity on 23rd January, 1959, a gift was made by him with respect to the property, which had devolved upon him by survivorship on the death of his brother Santu, in favour of his wife Smt. Dharmi Devi. This act, on the part of Vishnu in having made the gift was challenged by plaintiff as illegal, since according to plaintiff this was ancestral property in the hands of Vishnu and he had no right to make gift.

4. The suit was contested by the defendants, who denied the ancestral nature of the property and claimed that the property inherited by Vishnu from his brother Santu was not ancestral. It was a separate property of Vishnu and he was within his rights to have made the gift and the plaintiff had no right to challenge the same. The suit was also contested on other grounds.

5. The trial court held that the suit land, as described in para I-A of the plaint, namely, agricultural land, which Vishnu inherited from his brother Santu was neither ancestral, nor a joint Hindu co-parcenary property, since it did not come to him by survivorship but came by succession. So far as the houses described in

para 1-B of the plaint are concerned, it was held that the same were the joint Hindu coparcenary property. The gift made by Vishnu in favour of his wife was upheld in so far as the agricultural land described in para 1-A of the plaint is concerned being his separate or self-acquired property. In so far as the houses are concerned, it was held that the same formed part of coparcenary and the same also did not find mention in the deed of gift. The court also found that the same could not be alienated by Vishnu. As a consequence of these findings, the plaintiffs suit with respect to the house property described in para 1-B of the plaint was decreed. A preliminary decree was passed for separate possession of one half share in the houses in favour of the plaintiff. His suit as regards agricultural land described in para 1-A of the plaint was dismissed.

6. Feeling aggrieved, two appeals were preferred, one by plaintiff, which was registered as Civil Appeal No. 68/81 and the other by defendants being Civil Appeal No. 81 of 1981. The lower appellate court held that on the death of Santu, who died without leaving any male issue, the property was inherited by Vishnu, which on such inheritance was held by him as his separate property and not ancestral property. Since the execution of the gift was not disputed, the lower appellate court upheld the validity of the gift. The lower appellate court also concurred with the findings of fact recorded by the trial court that the houses were coparcenary property and were not included in the deed of gift. The plaintiff had also laid a claim on the basis of Will as regards the estate of his grandmother Chandermu. The legality and the validity of the Will, which had been upheld by the trial court was affirmed and as a consequence the undivided share in the property was held to be one half. The decree granted by the trial court in favour of the plaintiff with respect of 1/2 share in the houses was held to have been wrongly granted and instead it was held that he ought to have been granted only 1/4 share in the houses, because of the 1/2 share of the property alone remained coparcenary, the court modified the decree passed by the trial court by holding the plaintiff to be entitled for 1/4 share only in the houses. Thus the appeal preferred by Dharmi Devi was partly allowed and the appeal preferred by the plaintiff was dismissed. The plaintiff has now preferred two separate appeals, which have been heard. Learned counsel for the parties have also taken me through the entire record.

7. The short question, which arises for determination in the appeals is' about the nature of the property of Santu, which came in the hands of Vishnu, as to whether the same is to be treated as ancestral property qua the plaintiff Om Parkash and Sarvjit Singh defendant in the hands of their father Vishnu or a separate property of Vishnu.

8. It is contended by the learned counsel for the plaintiff-appellant that since Vishnu got the share of Santu by survivorship, the same continued to remain coparcenary property. One of the incidents of the coparcenary property is that the same devolves by survivorship and not by inheritance. It is contended that had it come to Vishnu by way of inheritance, there is no reasons why Chandermu, the mother of Santu, would not have got a share in the said property. Being coparcenary property, it was held by Vishnuas ancestral property and he had no right to make gift of the same in favour of his wife Dharmi Devi.

9. Mr. Sood, appearing for respondent, has contended that the essential feature of ancestral property, as regards male issue, is the one which is inherited by a person from his father or father's father or father's father's father, or, in other words, it is that property in which the sons, grand-sons and great grandsons of a person, who inherits it acquire an interest in it by birth. The ancestral property is called un-obstructed heritage. The property inherited as obstructed heritage by a Hindu from a person other than father, father's father or father's father's father is his separate property. Since, Vishnu inherited the property as obstructed heritage from his brother Santu, it would be deemed as his separate property and not ancestral property.

10. Having given my considered thought to the question posed, I am of the view that the submissions made by the learned counsel for the appellant cannot be accepted.

11. A Hindu comparcenary, as compared to a joint family is a much narrower body and generally speaking it includes only those persons, who acquire, by birth, an interest in the joint or coparcenary property. They are the sons, grand-sons and great grand-sons of the holder of the joint property for the time being. In other words, the three generations, next to the holder, in the unbroken male descent.

(See : Para 213 of Mulla's Principles of Hindu Law, page 239, Sixteenth Edition). Six incidents of co-parcenership under the Mitakshara Law, as noticed by the Supreme Court in *State Bank of India v. Ghamandi Ram*, AIR 1969 SC 1330, are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. These instances were further approved in *Controller of Estate Duty, Madras v. Alladi Kuppaswamy* (1977) 3 SCC 386: (AIR 1977 SC 2069).

12. The question, which has to be decided is about the nature of the property. For this it may be noticed that the Mitakshara divides property into two classes, namely, *aprati-bandha daya* or unobstructed heritage, and *sapritibanda daya* or obstructed heritage. In para 218 of Mulla's Principles of Hindu Law, it is observed that the property in which a person acquires an interest by birth is called unobstructed heritage. Reason for this is because the accrual of the right to it is not obstructed by the existence of the owner. Thus unobstructed heritage is the one, in which a person acquires an interest by birth as distinguished from the property, the right to which accrues not by birth but on the death of the last owner without leaving male issue, which is known as obstructed heritage. It is so called because the accrual of the right to it is obstructed by the existence of the owner. In Clause (2) of para 218, it is noticed that unobstructed heritage devolves by survivorship; whereas obstructed heritage by succession. There are, however, some cases in which even obstructed heritage may also pass by survivorship.

13. The property according to Hindu Law is divided into two classes, namely, joint family property and separate property and it is this joint family property, which may be divided, according to the sources from which it comes into, namely, (1) an ancestral property and (2) separate property of coparceners thrown into the

common stock or the property jointly acquired by the members of joint family with the aid of ancestral property. The term 'joint family property' is synonymous with 'coparcenary property'.

14. In *C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar*, AIR 1953 SC 495, the nature of the ancestral property according to Mitakshara School was considered and it was held that according to Mitakshara the son has a right by birth in his father's and grand-father's estate but this is subject to a distinction made, namely, in the ancestral 'Or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or predominant interest in the same. The ancestral property has been held to be one in which the son can assert an equal right with the father only when the grandfather's property had devolved on his father. It was also noticed that the property of grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of grandfather or receives it by partition made by the grandfather himself during his lifetime. But when the father obtains the grandfather's property in any other way, such as gift, he receives it not because he is his son but because the father has chosen to bestow a favour on him. Such property cannot be said to be ancestral in the hands of the father vis-avis his son. The court pointed out that in order to find out whether the property is or is not ancestral, in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. These observations were made by the court in para 12 of its report in the following words, after quoting the text of Hindu Law on Yagnavalkya and Mitakshara :

'.....It is undoubtedly true that according to Mitakshara, the son has a right by birth both in his father's and grandfather's estate, but as has been pointed out before, a distinction is made in this respect by Mitakshara itself. In the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father, while in the self-acquired property of the father, his rights are unequal by

reason of the father having an independent power over or redominant interest in the same; vide Mayne's Hindu Law, 11th Edition, page 336. It is obvious, however, that the son can assert this equal right with the father only when the grandfather's property has devolved upon his father and has become ancestral property in his hands. The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of the grandfather or receives it, by partition, made by the grandfather himself during his life-time. On both these occasions the grandfather's property comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his hands.

But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such property but because his father chose to bestow a favour on him when he could have bestowed on any other person as well. The interest which he takes in such property must depend upon the will of the grantor. A good deal of confusion, we think has arisen by not keeping this distinction in mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and the present holder but the mode of transmission also must be looked to; and the property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner.....'

15. In the instant case, learned counsel for the appellant has based his submissions on the assumption that since on the death of Santu, his mother Chandermu did not get any share, therefore, it must be presumed that Vishnu got the estate by survivorship and not by inheritance and thus it was unobstructed heritage or that the nature and character of the property continued to be ancestral. There is a fallacy in such a statement. The death of Santu took place on 22nd February, 1920, and on his death there was no question of Smt. Chandermu getting any share in the property, since the Hindu Women's Right to Property Act, 1937 had not seen the light of the day by that time. Para 230 of Mulla's Principles of Hindu Law enumerates properties, which are considered as separate properties of the acquirer and which are subject to the incidents of separate or self-acquired

property as detailed in para 222 therein. The first of such properties is the obstructed heritage and has been defined 'property inherited by a Hindu from a person other than his father, father's father, or father's father's father.

16. Since the essential feature of the ancestral property, according to Mitakshara Law is that the sons, grandsons and great grandsons of the persons, who inherits it, acquire right by birth in it, the property in the hands of Santu, in the instant case, who left no male issue cannot be considered to be an unobstructed heritage and has to be treated as obstructed heritage.

17. In Smt. Dipu v. Waman Singh, AIR 1983 SC 846, the apex court noticed the incidents of ancestral property as quoted in the Mulla's Hindu Law (15th Edition), pages 289 and 291 respectively, in the following words :

'..... if A inherits property, whether movable or immovable, from his father or father's father, father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, son's son's son, in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases..... A person inheriting property from his three immediate paternal ancestors holds it and must hold it, in coparcenary with his sons, son's sons and son's son's son, but as regards other relations, he holds it and is entitled to hold it, as his absolute property.

The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession.'

18. The aforementioned principles, if applied to the facts of the present case, it will be noticed that the property of which gift was made by Vishnu did not come in his hands by way of inheritance from his father's father or from father's father's father. It came to him by inheritance from his brother Santu. Even if it be assumed that it came to him by survivorship, even in that case, it cannot be considered as

ancestral property in his hands qua his male issues. By virtue of being obstructed heritage it will be separate property of Vishnu, over which he had absolute power of disposal.

19. In view of the above discussion, I do not find any force in the appeals and the same are dismissed leaving the parties to bear their respective costs.

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