

Smt. Anar Kumari

Vs

Jamuna Prasad Singh and Others

Civil Appeal No. 1843 of 1967

(V.R. Krishna Iyer, A.C. Gupta JJ)

24.09.1975

JUDGMENT

KRISHNA IYER, J. -

1. This appeal, by certificate, stems from a suit for partition instituted by the widow of a Hindu coparcener who set up a specific case that her husband, who had died in 1930, was entitled to one-sixth share in the joint family properties, since there had been an earlier partition in 1928.
2. One Rambhajoo Singh, first defendant (now deceased) had two wives. By the first wife he had two sons-the second defendant and the third defendant-and by the second wife he had three sons, the late husband of the plaintiff (Rameshwar Prasad Singh) and fourth and fifth defendants. The plaintiff, the widow of Rameshwar Prasad, set up the case that she was entitled to a widow's estate in her husband's share, which she stated, was one-sixth of the entire family properties, based on her case of a partition in 1928. The defendants contested the case of partition in 1928 and set up a later partition on 1936. If Rameshwar Prasad died in 1930 and there was no prior partition, the present plaintiff would not be entitled to a share and suit would have had to be dismissed. Of course, a minor matter falls to be noticed at this stage. The common ancestor, Rambhajoo Singh, the first defendant, died pendente lite and on that basis under the Hindu Succession Act, the plaintiff, in any case, would be entitled to 1/25th share in the family properties. This is not contested by the other side.
3. Anyway, the partition of 1928 has been disbelieved by both the courts below and we are not disposed to reopen the concurrent finding. The inevitable result flowing from this conclusion would have been that the plaintiff would have had to rest content with 1/25th share in the family properties as decreed by the High Court and also a claim for maintenance as held in the judgment of the High Court.
4. Shri Sarjoo Prasad, appearing for the plaintiff/appellant, has brought to our notice an important circumstance which compels modification of the relief the plaintiff/appellant is entitled to. The High Court has rightly pointed out :

Defendants 4 and 5, who are respondents 2 and 3 in both the appeals filed a petition in the trial Court on March 24, 1960, after the preliminary decree for partition was passed, that they would not prefer any appeal and they would have no objection to partition by metes and bounds in accordance with the preliminary decree. To the same effect, petition were filed in both these appeals in this Court on behalf of defendant 2, 7, 8 and 16, who are appellants 1, 4, 5 and 6. The petition on behalf of

defendant 7 was filed on July 27, 1962 and the petition by the other defendants was filed on July 24, 1962, both through one advocate, namely, Shri Ram Nandan Sahai Sinha.

5. It is clear that guided by the trial Court's decree, based on section 8 of the Hindu Succession Act, the other four sharers, namely, defendants 2, 4 and 5, either in the trial Court or in the High Court, gave up their rights to the extent to which the trial Court had decreed a share in favour of the plaintiff. It is legitimate and fair to construe these petitions filed by the various defendants in the trial Court and the High Court to mean that they had parted with their right on the lines by the trial Court in favour of the plaintiff. They were entitled to give up their share to any extent since it was their property. And it was not proper for the High Court not to have given effect to what the parties themselves had given up in favour of the plaintiff.

6. Both sides have agreed on our indicating the decision we have reached that the shares to be worked out shall be as follows.

7. The share of defendant 3 (Jadunandan Prasad Singh) and his branch shall be $\frac{6}{25}$ th of the total properties and the share of the plaintiff will be $\frac{1}{4}$ th of $\frac{19}{25}$ of the total properties, that is $\frac{19}{100}$. Likewise, the shares of defendants 2, 4 and 5 and their branches will be also $\frac{19}{100}$ each.

8. There is a small matter relating to maintenance. The High Court has directed that maintenance at the rate of Rs. 200 p. m. be decreed in favour of the plaintiff. In view of the award of a share to the plaintiff which we have indicated, she will be entitled to only Rs. 50 p.m. from the second respondent and his branch until partition and allotment of her share as decreed now. Once she gets her share, the liability for maintenance also will stop. The decree of the High Court is modified to this extent. Parties will bear their own costs.

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