

Gian Chand Kapur (Dead) By Lrs

Vs

Rabindra Mohan Kapur and Others

Civil Appeal No. 558 of 1973

(G. L. Oza, Ranganath Misra JJ)

03.12.1986

JUDGMENT

RANGANATH MISRA, J. -

This appeal by certificate is by defendant 1 and is directed against the reversing decree of the High Court in a suit for partition of a house and other related reliefs. The trial court had dismissed the suit but the High Court has found that the plaintiffs were entitled to one-third share as against two-thirds claimed by them and has given a decree for it. Defendant 1 who maintains that the plaintiffs have no interest in the suit house has challenged the appellate decree.

2. Admittedly the house in dispute belonged to Chander Mohan. On June 29, 1937 he made a gift of it in favour of Gian Chand, son of his brother but on December 8, 1937 filed a suit for cancellation of the gift. That suit was referred to the arbitration of the plaintiffs' advocate by an application dated May 31, 1938 and the Arbitrator made his award on June 20, 1938 on the basis of a compromise between the parties which he treated as a family settlement. The award was accepted by the court on the same day and a decree followed.

3. Under the decree, Chander Mohan got a right of enjoyment during his lifetime. Gian Chand (defendant 1) and the sons of Mohinder Mohan, another brother of Chander Mohan together got one-third share each. The remaining one-third share went to Tarawati, daughter of the donor from the deceased wife with life interest and after her, absolutely to her son.

4. A second round of litigation in respect of the property started with the suit in June 1953 by the three sons of Mohinder Mohan asking for exclusive possession of their one-third share in the house and for accounting. After a chequered career, this litigation received a final seal by the judgment of the High Court in R.S.A. No. 61-D of 1958. The High Court held that the three plaintiffs were not entitled to a share in the property.

5. Soon after the disposal of the second round of litigation, Rama Devi and her son Rabindra claiming to be widow and son respectively of Chander Mohan filed a suit claiming two-thirds share in the property and for partitioning thereof along with other ancillary reliefs. The trial court dismissed the suit by finding :

(1) Rama Devi was wife of Chander Mohan and Rabindra is their son;

(2) The judgment of the High Court in the second round of litigation did not bar the present claim;

(3) The award was void and the gift operated and since under it, no share was given to the plaintiffs, they had no right to sue for partition.

6. The High Court did not agree with the trial court that the award was bad and the gift operated. It found that the plaintiffs had one-third share and decreed the claim to that extent. This appeal by defendant 1 is against this reversing decree.

7. The High Court, in our opinion, was wrong in holding that the plaintiffs had a share in the property. In the very first litigation itself the decree was in the nature of a family settlement on the basis of an award grounded upon compromise. There is no justification to hold that the gift which constituted the title in respect of the subject-matter thereof, namely, the house, were separate from one another; equally fallacious was the view of the trial court that notwithstanding the compromise, the award and the decree, the gift still remained valid as it has not been set aside. Admittedly under the gift or in the compromise and the award no share had been given to the present plaintiffs. In such circumstances, the plaintiffs could not claim any share in the property. Reasoning given by the High Court to carve out one-third share in favour of the plaintiffs is not tenable in law nor on facts. It is not appropriate at this stage to examine the correctness of the judgment of the High Court in the second appeal. By that judgment Mohinder Mohan had lost title to the property.

8. An affidavit was filed in course of the hearing of the appeal on behalf of the plaintiff-respondents to suggest that Vijay Kumar was not the son of Tarawati. The affidavit which seeks to reopen a question of fact cannot be accepted at this stage. The plaintiffs have no title and would, therefore, not be entitled to one-third share in the house as decreed by the High Court. The appeal is allowed and the plaintiffs' suit has to be dismissed. We set aside the judgment of the High Court and restore that of the trial court with a direction that parties shall bear their own costs throughout.

9. Rama Devi has been found to be the widow of Chander Mohan and Rabindra Mohan is the son. The evidence shows that both of them had been living in this house. We think it appropriate that Rama Devi should be allowed to live during her lifetime in this house without title to the property. If the residential portion for Rama Devi is not amicably carved out within six months from today, it will be open to her to apply to the learned trial Judge to carve out a reasonable portion of the house for her living during her lifetime without right of alienation in any manner.

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