SUPREME COURT OF INDIA

Roshan Singh

Vs.

Zile Singh

C.A.No.2185 of 1987

(A. P. Sen and B. C. Ray, JJ.)

24.02.1988

JUDGEMENT

SEN, J.:-

1. This appeal by special leave by the defendants arises in a suit for a dcclaration and injunction brought by the plaintiffs and in the alternative for partition. They sought a declaration that they were the owners in possession of the portions of the property delineated by letters B2, B3, B4 and B5 in the plaint map which had been allotted to them in partition, and in the alternative claimed partition and separate possession of their shares. The real tussel between the parties is to gain control over the plot in question marked B2 in the plaint map, known as Buiyanwala gher. Admittedly, it was not part of the ancestral property but formed part of the village abadi, of which the parties were in unauthorised occupation. The only question is whether the plaintiffs were the owners in possession of the portion marked B2 as delineated in the plaint map. That depends on whether the document Exh. P-12 dated 3rd August, 1955 was an instrument of partition and therefore inadmissible for want of registration under S. 49 of the Indian Registration Act, 1908, or was merely a memorandum of family arrangement arrived at by the parties with a view to equalisation of their shares.

2. The facts giving rise to this appeal are that the plaintiffs who are four brothers are the sons of Soonda. They and the defendants are the descendants of the common ancestor Chhatar Singh who had two sons Jai Ram and Ram Lal. Soonda was the son of Ram Lal and died in 1966. Jai Ram in turn had two sons Puran Singh and Bhagwana. The latter died issueless in 1916-17. Puran Singh also died in the year 1972 and the- defendants are his widow, three sons and two daughters. It is not in dispute that the two branches of the family had joint ancestral properties, both agricultural and residential in Village Nasirpur, Delhi Cantonment. The agricultural land was partitioned between Puran Singh and Soonda in 1955 and the names of the respective parties were duly mutated in the revenue records. This was followed by a partition of their residential properties including the house, gher/ghetwar etc. The factum of partition was embodied in the memorandum of partition Exh. P-12 dated 3rd August, 1955 and bears the thumb impressions and signatures of both Puran Singh and Soonda. In terms of this partition, the ancestral residential house called rihaishi and the open space behind the same shown as portions marked A1 and A2 in the plaint map Exh. PW 25/1, fell to the share of Puran Singh. Apart from this, Puran Singh was also, allotted gher shown as A3 in the plaint map admeasuring 795 square yards. Thus, the total area falling to the share of Puran Singh came to 2417 square yards. The plaintiffs' ancestor Soonda on his part got a smaller house called baithak used by the male members and visitors, marked B1 in the plaint map having an area of 565 square yards. Apart from the house marked B1, Soonda also got ghers marked B2 to B5, demarcated in yellow in the plaint map and thus the total area got by Soonda also came to 2417 square yards.

3. In terms of this partition, the plaintiff's claim that the parties have remained in separate exclusive possession of their respective properties. However. in February, 1971 the plaintiffs wanted to raise construction over the gher marked B2 in the plaint map and started constructing a boundary wall. Defendants Nos. 1-3, sons of Puran Singh, however, demolished the wall as a result of which proceedings under S. 145 of the Code of Criminal Procedure, 1898 were drawn against both the parties about this property. The Sub-Divisional Magistrate, Delhi Cantt., New Delhi by her order dated 26th April, 1972 declared that the second party, namely Puran Singh, father of defendants Nos. 1-3, was in actual possession of the disputed piece of land marked B2 on the date of the passing of the preliminary order and within two months next before such date and accordingly directed delivery of possession thereof to him until evicted in due course of law. On revision, the Additional Sessions Judge, Delhi by order dated 4th March, 1974 agreed with the conclusions arrived at by the learned Sub-Divisional Magistrate. On further revision, a learned single Judge (M.R.A. Ansari, J.) by his order dated 6th August, 1975 affirmed the findings reached by the Courts below on condition that while party No. 2 Puran Singh, would remain in possession of the property in dispute, he would not make any construction thereon. The plaintiffs were accordingly constrained to bring the suit for declaration and injunction and in the alternative, for partition.

4. After an elaborate discussion of the evidence adduced by the parties, the learned single Judge (D. R. Khanna, J.) by his judgment dated April 18, 1980 came to the conclusion, on facts, that the plaintiffs were the owners in possession of the property marked as B1, a smaller house known as baithak, and the disputed plot B2, and the properties marked as Al, the ancestral residential house called rihaishi and A2, the open space behind the same, belonged to the defendants. Taking an overall view of the evidence of the parties in the light of the circumstances, the learned single Judge came to the conclusion that the gher marked B2 belonged to the plaintiffs and it had fallen to their share in the partition of 1955 and later confirmed in the settlement dated 31st January, 1971. In

coming to that conclusion, he observed :

"I have little hesitation that the portions marked A-1 and A-2 and B-1 and B-2 were ancestral residential houses or Ghers of the parties and Soonda and Puran had equal share in them. The residential house shown as A-1 and the open space behind that marked as A2 were admittedly given to Puran in the partition of 1955. Similarly B-1 was allotted to Soonda. I am unable to hold that B-2 was also-allotted to Puran. This would have been wholly unequitable and could not have by any stretch reflected the equal division of these joint properties. Puran in that case apart from getting the residential house for which he paid Rs. 3,000/- to Soonda would have also got area far in excess if defendants' case that Gher B-2 also belongs to them is accepted. In any natural and equitable division of the properties, that allotment of the residential house marked 'A' and the open space behind the same to Puran, Baithak B-1 and Gher No. 1 could have naturally been given to Soonda. That it was actually done so, gets clarified in the document Ex. P1 dated 31-1-1971 which was written in the presence of a number of villagers between Puran and Soonda."

The learned Judge went on to say that the document Exh. P-12 was executed by Puran Singh and Soonda in the presence of the villagers who attested the same, and there was some sanctity attached to it. What is rather significant is that Puran Singh was required to pay Rs. 3,000 as owelty money for equalisation of shares.

5. Aggrieved, the defendants preferred an appeal under Cl. 10 of the Letters Patent, A Division Bench of the High Court (D. K. Kapur, C.J. and N. N. Goswamy, J.) by its judgment dated 4th August, 1986 affirmed the reasoning and conclusion arrived at by the learned single Judge and accordingly dismissed the appeal. Both the learned single Judge as well as the Division Bench have construed the document Exh. P-12 to be a memorandum of family arrangement and not an instrument of partition requiring registration and therefore admissible in evidence under the proviso to S. 49 of the Act, and have referred to certain decisions of this Court in support of that conclusion.

6. In support of the appeal, Shri S. N. Kacker, learned counsel for the appellants has mainly contended that the document Exh. P-12 is an instrument of partition and therefore required registration under S. 17 of the Act. It is urged that the High Court has on a misconstruction of the terms wrongly construed it to be a memorandum of family arrangement and admissible for the collateral purpose of showing nature of possession under the proviso to S. 49 of the Act. In substance, the submission is that the document does not contain any recital of a prior, completed partition but on its terms embodies a decision which is to be the sole repository of the right and title of the parties i.e. according to which partition by metes and bounds had to be effected. We regret, we find it rather difficult to accept the contention.

7. In order to deal with the point involved, it is necessary to reproduce the terms of the document Exh. P-12 which read :

"Today after discussion it has been mutually agreed and decided that house rihaishi (residential) and the area towards its west which is lying open i.e. the area on the back of rihaishi (residential) house has come to the share of Chaudhary Pooran Singh Jaildar.

2. House Baithak has come to the share of Chaudhary Soonda. The shortage in area as compared to the house rihaishi and the open area referred to will be made good to Chaudhary Soonda from the field and gitwar in the eastern side.

3. Rest of the area of the field and gitwar will be half and half of each of co-sharers. The area towards west will be given to Chaudhary Pooran Singh and towards east will be given to Chaudhary Soonda.

4. Since house rihaishi has come to the share of Chaudhary Pooran Singh therefore he will pay Rs. 3000/- to Chaudhary Soonda.

5. A copy of this agreement has been given to each of the co-sharers.

D/- 3-8-1955

Sd/- in Hindi LTI

Pooran Singh Zaildar Ch. Soonda' '

8. According to the plain terms of the document Exh. P-12, it is obvious that it was not an instrument of partition but merely a memorandum recording the decision arrived at between the parties as to the manner in which the partition was to be effected. The opening words of the document Exh. P-12 are : 'Today after discussion it has been mutually agreed and decided that...' . What follows is a list of properties allotted to the respective parties. From these words, it is quite obvious that the document Exh. P-12 contains the recital of past events and does not itself embody the expression of will necessary to effect the change in the legal relation contemplated. So also the Panch Faisla Exh. P-1 which confirmed the arrangement so arrived at, opens with the words 'Today on 31-1-1971 the following persons assembled to effect a mutual compromise between Chaudhary Puran Singh and Chaudhary Zile Singh and unanimously decided that....' . The purport and effect of the decision so arrived at is given thereafter. One of the terms agreed upon was that the gher marked B2 would remain in the share of Zile Singh, representing the plaintiffs.

9. It is well-settled that while an instrument of partition which operates or is intended to operate as a declared volition constituting or severing ownership and causes a change of legal relation to the property divided amongst the parties to it, requires registration under S. 17(1)(b) of the Act, a writing which merely recites that there has intime pastbeen a partition, is not a declaration of will, but a mere statement of fact, and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does, not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow : (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, S. 49 of the Act will prevent its being admitted in evidence. Secondly evidence of the factum of partition will not be admissible by reason of S. 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered to prove the fact of partition : See Mulla's, Registration Act, 8th Edn., pp. 54-57.

10. The tests for determining whether a document is an instrument of partition or a mere list of properties, have been laid down in a long catena of decisions of the Privy Council, this Court and the High Courts. The question was dealt with by Vivian Bose, J. in Narayan Sakharam Patil v. Co-operative Central Bank, Malkapur, ILR (1938) Nag 604 : (AIR 1938 Nag 434). Speaking for himself and Sir Gilbert Stone, C.J. the learned Judge relied upon the decisions of the Privy Council in Bageshwari Charan Singh v. Jagarnath Kuari, (1932) 59 Ind App 130: (AIR 1932 PC 55) and Subramanian v. Lutchman, (1923) 50 Ind App 77 : (AIR 1923 PC 50) and expressed as follows :

"It can be accepted at once that mere lists of property do not form an instrument of partition and so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to 'create, declare, assign, limit or extinguish.....any right, title or interest' in the property which is admittedly over Rs. 100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated."

Sir Gilbert Stone, CJ speaking for himself and Vivian Bose, J. in Ganpat Gangaji Patil v. Namdeo Bhagwanji Patil, ILR (1942) Nag 73 : (AIR 1941 Nag 209) reiterated the same principle. See also : other cases in Mulla's Registration Act at pp. 56-57.

11. Even otherwise, the document Exh. P 12 can be looked into under the proviso to S. 49 which

allows documents which would otherwise be excluded, to be used as evidence of 'any collateral transaction not required to be effected by a registered instrument' . In Varada Pillai v. Jeevarathnammal, (1919) 46 Ind App 285 : (AIR 1919 PC 44) the Judicial Committee of the Privy Council allowed an unregistered deed of gift which required registration, to be used not to prove a gift 'because no legal title passed' but to prove that the donee thereafter held in her own right. We find no reason why the same rule should not be made applicable to a case like the present.

12. Partition, unlike the sale or transfer which consists in its essence of a single act, is a continuing state of facts. It does not require any formality, and therefore, if parties actually divide their estate and agree to hold in severalty, there is an end of the matter.

13. On its true construction, the document Exh.P-12 as well as the subsequent confirmatory panch faisla Exh.P-1 merely contains the recitals of a past event, namely, a decision arrived at between the parties as to the manner in which the parties would enjoy the distinct items of joint family property in severalty. What follows in Exh.P-12 is a mere list of properties allotted at a partition and it cannot be construed to be an instrument of partition and therefore did not require registration under S. 17(1)(b) of the Act. That apart, the document could always be looked into for the collateral purpose of proving the nature and character of possession of each item of property allotted to the members.

14. The matter can be viewed from another angle. The. true and intrinsic character of the memorandum Exh.P-12 as later confirmed by the panch faisla Exh.P-1 was to record the settlement of family arrangement. The parties set up competing claims to the properties and there was an adjustment of the rights of the parties. By such an arrangement, it was intended to set at rest competing claims amongst various members of the family to secure peace and amity. The compromise was on the footing that there was an antecedent title of the parties to the properties and the settlement acknowledged and defined title of each of the parties. The principle governing this was laid down by the Judicial Committee in Khunni Lal v. Gobind Krishna Narain, (1911) 38 Ind App 87. Ameer Ali, J. delivering the judgment of the Privy Council quoted with approval the following passage from the judgment in Lalla Oudh Beharee Lall v. Ranee Mewa Koonwer (1868) 3 Agra HCR 82 at p. 84 :

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement.' '

15. This view was adopted by the Privy Council in subsequent decisions and the High Courts in

India. To the same effect is the decision of this Court in Sahu Madho Das v. Mukand Ram, (1955) 2 SCR 22 : (AIR 1955 SC 481). The true principle that emerges can be stated thus : If the arrangement of, compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to the others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, there is no question of one deriving title from the other, and therefore, the arrangement does not fall within the mischief of S. 17 read with S. 49 of the Registration Act as no interest in property is created or declared by the document for the first time. As pointed out by this Court in Sahu Madho Das' case, it is assumed that the title had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

16. In the present case, admittedly, there was a partition by metes and bounds of the agricultural lands effected in the year 1955 and the shares allotted to the two branches were separately mutated in the revenue records. There was thus a disruption of joint status. All that remained was the partition of the ancestral residential house called rihaishi, the smaller house called baithak and ghers/ghetwars. The document Exh.P-12 does not effect a partition but merely records the nature of the arrangement arrived at as regards the division of the remaining property. A mere agreement to divide does not require registration. But if the writing itself effects a division, it must be registered. See : Rajangam Ayyar v. Rajangam Ayyar, (1923) 69 Ind Cas 123 : (AIR 1922 PC 266) and Nani Bai v. Gita Bai, AIR 1958 SC 706. It is well-settled that the document though unregistered can however be looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family as co-tenants. The document Exh.P-12 can be used for the limited and collateral purpose of showing that the subsequent division of the properties allotted was in pursuance of the original intention to divide. In any view, the document Exh.P-12 was a mere list of properties allotted to the shares of the parties.

17. In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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