SUPREME COURT OF INDIA

Hardeo Rai

Vs

Sakuntala Devi

Appeal (civil) 3040 of 2008 (Arising out of SLP (C) No. 2569 of 2007)

(S.B. Sinha and V.S. Sirpurkar)

29/04/2008

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Appellant is aggrieved by and dissatisfied with a judgment and order dated 16th November, 2006 passed by a Division Bench of the Patna High Court in LPA No.1334 of 1997 whereby and whereunder a judgment and order dated 15th September, 1997 passed by a learned Single Judge of the said Court was set aside.

3. Appellant and the father of respondents herein had entered into an agreement to sell a property admeasuring 18 kathas and 5 dhurs of land situate in the District of Begusarai on or about 10th April, 1978. In the said agreement a representation was made by the appellant herein that a partition of the joint family property had taken place and each of four co-sharers had been in possession of separate portions of the property allotted to them.

4. Father of the respondents had paid a sum of Rs.16, 000/- out of the total consideration of Rs.25, 000/-. They were put in possession of 16 kathas and 5 dhurs of land. The balance amount of Rs.9, 000/- together with interest of Rs.4, 000/- was to be paid within 4 months from the date of agreement of sale i.e. 10th August, 1978.

5. Admittedly the said agreement was scribed by PW-14, Ram Gulam Pandit;, PW-11, Garib Nath Chaudhary & PW-12, Narayan Singh were witnesses to the said agreement.

6. As despite notice, the appellant failed and/or neglected to execute a sale deed in terms of the said agreement a suit praying for specific performance thereof, which was registered as Title Suit No.79 of 1978, was filed in the Court of the Subordinate Judge, Begusarai.

7. In his written statement, the appellant raised two defences :

a) He was forcibly made to sign blank stamped papers whereon the purported agreement of sale was scribed later on.

b) That the said property was a joint family property.

8. Respondents' father in support of his case examined himself as a witness. The scribe of the agreement as also the witnesses were also examined in the said suit.

9. Appellant also examined 7 witnesses to prove his case. DW-2, Geeta Rai, admitted that the appellant had been in possession of the land in dispute. Even appellant in his deposition before the learned trial Judge, although stated in the examination-in-chief that he and his brothers had not been in separate possession of the land, in the cross-examination stated as under :-

"Bhiku Rai is my uncle. He has = share on the south of the said property. My 4 kathas and 19 dhurs is measured with 15 kathas of land on which there is my house. I have = share in that there is no plot of 3 kathas and 6 dhurs. Brajkishore does not have possession over any plot Khasra No.1971 is measuring 1 bigha and 17 dhurs. There is my share as well as share of Bhiku Rai in the south of the said property. There is no plot of 4 kathas. No part in possession of Brajkishsore Rai. I have possession over the land over which there is brick kiln Khasra No.2526 is as measuring 17 kathas. My share is from the east."

10. Appellant, however, failed to explain the stipulation contained in the said agreement that a partition of the joint family property had already taken place. Brothers of the appellant were not examined to prove joint possession. Existence of the coparcenary had not been established. The learned trial court keeping in view the nature of the evidences brought on record, decreed the suit, dis-believing the defence of the appellant that the said agreement was an outcome of a forcible execution. It, however, did not enter into the question in regard to jointness of the property.

11. On an appeal having been preferred therefrom, the appellate court allowed the appeal of the appellant by a judgment and decree dated 15th September, 1997 on the sole ground that the suit property was a joint family property.

The first appellate court in its judgment held:-

"11. In his evidence the defendant has explained his alleged admission of private partition in the family in the Mahda in question. According to him his signature and left thumb impression was forcibly, on the point of gun, obtained by the plaintiff on blank papers and later on a forged and fabricated Mahdanama was scribed over those papers.

12. I find that even in the Mahdanama (Ext.1), it stood recited that rent receipt of entire joint family lands were issued only in the name of Ram Autar Rai, the father of the defendant. I further find that DWs 2, 5 and 6 and the defendant himself as DW 7 have supported jointness in the family of the defendant at the time of execution of the alleged Mahdanama and till date. Even after the death of his father in the year 1986. Nothing in their cross-examination has been taken by the plaintiff to discredit their testimony in the regard. The defendants' case that the lands shown is schedule A to the plaint have no separate identification and it stood amalgamated on the spot with other lands belonging to the family is supported by the report (Ext.8) of the Advocate Commissioner (DW-3). In such situation not only jointness of the defendant with his brothers and father was proved, the plaintiff's claim for being put in possession over 16 kathas 5 dhurs, including the brick kiln (schedule B) on 10.4.1978 was also falsified."

12. The first appellate court, however, failed to determine the issue as to whether the signatures of the appellant were forcibly obtained. In fact it did not enter into the said question at all.

13. The Division Bench of the High Court, as noticed hereinbefore, allowed the appeal preferred by

the respondents herein.

14. Mr. Nagendra Rai, learned senior counsel appearing on behalf of the appellant, would submit that keeping in view the specific defence raised by the appellant herein that the property in question was a joint family property, it was obligatory on the part of the trial court as also the Division Bench of the High Court to go into the said question.

15. The Division Bench, Mr. Rai would contend, wrongly proceeded on the basis that the suit of the respondents could be decreed only on the basis of the representation made by the appellant herein.

16. Mr. Gaurav Agrawal, learned counsel appearing on behalf of the

respondents, on the other hand, would submit :-

i) Joint ness of a family must be established having regard to jointness of kitchen and mess, which having not been proved and on the contrary, separate possession of the appellant in the property having been admitted, there is no infirmity in the impugned judgment.

ii) Main defence of the appellant in the suit being that he had not executed the document, and the same having been found to be incorrect by the learned trial court there is no infirmity in the impugned judgment particularly when no finding contrary thereto was arrived at by the first appellate court.

17. There exists a distinction between a Mitakashra Coparcenary property and Joint Family property. A Mitakashra Coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties. A Mitakashra Coparcenary is a creature of law. It is, thus, necessary to determine the status of the appellant and his brothers.

18. We may at the outset notice the characteristics of a Mitakakashra Coparcenary from the decision of this Court whereupon Mr. Rai has placed strong reliance being State Bank of India vs. Ghamandi Ram (Dead) through Gurbax Rai : AIR 1969 SC 1330. Therein this Court was concerned with a notification issued by the Government of Pakistan in terms of Section 45 of the Pakistan (Administration of Evacuee Property) Ordinance, 1949. We may, however, notice the dicta laid down therein:

"7. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I. 1-27). The incidents of co-parcenership under the Mitakshara law 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. A coparcenery under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter."

19. The first appellate court did not arrive at a conclusion that the appellant was a member of a Mitakashra co-parcenary. The source of the property was not disclosed. The manner in which the properties were being possessed by the appellant vis-a-vis, the other co-owners had not been taken into consideration. It was not held that the parties were joint in kitchen or mess. No other documentary or oral evidence was brought on record to show that the parties were in joint possession of the properties.

20. One of the witnesses examined on behalf of the appellant admitted that the appellant had been in separate possession of the suit property. Appellant also in his deposition accepted that he and his other co-sharers were in separate possession of the property.

21. For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a co-parcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants in common". The decision of this Court in State Bank of India (supra), therefore is not applicable to the present case.

22. Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property.

23. We have noticed the representation made by the appellant. If the representation to the respondents' father was incorrect, the appellant should have examined his brothers. He should have shown that such a representation was made under a mistaken belief. He did nothing of that sort.

24. In M.V.S. Manikayala Rao vs. M. Naraisimhaswami and others: AIR 1966 SC 470 this Court stated the law thus:-

"It is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased."

Thus, even a coparcenaries interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession. He acquires a right to sue for partition.

25. It does not appear that in State Bank of India (supra) binding precedent in M.V.S. Manikayala Rao (supra) was noticed.

26. However, in view of the admission made by the appellant himself that the parties had been in separate possession, for the purpose of grant of a decree of specific performance of an agreement, a presumption of partition can be drawn.

27. The learned Single Judge of the High Court, with respect, committed a serious error in so far as it failed to take into consideration the essential ingredients of a Mitakshra Coparcernary.

28. We may also notice that the Patna High Court in Dhanu Pathak vs. Sona Koeri : (1936) XVII Patna Law Times 380 had held thus :-

"It is hardly necessary to add that there would have been no estoppel, if there had been any collusion between the plaintiffs and the defendant, and if it had been established that the former had deliberately misrepresented themselves to be tenure-holders to the knowledge of the latter to defeat the provisions of the Chota Nagpur Tenancy Act."

29. The decision of the Patna High Court in Bageshwari Prasad Duivedi vs. Deopati Kuer and another : AIR 1961 Patna 416 whereupon reliance has been placed by Mr. Rai was rendered on a finding that the family was governed by Mitakashara School of Hindu Law and the parties thereto was joint and in that view of the matter the share of defendant No.2 therein not having been defined, no decree could be passed against him for the execution of the mukarrari patta. In the aforementioned situation it was held that agreement of sale cannot be enforced against the defendant No.1 therein. Such is not the position here.

30. The question which now arises for consideration is as to whether in a situation of this nature the Court shall exercise its discretionary jurisdiction under Section 20 of the Specific Relief Act, 1963.

31. The agreement was entered into in the year 1978. The suit had been decreed on 7th February, 1981. Respondents' father had been put in possession of the property. No suit has been filed by the alleged coparceners of the defendant/appellant so long. There was, therefore, in our opinion, no reason as to why the judgment and decree passed by the learned trial court should be interfered with.

32. For the reasons abovementioned the appeal fails and is dismissed with costs. Counsel's fee assessed at Rs. 10,000/-.