SUPREME COURT OF INDIA

Man Singh (D) By LRs.

Vs.

Ram Kala (D) By LRs.

C.A.No.7179 of 2005

(Aftab Alam and R.M. Lodha JJ.)

09.12.2010

JUDGMENT

R.M.Lodha, J.

1. This appeal, by special leave, is directed against the judgment dated January 7, 2004 passed by the High Court of Punjab and Haryana whereby the second appeal preferred by present respondents 1(i) to (vi) was allowed and the judgment and decree dated December 21, 1981 passed by the Additional District Judge (III), Kurukshetra was set aside and the judgment and decree dated August 31, 1981 passed by Sub-Judge, Ist Class, Kaithal was restored.

2. Soran, resident of Village Bandrana, Tehsil Kaithal, District Kurushetra, Haryana died intestate leaving two wives – Nanhi and Shingari, one son Ram Kala and three daughters Chameli, Panmehswari and Boghri him surviving. Soran's first wife was Pratapi who pre-deceased him. Ram Kala was born out of that wedlock. Chameli, Panmeshwari and Boghri are daughters of Shingari from the loins of Soran. Prior to her marriage with Soran, Shingari was married to Lachhman and a son Man Singh was born from her first marriage.

3. Man Singh (since deceased - now represented by his wife - hereinafter referred to as `the appellant') filed a suit against his mother Shingari on March 6, 1979 in the Court of Sub-Judge, IInd Class, Kaithal. The prayer was for `a decree for declaration to the effect that the plaintiff is owner in possession of the land mentioned in para no. 1(a)(b) of the plaint in place of the defendant' based on the family settlement entered into between him and his mother on January 1, 1978. He averred that on the basis of the family settlement, he was given possession of the land mentioned in para 1 of the plaint and his mother agreed that she would get the revenue entries of the suit land corrected in his favour but those entries have not been corrected. He alleged that his mother was seeking to back out of the family settlement.

4. Shingari filed written statement on March 9, 1979 and admitted appellant's claim in the suit. As there was no contest from Shingari, the Sub-Judge, IInd Class, Kaithal decreed appellant's suit as prayed on that day itself.

5. The appellant, as noted above, was Shingari's son born of her first marriage with Lachhman and he had no claim in the property left by Soran. The claim made by the appellant against his mother was founded on the basis that his mother had acquired 1/5th share in the property after the death of Soran. Having come to know of the decree passed in favour of the appellant, Ram Kala (since deceased - now represented by his legal heirs - hereinafter referred to as the `first respondent') instituted a suit against appellant and Shingari praying therein that the decree dated March 9, 1979 be declared null and void and the appellant be restrained from interfering with the possession of the first respondent in respect of the said land. The first respondent set up the case that the property of Soran has devolved on his heirs according to the Hindu Succession Act, 1956 and Shingari inherited 1/10th share in the property left by his father and she had no right to alienate the suit land in favour of the appellant.

6. The appellant traversed the averments made by the first respondent and set up diverse pleas justifying the decree dated March 9, 1979.

7. On the basis of the pleadings of the parties, the trial court framed as many as nine issues and after recording the evidence, decreed the suit filed by the first respondent on August 31, 1981 and held that the decree dated March 9, 1979 was null and void and not binding on the first respondent.

8. As against the decree passed by the Sub-Judge, Ist Class, Kaithal, the appellant preferred civil first appeal which was heard by Additional District Judge (III), Kurukshetra. The Additional District Judge partly allowed the appeal; modified the decree passed by the Sub-Judge Ist Class, Kaithal on August 31, 1981 by holding that the findings recorded by the trial court on issue nos. 5 and 6 were wrong but maintained that the decree dated March 9, 1979 would not affect the rights of the first respondent.

9. The first respondent challenged the decree passed by the Additional District Judge (III) in the second appeal before the High Court. During the pendency of the second appeal the appellant as well as first respondent died and their legal representatives were brought on record. In the opinion of the High Court, the only substantial question of law for consideration in second appeal was, whether there could be any estoppel against the statute. The High Court while dealing with the said question held as under:

> "Indisputably, Soran died intestate leaving behind his two widows, three daughters and one son. It is also the undisputed position that all the widows of a deceased are entitled to only one share. It is also not disputed that sons, grandsons and great grandsons acquire interest in the joint Hindu family property by birth. In the present case Smt. Shingari, who had given birth to three daughters, from the loins of Soran,

had suffered a collusive decree in civil suit No. 165 of 1979 on 9.3.1979 in favour of Man Singh (defendant No. 1), who was her son from the loins of her earlier husband, and thereby she had alienated one-fifth share from the property which belonged to Soran, Ram Kala being the only male child of Soran, had acquired one-half share in the property of Soran on the very day he was born. Thus, as per Explanation 1 to Section 6 of the Act, Soran was the owner of only one half share in the suit property as the other half belonged to Ram Kala plaintiff. After the death of Soran, only one-half of the suit property could be distributed amongst his legal heirs. According to the undisputed position of law, Ram Kala, Chameli, Panmeswari and Buggari were entitled to one-fifth share each out of the one-half share of Soran Deceased. The rest of one-fifth share out of the one-half share of Soran is to be divided between the two widows, namely, Nanhi and Shingari, thus, both Nanhi and Shingari were jointly entitled to one-tenth share of the total suit property and each one of them was entitled to only one-twentieth share, after the death of Nanhi, the property left behind by her was to be divided among the remaining legal heirs, i.e. Smt. Shingari, Ram Kala, Chameli, Panmeswari and Buggari. Thus, Smt. Shingari was entitled to only 1/20th Share + 1/100th share out of the total suit property. On the other hand, Ram Kala was entitled to one half + 1/10th + 1/100th share out of the total suit property. As Smt. Shingari had alienated one-fifth share in favour of her son Man Singh out of the total suit property, which is much beyond her share in the suit property, the impugned decree dated 9.3.1979 (Ex. P6) is null and void and is not binding on the rights of the plaintiff (Ram Kala). It is well-settled that there can be no estoppel against the statute. In case, the plaintiff was not aware of his right in the suit property at the time of filing of the suit in the trial Court, it does not mean that his share is to be usurped by Smt. Shingari and her son Man Singh (defendants)."

10. It is pertinent to notice here that insofar as the decree dated March 9, 1979 is concerned, all the three courts have concurrently held that the said decree was not binding on the first respondent, although reasons recorded for that conclusion were different. The trial court recorded the following reasons in this regard:

> "With regard to issue no. 5 and 6, it is observed that it has been found in issues no. 2 and 3 above that Smt. Shingari inherited 1/ 20th share of the property of Soran deceased on his death and she further inherited 1/100th share (1/5th share of 1/20th share) on the death of Nanhi. Thus the total share of Smt. Shingari is less than 1/ 5th which she alienated in favour of defendant no. 1 Man Singh through impugned decree passed in Civil Suit No. 165/79. Consequently, the decree is liable to be set aside and the plaintiff is entitled to the relief claimed by him."

11. The first appellate court did not agree with the trial court's finding as regards Shingari's share in the properties left by Soran and held as under:

> "The learned counsel for the appellant has then contended that the findings of the learned Trial Court on Issue No. 5 and 6 are also liable to be reversed. There is

considerable force in the argument of the learned counsel. The learned Trial Court set aside the decree passed is Civil Suit No. 165/1979 on the ground that the share of Smt. Shingari defendant no. 2 was less than 1/5th and that she having admitted the claim of Man Singh defendant no. 1 to the extent of 1/5th share, the entire decree was liable to be set aside. However, in view of my findings on Issue No. 1 that the plaintiff was entitled to 1/5th share on the death of Soran and that he further inherited 1/50th on the death of Smt. Nanhi, the entire decree passed in Civil Suit No. 165/1979 could not be set aside by the learned trial court. The plaintiff is only entitled to get the relief to the extent that the decree passed in the said suit, effecting his right in the suit property, would not binding on him. This would mean that the said decree to the extent of 1/50th share (which the plaintiff was entitled to inherit on the death of Nanhi) would not be binding on the plaintiff. It has been held in AIR 1941 Lahore 402 D.B. that the party challenging the collusion decree can get it declared as void, so far as his interest are concerned. Accordingly, I hold that the entire decree passed in Civil Suit No. 165/1979 could not be set aside and that the only relief of which the plaintiff is entitled to is that the said decree could not effect his share 1/5th and 1/50th share in the suit property. According, the finding of the learned trial court on issue No. 5 and 6 are set aside and the said issue are accordingly decided and it is held that the decree passed in Civil Suit 165/79 shall not effect the rights of the plaintiff, to the extent of his share, as held above, and the plaintiff is entitled to the relief to that extent."

12. We have already noticed the view of the High Court above. In our opinion, the conclusion arrived at by the three courts that the decree dated March 9, 1979 was not binding on the first respondent is right and proper and calls for no interference. However, we maintain the conclusion not for the reasons given by the High Court or the two courts below but for the reasons which we indicate hereinafter. Pertinently, in the earlier suit filed by the appellant against his mother in which the decree dated March 9, 1979 was passed, it was not even the case of the appellant or his mother Shingari that shares among heirs of Soran were determined by agreement or otherwise. Till disruption of joint family status takes place, neither coparcener nor the other heirs entitled to share in the joint family property can claim with certainty the exact share in that property. In the case of *Appovier Alias Seetaramier v. Rama Subba Aiyan & Ors.*[1], Lord Westbury speaking for the Judicial Committee (Privy Council) observed, `According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.'

13. In *A. Raghavamma and Anr. v. A. Chenchamma and Anr.*[2], this Court reiterated the legal position that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty. While dealing with the question whether a member of a joint Hindu family becomes separated from the other members of the family by mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge of the other members of the family, after noticing the Hindu Law texts and series

of decisions by the Privy Council, it was held that a member of joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate, even though no actual division takes place. This Court in paragraph 32 of the report held as under:

> "32. It is, therefore, clear that Hindu law texts suggested and Courts evolved, by a process of reasoning as well as by a pragmatic approach that, such a declaration to be effective should reach the person or persons affected by one process or other appropriate to a given situation."

14. In *Kalyani (Dead) By LRs. v. Narayanan and Ors.*[3], this Court explained the concept of partition in Mitakshara Hindu Law in paragraph 10 as under:

> "Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property."
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> In paragraph 20 of the report, this Court stated thus:
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> "Till disruption of joint family status takes place no coparcener can claim what is his exact share in coparcenary property. It is liable to increase and decrease depending upon the addition to the number or departure of a male member and inheritance by survivorship. But once a disruption of joint family status takes place, coparceners cease to hold the property as joint tenants but they hold as tenants-in-common."

15. In Principles of Hindu Law by Mulla; Vol. I (17 th Edition) as regards the right of wife, it is stated that a wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (Article 315 at Page 506).

16. Section 6 of the Hindu Succession Act, 1956 (for short, `1956 Act') provides for devolution of interest in coparcenary property. Prior to Hindu Succession (Amendment) Act, 2005, Section 6 read as follows:

"S. 6. Devolution of interest in coparcenary property.-- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left surviving him a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Mitakshara Coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.--For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.--Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

17. Section 9 of the 1956 Act provides for order of succession among heirs in the Schedule. It reads as under:

"S. 9. Order of succession among heirs in the Schedule.--Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession."

18. Widow, sons and daughters are Class I heirs and in terms of Section 9, the succession among heirs in Class I takes simultaneously and to the exclusion of all other heirs. Mr. Neeraj Jain, learned senior counsel for the appellant strenuously urged that in view of proviso to Section 6, which is attracted in the present case as the normal rule provided for by that Section does not apply and the fact that Soran left behind him two wives, one son and three daughters at the time of his death and one of the surviving wives had also died, Shingari's share in the property would be at least 1/5th and, therefore, High Court was clearly in error in holding that Shingari alienated much beyond her share to the appellant. In this regard, learned senior counsel relied upon, (i) *Gurupad Khandappa Magdum vs. Hirabai Khandappa Magdum and others*[4] and (ii) *Smt. Raj Rani vs. Chief Settlement Commissioner, Delhi and others*[5]. We are afraid, in the absence of any pleading or evidence in the suit filed by the appellant that shares among heirs of Soran were determined by agreement or otherwise, the share of Shingari was not identified and, thus, she could not have alienated

1/5th share in the property to the appellant. In any case, determination of the shares in the absence of the three daughters of Soran, who were also Class I heirs in Schedule appended to the 1956 Act could not have been done. All the three courts fell in grave error in determining the shares of Shingari and the first respondent even though the three daughters were not party in the suit. The whole exercise by the three courts in this regard was unnecessary, uncalled for and in violation of principles of natural justice.

19. For the foregoing reasons, we confirm the judgment of the High Court to the extent it has been held therein that the decree dated March 9, 1979 is not binding on the first respondent. However, the determination of shares among the heirs of Soran by the High Court cannot be sustained and we set aside the same. The appeal is disposed of accordingly. It will be open to the heirs of Soran to prosecute appropriate remedy for determination of their respective shares and claim partition in accordance with law, if so advised. The parties shall bear their own costs.

[1]*(1866) 11 MIA 75*
[2] *AIR 1964 SC 136*
[3]*1980 (Supp) SCC 298*
[4]*(1978) 3SCC 383*
[5]*(1984) 3 SCC 619*