

ALLAHABAD HIGH COURT

Punwasi

Vs.

Sukha Devi

F.A.F.O. No.682 of 1984

(B.D. Agrawal, J.)

10.09.1985

JUDGEMENT

B.D. Agrawal, J.

1. The question raised in this appeal under Order 43, Rule 1(u) Civil Procedure Code directed against the order of the Additional District Judge, Varanasi, dated May 29, 1984, is short, but of some importance.

2. The respondent No.1 (Smt. Sukha Devi) instituted Original Suit No. 63 of 1980 in the Court of Munsif City, Varanasi, for partition in respect of a dwelling house, situate in a mohalla of that city. The house, it is alleged, belonged to Shiva Bhikh, who died leaving his son Bhagelu. The death of Bhagelu took place on Aug. 5, 1979. He left behind two sons, namely, Punwasi (the appellant), the respondent No. 2 (Banarasi) and one daughter, namely, Smt. Sukha Devi (plaintiff-respondent No.1). The share claimed by the plaintiff in the house is one third. The averment in the plaint also is that she gave notice to the defendants on Nov. 22, 1979, but they did not divide the house and hence the action for partition. The defendants, arrayed to the suit, were the present appellant and the respondent No.2. The appellant resisted the suit on ground, inter alia, that this was not maintainable at the instance of the plaintiff-respondent No. 1. The respondent No. 2 defendant filed a separate written statement wherein he said that the house is too small to admit of a division by metes and bounds, but that in case it is partitioned his one third share be also separated.

3. The question arose before the trial Court whether the suit at the instance of the respondent No. 1 plaintiff lay in view of the bar created under Section 23

Hindu Succession Act, 1956. This was taken up as preliminary issue and decided against her. In the appeal filed by the respondent No. 1, the decision reached by the trial Court was reversed and the case remanded to the trial Court to proceed on merit in respect of the other issues. Aggrieved the defendant No. 1 has preferred this appeal.

4. Section 23 Hindu Succession Act, 1956, provides as under : -

Section 23. Special provision respecting dwelling house :-

Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein.

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

5. This section makes a special provision respecting dwelling houses when they devolve in accordance with the provisions of the Act. The section applies whether or not the dwelling house is the only property left by the deceased. There is no dispute that both the sons of Bhagelu deceased and the daughter, who is the respondent No. 1, are heirs specified in Class I of the Schedule to the Act. It is also not in controversy that the house in dispute is a dwelling house wholly in the occupation of the brothers of the plaintiff-respondent. Section 23 does not mean that a right to demand partition of a dwelling house does not exist, it would only mean that such a right will not be exercisable so long as the male heirs do not choose to exercise right of partition. This provision appears to have been made to prevent disintegration of a family house and to perpetuate to certain extent the ascendancy of male heirs. Mulla : Hindu Law (Fifteenth Edition) 1982 at page 1031 observes that an objection raised against the right of a female to be recognised as an unqualified heir and to equal distribution of the property of a Hindu dying intestate used to be that in many cases the property might consist substantially of the family dwelling house and the allotment of a

share to a daughter and particularly a married daughter in such a case would be fraught with serious consequences to the sons of the intestate. The note of the Joint Committee said that this section restricts the right of a female heir to claim partition of a dwelling house so long as the male heirs do not choose to effect partition of the same, but it expressly recognized her right to reside in such house. The right of a female heir covered in the Class I of the Schedule to demand actual partition of the family dwelling house is deferred and kept in abeyance until the male heirs specified in Class I decide to divide it by metes and bounds or realize its sale proceeds. The contention raised for the appellant before me by the learned counsel is. that the right to seek partition did not arise to the respondent No. 1 plaintiff because the male heirs did not at any stage agree to partition their respective shares in the house.

6. Conflict exists on the interpretation of the words "until the male issues choose to divide their respective shares therein." The view taken by the Calcutta and the Madras High Courts is that this bar is attracted even where there is only one male heir. In *Arun Kumar Sanyal v. Jnanendra Nath Sanyal*,¹ it was held by a Division Bench that Section 13(2) General Clauses Act, 1897 wherein it is mentioned that "words in the singular shall include the plural and vice versa", could not be made applicable for the purpose of construing the words "male heirs" as used in Section 23 of the Act as to include "a single male heir". The reasons assigned by the Calcutta High Court are :-

" Prima facie it does not appear that there is anything repugnant in the subject or context to the applicability of Section 13(2). But, a further difficulty has been created by the word "respective" which apparently stands in the way of the applicability of Section 13(2). Even if the words "male heir", also include a singular, that is, male heir, no effect can be given to it in the presence of the word "respective." It is beyond the purview of the Court to omit the said word from the section for the purpose of giving effect to the provision of Section 13(2). If Section 13(2) could be applied, there would not have been any difficulty. But, as it is inapplicable it is necessary to ascertain the intention of the legislature."

7. This was followed by another Division Bench of the Calcutta High Court in *Surjyya Kumar Das v. Maya Dutta*,²

8. This is also the view taken by the Division Bench of Madras High Court in *Janabai Ammal v. T. A. Spalani Mudaliar*,³ The Orissa High Court has taken the contrary view in *Hemalata Devi v. Umasankan Maharane*,⁴ which is to the effect that where there is a single male heir, the right to claim partition of the dwelling house by a female heir is not excluded. If there are more than one male heir then there is a possibility of any one of such heirs asking for a partition of the dwelling house and the female heir in such a case can claim partition. But where there is a single male heir, there is no possibility of that male heir claiming any partition against another male heir. The unhappy expression appearing in Section 23 is also taken note of by the commentators. In Mulla : Hindu Law, (Fifteenth Edition) page 1034 we find it said:-

"The words until the male heirs choose to divide their respective shares therein may suggest that there must be at least two such male heirs if the restriction is to operate. The object of the special provision is to prevent female heirs and particularly a daughter of the intestate from creating a situation in which partition of the family house may entail a forced sale of it or otherwise cause hardship to the son or sons of the intestate where it may not be possible for the son or sons to buy off the share of the female heir who insists on actual partition of it. It is submitted that there is nothing repugnant in the subject or context to prevent the operation of the rule laid down in Section 13(2) of the General Clauses Act to the effect that the plural shall include the singular and the restriction will apply even where there is only one male heir who does not choose to divide his respective share in the dwelling house. It would seem that the right of a female heir to demand partition may be deferred and remain in abeyance under this section till the lifetime of the male heirs enumerated in class I of the Schedule or the last survivor of them unless a partition of the dwelling house is sought by any one of them before such time. The restriction will cease to operate on the death of the last of such male heirs of the intestate."

9. S. V. Gupte Hindu Law (Vol. I) 1981 (Third Edition) at page 543 is of different opinion as appearing from the following :-

What is to happen if there is only one male heir or when, among the many, only one male heir chooses to divide his share in the property? It has been held that if there is only one male heir in the family the right of any female to claim partition is not taken away by this section. The Calcutta High Court has taken a contrary view. Madras High Court has also now taken the same view. The use of the word "respective" is open to grave objection. The intention appears to be that no female heir shall claim partition of the house until all the male heirs come to a division of the property by metes and bounds. It also appears that if there is only one male heir, the female heirs cannot claim partition of the dwelling house during his lifetime unless he voluntarily agrees to partition the same between himself and the female heirs. It is also submitted that the object of preventing disintegration of the joint residence in a family house at the instance of a female heir who may become an outsider by marriage is not fully achieved as the son of a predeceased daughter who is a Class I heir but who would be an outsider to the family of the deceased, can claim partition of a dwelling house. But a transferee of a female heir cannot claim a right of partition under this section, though her right to transfer her share is not taken away by this section.

10. In the instant case the Court is not called upon to decide this issue the reason being that the male heirs left by Bhagelu are two and not one. It was felt necessary to refer to the conflict of judicial opinion above since it was urged for the respondent No. 1 that in view of the claim made by Banarasi (respondent No. 2) for partition of his share, this be taken to be a case where there is only one male heir in the picture. It is not possible to accede to this proposition'. There can be no denial that when Bhagelu died on 5th Aug. 1979 and the succession opened, there were two male heirs of Class I of the Schedule and both of them survive till date. Respondent No. 1 is married and it is not her case that she has been deserted or has separated from her husband or is a widow.

11. In Section 23 the emphasis is upon the right to arise. The substance of the provision is that the right does not arise until the male heirs choose to divide their respective shares in the dwelling house. The accrual of the right to seek partition has to precede the filing of the suit. The cause of action is founded upon the right to seek the relief. The cause of action is non-existent until the

right has arisen. In *Katara v. Smt. Hoshiyari*,⁵ a learned single Judge of this Court has taken the view that the expression "choose to divide" in Section 23 must be interpreted to mean actual exercising their choice of getting dwelling house divided. Even if there be the intention on their part to seek partition, the requirement is not fulfilled unless there is evidence before the Court that they had partitioned the house between themselves or any one of them had instituted any suit to get the dwelling house partitioned, that is the condition precedent. (See also *Putti Ram v. Kota* :).⁶ In the present case, according to the respondent No. 1, herself she had given notice to both the defendants prior to the institution of the suit and she alleges that both of them including Banarasi declined to have the division made. This means clearly that before the institution of the suit aforementioned the male heirs had not chosen to divide this house.

12. Assuming that the Court could take notice of a subsequent readiness on the part of one of the male heirs to divide the house and accepting further for the sake of argument that the bar is removed where one of the male heirs accedes to partition, it cannot be overlooked that in the written statement filed by him. Banarasi did not seek partition unequivocally. He pleaded on the other hand that the house is too small to, admit of actual division but in case the decision is made meaning thereby that in the event of the Court accepting the claim of the plaintiff for partition, his share be divided as well. In a partition suit it is open, no doubt, to a defendant to seek a division of his share on payment of the required court fee, but what is material for the purposes of Section 23 and the argument raised for the respondent No. 1 is that even at the stage of filing the written statement the defendant No. 2 Banarasi had not chosen in unambiguous terms for a division of the house and certainly there was no such choice exercised by the two male heirs to divide their respective shares.

13. For the above the conclusion is inevitable that the suit at the instance of the respondent No. 1 did not lie at this stage.

14. The appeal, for these reasons succeeds and is allowed. Judgment and decree passed by the lower appellate court are set aside and that of the trial court restored. Costs on parties.

Appeal allowed.

Cases Referred.

1. AIR 1975 Cal 232
2. AIR 1982 Cal 222
3. AIR 1981 Mad 62
4. AIR 1975 Ori 208
5. 1967 All LJ 1031
6. AIR 1985 Ori 70