

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 31st July, 2013

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RFA 56/2011

KAVITA & ANR.

..... Appellants

Through: Mr. Tarun Gupta, Adv.

versus

SAMUNDER SINGH & ORS.

..... Respondents

Through: Ms. Geeta Mehrotra, Adv. for
R-1 to 6.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 31st August, 2010 of the Addl. District Judge, Central-14, Delhi of dismissal of suit No.483/2009 filed by the appellants for partition of residential property situated in Village Malikpur, Post Office Ujwa, Tehsil Najafgarh, Delhi and agricultural land measuring 16 kila vide Khata Khatoni No.35/33, village Malikpur Zere, Tehsil Najafgarh, Delhi.

2. Notice of the appeal was issued and the appeal admitted for hearing. The counsel for the respondents gave a statement as recorded in the order dated 25th November, 2011, not to sell or alienate the suit property without

permission of this Court. Though the parties were referred to mediation but the same remained unsuccessful. On application of the appellants/plaintiffs, the hearing of the appeal was expedited. The counsels have been heard.

3. The appellant no.1 instituted the suit from which this appeal arises on behalf of herself and her minor daughter appellant no.2 pleading:-

- (a). that the respondent / defendant no.1 was the *Karta* of his family comprising of three sons i.e. the respondents /defendants no.2&3 and the deceased husband and father respectively of the appellants/plaintiffs and three daughters impleaded as respondents / defendants no.4 to 6;
- (b). that the appellant no.1 was married to the son of the respondent / defendant no.1 on 26th February, 2001 and from this marriage appellant no.2 was born on 4th August, 2002;
- (c). that the family of which the respondent / defendant no.1 is the *Karta* owns residential house situated in Village Malikpur and land measuring 16 kila (41.18 bighas) also in Village Malikpur Zere, Tehsil Najafgarh;

- (d). that the husband/father of the appellants/plaintiffs died on 26th May, 2002 and the respondents / defendants threw out the appellants/plaintiffs out of the house in September, 2002;
- (e). that the appellants/plaintiffs first filed a suit for declaration and permanent injunction but during the pendency whereof a settlement was arrived at and the appellants/plaintiffs were permitted to occupy one room in the residential house and the respondents/defendants also agreed to take care of the other needs of the appellants/plaintiffs;
- (f). however the respondents/defendants created obstructions in the peaceful existence of the appellants/plaintiffs in the said house, leading the appellants/plaintiffs to institute the suit claiming their share in the property; and,
- (g). according to the appellants/plaintiffs they together have a 1/4th share in the said properties of the family.

4. The respondents/defendants filed a written statement contesting the suit on the grounds:-

- (i). that the Civil Court has no jurisdiction to entertain the suit for partition of agricultural land in view of provision of Section 185 of the Delhi Land Reforms Act, 1954 and partition of agricultural land could be sought only by a *bhumidhar* and before a Revenue Court; the appellants/plaintiffs were not a *bhumidhar*;
- (ii). that the suit was barred by Order 2 Rule 2 of the CPC owing to the earlier suit for declaration and injunction filed by the appellants/plaintiffs;
- (iii). that the appellant no.1 was keeping the room given to her in pursuance to the settlement arrived at in the earlier suit locked and staying away from the house;
- (iv). that the respondent / defendant no.1 was not acting as *Karta* of any Hindu Undivided Family and was carrying on agricultural activities and his sons respondents / defendants no.2&3 were carrying on their separate business and/or were employed;

- (v). that the deceased husband/father of the appellants/plaintiffs was not having any joint family with his father and had no right to any of the properties of the respondent / defendant no.1;
- (vi). that Shri Mauzi Ram father of the respondent / defendant no.1 was the *bhumidhar* of agricultural land and owner of the residential house; that the said Shri Mauzi Ram died in November, 1943 leaving, the respondent / defendant no.1 and his brother, who is defendant no.7 in the suit and respondent no.7 in this appeal, as his heirs and the agricultural land and residential house of Shri Mauzi Ram devolved upon the respondents / defendants no.1&7 and was mutated in their names;
- (vii). that the respondents / defendants no.1&7 in the year 1967 orally partitioned the agricultural land and house between themselves and the residential house earlier owned by the deceased Mauzi Ram fell to the share of respondent / defendant no.7 and the respondent / defendant no.1 raised construction of his own

house in the year 1967 and the said house is as such the self acquired property of respondent / defendant no.1;

(viii). that in the year 1967 respondent / defendant no.1 had no child and the question of any of the children of respondent / defendant no.1 having any rights in the property did not arise;

(ix). that though the agricultural land in the revenue records was standing in the joint names of the respondents / defendants no.1&7 but in fact they were cultivating separate portions thereof as per their oral partition;

(x). that at the time of death of Shri Mauzi Ram father of the respondent / defendant no.1, the deceased husband/father of the appellants/plaintiffs was not even born and the question of his having any right or share in the property of Shri Mauzi Ram did not arise;

(xi). that the claim of the appellants/plaintiffs was barred by Section 50 of the Reforms Act; and,

(xii). that the respondent / defendant no.1 without prejudice to his aforesaid contentions was offering to pay Rs.4,50,000/- to the appellant no.2 upon the appellant no.1 withdrawing the suit.

5. The appellants/plaintiffs filed a replication *inter alia* denying that the suit for division of agricultural land was not maintainable before the Civil Court.

6. In the aforesaid state of pleadings the following issues were framed in the suit on 6th May, 2008:-

- “1. *What is the effect of withdrawal of the suit filed by the plaintiff against the defendant for declaration and permanent injunction? OPP*
2. *Whether the plaintiffs are entitled to 1/4th share in residential property situated in Village Malikpur, Post Office Ujawa, Tehsil Najafgarh, Delhi and the agricultural land measuring 16 kile in Khatauni No.35/33, Village Malikpur Zere, Tehsil Najafgarh, Delhi? OPP*
3. *Whether the aforesaid properties were joint family property? If so, its effect? OPD*
4. *Whether defendant No.1 was acting as Karta of Joint Hindu Family? If so, its effect? OPD*
5. *Whether the property has not been correctly defined in the plaint? If so, its effect? OPD*

6. *Whether the suit is hit by the provisions of Order 2 Rule 2 CPC as stated in para 4 of the written statement of deft Nos. 1 to 6? OPD*

7. *Relief.”*

and the parties went to trial.

7. The learned Addl. District Judge has dismissed the suit observing/finding/holding:-

- (i). that the suit was not barred by Order 2 Rule 2 of the CPC and the withdrawal by the appellants/plaintiffs of the earlier suit for declaration and injunction did not bar them from suing for partition;
- (ii). that the burden to prove that the property had not been correctly defined in the plaint was on the respondents/defendants and the respondents/defendants had not led any evidence to the said effect; thus Issue No.5 was accordingly decided against the defendants/respondents;
- (iii). that the appellants/plaintiffs had been unable to establish that there was any element of jointness in the family of the respondent / defendant no.1;

- (iv). that the appellants/plaintiffs had admitted in evidence that agricultural land stood in the name of the respondents / defendants no.1&7 only and an oral partition had been effected between them and they were having their separate holdings;
- (v). that the appellant no.1 had in evidence also admitted that the respondents/defendants were occupying different portions of the house and maintaining separate mess and residing in separate accommodation;
- (vi). it was thus held that the appellants/plaintiffs had failed to establish that the respondent / defendant no.1 was acting as a *Karta* of a Joint Hindu Family and Issue No.4 was decided against the appellants/plaintiffs;
- (vii). that the suit for partition of agricultural land was barred under Section 185 of the Reforms Act and was not maintainable before the Civil Court;
- (ix). that though the respondents/defendants in their written statement had pleaded that the residential house inherited by the respondents / defendants no.1&7 from their father Shri Mauzi

Ram had in the partition of the year 1967 gone to the respondent / defendant no.7 but the respondent / defendant no.1 in his cross examination admitted that the residential house in his occupation earlier belonged to his father Shri Mauzi Ram; and,

- (x). the said residential house was inherited by the respondent / defendant no.1 from his father Shri Mauzi Ram, being a Class-I heir under the Schedule of Section 8 of the Hindu Succession Act, 1956 and thus the children of the respondent / defendant no.1 had no right thereto; the appellants/plaintiffs thus had no right to the residential house also.

8. The respondent No.7 Sh. Jit Ram who is the brother of the respondent no.1 is informed to have remained *ex parte* before the Trial Court. He, though filed a reply to the appeal has failed to appear thereafter and since there is no formal order till now proceeding *ex parte* against him, it is deemed appropriate to now record that he is proceeded against *ex parte*.

9. It was at the commencement of the hearing enquired from the counsel for the appellants / plaintiffs as to why they were not ready to accept the sum

of Rs.4,50,000/- offered by the respondents / defendants No.1 to 6. It was informed that the respondents / defendants have reneged from the said offer and that it is their stand that they had never authorized making of said offer.

10. The partition claimed by the appellants / plaintiffs was of two properties i.e. residential house and agricultural land. The learned Additional District in the impugned judgment has held the suit, insofar as for partition of agricultural land to be not maintainable before the Civil Court owing to the bar of Section 185 of the Reforms Act. However as far as the residential house is concerned, the learned Additional District Judge has held the deceased husband / father of the appellants / plaintiffs to be not having any share therein for the reason of the respondent no.1 having inherited the same from his father Sh. Mauzi Ram under Section 8 of the Succession Act and the same being thus his personal property and his son, being the deceased husband / father of the appellants / plaintiffs and through whom the appellants / plaintiffs are claiming, thus having no share therein.

11. I may at the outset record that though it was the plea of the respondents / defendants No.1 to 6 in their written statement that the residential house was not inherited by the respondent / defendant No.1 from

his father Sh. Mauzi Ram and had been constructed by the respondent / defendant no.1 on his own but respondent / defendant no.1 in his cross examination admitted that the residential house also was inherited by him from his father Sh. Mauzi Ram. The said finding has not been challenged before me.

12. It is the admitted position that Sh. Mauzi Ram, father of the respondent / defendant no.1 died in 1943. The finding of the learned Additional District Judge that the respondent / defendant no.1 inherited the residential house from his father Sh. Mauzi Ram as his Class-I heir under the Succession Act which came into force in the year 1956 is thus obviously incorrect.

13. Prior to the coming into force of the Succession Act in the year 1956, a male Hindu inheriting any property from his ancestors including his father, inherited the same not as his personal individual property but also for the benefit of his own male heirs. Thus when the respondent / defendant No.1 inherited the residential house from his father Sh. Mauzi Ram in the year 1943, he inherited the same with the condition that his own male progeny would also have a share in it by birth. (see para 15 of *Commissioner of*

Wealth Tax Vs. Chander Sen (1986) 3 SCC 567). It was held in ***Eramma Vs. Verrupanna*** AIR 1966 SC 1879 that Section 8 of the Succession Act is not retrospective in operation and when a male Hindu died before the Succession Act came to fore i.e. where succession opened before 1956, Section 8 will have no application.

14. The counsel for the respondents No.1 to 6 also does not controvert the said position. She however contends that since the husband / father of the appellants / plaintiffs was not even born in the year 1943, the question of his having any share in the residential house did not arise.

15. I am unable to accept the aforesaid contention. Once the inheritance by the respondent / defendant no.1 is found to be governed by the principles of Hindu law as in force prior to the coming into force of the Succession Act in the year 1956, it matters not whether the male progeny of the respondent / defendant no.1 was in existence or not at the time when the respondent / defendant no.1 inherited the property. The male progeny of the respondent / defendant no.1 as and when born would have a share in the property inherited by the respondent no.1 from his ancestors prior to the coming into force of the Succession Act. Reference in this regard can be made to ***Sheela***

Devi Vs. Lal Chand (2006) 8 SCC 581 reiterating that property which comes to an inheritor from one of his three immediate paternal ancestors as absolute property owing to absence of sons and grandsons, becomes ancestral property with the birth of any son and as soon as a son is born, the concept of property being a coparcenary property is revived.

16. The counsel for the respondents / defendants has also argued that the husband / father of the appellants / plaintiffs would not have any share since he was not even born till the year 1967 when the properties inherited by the respondents / defendants No.1 and 7 from their father were partitioned between them.

17. In my view, the same would also not change the nature and character of the property. Once the property had been inherited by the respondent /defendant No.1 as ancestral property and in which his own sons would have a share by birth, the partition between the respondent / defendant No.1 and the respondent / defendant No.7 would not make any difference save to the extent that unless the petition is challenged, the sons of the respondent / defendant No.1 would have a share in the portion of the property falling to the share of the respondent / defendant No.1 in the said partition. Reference

in this regard also can be made to *Sheela Devi* supra laying down that sons take an interest by birth, whether they are in existence at the time of partition or are born subsequently and that though a share in ancestral property allotted to coparcener on partition will be his separate property as regards others, it will be ancestral as against the allottees sons.

18. The counsel for the respondents / defendants has invited attention to *Sri Chand Vs. Land Acquisition Collector* 2005 IV AD (Delhi) 401, *Nathu Vs. Hukam Singh* AIR 1983 Delhi 216 (DB), *Smt. Mukesh Vs. Bharat Singh* 149 (2008) DLT 114 & *Gopi Chand Vs. Smt. Bhagwani Devi* MANU/PH/0275/1963 but which are not found to be applicable insofar as the aforesaid aspect is concerned. The counsel for appellants / plaintiffs has rightly relied on *C. Krishna Prasad Vs. CIT Bangalore* (1975) 1 SCC 160 and *Ranganayakamma Vs. K.S. Prakash* 2008 (15) SCC 673.

19. Thus the impugned judgment and decree, insofar as it holds the appellants / plaintiffs to be not having any share in the residential house cannot be sustained and is set aside.

20. At this stage the counsel for the respondents / defendants 1 to 6 states that the respondents / defendants are willing to abide by the offer in the

written statement and on persuasion of Court, have agreed to better the same also. However now, the appellants / plaintiffs are not agreeable.

21. As far as the agricultural land is concerned, the claim of the appellants / plaintiffs for partition thereto has been declined for the reason of the same being not maintainable before the Civil Court owing to the bar contained in the Reforms Act. No fault can be found with the said proposition. The counsel for the appellants has not urged that the said agricultural land is not governed by the Reforms Act. The remedy if any of the appellants / plaintiffs with respect to the said land is thus before the Revenue Courts and not before the Civil Courts.

22. The question still remains as to what is to be the share of the appellants / plaintiffs in the residential house. Though under the old Hindu law, saved by Section 6 of the Succession Act, it was only the male descendants who acquired a share by birth in the ancestral property and as per which the respondent / defendant No.1 and his three sons including the deceased husband / father of the appellants / plaintiffs would have a one-fourth share each in the said ancestral property and on which basis the appellants / plaintiffs appear to have made a claim for one-fourth share but a

change has been effected by the Hindu Succession (Amendment) Act, 2005 with effect from 09.09.2005. By the said change, the distinction between sons and daughters has been removed and thus the three daughters of the respondent / defendant No.1 would also have an equal share in the said ancestral property. Though the husband / father of appellants died in 2002 but the amendment in 2005 has been held to be retrospective in ***Ganduri Koteshwaramma Vs. Chakiri Yanadi*** (2011) 9 SCC 788 and in ***Krishna Gupta Vs. M/s Rajinder Nath & Co. HUF*** 198 (2013) DLT 85. Thus the share of the deceased husband / father of the appellants / plaintiffs and through whom the appellants / plaintiffs claim would be one-seventh, with the respondent / defendant No.1 and his two sons and three daughters having remaining one-seventh share each. Further, the one-seventh share of the husband / father of the appellants / plaintiffs would devolve on the two appellants / plaintiffs and the mother of the deceased i.e. wife of respondent no.1 in equal share. Thus the share of the two appellants / plaintiffs is found to be the two-third out of one-seventh share in the residential house.

23. The counsel for the appellants / plaintiffs has also referred to the Division Bench Judgment of this Court in ***Nirmala Vs. Government of NCT of Delhi*** 170 (2010) DLT 577 (DB) but which is with respect to agricultural

land and qua which as aforesaid, the Civil Courts have no jurisdiction and therefore it is not deemed appropriate to make any observations with respect thereto.

24. The appeal is thus partly allowed. The judgment and decree of the Trial Court, to the extent it holds the appellants / plaintiffs to be not having any share in the residential house is set aside and a preliminary decree for partition of the residential house is passed declaring the appellants / plaintiffs to be having two-third share out of one-seventh share in the residential house and the respondents / defendants No.1 to 6 having the remaining one-seventh share each therein. It is also deemed appropriate to restrain the respondents / defendants No.1 to 7 from alienating, encumbering or parting with possession of the agricultural land for a period of six months from today to protect the same till the time the appellants / plaintiffs if so desire approach the Revenue Courts claiming a share therein. If the appellants / plaintiffs approach the Revenue Courts, they would be entitled to seek extension of the said stay and the Revenue Courts if find any *prima facie* case in favour of the appellants / plaintiffs would make appropriate orders with respect thereto.

25. The Trial Court record be immediately returned to the Court of Additional District Judge, Central-14, Delhi for undertaking proceedings pursuant to preliminary decree for partition of residential house. The parties to appear before that Court on 17th September, 2013.

26. In the circumstances, no costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 31, 2013

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