

=====

Kripana

Smt. Bi

=====

Appea

For the

For the

=====

.... Petitioner/s

Smt. Bibha Thakur & Ors

.... Respondent/s

For the Petitioner.

— Mr. J. S. Arora, Advocate

—

Mr. S. S. Dwivedi, Sr. Advocate

Mr., Rana Ishwar Chand, Advocate with him.

P R E S E N T

CAV ORDER

2. The learned counsel, Mr. J. S. Arora submitted that dismissing the writ application mistakes/ errors which are on the face of the record is committed which vitiated the according to the learned counsel, while dismissing the writ a, it has been held by this Court that the High Court in First



Appeal No.154 of 1952 while modifying the trial Court's preliminary decree has held that the properties acquired by the defendants after 1920 are not liable for partition. Therefore, application was filed by the defendants for exclusion of the properties purchased by the defendants after 1920 and accordingly, the Court below directed to prepare the list of properties which were acquired prior to 1920 liable for partition and after 1920 not liable for partition and accordingly, has dismissed the writ application, but in fact this is error apparent on the face of the record. According to the learned counsel, there is no such direction in the judgment and decree passed by the High Court in F.A.No.154 of 1952 but the learned Court below by the order which was challenged in writ application under Article 227 of the Constitution of India has in fact modified the judgment and preliminary decree of the High Court. The learned counsel further submitted that the lands covered by exhibit 'C/2, C/3, R, R/1 and R/3 are the joint family property and there is no finding of the High Court in First Appeal that those are the self acquired property of defendants. The lands covered by Exhibit 'C/2' C/3 and 'R' are of Schedule I land and for which no dispute was raised before the High Court. So far the lands covered by Ext. 'R/1' and 'R/3' are concerned, those are of Schedule II land. So far this Schedule II property is concerned, the High Court has notified the preliminary decree.



3. On the other hand, the learned senior counsel, Mr. S. S. Dwivedi, submitted that there is no error apparent on the face of record. The trial Court clearly recorded a finding that there was severance of coparcenary status in the year 1920. Now, therefore, in view of this finding of the trial Court which was confirmed by the appellate Court, the property which were purchased after 1920 will be the self-acquired property of defendants and that is what the High Court held in the First Appeal. Final decree was prepared and against the final decree, First Appeal No.706 of 1968 was filed and the High Court set aside the final decree and directed that the Court below shall pass a fresh final decree after hearing the parties. In this Judgment, it has been held that the conclusion has been recorded on the basis of the accepted case that there was severance in the year 1920. Therefore, when this Court held so then adjudication has to be made as to which properties are the properties acquired after 1920 and that is what has been done by the trial Court which was challenged in the writ application as such this Court has rightly dismissed the writ application.

4. I have heard at length the learned counsel for the parties. Since the petitioners raised the question of error apparent on the face of the record, it is required to be dealt with here.



5. It appears that partition suit was filed claiming partition of suit properties. The plaintiff's suit was decreed with respect to Schedule '1', Schedule '2' and Schedule '4' properties. Against the said judgment and decree, the defendants filed First Appeal No.154 of 1952 before the High Court. The Judgment has been annexed in the writ application. Before the High Court, the dispute was with respect to Schedule I, II and Schedule IV properties. At page 30 of Judgment of First Appeal, it has clearly been mentioned by the High Court that the lands mentioned in Schedule I of the plaint are admittedly the ancestral property of the family, and there is no more any dispute about these properties. These lands are accordingly, held to be joint family properties.

6. In view of this finding of the first Appellate Court, i.e., this High Court, so far Schedule I property is concerned, there is no dispute. It is the specific case of the petitioner that the lands of ext. C/2, C/3 are the lands of Schedule I which have been separated by the impugned order holding that those are acquired after 1920 as such not available for partition. Therefore, what is recorded by the High Court in the First Appeal is being modified by the trial Court in an interlocutory application. The preliminary decree passed by the trial Court has been modified by the High Court as follows :-

- 
- (i) 'That the decree of the Court below that the plaintiffs and the defendant 2nd party would get their proportionate compensation in the money value of the Madhubani house shall be set aside and this house shall not be divided and will remain the properties of the defendants Ist party and it is hereby held that this defendants Ist party and it is hereby held that this house along with the land on which it stands was self acquisition of defendant No.1 and it has been all the time treated as such.
- (ii) That the decree of the Court below regarding the property covered by the Award, Ext.A and shown in Sch. 2 of the plaint, shall be excluded from partition and the parties of the Award, namely, the defendants-appellants one hand the plaintiff respondent along with defendant no.8 on the other must stand by the Award which is binding on these two parties.
- (iii) That the decree of the Court below for division of the lands covered by Ext.A(1) among the three branches in equal shares shall stand so far as it relates to the family properties and in respect however, of the properties newly acquired, if any, this award, so far as it relates to such properties may be

binding upon the defendants Ist, party and the 2nd party inter se.

- 
- (iv) That the decree of the Court below for division of oharna dues is set aside.
- (v) That the decree of the Court below regarding the lands shown in Sch.2 is modified to this extent that in case the khata No.508(Ka) is a mistake for khata 108 of Mauja Bhachhi, the plots 936, 1481, 1551, 2184, 2185, 937, 1552, 2186, 1080, 1265 and 2268, contained in the sale certificate, Ext.R(2) will be deemed to be self-acquired property of defendant Ist, party. In case, however, these plots situate in any other village than Bhachhi, they will not be deemed to be exclusive land of the defendants Ist, party and in that case, they would be equally divided between the parties. This fact will be ascertained during the course of the proceeding for the preparation of the final decree. The plots which are not in the sale certificates, Ext.R(2), and which are included in Sch.2 of the plaint under Khata 508 (ka) will be divided equally in any case. And it is further ordered and decreed that the cross-objection is dismissed except for findings as mentioned above.

And, it is further ordered and decreed that the parties shall bear their costs of this appeal and the cross-objection.'

7. From perusal of the Judgment of the First Appellate Court, there is no direction of the High Court that the properties which have been acquired after 1920 are the self acquired property. Schedule I properties have been held to be the ancestral property. So far schedule II is concerned, there is specific modification as quoted hereinabove.

8. From perusal of the order sought to be reviewed, it appears that these factual aspects have not been considered, therefore these are the errors apparent on the face of the record.

9. From perusal of the Judgment of the High Court arising out of the final decree, also I find that there is no such finding recorded by this Court. Absolutely, there is no direction to separate the properties which were acquired after 1920. Moreover, the preliminary decree cannot be modified or altered or varied in the final decree. Whatever final decree was passed, it was set aside by the High Court. Therefore, the preliminary judgment is there, as it was and it is to be followed strictly while preparing the final decree. In other words, the final decree must be in conformity with the preliminary decree. While



considering this aspect, one cannot further investigate and record any contrary finding or inference can be drawn that since there was severance in 1920, the properties acquired after 1920 will be the self acquired property, particularly when there is no such finding. Moreover, Schedule I property is concerned, there was no dispute at all. Schedule II property are concerned, the trial Court preliminary decree has been modified by the High Court as stated above. From perusal of the order which was under challenged in writ application, it appears that the trial Court by order dated 18.05.2007 allowed the application filed by defendant No.1 and directed the office clerk to prepare a list of properties liable to be partitioned and not liable to be partitioned by dividing into two categories in the light of the order of High Court and the list was prepared accordingly. Although in the said order, the Court below held that the lists have been prepared according to direction of the High Court but it appears that the Court below has not at all gone through the preliminary decree of the High court. Findings have been recorded regarding exhibit C/2, C/3, exhibit R, R/3 etc., contrary to the finding and preliminary decree passed by the High Court and the review application against that order was rejected by 22.04.2014 finding that the order dated 18.05.2007 is exhaustive, perfect and in accordance with the Judgment with the High Court. This observation of the Court below is without any basis.

As discussed above, the Court below is to give effect to the judgment and preliminary decree of the High Court passed in First Appeal No.154 of 1952.

10. All these narration of the facts stated above are the mistakes and errors which are apparent on the face of the record and were not noticed by this Court on presumption that the Court below is acting according to the direction to the High Court but in fact the direction and preliminary decree is otherwise. If there was any ambiguity then the parties should have approached the High Court for modification of the preliminary decree but it was never done and subsequently, this application was filed before the trial Court and the Court below passed the order which are contrary to the direction / observation and preliminary decree of the High Court.

11. In view of the this above facts, I find that the order passed by me dated 28.01.2016 in C.W.J.C.No.13049 of 2014 suffers from errors apparent on the face of the record. Thus, the order dated 28.01.2016 in C.W.J.C.No.13049 of 2014 is hereby set aside.

12. In the result, this review application is allowed and consequently, the C.W.J.C. No.13049 of 2014 is also allowed. The impugned order dated 18.05.2007 and the order dated 22.04.2014 passed by the Court below in partition suit No.69 of 1950 are also

hereby set aside. The Court below is directed to comply the order and direction of the preliminary decree of the High Court which had modified the trial Court decree and pass the final decree accordingly.

(Mungeshwar Sahoo, J)

Sanjeev/-

U		T	
---	--	---	--