

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.362 of 2005

Mohd. Yasin, S/o Late Abdul, Aged about 70 years, R/o Village
Vimlapur, Tah. Pal, Distt. Surguja (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Must. Najma, Aged about 55 yrs., Wd/o Late Jamaluddin, Occupation
Agriculturist, R/o Village Vimlapur, Tahsil Pal, Distt. Surguja (C.G.)
2. State of Chhattisgarh, Through Collector, Surguja, Ambikapur (C.G.)
(Defendants)
---- Respondents

For Appellant: Mr. Manoj Paranjpe and Mr. Anurag Singh, Advocates.
For Respondent No.1: -
Mr. Sushil Dubey, Advocate.
For Respondent No.2 / State: -
Mr. Aakash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

24/07/2019

1. This plaintiff's second appeal has been admitted on the following
substantial questions of law for determination: -

1. Whether both the Courts below have erred in law in
holding that the suit as framed was not maintainable
before the trial Court?
2. Whether the lower appellate Court was justified in
dismissing the suit even after holding 1/6th share of the
appellant?

(For the sake of convenience, parties hereinafter will be referred
as per their status shown and ranking given in the plaint before the
trial Court.)

2. Plaintiff Mohd. Yasin and Jamaluddin were brothers and defendant
No.1 is widow of Jamaluddin. They being Mohammedans are
governed by the Hanfi branch of the Muslim Law in the matter of

succession. The dispute relates to the property shown in Schedules A & B annexed with the plaint. The suit filed by Mohd. Yasin, the appellant herein / plaintiff, for declaration of title, partition and possession, was dismissed from amongst other grounds principally on the ground that the civil suit filed for declaration of title and partition is not maintainable in view of the provisions contained in Section 178 of the Chhattisgarh Land Revenue Code, 1959 (wrongly mentioned as Section 165) which was upheld by the first appellate Court, though the first appellate Court has held that the plaintiff is entitled for 1/6th share in the suit property against which this second appeal has been preferred in which substantial questions of law have been framed.

3. Mr. Manoj Paranjpe, learned counsel for the appellant / plaintiff, would submit that the first appellate Court has fallen into grave error in holding that the civil court has no jurisdiction to entertain the suit for declaration of title and possession in view of the fact that the Tahsildar in Revenue Case No.18A-27/2000-2001 (Najma v. Yasin) had already directed to get the dispute of title decided by the jurisdictional civil court on 25-7-2002 and in view of that both the Courts below are absolutely unjustified in holding so ignoring the Full Bench decision rendered by the M.P. High Court in the matter of Nagjiram v. Mangilal and others¹ in which the principle of law has been laid down qua Section 178 of the Chhattisgarh Land Revenue Code, 1959 (for short, 'the Code'). As such, the impugned judgment & decree deserve to be set aside and the suit be decreed as held by the first appellate Court that the plaintiff is entitled for 1/6th share in the suit property.
4. Mr. Sushil Dubey, learned counsel appearing for respondent No.1 herein / defendant No.1, would submit that both the Courts below

¹ AIR 1977 MP 8 (FB)

have rightly held the suit to be not maintainable, as at the best, the plaintiff could have instituted suit for declaration of title, but not for partition. He would also submit that share of the plaintiff has not been clearly held by the first appellate Court to be 1/6th share, whereas he will not get any share.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

Answer to the First Substantial Question of Law: -

6. It is admitted position on record that defendant No.1 herself has made an application under Section 178 of the Code before the Tahsildar being registered as Revenue Case No.18A-27/2000-2001 (Najma v. Yasin) which was decided on 26-10-2002 in which the learned Tahsildar finding that question of title is involved directed the parties to get the title determined in the jurisdictional civil Court and in view of that order, the plaintiff instead of approaching again to the revenue court under Section 178 of the Code filed civil suit for declaration of title, partition and possession.
7. The Full Bench decision of the M.P. High Court in **Nagjiram** (supra) resolving the conflict between two Division Bench decisions of that Court has clearly laid down the law in that regard holding that once the question of title is found involved and it is raised competently, the revenue court would not proceed with the partition proceedings and observed so in paragraph 16 of the report authoritatively and conclusively as well. For the sake of convenience, I deem it expedient to extract paragraph 16 of the report which is as under: -

“16. The conclusions we have reached may now be summed up thus:

(i) When there are more Bhumiswamis than one, to any holding (which has been assessed for the purpose of agriculture) every one of them has the right to apply to the Tahsildar for a partition of his share.

(ii) the proviso to Section 178(1) of the Madhya Pradesh Land Revenue Code, 1959, is attracted as soon as any question of title is raised. The Revenue authority has no jurisdiction to enter into any such question, whether the question of title raised is genuine or bogus, strong or weak, bona fide or mala fide.

(iii) When a question of title is raised, partition shall not be made and the Revenue authority shall stay its hands to await the decision of the Civil Court.

(iv) The Revenue authority has no jurisdiction to give any direction to any particular party to institute a civil suit, much less to fix any time for that purpose.

(v) The application for partition will in such case remain in abeyance until the question of title is decided. The Revenue authority may for statistical purpose consign the proceeding to the record room to be recalled when the decision of the Civil Court is received. The application for partition cannot be dismissed.

(vi) When the decision of the Civil Court is received, the Revenue authorities shall proceed to make the partition having regard to the decision of the Civil Court.

(vii) *Paitram v. Board of Revenue* (1968 Jab LJ 304) was not correctly decided in so far as it was held that a direction ought to be given to one of the parties.

(viii) *Gangaram v. Kanhaiyalal* (1971 Jab LJ 819) was not correctly decided in so far as it was held that the party seeking partition must necessarily go to the Civil Court. All that the Revenue authority can do is to tell the parties that since a question of title is raised, it would not proceed with the partition proceedings. The Revenue authority must stop on that point and leave the parties to take recourse to the civil suit. Naturally, that party will go to the Civil Court, who wants the partition proceeding to be proceeded with and completed. However, it is not for the Revenue authority to advise either of the parties or to give any direction to either of them to institute a civil suit."

8. Thus, in view of the principles of law so laid down by the Full Bench of the M.P. High Court in **Nagjiram** (supra), which is binding to this court, I have no iota of doubt in my mind that since the revenue court by order dated 26-10-2002 between the parties to the lis has already directed to get the title determined, therefore, the plaintiff has no

option except to file civil suit for declaration of title, partition and separate possession, as the revenue court cannot proceed with the partition and as defendant No.1 herself has raised the question of title before the revenue court as recorded by the learned Tahsildar in the order dated 26-10-2002, which the learned trial Court has catalogued in paragraph 6 of its judgment & decree dated 14-5-2003. The submission of Mr. Dubey, learned counsel appearing for defendant No.1, that civil court cannot direct for partition also deserves to be noticed for rejection.

9. In the matter of **Shub Karan Bubna alias Shub Karan Prasad Bubna v. Sita Saran Bubna and others**², the manner of making partition after the decree of the civil court has been authoritatively laid down and enunciated by Their Lordships of the Supreme Court in a suit for partition or separation of a share. Paragraph 18 of the report states as under: -

“18. The following principles emerge from the above discussion regarding partition suits:

18.1. In regard to estates assessed to payment of revenue to the Government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that the Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of the Government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible.) Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third

2 (2009) 9 SCC 689

party affected thereby.

18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is, buildings, plots, etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually an engineer, draughtsman, architect, or lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until *partition*, that is, division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the Limitation Act). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in

the pending suit so that the suit is taken to its logical conclusion.”

10. Thus, the first question is answered accordingly by holding that the civil suit as framed and filed for deceleration of title and possession was maintainable.

Answer to the Second Substantial Question of Law: -

11. The next substantial question of law is, how much share the plaintiff is entitled for?
12. The first appellate Court in its impugned judgment has clearly threadbare discussed and held that the right of the plaintiff qua the Hanfi branch of the Muslim Law applicable to the parties and has come to a specific conclusion that at the most, the plaintiff will be entitled for 1/6th share in the property left by Jamaluddin, husband of defendant No.1. That finding has not been questioned by defendant No.1 by filing cross-appeal or cross-objection, therefore, it has attained finality and therefore it is held that the plaintiff will be entitled for 1/6th share in the suit property. Accordingly, judgments & decrees of both the Courts below are partly set aside. It is held that the suit is maintainable and the plaintiff will be entitled for 1/6th share in the property scheduled in Schedules A & B annexed with the plaint which should be made part of the decree. Thereafter, partition will be done by the Collector under Order 20 Rule 18 of the CPC. The second substantial question of law is also answered accordingly.
13. The second appeal is allowed to the extent sketched herein-above. Parties will bear their own cost(s).
14. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge