



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ESA-41-2022 (O&M)

Reserved on: 21.08.2024

Pronounced on : 27.08.2024

CHANDRO AND ANOTHER

. . . . APPELLANTS

Vs.

AMIT KUMAR AND ANOTHER

. . . . RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Argued By:- Mr. Sumit Sangwan, Advocate, for the appellants.

Mr. D.N. Ganeriwala, Advocate, with
Mr. Keshav Kapoor, Advocate, for respondent No.1.

DEEPAK GUPTA, J.

This Execution Second Appeal has been filed against the concurrent findings of the Courts below, dismissing the third party objections of the appellants.

2.1 As the paper book would reveal, Civil Suit No. 224 of 2013 for recovery of ₹4,92,016, filed on 11.04.2013 by plaintiff Amit Kumar [*decree holder - now respondent No.1*] was decreed against Dinesh Kumar son of Ishwar Singh defendant [*judgment debtor - now respondent No. 2*], on 25.07.2014 by Ld. Addl. Civil Judge (Sr. Divn., Charkhi Dadri. The two third party objectors [*now appellants*] are the mother & son respectively of the JD-Dinesh Kumar.

2.2 In order to realize the decretal amount, the decree holder filed Execution No. 1795 of 2014 (CNR No. HRBHAO-001008-2014) before the Executing Court at Charkhi Dadri. During execution, the decree holder furnished the details of the ancestral property of the JD. The said property was sought to be attached, when the two appellants filed third party objections, submitting that property in question was earlier owned by Ishwar, the father of JD-Dinesh Kumar and that said Ishwar by virtue of a registered

Release Deed No. 6510 dated 12.03.2015 had relinquished his rights regarding the said property in favour of the third party objectors. It was claimed that JD-Dinesh Kumar had no share in the said property.

2.3 On the other hand, the stand of the decree holder was that the release deed had been executed within a *mala fide* intention only to defeat the rights of the decree holder, inasmuch as the property in question was ancestral in nature, in which JD had right by birth and as such, the release deed was void in the eyes of law and that the share of the JD in the said property could be attached so as to realize the decreetal amount.

2.4 The Executing Court framed necessary issue as to '*whether the property in question was ancestral qua the judgment debtor Dinesh*'. After taking evidence produced by the parties, the Executing Court held that suit property was ancestral in nature, in which the judgment debtor had birth right and therefore, the release deed No. 6510 dated 12.03.2015 in favour of the third party objectors was void to the extent of its negating the share of JD in the said property. As such, dismissing the objections vide order dated 30.09.2022, direction was issued to attach the share of Dinesh Kumar in the property in question to be sold by way of auction upto the extent of the decreetal amount for its realization.

2.5 The said order dated 30.09.2022 passed by the Executing Court was challenged by the third party objectors before the Appellate Court. However, their Civil Appeal No. 51 of 2022 was dismissed by the Appellate Court of learned Additional District Judge, Charkhi Dadri vide order dated 10.11.2022 upholding the view taken by the Executing Court to the effect that property in question was ancestral in the hands of father of the judgment debtor and that the release deed in favour of the third party objectors was void and that the share of the JD in the suit property could be attached as per law.

3.1 The aforesaid orders have been assailed by the third party objectors by way of present appeal. It is contended by learned counsel for the

appellants that as per the settled proposition of law, a property becomes ancestral in the hands of a person, when it comes to him from his three male lineal ascendants by way of natural succession i.e. when he received the property from his father, father's father or father's father's father by way of natural succession. Learned counsel contends that in the present case, Ishwar, the father of the JD, was the son of Badlu Ram and said Badlu Ram was the son of Fusa. It was obligatory upon the decree holder to produce the record that Badlu had inherited the property of Fusa by way of natural succession but no such evidence was produced. It is further contended that even Ishwar i.e. the father of Judgment Debtor got the property by way of a consent decree dated 05.08.1995 and not by way of natural succession and therefore, in such circumstances, the property cannot be held to be ancestral or coparcenary property in the hands of Ishwar, in which the JD had any birth right. It is contended further that with the passing of the consent decree in his favour, the property in the hands of Ishwar had become his self acquired property and had lost the character of Joint Hindu family coparcenary property. For this proposition, learned counsel has relied upon ***Mohinder Kaur versus Pargat Singh 2010(2) PLR 742.***

3.2 Contending that the Courts below have failed to appreciate the legal position correctly, prayer is made to set aside the orders of the Courts below and to allow the objections of the appellants.

4.1 Refuting the aforesaid contentions, it is argued by learned counsel for respondent No.1/decreed holder that as per the evidence on record, the property in question was inherited by Badlu from his father Fusa. In fact, Badlu along with his brother Khubi had inherited the property of Fusa after his death. Badlu then suffered a consent Decree in the year 1995 in favour of his two sons i.e. Ishwar & Radhey Shyam. Learned counsel contends that simply because instead of the natural succession, property was transferred by way of a consent decree by Badlu in favour of his sons i.e. Ishwar & Radhey Shyam in the year 1995, the property will not lose the character of ancestral property, as it only amounts to acceleration of

succession. Learned counsel contends that in these circumstances, the property in the hands of Ishwar i.e. the father of the JD was ancestral coparcenary property qua the JD-Amit, in which JD had a share and therefore, said property can be attached for realization of the decretal amount.

4.2 Learned counsel contends further that the release deed executed in 2015 by Ishwar in favour of his wife & grandson by ignoring JD, is nothing but an attempt to deprive the decree holder from the fruits of the decree for recovery.

4.3 Learned counsel has relied upon ***Arshnoor Singh vs. Harpal Kaur & others AIR (2019) SC 3098; Harjit Singh vs. Manjit Kaur and others, 2004(3) PLR 118; and Ram Singh and another versus Hardip Singh and others 2010 (1) RCR (Civil) 476.*** Prayer is made for dismissal of the appeal.

5. I have considered submissions of both the sides and perused the record carefully.

6. The evidence produced before the Executing Court would indicate that Chander Bhan & Fusa sons of Rura were recorded to be owner of 58 Bighas of land situated in village Changroad, Tehsil Dadri. On the death of Fusa, his share was inherited by his two sons i.e. Khubi & Badlu in the year 1919. The mutation N: 116, Ex.PW-16/H was accordingly sanctioned after the death of Fusa. Badlu, who had become owner of 1/2 share in the property, suffered a decree in favour of his two sons i.e. Ishwar & Radhey Shyam on 05.08.1995 in Civil Suit No.520 of 1995. Copy of the said judgment is Ex.P-21 and by virtue of the same, Ishwar became owner of the property to the extent of 1/4 share in the total land measuring 262 kanal 11 marla. It is not disputed that JD-Dinesh Kumar is the only son of Ishwar.

7. It is revealed further that by ignoring his son Dinesh, Ishwar son of Badlu executed a release deed dated 12.03.2015 in respect of 69 kanal 17½ marla of his land in favour of his wife Smt. Chandro and grandson namely Amit son of Dinesh. Prior to the execution of the said release deed, a decree for recovery of ₹ 4,92,016/- had already passed against the JD-Dinesh Kumar

on 25.07.2014 and it is during the execution of that decree, that the share of Dinesh Kumar in the ancestral property was sought to be attached.

8. Two questions before this Court are –

- Whether the property in the hands of Ishwar regarding which he executed the release deed in favour of his wife & grandson, was ancestral coparcenary property in his hands qua JD-Dinesh Kumar.
- In case the property is found to be ancestral coparcenary property in the hands of Ishwar, whether the share of JD-Dinesh Kumar in the said property could have been attached for the purpose of realization of the decretal amount in favour of decree holder Amit son of Om Parkash.

9. As far as the issue to the effect that whether the property in question in the name of Ishwar was ancestral is concerned, the similar issue had arisen before Hon'ble Supreme Court in the case of **Arshnoor Singh (supra)**.

9.1 In that case before Hon'ble Supreme Court, Lal Singh was the owner of the land, who passed away in 1951. On his death, his entire property was inherited by his only son Inder Singh. During his life time, Inder Singh in the year 1964 effected a partition of his entire property vide a decree dated 04.11.1964 passed in a civil suit between his three sons namely Gurcharan Singh, Dharam Singh and Swaran Singh in equal share. The dispute before the Supreme Court was regarding the property, which had come to the share of one of the sons namely Dharam Singh. Said Dharam Singh had one son namely Arshnoor Singh. Dharam Singh had purportedly sold his entire property in favour of Harpal Kaur by virtue of two sale deeds dated 01.09.1999 for ostensible sale consideration of ₹4,87,500/-. Arshnoor Singh filed a Civil Suit against his father Dharam Singh as well as Harpal Kaur for declaration that suit property was coparcenary property and that the two sale deeds dated 01.09.1999 executed by his father Dharam Singh in favour of Harpal Kaur were illegal, null and void.

9.2 Trial Court held the suit property to be ancestral coparcenary property of Dharam Singh and his son Arshnoor Kaur and that sale deeds executed by him were without any legal necessity. Appeal filed by Harpal Kaur was dismissed by learned Additional District Judge. However, in the Regular Second Appeal No. 1354 of 2014 filed before this High Court, the same was allowed holding that Arshnoor Kaur had no locus to institute the suit since the coparcenary property ceased to exist after Inder Singh had partitioned the property between his three sons in the year 1964 and that said Arshnoor Singh had no right to challenge the sale deeds.

9.3 One of the questions considered by Hon'ble Supreme Court was *as to whether the suit property was coparcenary property or self acquired property of Dharam Singh.*

9.4 Hon'ble Supreme Court noticed that on account of death of Lal Singh in 1951, succession had opened in 1951 i.e. prior to the commencement of Hindu Succession Act, 1956, when his son Inder Singh succeeded to Lal Singh's property in accordance with old Hindu Mitakshara law. Hon'ble Supreme Court then referred to the relevant paragraphs of the commentary on Hindu Law by Mulla and also decision rendered in ***Shyam Narayan Prasad Vs. Krisha Prasad and others, (2018) 7 SCC 646*** and held as under: -

7.1. Mulla in his commentary on Hindu Law (22nd Edition) has stated the position with respect to succession under Mitakshara law as follows:

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"A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship."

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"All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons

and great-grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property." (emphasis supplied)

7.2. In ***Shyam Narayan Prasad v. Krishna Prasad & Ors. (2018) 7 SCC 646***, this Court has recently held that :

"12. It is settled that the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship." (emphasis supplied)

7.3. Under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him, would get an equal right as coparceners in that property.

9.5 Hon'ble Supreme Court then referred to the change in position, post Hindu Succession Act, 1956 and referred to ***Yudhishter Vs. Ashok Kumar, (1987) 1 SCC 204*** and held as under: -

7.4. In ***Yudhishter v. Ashok Kumar***, this Court held that :

"11. This question has been considered by this Court in ***Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors. [1986] 161 ITR 370 (SC)*** where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from

whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Kar of his own undivided family but takes it in his individual capacity.”

(emphasis supplied)

7.5. After the Hindu Succession Act, 1956 came into force, this position has undergone a change. Post – 1956, if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property, and does not remain coparcenary property.

9.6 After nothing the above said distinction, prior to coming into force of the Hindu Succession Act i.e. old Hindu Mitakshara law and the post Hindu Succession Act, Hon’ble Supreme Court then held as under: -

7.6. If succession opened under the old Hindu law, i.e. prior to the commencement of the Hindu Succession Act, 1956, the parties would be governed by Mitakshara law. The property inherited by a male Hindu from his paternal male ancestor shall be coparcenary property in his hands vis-à-vis his male descendants upto three degrees below him. The nature of property will remain as coparcenary property even after the commencement of the Hindu Succession Act, 1956.

9.7 Adverting to the facts of the case before it, Hon’ble Supreme Court then held that since succession opened in 1951 on the death of Lal Singh, therefore, nature of the property inherited by his son Inder Singh was coparcenary and even though Inder Singh had effected a partition of the coparcenary property amongst his sons in 1964, the nature of the property inherited by Inder Singh’s sons would remain as coparcenary property qua their male decedents upto three degrees below them. It was held that as the entire property of Lal Singh was inherited by his son Inder Singh prior to 1956 and then the said coparcenary property was partitioned between three sons of Inder Singh by a Court decree dated 04.11.1964, therefore, the shares allotted in partition to the coparceners continued to remain coparcenary

property in their hands qua their male decedents and as a consequence thereof, the property allotted to Dharam Singh in partition continued to remain coparcenary property qua the appellant.

9.8 Hon'ble Supreme Court then referred to another paragraph No.339 of Mulla on Hindu Law and further referred to a decision rendered in ***Valliammai Achi Vs. Nagappa Chettiar and others, AIR 1967 SC 1153*** and held as under: -

7.10. With respect to the devolution of a share acquired on partition, Mulla on Hindu Law (22nd Edition) states the following:

"§ 339. Devolution of share acquired on partition. – The effect of a partition is to dissolve the coparcenary, with the result, that the separating members thenceforth hold their respective shares as their separate property, and the share of each member will pass on his death to his heirs. However, if a member while separating from his other coparceners continues joint with his own male issue, the share allotted to him on partition, will in his hands, retain the character of a coparcenary property as regards the male issue [§ 221, sub-§ (4)]." (emphasis supplied)

10. The facts of the present case are squarely covered by the legal position as explained by Hon'ble Supreme Court in the case of ***Arshnoor Singh (Supra)***. In the present case also, the estate of Fusa was inherited by his two sons Khubi & Badlu in the year 1919 i.e. prior to coming into force of the Hindu Succession Act i.e. as per the old Hindu Mitakshara law. Thereafter, even if Badlu suffered a decree regarding his share in the property in favour of his two sons Ishwar & Radhey Sham in 1995 i.e. after coming into force of the Hindu Succession Act, the property so received by Ishwar from his father Badlu by way of the consent decree, in his hands will be ancestral coparcenary property qua his son Amit i.e. Judgment Debtor. Simply because Ishwar did not get the property from his father Badlu by way of natural succession and rather, got the property by way of the consent decree, will not change the nature of the property, as by suffering the decree in 1995 by Badlu, he merely accelerated the succession.

11. Once it is held that Amit son of Ishwar i.e. Judgment Debtor had

a share in the property in question, which was the ancestral coparcenary property in the hands of Ishwar, there can be no hitch in holding that the release deed dated 12.03.2015, executed by Ishwar in favour of his wife & grandson cannot be held to be legal. Said release deed was apparently executed with malafide intention by Ishwar to pre-empt the move of decree holder to get the share of JD attached for realisation of the decretal amount. The said release is held to be null and void.

12. In view of the legal position as explained by the Hon'ble Supreme Court in **Arshnoor Singh (Supra)**, the contrary view taken by Coordinate Bench of this Court in **Mohinder Kaur Vs. Pargat Singh and others, 2010(2) PLR 742**, relied by counsel for the appellant cannot of any help to advance his case.

13. The next question is as to whether the share of Amit-JD in the coparcenary property can be attached. The said issue was discussed at length by this Court in **Harjit Singh (Supra)** and it was held as under: -

"8. However, the question whether an undivided share of a coparcener in a joint Hindu family property can be attached for payment of debt of a coparcener is a legal question. A Division Bench of Madras High Court in **Shunmugam Chettiar's case (supra)** had the occasion to consider the precise question wherein it was held that it is possible to attach the judgment-debtor's interest in a part only of the joint family property. In the said case also, the reliance was placed by the judgment-debtor on the provisions of Section 60(1)(m) of the Civil Procedure Code and it was held that the said provision has no application. It was held that the interest of the coparcener is a vested interest. On the other hand, **Rajes Kanta Roy's case (supra)** referred to by learned counsel for the petitioner holds that the contingent interest cannot be attached but that was a case where under the terms of the Trust Deed the interest of the judgment-debtor was sought to be attached which was found to be contingent interest. It was held that a mere contingent interest though transferable inter vivos is not attachable. In **Rajes Kanta Roy's case (supra)**, the Supreme Court has relied upon the principles of law enunciated by the Privy Council in the case reported as **Pestonjee Bhicajee Firm v. Patrick H. Anderson, AIR 1939 Privy Council 6**, that the contingent interest cannot be attached under Para (m) to the Proviso to Section 60 of the Civil Procedure Code. In the said case, the Privy

Council was considering a contingent interest created by virtue of a Will. It was the said interest which was sought to be attached and sold. The Privy Council held that though a contingent interest can be made subject of a voluntary transfer under Section 6 of the Transfer of Property Act but since Civil Procedure Code has exempted such contingent interest, it cannot be sold in execution of a decree. The said case is clearly distinguishable than the present case in which the coparcener had share by birth in the ancestral property.

9. The question raised in the present case is whether an undivided share of a coparcener is a contingent interest. The argument of learned counsel for the petitioner is that till the property is partitioned it cannot be said that any of the coparceners has a defined share and, thus, it cannot be held that the judgment-debtor has $\frac{1}{2}$ share in the property. There is no dispute with the proposition raised by learned counsel for the petitioner but it cannot be lost sight of the fact that on the date of attachment, the petitioner and his son are the only two coparceners. Thus, the judgment-debtor is owner of $\frac{1}{2}$ share of the land by birth which share is not a contingent but a vested right in the judgment-debtor which can be attached in terms of the judgment relied upon by learned counsel for the respondent.

10. A Division Bench of Calcutta High Court in the case of **Mt. Muneswari & others v. Smt. Jugal Mohini Dasi, AIR 1952 Calcutta 368** has held that an attachment of the undivided share of a member of a Mitakshara joint family during his life time operates as a division of interest and causes a severance of status. The interest which passes to the purchaser is the share which the judgment-debtor would get if a partition was made at the time of sale, it follows that the interest would neither be diminished by an increase, nor increased by a diminution in the number of cosharers. It was held to the following effect :-

"In my opinion, it is clear from the decisions of the Judicial Committee referred to above that an attachment of the undivided share of a member of a Mitakshara joint family during his lifetime operates as a division of interest and causes a severance of status. If the interest which passes to the purchaser is the share which the judgment-debtor would get if a partition was made at the time of the sale, it follows that the interest would neither be diminished by an increase, nor increased by a diminution in the number of co-sharers, as has been held by a Full Bench of the Madras High Court in the case of voluntary alienations of undivided shares which, in the Madras Presidency, are valid : **Chinnu v. Kalimuthu, 35 Mad. 47.**"

It is, thus, concluded that undivided share of a coparcener can be sold and attached in execution of a decree. Still further, after the sale being effected, it would operate as division of estate and causes severance of interest.”

14. It is, thus, clear from the legal position explained by this Court by making reference to Division Bench judgment of Calcutta High Court in **Mt. Muneswari & others Vs. Smt. Jugal Mohini Dasi, AIR 1952 Calcutta 368** that undivided share of a coparcener can be attached and sold in execution of the decree and that after sale, it would operate as division of interest and causes a severance of interest. It is further clear that the interest, which passes to the purchaser, would neither diminish by an increase nor increase by diminution in the number of co-shares during life time of the JD.

15. In view of the aforesaid legal position, it is held that Executing Court did not commit any error in ordering the attachment of the share of the JD-Amit in the ancestral coparcenary property, which was held by his father Ishwar, as the release deed executed by said Ishwar in favour of his wife and grandson has been found by this Court to be null and void.

16. Consequent to the entire discussion above, this Court does not find any merit in the present appeal. Same is hereby dismissed.

27.08.2024
Vivek

(DEEPAK GUPTA)
JUDGE

Whether speaking/reasoned?	Yes
Whether reportable?	Yes