

Sukhrani (Dead) By L.Rs. & Ors vs Hari Shanker & Others on 12 April, 1979

Equivalent citations: 1979 AIR 1436, 1979 SCR (3) 671, AIR 1979 SUPREME COURT 1436, 1979 (2) SCC 463, (1979) 3 MAHLR 287, 1979 UJ(SC) 482, (1979) 2 SCJ 387, (1979) 3 SCR 671 (SC)

Author: O. Chinnappa Reddy

Bench: O. Chinnappa Reddy, P.N. Shingal

PETITIONER:

SUKHRANI (DEAD) BY L.RS. & ORS.

Vs.

RESPONDENT:

HARI SHANKER & OTHERS

DATE OF JUDGMENT 12/04/1979

BENCH:

REDDY, O. CHINNAPPA (J)

BENCH:

REDDY, O. CHINNAPPA (J)

SHINGAL, P.N.

CITATION:

1979 AIR 1436 1979 SCR (3) 671

1979 SCC (4) 463

CITATOR INFO :

D 1988 SC1531 (185)

ACT:

Partition of ancestral property and business-One of the parties a minor at the time of partition-Partition-If could be re-opened when minor became a major.

HEADNOTE:

The plaintiff's father and the fifth defendant were brothers. During his minority, the plaintiff filed a suit alleging that the business which his father and uncle were doing was ancestral in that it was being carried on with the capital given by his grandfather, that on the death of his grandfather his uncle proposed to his father for a nominal partition of the business and other family assets to avoid

income tax, that in so doing he took two-thirds share in the business as well as in other assets but gave only one-third to his father and that lastly the partition, even if true, was "unequal, unfair and unconscionable." He further alleged that the partition did not bind the interest of the minor plaintiff and his minor brothers.

During the pendency of the suit a reference was made to arbitration. The arbitrators gave an award. But that award was impugned by the defendants alleging that it was given without any enquiry and without giving the parties a chance to adduce evidence and that the arbitrators had no jurisdiction to reopen the partition. The trial court set aside the award. The plaintiff's appeal against this decision of the trial court was dismissed by the High Court holding that there was an error of law on the face of the award because the arbitrators had found that there was neither fraud nor misrepresentation and that unequal shares had been accepted voluntarily and yet had reopened the partition.

After remand the trial judge found that the business was not ancestral but was only a joint business and that there was a complete partition of the joint family property, and that there was neither fraud nor misrepresentation in bringing about the partition. The trial court however observed that though the plaintiff's father voluntarily agreed to accept one-third share, the partition of the business was "unequal and unconscionable." It, however, dismissed the suit on the ground that the business was not ancestral and therefore the plaintiff had no right to reopen the partition.

On appeal by the plaintiff the High Court found that the business being ancestral the sons of the two brothers acquired interest by birth and that so far as the partition was concerned there was no fraud or undue influence vitiating the partition. It, however, affirmed the trial court's view that one-third share given to the plaintiff's father was unfair and prejudicial to the interests of the minors.

In appeal to this Court the defendants contended that the partition could not be reopened by the plaintiff because he and his brothers were represented in the partition by their father and there was no allegation of fraud or misrepresentation.

672

Dismissing the appeal, the Court,

^

HELD : 1. It is not the practice of this Court to interfere with findings of fact arrived at by the High Court except to prevent gross miscarriage of justice. [676 B]

In the instant case there is no justifiable ground to go behind the findings of fact. [676 C]

2. It is well established that simply because a matter has been decided at an earlier stage by interlocutory order

and no appeal has been taken therefrom or no appeal did lie, a higher court is not precluded from considering the matter again at a later stage of the same litigation. The correctness of an order of remand passed by the High Court which was not questioned at that time by filing an appeal in the Supreme Court can nevertheless be challenged later in the Supreme Court in the appeal arising out of the final judgment pronounced in the action. [676 E-F]

Satyadhan Ghosal & Ors. v. Smt. Deo Rajan Debi & Anr. [1960] 3 SCR 590, Jasraj Indusingh v. Hemraj Multan Chand [1972] 2 SCR 973, Margaret Lalita v. Indo Commercial Bank Ltd., AIR 1979 S.C. 102, Arjan Singh v. Mohindra Kumar & Ors. [1964] 5 SCR 946; referred to.

Where an application under Order IX, r. 7 was dismissed and an appeal was filed against the decree in the suit in which the application was made, the propriety of the order rejecting the reopening of the proceeding might, without doubt, be canvassed in the appeal and dealt with by the appellate court. [676 G]

In the present case the same principle applies and the parties could challenge in this Court in the appeal against the final judgment in the suit any finding given by the High Court at the earlier stage in the suit when the award made by the arbitrators was set aside and the suit thrown open for trial. [676H, 677A]

3. Even though there was no fraud, misrepresentation or undue influence a partition could be reopened at the instance of a minor coparcener, despite the fact that his branch was represented by his father at the partition, if the partition was unfair or prejudicial to the interest of the minor. The entire partition need not be reopened if the partition was unfair in regard to a distinct and separable part of the scheme of partition. In such an event the reopening of the partition could be suitably circumscribed. [677 G-H, 678 A]

Ratnam Chettiar & Ors. S. M. Kuppuswami Chettiar & Ors. Air 1976 S.C. 1 applied.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 168 of 1969.

Appeal by Special Leave from the Judgment and Decree dated 31-1-1968 of the Madhya Pradesh High Court in First Appeal No. 80/64.

I. P. Naik, S. L. Jain, Miss M. Gupta and M. S. Gupta for the Appellant.

B. D. Sharma for the Respondents.

The Judgment of the Court was delivered by CHINNAPPA REDDY, J.-The legal representatives of the fifth defendants 6 to 15 in Civil Suit No. 17-A of 1957 in the Court of Additional District Judge, Narsinghpur are the appellants in this appeal by special leave. Mannulal (5th defendant) and Rajaram (1st defendant), both of whom died during the pendency of the suit, were brothers. They were the sons of Pusau. The plaintiff, a son of Rajaram and a minor on the date of the institution of the suit, filed the suit for partition and separate possession of a one eighth share in the properties mentioned in schedule 'A' of the plaint and also for an account from defendants 5 to 8 of the assets and income of the business, "Mannulal Lakhanlal". It was alleged in the plaint that with the capital given to them by their father, Pusau, Mannulal and Rajaram started the business of manufacturing Bidis. After the death of Pusau in 1936 the business was continued by the two brothers. In 1948 Mannulal represented to Rajaram that in order to avoid income tax it was necessary that there should be a nominal partition and that the joint family business should be converted into a partnership business. Accordingly the firm "Mannulal Lakhanlal" was registered under the Partnership Act. Mannulal's share was shown as 10 Ans. 8 ps. in a rupee while Rajaram's share was shown as 5 Ans. 4 ps. In 1953 Babulal and Sunderlal, sons of Mannulal were also shown as partners. The share of Mannulal was reduced to 5 Ans. 4 ps. and the share of Babulal and Sunderlal was shown as 5 Ans. 4 ps. All this was done nominally with a view to avoid income-tax. The houses belonging to the family were also divided. Rajaram was given one-third share and Mannulal took two-thirds share. The partition of ancestral property and business between the two brothers Rajaram and Mannulal, even if true, was "unequal, unfair and unconscionable". The partition and the formation and dissolution of the firm did not bind the interest of the minor plaintiff and all his brothers. It was further alleged in the plaint that Mannulal promised Rajaram at the time of the fictitious partition that he would be given his half share when a real partition was made. It was on those allegations that the plaintiff, a minor, represented by his next friend Harchand filed the suit, out of which the appeal arises, for the reliefs already mentioned. The suit was contested by Mannulal and his sons who pleaded that the business was not joint family business and that it was a purely partnership business. The allegations that the partition was nominal and that the formation and dissolution of the partnership were nominal, were denied. It was pleaded that there was a complete disruption of the family on 31st March, 1948. The partition was not unfair. After the partition the two brothers decided to run the Bidi manufacturing business in partnership, with Rajaram taking a share of 5 Ans. 4 ps. and Mannulal taking a share of 10 Ans. 8 ps.

During the pendency of the suit a reference was made to arbitration and the Arbitrators gave an award under which it was directed that a sum of Rs. 12,000/- was to be paid to each of the 2 minor sons of Rajaram to equalize the shares of the two branches. The contesting defendants filed an application to set aside the award claiming that the Arbitrators had given their award without any enquiry and without giving the parties a chance to adduce evidence. It was also claimed that the Arbitrators had found that the earlier partition was not fraudulent and that it was also not the result of any misrepresentation and on that finding the Arbitrators had no jurisdiction to reopen the partition. The Trial Court set aside the award on the ground that the Arbitrators had made the award without any enquiry and without giving the parties a chance to adduce evidence. The plaintiff preferred an appeal to the High Court. The appeal was dismissed by the High Court on 10th January, 1962. The High Court upheld the finding of the Trial Court that the award was vitiated as it was made without enquiry and without opportunity being afforded to the parties to adduce

evidence. The High Court also found that there was an error of law on the face of the award inasmuch as the Arbitrators had found that there was neither fraud nor misrepresentation and that unequal shares had been accepted voluntarily and yet had reopened the partition. It was observed that this was contrary to law as the plaintiff and his other minor brother were duly represented by their father Rajaram.

Thereafter, consequent to the setting aside of the award, the suit proceeded to trial. The plaintiff attained majority during the pendency of the suit and elected to continue the suit. Among the witnesses examined on behalf of the plaintiff was Rajaram. Mannulal, the 5th defendant, did not step into the witness box and he also objected to answer the interrogatories which were sought to be served on him. The learned Trial Judge found that the business was not ancestral business but only a joint business and that there was a complete partition of the joint family property and the Bidi business on 31st March, 1948. There was neither fraud nor misrepresentation practised on Rajaram to bring about the said partition. The learned Trial Judge, however, observed that though Rajaram voluntarily agreed to accept one third share only, the partition of the joint business appeared to be 'unequal, unfair and unconscionable'. The suit was, however, dismissed in view of the finding that the business was not ancestral business, and the plaintiff, therefore, had no right to reopen the partition on the ground that the partition of the joint business was 'unequal, unfair and unconscionable'. The plaintiff preferred an appeal to the High Court. The High Court found that the oral evidence adduced on behalf of the plaintiff which was practically unrebutted by the defendants and the documentary evidence including the deed of partition and the deed of partnership clearly established that the business of "Mannulal Lakhnial" was ancestral business in which the sons of Mannulal and Rajaram acquired interest by birth. The High Court also found that there was no fraud or undue influence vitiating the partition. The High Court, however, affirmed the finding of the Trial Court that the partition of the joint family business resulting in the formation of a partnership in which Mannulal took 10 Ans. 8 ps. share and Rajaram took 5 Ans 4 ps. share was unfair and prejudicial to the interests of the minor sons of Rajaram. On those findings the High Court granted a decree in favour of the plaintiff for an account of his one eighth share of the Bidi business upto 30th November, 1955, on which date the partnership business of which Rajaram was a partner was dissolved. It was also directed, that a sum of Rs. 5,000/- representing one eighth of the amount which had already been received by Rajaram should be adjusted when accounts were taken to determine the amount to which the plaintiff was entitled. The contesting defendants have preferred this appeal by special leave of this Court.

The learned counsel for the appellants submitted that the finding of the High Court in the proceeding to set aside the award to the effect that the partition could not be reopened since there was no fraud or misrepresentation and since unequal shares had been voluntarily accepted was binding on the parties at all subsequent stages of the suit. He pointed out that, in any event, on the facts of the present case, the plaintiff and his brothers were effectively represented in the partition by their father Rajaram and in that situation the partition could not be reopened by the plaintiff on the mere ground of equality of shares, in the absence of fraud or misrepresentation. He further questioned the findings of the High Court that the business was ancestral and that the partition was unfair. In support of his contentions the learned counsel relied upon a passage from N. R. Raghavachariar's Hindu Law (5th Edn. p.

428). He also drew our attention to *Balkishan Das & Ors. v. Ram Narain Sahu & Ors.*(1) on the other hand the learned counsel for the respondent urged that an erstwhile minor coparcener could always seek to reopen a partition on attaining majority if he could show that it was unfair or prejudicial to his interest. He also contended that the decision of the High Court in the proceeding to set aside award would not be binding on this Court at a later stage of the same suit and that it was open to him to challenge in this Court the earlier finding of the High Court. The learned counsel placed reliance on *Ratnam Chettiar & Ors. v. S. M. Kuppuswami Chettiar & Ors.*(1) and *Jas Raj Indu Singh v. Hem Raj Multan Chand.*(2) The findings of fact arrived at by the High Court are:

(1) the business was ancestral, (2) the partition was not vitiated by fraud or misrepresentation and (3) the partition was unfair and prejudicial to interests of the minor sons of Rajaram in so far as it related to the definition of shares in the partnership business. Now, it is not the practice of this Court to interfere with findings of fact arrived at by the High Courts except to prevent gross miscarriages of justice. We find no justifiable ground to go behind these findings of fact and we, therefore, proceed to consider the questions raised in the appeal on those basic findings.

It is true that at an earlier stage of the suit, in the proceeding to set aside the award, the High Court recorded a finding that the plaintiff was not entitled to seek reopening of the partition on the ground of unfairness when there was neither fraud nor misrepresentation. It is true that the plaintiff did not further pursue the matter at that stage by taking it in appeal to the Supreme Court but preferred to proceed to the trial of his suit. It is also true that a decision given at an earlier stage of a suit will bind the parties at later stages of the same suit. But it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher Court is not precluded from considering the matter again at a later stage of the same litigation (vide *Satyadhan Ghosal v. Smt. Deorajan Devi & Anr.*(3). So, it has been held that the correctness of an order of remand passed by the High Court which was not questioned at that time by filing an appeal in the Supreme Court could nevertheless be challenged later in the Supreme Court in the appeal arising out of the final judgment pronounced in the action (vide *Jasraj Indu Singh v. Hem Raj Multan Chand* (supra) and *Margaret Lalita v. Indo Commercial Bank Ltd.*(4) In *Arjun Singh v. Mohindra Kumar & Ors.*(5) it was held that where an application under Order IX, Rule 7 was dismissed and an appeal was filed against the decree in the suit in which the application was made, the propriety of the order rejecting the reopening of the proceeding might without doubt, be canvassed in the appeal and dealt with by the appellate Court. In our view the same principle applies in the present case and the parties can challenge in this Court in the appeal against the final judgment in the suit any finding given by the High Court at the earlier stage in the suit when the award made by the arbitrators was set aside and the suit thrown open for trial.

The only question therefore, requiring our consideration is whether the partition in so far as it related to the business could be reopened on the sole ground that it was unfair and prejudicial to the interest of the minor, when there was no fraud or misrepresentation. In *N. R. Raghavachariar's Hindu Law* (5th Edn.), the learned author has said at page 428:

"Ordinarily where a partition has been entered into by adult members of a joint family, each of them having minor sons, the minors are represented by their respective fathers in the partition, and it is not open to any of them to challenge the validity of the partition arrangement except where it is alleged and provided that there has been fraud vitiating the transaction and resulting in inequity and obviously smaller share having been allotted to a particular adult member who represented his minor son. The mere fact that outwardly or apparently the shares appear to be unequal is no ground for reopening the same at the instance of the minor sons of an adult member who was a party to the partition, because in a partition arrangement so many factors enter into the reckoning with reference to the proper shares to be allotted and unless it can be distinctly shown that there had been an element of overreaching or fraud taking advantage of the ignorance or incapacity or other disqualification of a particular member, the partition should rarely be reopened".

All that we need say is that the learned author has not referred to any decided case in support of what he has said, but the matter is now no longer *res integra*. In *Ratnam Chettiar & Ors. v. S. M. Kuppuswami Chettiar & Ors.* (supra) an identical question arose and it was held that even though there was no fraud misrepresentation or undue influence, a partition could be reopened at the instance of a minor coparcener, despite the fact that the branch was represented by his father at the partition, if the partition was unfair or prejudicial to the interest of the minor. It was also held that the entire partition need not be reopened if the partition was unfair in regard to a distinct and separable part of the scheme of partition. In such an event the reopening of the partition could be suitably circumscribed. In the light of the principles laid down in *Ratnam Chettiar & Ors. v. S. M. Kuppuswami Chettiar & Ors.* (supra) this appeal is dismissed with costs.

N.K.A.

Appeal dismissed.