Ram Khelawan And Anr. vs Sri Ram And Anr. on 15 March, 1951

Equivalent citations: AIR1952ALL191, AIR 1952 ALLAHABAD 191

Author: Ghulam Hasan

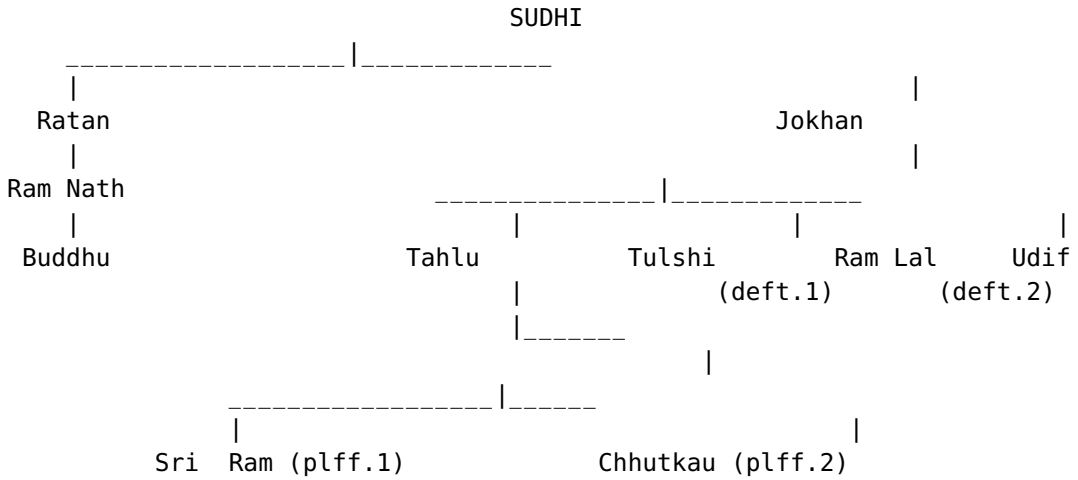
Bench: Ghulam Hasan

JUDGMENT

Ghulam Hasan, J.

1. These are two appeals arising out of a suit for partition. Second Civil Appeal No. 190 of 1946 is an appeal against the preliminary decree while second civil Appeal No. 403 of 1948 is directed against the final decree. The appeals are filed by the defendants. The appellants, Tulshi and Ram Lal died during the pendency of the appeal (Second civil Appeal No. 190 of 1946) and were substituted by there legal representatives.

2. The facts will appear clear from the following short pedigree, which is not disputed.



3. The simple case laid in the plaint was that the parties are members of a joint Hindu family governed by the Mitakshara and the property in list A attached to the plaint was the joint family property of the parties and had been acquired out of family funds in which the plaintiffs claimed one-third share. The plaintiffs were not willing to leave their share joint and asked for possession by partition to the extent of their one-third share. The suit was filed in February 1915. In defence the

joint family and joint family property were denied. It was alleged that the parties had been separate from a long time. The claim of the plaintiffs to each item of the properties in list A was denied. These properties will be dealt with in detail in their proper place.

4. The trial Court framed issues. On the main question in the case, the Court held that the property did not form part of the joint family property of the parties and that there had been a partition long ago in which Udit and Buddhu had separated. The plaintiffs were accordingly held to have no share in the properties in suit. The plea of jurisdiction, which was the subject-matter of issue 3, was not pressed by the defendants at the time of the arguments. The suit was consequently dismissed. The lower appellate Court found, after a consideration of the entire evidence, that the plaintiffs remained joint even after the partition of Udit and Buddhu with their uncles, the two defendants. As regards the various items of property, the Court found that there was no evidence to show that items 3 and 6 were purchased out of joint family funds and dismissed the suit in respect of these items; but in respect of the other items of list A it was found that they were the joint family properties of the parties and the plaintiffs were entitled to one-third share in those properties. The question of jurisdiction did not figure in the lower appellate Court.

5. The defendants filed appeal No. 190 of 1946 against the preliminary decree for partition. Subsequently the property was divided by the Court through a commissioner appointed by it. Against the final decree the other Appeal No. 403 of 1948 was filed by the defendants.

6. So far as the main question in the case is concerned, I see no reason to disturb the finding of the lower appellate Court which is a finding of fact and is binding in second appeal. It is urged here that the finding is wrong because the lower appellate Court did not take into consideration two important documents, EXS. 1 and A 1 which are the khewats of 1352 and 1349 respectively, in arriving at the finding. It is contended on the authority of two pronouncements of Sir Shadi Lal in Mt. Anurago Kuer v. Darshan Raut, 1938 Oudh App. 187 (p. c.) and Harikishan Singh v. Partan Singh, 1938 Oudh App. 646 (P. C.) that the definition of shares as evidenced by Ex. 1 and Ex. A-1 was conclusive on the question of separation. It is no doubt true that Exs. 1 and A-1 are not specifically referred to by the lower appellate Court but the mere fact that they are not so referred to is no ground for presuming that the lower appellate Court did not take them into consideration. (See Kallu v. Ghulam Haidar Khan, A. I. R. (30) 1943 Oudh 439. The finding, therefore, remains nonetheless a finding of fact which is binding in second appeal. I have however, considered these documents and considered the decisions referred to but I am satisfied that they do not support the contention advanced for the appellants.

7. In Anurago Kuer's case, 1933 Oudh App. 187 (P C.) it was laid down that the definition of shares may be proved inter alia by an entry in the record of rights showing the share of such member of the family. Such an entry will be evidence of the severance of the joint status. This observation does not lead to the conclusion that the definition of shares in the record of the rights is conclusive evidence of separation standing by itself. This case was not referred to in Harkishan Singh's case, 1938 Oudh App. 646 (P. C.) although that decision was given five months later, but there is no doubt that the observation made in the earlier case is repeated in more or less the same terms.

8. In Mayne's Hindu Law, Edn 11 (1950), it is observed at p. 546 in the footnote that "the decision in Mt. Anurago Kuer v. Darshsan Raut, A. I. R. (25) 1938 P. 0. 65: 1938 Oudh App. 187 has not effected a departure in the law as it was understood previously. The entry in the Record of Rights 'took its place as evidence' in the case and was considered along with the other evidence in determining whether a particular family was or was not joint. That fact alone was not treated as conclusive on the point."

Reference is made to a decision of the Privy Council in Nageshar Bakhsh Singh v. Mt. Ganesha, 47 Ind App. 57 (P c.) which had approved of the following pronouncement of Sir John Edge in Gajendar Singh v. Sardar Singh, 18 ALL. 176:

> "A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated."

According to Mayne's Law this pronouncement of the Privy Council stands unaffected by the two later decisions of the Privy Council referred to above.

9. The learned Judges in Darshan Singh v. Parbhu Singh, A. I. R. (33) 1946 ALL. 67 at p, 75 similarly remarked that the later decisions have not modified or introduced any departure from the well-settled legal rule founded upon the case of Gajendar Singh v. Sardar Singh, 18 ALL. 176. The learned Judges interpreted the decision as meaning that the definition of shares may be a factor along with other factors in the case to be considered for the purpose of arriving at a finding whether the family is joint or separate. They relied on an earlier decision of the Court in support of that view.

10. The decision in Mt. Pratap Kunwar v. Raj Bahadur Singh, A. I. R. (Sp) 1943 Oudh 316 by no means runs contrary to this principle. All that was said in that case was that an intention to separate could be presumed from the definition of shares but so could the intention be presumed from other circumstances, such as separate food, dwelling, worship or separate enjoyment of the property, separate income and expenditure, business transaction with each other and the like. Each one of these factors entitles the Court to raise a presumption in favour of separation but the question is one of fact which should be decided with due regard to the cumulative effect of all the circumstances.

11. The learned Judges of the Lahore High Court in Joint Hindu family, Chaudhri Atma Ram v. Umar Ali, I. L. R. (1941) 22 Lah. 39 also observed that the remarks of Sir Shadi Lal in Mt. Anurago Kuer v. Darshan Raut, 1938 Oudh App. 187 (P. c.) being taken with the context did not indicate any departure from the law as authoritatively laid down in several former pronouncements of the same tribunal and then they referred to Nageshar Bakhsh Singh v. Mt. Ganesha, 47 Ind. App. 57 (P. c.) and Gajendar Singh v. Sardar Singh, (18 ALL. 176).

12. I hold, therefore, in agreement with the view taken by the lower appellate Court that the finding on the question of jointness is one of fact, which is not vitiated by any error of law or procedure. I

am also of opinion that the finding is perfectly justified by the evidence on the record.

13. As regards the finding of the lower appellate Court in respect of Items Nos. 1, 2, 4, 5 and 7, I am satisfied that the findings are findings of fact and are fully justified by the materials on the record. [His Lordship then discussed the evidence relating to these items and proceeded :] Lastly it was contended that the suit was not maintainable in the civil Court. Reliance is placed in support of this contention on Section 64 and Order 20, Rule 18, Civil P. C. This plea, although embodied in an issue, was not pressed in the trial Court, nor was it raised in the lower appellate Court. I have heard arguments on this point but I am of opinion that the plea has no substance. Section 54 refers to the partition of an undivided estate assessed to the payment of revenue to the Government or for the separate possession of a share of such an estate. It is in respect of this property that Rule 18 of Order 20 directs the mode in which the partition is to be made by the collector. There is nothing on the record to show that item No. 1, which is three annaa odd share in the underpro-prietary rights in village Bilehri, is an undivided estate assessed to Government revenue.

14. Reliance was also placed on Section 138, Land Revenue ACT, which refers to the partition of taluqdari and under-proprietary mahals, etc. Section 233 (k) which ousts the jurisdiction of the civil Court refers to the partition of mahals. Chapter VII, Land Revenue Act, is headed "Partition and Union of Mahals". It opens with Section 106 which defines partition as the division of a mahal or a part of a mahal into two or more portions, each consisting of one or more shares. In an imperfect partition, several portions remain jointly reaponsible for the revenue assessed on the whole mahal while in a perfect partition the responsibility is divided among the several portions. The plaintiffs sought possession by partition. They did not ask for an imperfect partition as is contended for by the appellants. Mahal, according to Section 4 (4), Land Revenue Act, means any local area held under a separate engagement for payment of the land revenue. Under Section 109 (2) no mahal is to be formed by perfect partition unless the area is at least 100 acres or the revenue is Es. 100. The plea of jurisdiction involved the determination of a question of fact and as there was no evidence upon that point the plea was rightly abandoned at the time of arguments.

15. In Bam Dayal v. Megu Lal, 6 ALL. 452, it was observed that the word "estate" in Section 265, Civil P. C., corresponding to Section 54 of the present Civil P. C., could not be taken to mean isolated plots of land which fall short of being the share of a co-sharer of a mahal. Such a division of isolated plots cannot be called either a perfect or imperfect partition within the meaning of the Land Revenue Act. This case was distinguished in Ijrail v. Kanhai, 10 ALL. 5. That was a case on entirely different facts. The parties were co-

sharers of the patti in which the plots were situate. They formed part of numerous other plots also situate in the same patti and all the plots were jointly owned by the parties along with the other co sharers of the patti. It was accordingly held that the prayer contained in the plaint amounted simply to asking for partition of the four plots out of the many more plots included in the zamindari property. It was held that in the absence of other co-sharers the patti could not be disturbed in the civil Court and the nature of the claim set forth in the plaint and the defence set up to it gave rise to a dispute of a character which could not be entertained by the civil Court.

I hold that there is no substance in the plea of jurisdiction. Accordingly I dismiss the appeal with costs. [Regarding Second Appeal No. 403 of 1948, His Lordship found that there was no sub stance in the appeal, and that it was concluded by findings of fact. The appeal was dismissed with costs.]