

## Hirday Narain Rai vs Ram Das Rai And Ors. on 8 January, 1951

**Equivalent citations: AIR1951ALL606, AIR 1951 ALLAHABAD 606**

### JUDGMENT

Agarwala, J.

1. This is a pltf's. appeal arising out of a suit for recovery of possession of certain property.

2. The facts briefly stated are as follows : Ram Sarup Rai & his son Hirday Narain Rai formed a joint Hindu family owning valuable ancestral zamindari & house property. Ram Sarup Rai contracted debts to the extent of about Rs. 26,000 within 9 years from 1921 to 1930. On 26-2-1929 Hirday Narain Rai, who was then a minor, filed a suit for partition of the family property under the guardianship of his mother, as against his father, Ram Sarup Rai. A preliminary decree was obtained on 29-5-1929 defining the share of minor, Hirday Narain Rai. A final decree was also passed on 14-12-1929 & the house property was partitioned, but no suit for the actual division of the zamindari property was instituted in the Revenue Ct. On 1-9-1929, that is after the preliminary decree had been passed, Ram Sarup Rai borrowed Rs. 100 under a simple bond from Dip Narain Rai. He again borrowed a sum of Rs. 100 on 26-11-1929 from the same creditor. On the basis of these debts, Dip Narain Rai filed Suit No. 642 of 1930 against Ram Sarup Rai without impleading Hirday Narain Rai & obtained a decree for a sum of Rs. 289-4-0 against Ram Sarup Rai alone. In execution of this decree, he purchased at an auction sale 10 bighas of zemindari property on 20-7-1931 & entered into possession of the same sometime in 1932.

3. The suit which has given rise to this appeal was filed by Hirday Narain Rai after he had attained majority on 14-8-1943. He claimed that since there had been a partition between him & his father, the sale of his share of the property was not binding on him. He further alleged that the debts contracted by his father were for immoral purposes. General allegations of waste & immorality were levelled against his father. The relief claimed was for possession over 2/3rds of the property sold. The defence of Dip Narain Rai creditor was that the debts were contracted for legal necessity & that the partition was fictitious transaction & was not binding on him.

4. The trial Ct. held that the debts were taken for immoral purposes & on that ground decreed the suit. The lower appellate Ct. came to a contrary conclusion & dismissed the suit. Both the Cts. below, however, held that the partition was a mala fide one.

5. In this second appeal by the pltf. it has been argued that the finding that the partition was a mala fide one is vitiated because the Cts. below did not approach the case from a correct perspective & that, in any case, the finding could not affect the pltf.-applt. qua the creditor Dip Narain Rai so far as the debts in dispute which had been contracted after the preliminary decree in the partition suit had been passed were concerned.

6. In the trial Ct. along with the suit which has given rise to this appeal, there were two other suits filed by Hirday Narain Rai against two other creditors, that were pending & tried along with the present suit, & all the three cases were disposed of by one judgment. In the Ct. below, two suits, the present one & another were taken in appeal & were disposed of by one judgment. The other two suits concerned debts which had been contracted before the suit for partition was filed by Hirday Narain Rai & obviously different considerations applied to those two cases.

7. The finding of the Ct. below that the partition was mala fide is based on grounds which may be summarised as follows: (1) That the father did not contest the suit & merely prayed for being exempted from costs ; (2) that the partition by metes & bounds was not effected qua the zamindari property & that though it was effected with regard to the house property, it was not given effect to in actual practice, & (3) that no provision was made for payment of the debts of the father which had been contracted before the suit for partition was filed.

8. There is a clear distinction between a, mala fide partition & an unreal or fictitious partition. When the intention is that the past creditors of the father may be defeated or delayed & no provision is made in the partition for the payment of their debts, the partition is mala fide & is not binding upon the past creditors. The son may, however, intend, or where he is a minor, his guardian, or even the father may intend, that the son's interest may be safeguarded against future liabilities which may be contracted by the father. In such a case the partition may be genuine & not unreal. Where the intention is both to defeat & to delay the past creditors as well as to save the property from the clutches of the future creditors the partition may be mala fide so far as the past creditors are concerned, but it may not be unreal or fictitious so far as the future creditors are concerned. Where, however, the intention is that the joint family status of the parties is not to be disrupted, the partition is not only a mala fide transaction but is unreal. In order, however, to judge whether a partition is unreal the interest of the son at whose instance the partition is effected has to be looked into. If it is found that it is to the interest of the son that he should cease to be joint with his father so that his rights in the joint family property may be safeguarded for the future, the presumption is that the partition is real. This presumption is stronger when the son is a minor. In such a case the mere fact that no arrangement for the payment of the past debts of the father has been made or that the partition has been made with the concurrence of the father or that no partition by metes or bounds has been effected are not enough to displace the presumption of genuineness of the partition.

9. In the case of Bankey Lal v. Durga Prasad, 53 ALL. 868 : 1931 A. L. J. 917 : (A.I.R. (18) 1931 ALL. 512 (F. B.)), a F. B. of this Ct. was concerned with a case in which there was a partition in which no adequate provision for the payment of the just debts of the father due to past creditors has been made. It was held that in such a case the partition was a mala fide one & that the Receiver of the father's estate (father having been declared an inslvt.) could seize the son's interest, even though a partition had been effected. Their Lordships were not concerned with the case of future creditors & the effect of a partition qua future debts.

10. In the case of Priya Shanker v. Radhey Shiam, I. L. R. (1945) ALL. 856 : (A. I. R. (33) 1946 ALL 109), the above F. B. case was considered along with all other cases bearing upon the point & it was held that even though a partition was mala fide, yet if the partition was genuine, the creditor of the

father could not execute his decree against the son's share of the property which had been allotted to him at the partition without obtaining a decree against him, the partition having been effected before the decree was passed.

11. In the present case, the learned Judge failed to draw the distinction between a mala fide & an unreal or fictitious partition. He started by saying that the question still remains whether the partition was a genuine one & ended by recording the finding, "I am clearly of the opinion that the partition decree was a mala fide one" Upon the facts which he found, there can be no doubt that it was to the interest of the son that his share be separated, even though notionally, from that of his father. That alone could save it at least from future debts. If that was to his interest, there is no reason to hold that the partition was not genuine. The fact that the father consented to the decree is a piece of family policy & is not inconsistent with the genuineness of the partition. The father knows that he is in the habit of contracting debts, that he is likely to contract debts in future, as he has done in the past, & that it is his duty to safeguard the interest of his son. If he consents to a suit for partition filed on behalf of his son, it does not show that so far as future debts are concerned, he is actuated by any mala fide intentions & his consent to the partition does not make the partition suit unreal or non-genuine. To attribute the quality of collusiveness to such a proceeding is not to condemn the proceeding altogether.

12. The facts that the final decree was not fully carried out to effect & the property was not partitioned by metes & bounds, or that the already partitioned property was not kept separate by metes & bounds, are also beside the point because it is enough that there is disruption in the status of the family & it is not necessary that there should be a partition by metes & bounds.

13. The fact that there was no provision for the just debts of the father may lead to the conclusion that the partition was mala fide so far as those creditors whose debts were not provided for were concerned & to that extent may be held not to be binding upon them. But this fact could be no ground for holding that the partition was unreal qua the future debts.

14. The finding of the Ct. below, therefore, even if it is taken as it is, does not affect the pltf. in the present suit so far as the debts in dispute are concerned. Upon the facts found by the Ct. below, it is quite clear that the partition, which must presumably be treated as a genuine partition was in fact so.

15. The question of legal necessity is wholly immaterial in view of the fact that the debts were contracted after the pltf. applt. had separated.

16. The result is that the auction sale held on 20-7-1931 was not binding as against the pltf. applt. He was entitled to a 1/3 share in the property. His suit for possession even 1/3 share in the property which was the subject matter of the auction sale should have been decreed.

17. We, therefore, set aside the decree of the lower appellate Ct. & decree the pltf.'s suit in part for possession over 1/3 share in the zemindari property mentioned in the plaint.

18. As the success & failure of the parties have been equally divided, the parties shall bear their own costs throughout.