

Choteylal And Ors. vs Gajadhar Prasad And Anr. on 26 November, 1953

Equivalent citations: AIR1954ALL717, AIR 1954 ALLAHABAD 717

JUDGMENT

Agarwala, J.

1. This is a plaintiffs' appeal arising out of a suit for a declaration or in the alternative for recovery of possession by the ejectment of the defendants-respondents from certain zamindari property and a house.

2. One Ram Gopal who was arrayed as defendant No. 5 and who is in this appeal arrayed as respondent No. 2 and the plaintiffs-appellants are members of a family whose common ancestor was one Pitambar. Pitambar had three sons, Shib Lal, Ram Lal and Khiyali Ram. Plaintiffs 3 and 4 are great grandsons of Shib Lal. Plaintiff 1 is grandson of Ram Lal and plaintiff 2 is greatgrandson of Ram Lal. Ram Gopal is great-grandson of Khiyali Ram. The plaintiffs and Ram Gopal are, therefore, removed by several degrees from each other. Ram Gopal executed a mortgage in 1937 of the property in dispute in favour of one Dwarka Prasad, father of defendant-respondent Gajadhar Prasad. In 1938 Ram Gopal executed a deed of gift of the property in suit in favour of the same Dwarka Prasad.

The present suit was instituted by the plaintiffs in the year 1945 for a declaration that the aforesaid deeds of gift and mortgage were invalid because Ram Gopal was a junior member of the joint Hindu family and the property was joint ancestral property and as such he had no right to make a mortgage or gift of the same.

3. The defence was that Ram Gopal was a separated member of the family and the property was his own which he would gift or mortgage as he liked.

4. The trial court held that it was not shown that Ram Gopal had separated and therefore the two deeds in question were declared to be void and the suit for possession was decreed.

5. There was an appeal by the defendant Gajadhar Prasad. The lower appellate court held that in a case of this kind when the members of a family are removed by several degrees the presumption of jointness is very weak and that it was rebutted by the entry of the names of the members over defined and different shares in the Khewat. In this view the lower appellate court held that Ram Gopal was a separated member and he could mortgage and make a gift of the property in dispute.

6. In this second appeal by the plaintiffs it is urged that mere entry of the names of the members of the family over different shares in the Khewat does not amount to evidence of separation and that the presumption of jointness remains intact.

7. As already stated, Ram Gopal and the plaintiffs are removed by several degrees. The presumption of jointness which arises in the case of the members of a Hindu family becomes weaker and weaker as the parties are removed further and further from the common ancestor. For instance, it is strong in the case of brothers. In the case of grandsons it becomes weaker and in the case of greatgrandsons it becomes still weaker. As may be judged from the recent census report, the modern tendency in Hindu families, in this State at any rate, is towards separation rather than jointness. In modern times, a presumption of jointness can hardly be drawn when the parties are removed by four or five degrees. If, in addition to this, the names of the parties are recorded over separate shares in the Khewat or other records I do not think that a presumption of jointness should at all be drawn. In such an event the plaintiff must prove his allegation of jointness by evidence.

In the present case, however, there is a piece of evidence which the lower appellate court has overlooked and which also is destructive of the presumption of jointness. There was a partition in the village in the year 1931. In that partition two of the plaintiffs, viz. Raghubar Dayal and Prabhu Dayal applied that their shares in the Khewat be formed into a separate patti. That was done. This would show that, so far as at least these two plaintiffs were concerned, they were separated from the rest of the family in the year 1931. The trial court remarked that at that time Ram Gopal was a minor and therefore there could be no partition. This is a mistaken notion of the law.

Under the Hindu Law, a major member of a joint family may separate himself by his mere volition. A partition does not require the consent of the other members of the family even where the family consists of major as well as minor members. The major member can separate at any moment by a mere declaration of his will. So far as a minor member is concerned, as he is not capable of exercising his volition or giving his consent the law requires that in a suit by his guardian the court will order partition only if it is for the benefit of the minor and not otherwise. In the case of a minor, therefore, there is a difficulty in obtaining partition at will. But that difficulty does not exist in the case of a major member of a family. When Raghubar Dayal and Prabhu Dayal, two major members of the family, had separated, there was left no presumption either way about the rest of the members whether they remained joint or they too became separate. The presumption of jointness in such a case is destroyed and it is for the plaintiffs to establish their case. If the plaintiffs say that the family was joint, they have to prove jointness. If they say that the family has become separated, they have to prove separation.

In the present case it was for the plaintiffs to prove that the family was joint as no presumption of jointness could be raised in their favour. They failed to establish this fact.

8. There is no force in this appeal. It is dismissed with costs.