Rajendra Misra And Ors. vs Tirathraj Misra And Ors. on 17 March, 1952

Equivalent citations: AIR1953ALL376, AIR 1953 ALLAHABAD 376

JUDGMENT

Mushtaq Ahmad, J.

1. This is a plaintiff's appeal against a decree modifying the final decree in a suit for partition.

2. The preliminary decree was passed on 18 8-1941, in which the shares of the parties who represent two different branches of the same family were indicated in equal moieties. That decree became final on 21-9-1942. On 10-12-1942, the final decree was passed. This was modified on appeal on 19-7-1944 by the lower appellate Court, and the present appeal is against this last decree.

3. As usual, a commissioner had been appointed before the final decree was passed by the trial Court to divide the properties, and he made two lots of the same, A and B, the one for the plaintiffs and the other for the defendants. This allotment was accepted by the trial Court, and, on the basis of it, it passed the final decree on 10-12-1942 as already mentioned.

4. The present appeal raises only three points, relating respectively.

> (1) to a decree standing in the name of Sanman Datt, defendant 3, for Rs. 733-12-6 (2) to an agricultural holding measuring five bighas of occupancy land recorded in the name of Tirath Raj Misra, defendant-respondent 1 and (3) to mesne profits for the period of the defendants' possession after the institution of the suit.

I propose to deal with these items seriatim.

5. The position with regard to the first item, that is, the decree for Rs. 733-12-6 is that the trial Court by accepting the commissioner's report had awarded the same to the parties in equal shares. The lower appellate Court held that the plaintiffs-appellants were entitled only to a 1/4th share of the amount of the decree, although, when summarising its findings towards the end of the judgment, it said that they were entitled to a 1/4th only of Rs. 366-14-3 which is one half of Rupees 733-12-6. The learned Judge was obviously wrong in recording this finding of a wavering nature. He misread the allegations in the plaint so far as they related to the decree in question. While the plaintiffs had roughly mentioned the amount of their share in the decree as Rs. 400, they made it quite clear that they by themselves were entitled to a half share in the decree. The learned Civil. Judge read this as meaning that in fact the entire-family including the plaintiffs' branch was entitled to a half share in the decree and on that wrong basis ho naturally held that the plaintiffs' share was 1/4th in the entire

amount of the decree, How he remarked towards the end of the judgment that their share was 1/4th of Rs. 366-14-3 is not at all clear, and the basis on which this re-mark was made was not explained by the learned counsel for the defendants-respondents. On a correct reading of the relevant portions of the plaint, there can be no doubt that the plaintiffs had claimed a half share in the decree in question, and the trial Court had rightly decreed the same. The modification introduced by the lower appellate Court was, therefore, wrong.

6. As regards the second item relating to the five bighas of occupancy land, the lower appellate Court; was of opinion that the plaintiffs had failed to prove the same as a part of the joint family property. The only observation to be found in its judgment on this point is that, where a certain property was acquired in the name of a member of a joint Hindu family, there was a presumption that it was his exclusive property and that this presumption having not been negatived by the plaintiffs in this case, they had failed to prove that the holding was a part of the joint family property. Learned counsel for the plaintiffs-appellants argued that, while undoubtedly there was an initial presumption of this nature, it was easily rebuttable by a number of circumstances being shown by the party who claimed the property as a part of the joint family estate. The fact of the family having possessed a nucleus with which the property could have been acquired was one of such circumstances. That the family in this case was actually possessed of joint family property is a matter of admission. That the holding in dispute could be acquired with the aid of such property is also not denied. It is also a fact that Tirath Raj Misra in whose name the holding is recorded was the head of the family. This being the position, the initial burden that lay on the plaintiffs was not only discharged but it shifted to the defendants who ought to have proved that the holding was really the exclusive property of Tirath Raj defendant.

7. Learned counsel for the respondents placed before me two decisions of the Board of Revenue to contend that, if a tenancy stood in the name of a particular individual and a right was claimed in the same by the other members of his family, it was for them to establish their claim as against the landlord. Those were cases in which the landlord was one of the parties. Ho could of course not be bound by anything which the tenant may have done without his (landlord's) consent or by any such consequences as may affect the nature of the tenancy in accordance with a particular rule of Hindu Law. On the other hand, in a suit for partition by some of the members of a joint Hindu family against the others, if a question arises whether the member in whoso name a certain holding is recorded is the sole tenant of it or the other members of the family have also a common interest in the same, the matter would be decided in the light of the usual rules of Hindu Law relating to presumption and proof applicable to the case. The present case comes under the latter classification, and is, therefore, not affected by the rulings relied upon for the respondents.

Indeed, a Bench of this Court in Acharji Ahir v. Harai Ahir, 1930 ALL. L. J. 974, held that the ordinary rule of Hindu Law that properties acquired while the family was joint and with the help of the ancestral or joint family property should be regarded as joint family property, and that the burden of proof that it was self-acquired property of a single member should be on that member, should be applied also to a case where the property in question was a tenancy holding. There was thus no distinction between a case in which the property is a tenancy holding and one where the property is of any other kind so far as the point with which I am dealing is concerned. I am,

therefore, of opinion that the lower appellate Court was wrong in disagreeing with the trial Court and eliminating the five bighas of occupancy holding from the joint family estate in this case.

8. As regards the third item relating to mesne profits, Mr. Takru learned counsel for the appellants examined the position both with regard to the cultivated area and also the area negligently left by the defendants uncultivated. The plaintiffs claimed mesne profits in respect of both.

9. With regard to the cultivated portion, the position was that the commissioner had held that the plaintiffs were entitled to Rs. 785-8-0, that is, one half of the profits for the two years, 1941 and 1942. The trial Court reduced the amount to Rs. 457-8-0 as there was an agreement between the parties before it that the rate per bigha might be taken as Rs. 15 per year for the entire area of 30 bighas, 11 biswas. The lower appellate Court reduced the amount further to RS. 329-4-0, holding, as I have already noted, that five bighas of occupancy land should be taken out of the joint family tenancy from the 26 bighas, 15 biswas which, according to an agreement reached in that Court, represented the entire cultivatory area. It is obvious that the amount thus reduced on the basis of a particular area having been agreed upon cannot be challenged. At this rate they would be further entitled to mesne profits for the deflected area of five bighas occupancy land which I have already held to be part of the joint family property.

10. With regard to the uncultivated area, the learned counsel for the appellants argued that the lower appellate Court had gone wrong in refusing mesne profits on the more ground that the defendants had not intended to cause any loss to the plaintiffs by leaving a portion of the area uncultivated. Whatever the effect may have been of the absence of any such intention on the part of the defendants, the lower appellate Court also remarked that the defendants had not found sufficient time to look after the family cultivation in consequence of the present litigation. This was no doubt only an alternative remark, the learned Judge also noting that some plots might have been left parti with the object of causing loss to the plaintiffs. He did not definitely find as to whether the failure to cultivate this area was duo to the one or to the other cause. All the same, if it was due to the cause first mentioned, I should be loath to disturb the decree by allowing mesne profits to the plaintiffs for the area that remained fallow.

11. For these reasons I modify the decree of the lower appellate Court and restore that of the Court of first instance by allowing to the plaintiffs one half of the decree for RS. 783-12-6, mentioned as item l in this judgment, by adding to the partible joint family property the five bighas of occupancy holding excluded by the lower appellate Court and allowing a further amount of mesne profits on one half of this area at the agreed rate of RS. is per bigha per year for two years, namely its. 75.

12. The appellants shall get one half of their costs in this Court and the lower appellate Court from the respondents who will bear their own. The order of the trial Court as to costs shall stand.

13. Leave to appeal to a Division Bench is refused.