1930

APPAJI JIJAJI v. MOHANLAL RAOJI

Murphy J.

This fact, however, could not have escaped their Lordships' notice, for Mit. Ch. II, section 5, verse 2, "She (grandmother) must therefore succeed immediately after the brothers' suta," was considered by them.

But, in this Presidency the Vyavahara Mayukha has to be read, and harmonized, as far as may be, with the Mitakshara, and Ch. IV, section 8, pl. 18, of that work lays down—

"In default of brothers' sons succeed the gotrajas who are sapindas. Among them also the first is the paternal grandmother under the text of Manu, viz., 'and if the mother also be dead, the father's mother shall take the heritage.' Although she is here mentioned immediately next to the mother, still as there is no place of entry for her in the compact series of heirs ending with the brothers' sons she is to be entered at the end after the brothers' sons after the manner of 'the entry of the uninvited'."

In this Presidency therefore there is ground for what has been held to be the case, and the view that the compact series ends with the brothers' son, and that the grandmother takes first after the brothers' sons.

I agree with the views on the point enunciated by my learned brothers Madgavkar and Patkar, JJ., and in the order proposed to be made in the case.

Order accordingly.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shingne.

1930

March 24.

MARTAND PANDHARINATH CHAUDHARI (HEIR OF ORIGINAL DEFENDANT No. 5) *v.* RADHABAI KRISHNARAO DESHMUKH (ORIGINAL PLAINTIFF).*

Hindu Law—Joint family—Partition—Partition partial as to property or parties, effect of.

Where co-parceners in a joint Hindu family come to partition and divide the joint property with the exception of a portion of it, they are, in the absence of any indication to the contrary, tenants-in-common with reference to the excepted property unless and until a special agreement to hold as joint tenants is proved.

*Second Appeal No. 58 of 1928.

Dagadu Govind v. *Sakhubai*[1] and *Beni Parshad* v. *Mst. Gurdevi*,[2] relied on.

Where partition is partial not in respect of the property but in respect of the persons making it, so that where some of the various joint tenants separate from the rest, the remaining co-parceners without any special agreement among themselves may continue to be co-parceners and enjoy as members of a joint family the remaining property and the question whether or not they continue to be joint or separate is to be determined on the evidence in each case.

Babanna v. *Parawa*[3] and *Bhimabai* v. *Gurunathgouda*,[4] followed.

It is the bounden duty of a party, personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case.

Gurbaksh Singh v. *Gurdial Singh*,[5] relied on.

SECOND Appeal against the decision of E. Clements, District Judge at Ahmednagar, reversing the decree passed by D. V. Deshmukh, Second Class Subordinate Judge at Shevgaon.

Suit for partition.

Four brothers, Hari, Mahadev, Narayan and Krishnarao, formed a joint Hindu family governed by the Mitakshara school. The family owned lands and had income from a Jahagir. The Jahagir income was partitioned among the brothers at a remote period.

Of the four brothers Hari separated first and later on Mahadev separated. Narayan and Krishnarao continued to live jointly. Krishnarao died in 1918. After his death the name of his widow Yamunabai was entered in his place in the Record of Rights as a holder of eight annas share in the lands in suit.

On July 24, 1924, Yamunabai made a gift of the property to her daughter Radhabai (plaintiff).

On November 24, 1924, Radhabai filed a suit against Narayan (defendant No. 5) for partition of her father's half-share in the lands in suit and for separate possession of the same. Defendant No. 1 was joined

[1] (1923) 47 Bom. 773.
[2] (1923) 4 Lah. 252.
[3] (1926) 50 Bom. 815.
[4] (1928) 30 Bom. L. R. 859.
[5] (1927) 29 Bom. L. R. 1392.

1930

MARTAND PANDHARINATH v. RADHABAI KRISHNARAO

as a mortgagee from Narayan and defendants Nos. 2, 3 and 4 were joined as tenants.

Narayan (defendant No. 5) contended that he and his brother Krishnarao were members of a joint Hindu family and after Krishnarao's death he became the owner as the surviving co-parcener and therefore the plaintiff had no right to claim a separate share. The Subordinate Judge dismissed the suit as in his opinion the documentary and oral evidence in the case showed that Krishnarao and Narayan continued joint till the death of the former and they had not separated in interest. He based his conclusion on an observation as follows :—

" The separation of the Jahagir income would not, according to the principles of Hindu law, mean that there was partition of other ancestral property, because as to the properties remaining undivided, the members of the family continue to stand to one another in the relation of members of an undivided Hindu family. . . . It follows that the ancestral lands remained joint. Of the four brothers, Hari separated first and later on Mahadeo separated. This separation of the two brothers is admitted by both parties. The result of the separation of the two co-parceners according to Hindu law is that the partition must be presumed to be complete both as to parties and property. When one co-parcener separates from the others, there is no presumption either that the latter remain joint or that they have reunited. The question whether they remained joint or reunited is one of agreement between the parties, and such agreement must be proved like any other fact."

On appeal, the District Judge held that the trial Court was wrong in holding that the brothers were joint as regards the property in suit. His reasons were as follows :—

" The lower Court has noticed the ruling in *Dagadu* v. *Sakhubai* (I.L.R. 47 Bom. 773). The presumption of the law is in favour of the appellant's case and not against it as the lower Court thought. This means an entire revaluation of the evidence, because the Court evidently leant towards the view which was supported by what the Court considered to be a legal presumption."

On a revaluation of the evidence the Court came to the conclusion that the brothers held the property as tenants-in-common and accordingly the suit was decreed.

Defendant No. 5's heirs appealed to the High Court.

J. G. Rele, for the appellant.

Nilkanth Atmaram, for the respondent.

SHINGNE, J. :—This was a suit for partition brought by one Radhabai, daughter of a Hindu by name Krishnarao. Defendant No. 1 is a purchaser from Narayan who was defendant No. 5. This Narayan was Krishnarao's brother and died after the decision of the suit in the trial Court.

Hari, Mahadev, Narayan and Krishnarao were four brothers. At one time they formed a joint Hindu family governed by the Mitakshara School. They had income from a Jahagir and they owned other properties too. It is admitted by both the parties to this suit that the suit lands are ancestral properties. The four brothers effected a partition of the Jahagir income amongst themselves long time back and as a consequence each one of them got a two annas share which was separately paid to them. In course of time, Hari separated first in respect of the rest of the property and later on Mahadev separated. The question in this case is whether Narayan and Krishnarao held the property in suit as joint tenants so that on the death of Krishnarao in 1918 the whole property would be governed by the rule of survivorship and vest in Narayan.

It is important to note that in the Record of Rights Narayan and Krishnarao were regarded as holders of eight annas share each in respect of the suit-lands. After the death of Krishnarao in 1918, the name of Yamunabai, Krishnarao's widow, was entered in his place in the Record of Rights as the holder of eight annas share. No doubt, Narayan and Krishnarao were described as joint holders in the Record of Rights, but it is important to note that Narayan was senior to Krishnarao, and if the property had descended

1930

MARTAND PANDHARINATH v. RADHABAI KRISHNARAO

Shingne J.

by survivorship, Yamunabai's name would not appear at all.

There were various circumstances alleged and proved on either side, and the Court of first instance considered them fully and came to the conclusion that Krishnarao and Narayan continued joint till the death of the former and were not separated in interest as alleged by the plaintiff. As a result of this finding the suit came to be dismissed.

On appeal, the learned District Judge felt it necessary to revalue the entire evidence for reasons which will soon be mentioned and while proceeding to draw his conclusion from the evidence, the learned Judge made a special reference to the entries from the Record of Rights, discussed the oral evidence, and ultimately came to the conclusion that the finding of the trial Court was wrong and allowed the appeal.

Were it not for the contention which has been raised at the Bar in connection with the decision in the case of *Dagadu Govind* v. *Sakhubai*,[1] on which the learned District Judge relied, the point in this case would have been a simple point of fact as remarked by the Privy Council in *Palani Ammal* v. *Muthuvenkatachala*.[2] But Mr. Rele for the appellant argued that the learned District Judge went wrong in placing reliance upon the decision in *Dagadu Govind* v. *Sakhubai*,[1] to the exclusion of various other rulings amongst which he mentioned the Privy Council decision in *Palani Ammal* v. *Muthuvenkatachala*[2] referred to above and the rulings in *Babanna* v. *Parawa*[3] and *Bhimabai* v. *Gurunathgouda*.[4] On a consideration of all these rulings, I find that the rulings are all reconcilable and there is no error of law in the judgment of the District Court. It is clear that according to Hindu law a partition

[1] (1923) 47 Bom. 773.
[2] (1924) 27 Bom. L. R. 735 at p. 738; L. R. 52 I. A. 83.
[3] (1926) 50 Bom. 815.
[4] (1928) 30 Bom. L. R. 859.

between co-parceners may be partial either in respect of property or in respect of the persons making it. In the case where all co-parceners effect a separation of some of the joint property, the principle to be applied is the one in *Dagadu Govind* v. *Sakhubai*,[1] referred to above, and in *Beni Parshad* v. *Mst. Gurdevi*,[2] and the principle would be that where co-parceners in a joint Hindu family come to partition and divide the joint property with the exception of a portion of it, they are, in the absence of any indication to the contrary, tenants-in-common with reference to the excepted property unless and until a special agreement to hold as joint tenants is proved. But where the partition is partial not in respect of the property but in respect of the persons making it, so that, where some of the various joint tenants separate from the rest, it has been held by a long current of authorities that the remaining co-parceners without any special agreement amongst themselves may continue to be co-parceners and enjoy as members of a joint family the remaining property and the question whether or not they continue to be joint or separate is to be determined on the evidence in each case; see *Babanna* v. *Parawa*[3] and *Bhimabai* v. *Gurunathgouda*.[4]

This is a case in which, as stated above, all the four brothers effected a partition of a portion of the joint family property and as to the property that remained in course of time two of the four brothers separated. It is thus clear that this is a case in which on the facts as stated above, the principle in both the sets of rulings will be applicable. It seems that the trial Court had not paid regard to the principle laid down in the case of *Dagadu Govind* v. *Sakhubai*,[1] referred to above, for it remarks in paragraph 8 that

[1] (1923) 47 Bom. 773.
[2] (1923) 4 Lah. 252.
[3] (1926) 50 Bom. 815.
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1930

MARTAND PANDHARINATH v. RADHABAI KRISHNARAO

Shingne J.

on the partition of the jahagir income the ancestral land remained joint. Having regard to these circumstances, I do not think that the learned District Judge was wrong in remarking that the learned Subordinate Judge of the first Court had taken no notice of the ruling in *Dagadu Govind* v. *Sakhubai*.[1]

Mr. Rele contended that the revaluation of the entire evidence by the learned District Judge was halting in its result because the learned District Judge did not take into consideration the rulings in *Babanna* v. *Parawa*[2] and *Bhimabai* v. *Gurunathgouda*[3] mentioned above. I do not think that the judgment of the District Court requires to be disturbed on this ground. The learned District Judge did go into the evidence to decide the point whether Narayan and Krishnarao were joint.

In order that a point of some importance to the parties to this litigation should be fully considered, I allowed the appeal to be argued on facts and I have gone into the whole available evidence in order to satisfy myself as to which of the two discordant views of the lower Courts is correct. I can do that under section 103 of the Code of Civil Procedure and on consideration of the evidence I am entirely in agreement with the finding recorded by the lower appellate Court. The only things which could be said in favour of the present appellant are: (1) that Krishnarao allowed a decree to be passed against him and Narayan in respect of the mortgage bond passed exclusively by Narayan; (2) that the assessment of the suit lands was recovered out of moneys that were paid over to Narayan in connection with his Jahagir income; and (3) that the presence of the word "समाईक" in the extract from the Record of Rights is probably suggestive of the view

[1] (1923) 47 Bom. 779. [2] (1926) 50 Bom. 815.
[3] (1928) 30 Bom. L. R. 859.

that the brothers were joint. Other points of fact were also argued, but I am referring only to those that are very pertinent.

As to the first of the three points mentioned above, I say that there may be some reasons why Krishnarao submitted to that course, and Krishnarao being dead the present plaintiff is not expected to give us any useful information on the point. Narayan, who should have been able to give information on the point, did not care to go into the witness-box or get himself examined by obtaining a commission. Not only was it that Narayan did not care to place before the Court all the facts which must be within his knowledge, but defendant No. 1, who was really the contesting defendant and stood to lose the case if his contentions were not accepted, did not care to secure the necessary information by obtaining it from Narayan by either citing him as a witness or getting an order to examine him on commission. This circumstance has a great significance if we look to the decision of their Lordships of the Privy Council in *Gurbaksh Singh* v. *Gurdial Singh*,[1] and the remarks at page 1398 may be usefully referred to. It is the bounden duty of a party, personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case. Under these circumstances it cannot be said that the mere passing of a decree against Narayan and Krishnarao can be said to be a significant fact. The same can be said about the point of payment of assessment mentioned above, and as to the description in the Record of Rights I feel myself more in favour of noting, what I have already

[1] (1927) 29 Bom. L. R. 1392.

1930

MARTAND PANDHARINATH v. RADHABAI KRISHNARAO

Shingne J.

stated above, that having regard to the way in which things ordinarily go on in a Hindu joint family, the appearance of the name Yamunabai, the widow of Krishnarao, is destructive of the theory of survivorship and promotes the case of separation.

After referring to these points urged in favour of the appellant, I need only refer to one or two circumstances which also militate against the view advanced on behalf of the appellant. Thus, we find that when Krishnarao died, he had left some moneys in the Postal Savings Bank and that amount was recovered after his death by his widow in spite of Narayan's endeavour to the contrary. Then we have the fact that Krishnarao had a separate money-lending business.

The effect of all these facts and circumstances points in my view to the conclusion that Narayan and Krishnarao could not be said to be joint tenants with the result that on Krishnarao's death, Narayan, the last survivor, became entitled to the whole property in suit.

I should have mentioned that the Mukhtyar of Narayan was examined in the case at Exhibit 26. He said that he was not able to say what Krishnarao and Narayan did about the income of the suit lands. This is a point on which the Mukhtyar should have been well informed because on the date on which he was examined, Narayan was certainly alive. A statement of this nature is not calculated to further the cause of a master who himself stays away from Court.

For these reasons I confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Decree confirmed.

J. G. R.