HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

SINGLE BENCH: JUSTICE G.S. AHLUWALIA

Second Appeal No. 436/2002

Karelal and others

Vs.

Gyanbai widow of Keshari Singh and others

and

Second Appeal No. 434/2002

Karelal and others

Vs.

Gyanbai widow of Keshari Singh and others

Shri K.S. Tomar, senior counsel with Shri J.S. Kaurav, counsel for the appellants.

None for the respondents.

Date of hearing : 12/04/2018
Date of Order : 19/04/2018
Whether approved for reporting : Yes

J U D G M E N T
(19/04/2018)

This common judgment shall dispose of both the Second Appeal Nos. 436/2002 and 434/2002.

(2) These appeals have been filed against the judgment and decree dated 01.08.2002 passed by Additional Sessions Judge, Ganj Basoda District Vidisha in Civil Appeal No. 6-A/2002 and Civil Appeal No. 8-A/2002, by which the appeal filed by appellants Karelal and others was dismissed by the Appellate Court, whereas the appeal filed by respondent No. 1 Gyanbai was allowed by the Appellate Court.

(3) The necessary facts for the disposal of the present appeals,

in short, are that the respondents namely Gyanbai, Rekhabai, Gayatribai and Rajbai filed a suit for declaration of title and permanent injunction on the ground that joint Hindu Family Properly of the plaintiffs and the defendants is situated in village Pawai Tahsil Basoda District Vidisha, which includes Khasra Nos. 46, 70, 100, 101, 123, 152, 213, 215, 242, 256, 257, 258, 277, 278, 279, 286, 306, 333, 335, 336, 338, 339, 340, 342, 349, 343, 457, ad-measuring area 22.616 hectares, in which the defendant No. 1 Narayan Singh and defendant No. 2 Karelal have equal share. It was further pleaded that on 18.06.1997, the plaintiffs obtained the copy of revenue records from the Patwari, according to which Khasra No. 46 area 1.118 hectare, Khasra No. 70 area 2.749 hectare, Khasra No. 100 area 0.818 hectare, Khasra No. 101 area 0.376 hectare, Khasra No. 123 area 2.174 hectare, Khasra No. 257 area 0.241 hectare, Khasra No. 258 area 0.303 hectare, Khasra No. 286 area 0.251 hectare, Khasra No. 284 area 0.052 hectare and Khasra No. 755/1 area 1.667 hectare, total area 10.749 hectare is recorded in the name of defendant No. 2 Karelal only and this land is the property in dispute. The above-mentioned land shall be referred as “disputed property”. It was further pleaded that Karelal had five sons and the eldest son was Kesari Singh, who expired about 20 years back. The plaintiff No. 1 Gyanbai is the widow of Kesari Singh, whereas the plaintiffs No. 2, 3 and 4 are the daughters of Kesari Singh. It is alleged that the plaintiffs and the defendants No. 2 to 6 have equal share in the disputed property which is recorded in the name of Karelal. It was alleged that the plaintiffs have 1/6th share in the property, whereas the remaining defendants except Narayan Singh have 1/6th share. The property has never been partitioned and still it is in the joint possession of the parties and the plaintiffs as well as defendants No. 2 to 6 are earning livelihood from the said property. The right and title of the plaintiffs was never denied by the defendant No. 2 Karelal but now as their

relations have become strained, therefore, except defendant No. 1 – Narayan Singh, all other defendants have started denying the title of the plaintiffs and they are out and out to dispossess the plaintiffs and, therefore, the suit is being filed for declaration of title and permanent injunction. It is submitted that since the entire land was initially recorded in the name of Sardar Singh and after his death, names of Narayan Singh and Karelal were mutated and that's why Narayan has been made a party to the suit, however, the plaintiffs do not seek any relief against the defendant No. 1 Narayan Singh. Accordingly, the suit for declaration and permanent injunction was filed seeking declaration that out of the property in dispute, the plaintiffs as well as defendants No. 2 to 6 have equal share. Further relief was sought that the defendants No. 2 to 6 be restrained from dispossessing the plaintiffs from their share in the property.

(4) The appellant / defendant No. 2 filed a written statement and submitted that Karelal had two daughters also, who are also the co-sharers. It was further pleaded that during the life time, the husband of the plaintiff No. 1 - Gyanbai namely Kesari Singh about 25 years back had taken a share in the land and had got the land mutated in his name and had also taken away the movable property including the gold and silver ornaments. It was further pleaded that after the death of Kesari Singh, the plaintiff Gyanbai has retained 26 tola gold and 5 kg silver and it was never returned by her, whereas the plaintiffs continued to remain in the joint Hindu Family and during that period, plaintiff No. 1 Gyanbai had married her daughters, i.e., plaintiffs No. 2 to 4 and the expenses were borne by the defendants as elderly member of the family. It is further submitted that after including the other two daughters of the defendant No. 1, each and every defendant would have 1/8th share in the property in place of 1/6th share.

(5) The defendants No. 3 to 6 filed their separate written statement reiterating the same pleadings which were made by the

defendant No. 2 in his written statement.

(6) On the basis of the pleadings of the parries, the Trial Court framed the following issues:

> "(1) Whether the plaintiffs and the defendants No. 2 to 6 have 1/6th share in the property in dispute ?
>
> (2) Whether Kishna Bai and Kiran Bai two daughters of defendant No. 2 Karelal are the necessary party ?
>
> (3) Relief and costs ?"

(7) The Trial Court after recording the evidence of the parties, decreed the suit and held that two daughters of the defendant No. 2 Karelal namely Kishna Bai and Kiran Bai are not necessary party and held that the plaintiffs as well as the defendants No. 2 to 6 have 1/8th share in the property in dispute.

(8) Being aggrieved by the judgment and decree dated 12.12.2001 passed by the Trial Court, the plaintiffs as well as the defendants filed the appeal. The appeal filed by the plaintiff No. 1 was registered as Civil Appeal No. 8-A/2002, whereas the appeal filed by the defendants was registered as Civil Appeal No. 6-A/2002. The appeal filed by the defendants was dismissed in *toto*, whereas the appeal filed by plaintiff No. 1 was allowed and it was held that the plaintiffs are entitled for 1/6th share in the property in dispute in place of 1/8th as granted by the Trial Court.

(9) Therefore, the Second Appeal No. 434/2002 has been filed by the appellants/defendants against the dismissal of their appeal No. 6-A/2002 and Second Appeal No. 436/2002 has been filed by the appellants/defendants against the judgment and decree passed by the Appellate Court, by which it was held that the plaintiffs are entitled for 1/6th share in place of 1/8th share. The appeals have been admitted on the following substantial question of law by order dated 10.03.2003:-

> "Whether without claiming the relief of partition, suit for mere declaration is maintainable ?"

(10) It is submitted by the counsel for the appellants that the suit for declaration of title and permanent injunction would not be maintainable in absence of consequential relief of partition.

(11) None appears for the respondents in spite of the fact that it was being flashed continuously on the display board that the appeals are being taken up for final hearing. Even otherwise, the appeals were taken up for final hearing in the regular course and were not taken up out of turn.

(12) In the present case, the relationship of the parties has not been denied by the appellants / defendants. It has also not been disputed by the defendants that the plaintiffs are the widow and the legal representatives of Kesari Singh, who was son of defendant No. 2 Karelal. The only stand, which was taken by the appellants in their written statement, was that Kesari Singh has already separated himself after taking his share in the land as well as the movable property during his life time. The only substantial question of law which has been framed by this Court while admitting the appeals is that “whether the suit for declaration of title without seeking relief of partition is maintainable or not ?”

(13) If the facts of the case are considered in the light of the pleadings of the parties, then it would be clear that the defendants have not disputed, that Kesari Singh, the husband of the respondent no.1 was the son of the defendant no. 2/appellant no.1. The appellants have failed to prove that Kesari Singh had separated after taking his share in the property. Thus, it is clear that the parties are the co-sharer in the property. It is well established principle of law that possession of one co-sharer is possession of all co-sharers in the property. The question for determination is that whether a suit for declaration and permanent injunction is maintainable without seeking the relief of partition or not? The Supreme Court in the case of **C. Mohd. Yunus Vs. Syed Unnissa** reported in **(1962) 1 SCR 67** has held as under:-

> "6. In our view, the suit as framed was maintainable. The management of the institution is vested in the trustees. The four families, it is true, are by tradition entitled to perform and officiate at certain ceremonies and also to share in the income. A suit for declaration with a consequential relief for injunction, is not a suit for declaration simpliciter: it is a suit for declaration with further relief. Whether the further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case. In *Kunj Behari Prasadji Purshottam Prasadji* v. *Keshavlal Hiralal* it was held that Section 42 of the Specific Relief Act does not empower the court to dismiss a suit for a declaration and injunction and that an injunction is a further relief within the meaning of Section 42 of the Specific Relief Act."

(14) The High Court of Delhi in the case of **Sri Kishan Vs. Shri Ram Kishan and others** by order dated **1-5-2009** passed in **CS (OS) No. 94/2006** has held as under:-

> "17. The right to enforce partition is a legal incident of a co-ownership and as long as such co-ownership subsists, the right to seek partition continues. The mere fact that a co-owner files a suit for partition and then abandons or withdraws it will not deprive him of his right to seek partition of the joint property. The substantive right of a co-owner to seek partition of the joint property will not be extinguished by the provisions of Order XXIII Rule 1. If the plaintiff brings a suit for partition and then, for any reason, decides not to enforce the right immediately and withdraws the suit, then he would be deemed to have chosen to continue the ownership in common for some time more till he would find it necessary again to seek its termination. A suit which is barred by withdrawal of the claim under Order XXIII Rule 1(3) is one which is based on the same cause of action but a suit for partition and separate possession of the share which may be brought subsequently will be on a cause of action arising upon a demand subsequently made and refused [See Radhe

Lal v. Mulchand, AIR (11) 1924 ALL 905].

18. A Division Bench of this Court in Jai Devi & Ors. v. Jodhi Ram & Ors., 6 (1970) DLT 549 has held that the bar of second suit contemplated in Order XXIII, Rule 1(4) is not applicable to a partition suit, as the cause of action in such a suit is a recurring one. In the said case the husband of the appellant therein, Mr. Babu Ram had filed a suit in the Court of Subordinate Judge Ist Class, Delhi for partition of the joint family properties. An application was moved in the said suit by the plaintiff stating that he intended to withdraw the suit and did not want to pursue the same. Liberty was not reserved by the plaintiff either in his application or in his statement in Court to institute a fresh suit in respect of the subject matter of the suit nor was permission granted by the Court to withdraw with liberty to institute a fresh suit. Thereafter the wife of the plaintiff and his sons filed a suit for the partition of the same properties. One of the issues before the Court was whether the subsequent suit was barred by Order XXIII Rule 1 of the Code of Civil Procedure. The Court observed: “(13) Coming to the merits of the appeal the only Issue which require determination is whether the suit out of which the present appeal has arisen was barred by Order 23, Rule 1 of the Code of Civil Procedure. The learned Subordinate Judge came to the conclusion that where a party withdraws a suit without seeking permission to bring a fresh suit on the same cause of action or abandons a part of the claim, he is precluded from claiming the abandoned relief or from bringing a fresh suit on the same cause of action. This proposition, as a general proposition, is correct but it does not apply to suits for partition. In 1967 (1) Mlj 175 in re : Bajah V. Maheswara Rao v. Bajah V. Bajeswara Rao it has been held that :-

> "So far as a suit for partition or a suit for redemption is concerned, it is axiomatic that, when the plaintiff withdraws his suit, he will be entitled to file a fresh suit as the cause of action is recurring cause of action. Even if the plaintiff is not granted permission, under

> Order 23, Rule 1, Civil Procedure Code, he will nevertheless have a right to file a suit for partition at any time he pleases."
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> (14) To the same effect are the cases reported in AIR 1944.Sindh 192; AIR Madras 112; AIR 1935 Madras 909 and AIR 1924 Allahabad 905. We may only mention one other case reported in A1R. 1950 Federal Court In re : Thota China Subha Rao and Others v. Mattapalli Raju and Others, where it has been observed:-
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> "Provisions like Order 9, Rule 9 or Order 23, Rule 1 will not debar the mortgagor from filing a second suit for redemption because, as in a partition suit the cause of action in a redemption suit is a recurring one."
>
> (15) Even though, therefore, liberty was not reserved while withdrawing the earlier suit, the present suit would not be barred by Order 23, Rule 1 of the Code of Civil Procedure."

(15) The Supreme Court in the case of **Shub Karan Bubna Vs. Sita Saran Bubna**, reported in **(2009) 9 SCC 689** has held as under:-

> **"5.** "Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.
>
> **6.** A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without

> division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.
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> **7.** In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds.
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> * * * * *
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> **18.** The following principles emerge from the above discussion regarding partition suits:
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> **18.1.** In regard to estates assessed to payment of revenue to the Government (agricultural land), the court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of the Code. Such entrustment to the Collector under law was for two reasons. First is that the Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of the Government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible.) Where the Collector acts in terms of the decree, the matter does not come back to the court at all. The court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

(16) The Counsel for the appellants have relied upon the judgment passed by the Supreme Court in the case of **Bhaiya Ramanu Pratap Deo Vs. Lalu Maheshanuj Pratap Deo and others** reported in **AIR 1981 SC 1937** and submitted that where

the plaintiff is the holder of impartible estate and the defendant is the member of Joint Family, then the possession of the defendant would not be that of trespasser and therefore, only the suit for partition would be maintainable and the suit for possession and *mesne* profits would not be maintainable. The facts of the present case are distinguishable. It is not the case of the plaintiff, that the defendants/appellants are in joint possession of the property in dispute as a trespasser. It is the case of the plaintiff, that all the parties are in joint possession of the disputed property being the co-sharer.

(17) Thus, it is clear that even in a suit for partition, the rights of the parties are to be determined and thereafter, the property has to be separated by metes and bounds. Unless and until the entitlement of a party is not declared, no further steps can be taken. However, one thing is clear that right to seek partition is a recurring cause of action and a person may file another suit for partition even after having withdrawn the first suit without any liberty as the principle of *res judicata* would not apply as the subsequent suit shall be based on the different cause of action. Similarly, if a co-sharer who is denied his title as a co-sharer, if files a suit for declaration of title and permanent injunction with no intention to get the property separated, he may file the suit for declaration of title and permanent injunction without seeking further relief for partition. A co-sharer cannot be compelled to file a suit for partition even if he is not interested in separation of the property by metes and bounds.

(18) The matter can be ascertained from another angle also. In the present case, only the agricultural land is the disputed property. If the defendants had never challenged the rights and title of the plaintiffs, then there was no need for the plaintiffs to file a suit for declaration of title or even for partition. The plaintiffs could have filed an application under Section 178 of M.P. Land Revenue Code for partition of the agricultural land. Section 178

of M.P. Land Revenue Code, reads as under :-

> "178. Partition of holding.— (1) If in any holding, which has been assessed for purpose of agriculture under Section 59, there are more than one bhumiswami any such bhumiswami may apply to a Tahsildar for a partition of his share in the holding :
> [Provided that if any question of title is raised the Tahsildar shall stay the proceeding before him for a period of three months to facilitate the institution of a civil suit for determination of the question of title.]
> 10[(1-A) If a civil suit is filed within the period specified in the proviso to sub-section (1), and stay order is obtained from the Civil Court, the Talisildar shall stay his proceedings pending the decision of the Civil Court. If no civil suit is filed within the said period, he shall vacate the stay order and proceed to partition the holding in accordance with the entries in the record of rights.
> (2) The Tahsildar, may, after hearing the co-tenure holders, divide the holding and apportion the assessment of the holding in accordance with the rules made under this Code.
> [(3) x x x]
> [(4) x x x]
> [(5) x x x]
> Explanation I.—For purposes of this section any co-sharer of the holding of a bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding.
> [Explanation II.— x x x]
>
> [178-A. Partition of land in life time of bhumiswami.— (1) Whenever a bhumiswami wishes to partition his agricultural land amongst the legal heirs during his life time, he may apply for partition to the Tahsildar.
> (2) The Tahsildar may, after hearing the legal heirs, divide the holding and apportion the assessment of holding in accordance with the rules made under this Code.

(19) Thus, where the question of title is not involved, the revenue

authorities may partition the agricultural land amongst the co-sharers. Section 178(2) Explanation-I of M.P. Land Revenue Code, clearly provides that for the purposes of this Section, any co-sharer of the holding of a Bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding. Thus, even after obtaining the declaratory decree, the plaintiff may file an application under Section 178 of M.P. Land Revenue Code, for partition of the land. Even otherwise, in a case of partition, if the property in dispute is agricultural land, then the matter has to be referred to the revenue authorities for actual partition of the property by metes and bounds (Kindly see Judgment of the Supreme Court in the case of **Shub Karan Bubna (Supra)**. Thus, in any eventuality, the actual partition has to be done by the revenue authorities. Further, when the principle of *res judicata* does not apply to the suit for partition, then, it cannot be said that unless and until, the actual partition by metes and bounds is claimed, the suit for declaration of title and permanent injunction is not maintainable. If the plaintiff is not interested in actual separation of the property, then he can not be non-suited only for the reasons, that he had not sought the relief for partition. Thus, in view of Section 178 of the M.P. Land Revenue Code, this Court is of the considered opinion, that the suit for declaration of title and permanent injunction by a co-sharer against the other co-sharers without seeking the further relief of partition, would be maintainable and cannot be dismissed in view of Section 34 and 42 of Specific Relief Act.

(20) Accordingly, under the facts and circumstances of the case, this Court is of the considered opinion that the suit for declaration of title and permanent injunction filed by the plaintiffs, seeking a declaration to the effect that they are the co-sharer in the property in dispute and seeking the relief of permanent injunction against the remaining co-sharers would be maintainable.

(21) The Substantial Question of Law is answered in **Negative.**

(22) No more Substantial Question of Law has been framed.

(23) Accordingly, the judgment and decrees dated 1-8-2002 passed by Additional District Judge, Ganj Basoda, Distt. Vidisha in C.A. No. 6-A/2002 and 8-A/2002 as well as the Judgment and decree dated 12-12-2000 passed by 1st Civil Judge Class II, Basoda, Distt. Vidisha in Civil Suit No. 43-A/1998 are hereby affirmed.

(24) The appeals fail and are hereby **dismissed.**

(25) Decree may be drawn accordingly.

(G.S. Ahluwalia)
Judge
19/04/2018

Abhi