(1953) 02 AHC CK 0010

Allahabad High Court

Case No: Second Appeal No. 131 of 1948

Bankey Lal		APPELLANT
	Vs	
Narendra Singh and Others		RESPONDENT

Date of Decision: Feb. 27, 1953

Acts Referred:

- Uttar Pradesh Encumbered Estates Act, 1934 - Section 10, 11, 11(3), 19(2), 7

Citation: AIR 1953 All 533 : (1953) 23 AWR 355

Hon'ble Judges: Raghubar Dayal, J; Mukerji, J

Bench: Division Bench

Advocate: Brij Lal Gupta, for the Appellant; H.P. Gupta, for the Respondent

Final Decision: Dismissed

Judgement

Mukerji, J.
This is a defendant''s appeal arising out of a suit for partition. The appeal came up before a learned single Judge who has referred it to a Bench for decision because of the importance of the question of law that arises for determination in the case.

2. The facts giving rise to the appeal, very briefly stated, were these. One Lachhman Singh married twice and the two wives were named Savitri and Sarwati; they are both alive. He also had a son Narendra Singh who was the plaintiff in the suit. Narendra Singh was born sometime roundabout the year 1940 -- the exact year of his birth is however not given in the pleadings of the parties to this case. On the aforesaid composition of the family, Narendra Singh claimed one-fourth share in the family properties by right of his having an interest in the properties by being born into this family.

In the year 1936, Lachhman Singh made an application u/s 4 of the Encumbered Estates Act, he having been encumbered with debts and his property also having been encumbered with his private debts. The proceedings under the Encumbered Estates Act continued in accordance with the provisions of that Act and a decree u/s

14 of that Act was made by the Special Judge and subsequent to such decree being passed, the decree was transmitted to the Collector for the purposes of liquidation in accordance with the provisions of the Encumbered Estates Act.

It appears that the suit, out of which this appeal has arisen, was filed by Narendra Singh on 25-4-1944, that is to say long after the application u/s 4, Encumbered Estates Act, had been made by his father Lachhman Singh. It also appears that the suit was filed after the decree contemplated by Section 14 of the Encumbered Estates Act had been passed by the Special Judge and sent to the Collector for liquidation purposes. The case of Narendra Singh was a simple case of an after-born son claiming his share in the family property by virtue of his birth.

3. Several defences were raised; but the most material defence was that the plaintiff could claim no partition in the present case, because the property in respect of which he sought partition had been made the subject of proceedings under the Encumbered Estates Act and had in a sense "vested" in the Collector for the purposes of liquidating the debts which had been incurred by Lachhman Singh before the birth of the plaintiff. It was further contended on behalf of the defence that the decree which had been pronounced u/s 14, Encumbered Estates Act, was a bar to the present suit.

4. The trial court gave effect to the defence contention and dismissed the plaintiff''s suit.

5. An appeal was preferred by the plaintiff to the lower appellate court which reversed the decision of the trial court and decreed the plaintiff''s suit for partition. The operative portion of the lower appellate court''s decree is in these words: "The plaintiff-appellant has a 1/4 share in the property in suit and that the plaintiff is entitled to separate possession of his share after partition of the property in suit. The house property shall be divided according to law by the Civil Court, the Munsif of Fatehbad, and the ''zamindari'' property by the revenue court." The view which the lower appellate court took was that the decree u/s 14 of the Encumbered Estates Act did not operate as a bar to the plaintiff''s suit. The lower appellate court further pointed out the fact that the view of the trial court that Section 7(3) Encumbered Estates Act, had the effect of vesting the property in the Collector was incorrect. The lower appellate court consequently felt no difficulty in decreeing the plaintiffs suit in the terms which we have quoted earlier.

6. Defendant Banke Lal, who was a creditor of the plaintiff''s father Lachhman Singh in the Encumbered Estates Act proceedings, feeling dissatisfied with the decision of the lower appellate court, has preferred this second appeal.

7. Mr. Brij Lal Gupta, appearing on behalf of the appellant, has contended that the decision of the lower appellate court was contrary to law because the effect of the provisions of the Encumbered Estates Act was to deprive the plaintiff of the right to seek partition in respect of the properties which were the subject-matter of

proceedings before the Special Judge and then before the Collector in liquidation. Mr. Gupta sought support for his contention from the provisions of Sections 4, 7, 8, 9(4), 10 and 11(2) of the Encumbered Estates Act. He also relied on the provisions of Section 19(2) of the Act to reinforce the contention, which he mainly founded on the sections enumerated first. We have closely examined these provisions and we may at the outset state, that we shall refer to them in greater detail later, and that we are unable to accept the contention of Mr. Gupta to the effect that the proceedings initiated by Lachhman Singh under the Encumbered Estates Act defeated the right of the plaintiff to seek partition in respect of the family property to a share of which he was entitled the moment he was born.

8. That an after-born son is entitled to claim partition from his father and other coparceners of joint family property, is beyond controversy. What is further beyond controversy is that a father can make an alienation of family property without there being legal necessity if he is the sole surviving coparcener at the moment of the transfer, and that an after-born son cannot challenge such an alienation. Another proposition of Hindu law which we consider it is necessary to record at this stage is that a Hindu son is liable, because of his pious obligation, to pay the debts of his father, such debts as are not tainted with immorality; and that at a partition between a father and a son or sons the debts incurred by the father before the partition have got to be taken into account at the time of the partition and unless provision is made for those debts, debts which are not tainted with immorality at the time of the partition, then such a partition is deemed not to be a ''bona fide'' partition.

From the aforementioned propositions it would appear that in this case the plaintiff, who was an after-born son, had the right to seek partition of the family property; it is also clear that the partition that was to be made in this case had to take into account the debts incurred by the father before the son was born or before partition was sought by him, if those debts were not tainted with immorality. The right of the plaintiff to seek partition can only be defeated if the provisions of the Encumbered Estates Act so defeat them; otherwise there was nothing either in the facts of the case or in the Hindu law to defeat his right.

9. We have stated earlier that we would revert to the provisions of the Encumbered Estates Act to which reference was made by learned counsel for the appellant in order to see whether or not those provisions, in effect, either directly or indirectly, barred the plaintiff''s right.

10. Section 4 of the Encumbered Estates Act under which the application was made by Lachhman Singh, has in a proviso to it the following:

"Provided also that no application by a member of a joint Hindu family shall be entertained, unless

(a) all the members of such family join and the fact is stated in the application, or

(b) the applicant makes in the application an express declaration of his intention of separating from the joint family and states the names and addresses of the remaining members of the family and the share which the applicant would be entitled to get on partition of the family property:"

On the strength of this proviso, it was contended that where there were other members forming a joint Hindu family along with the applicant, then it was obligatory on the applicant to disclose the fact and either to make other members of the family co-applicants with him or to express his unqualified intention to separate from the family, thereby placing the controversy in regard to the debts of the applicant as also the properties to which the applicant could lay claim completely within the jurisdiction of the Special Judge. It was further contended that Section 7 of the Act indicated that the intention of the Act was for the Special Judge to deal with the property which the applicant alleged to be his. This is fairly clear from the words used in Section 7.

What was further contended, however, was that Section 7, in effect, divested the owner of his proprietary interest in the property which he showed as his property in the schedule attached to his application. We are unable to see such a consequence flowing from the provisions of Section 7. Section 7 undoubtedly places certain restrictions on the rights of ownership possessed by the applicant in respect of the properties which he discloses as his properties in his application u/s 4, but the section does not "divest" the applicant of the ownership of that property. Reliance was placed particularly on Clause (4) of Section 7, which is set out thus "Any transfer made in contravention of the provisions of this section shall be void" to show that ownership of the applicant was divested. We are of the opinion that this clause has no such effect. In our view, this clause indicates, if anything, the fact that the entire rights which an owner possesses in property were not taken away by the section or the sub-clause. Section 8 of the Act enjoins upon the applicant to submit within a period to be fixed, full particulars regarding his public and private debts as also the nature and extent of his property, as also such property which is liable to attachment and sale u/s 60, Civil P. C. Section 9(4) provides for an apportionment of debts and property in the case of an application by a member or certain members of a joint Hindu family. This provision, again, only indicates the desire of the Legislature to bring into liquidation such property as belongs to the landlord or such property as by investigation in those proceedings is held to belong to the applicant. This provision creates no bar or disability in respect of property to which claim could have been laid by a person under some other law.

Section 10 makes provision, in the nature of a counter-part, whereby every claimant referred to in Section 9 is called upon to file a written statement of his claim and give full particulars not only of his claim but also so far as is known to him or can be ascertained by him of the nature and extent of the landlord''s proprietary rights in land and the nature and extent of the landlord''s property other than proprietary

rights in land. This provision, again, is indicative of the desire of the Legislature to, as far as possible, bring into the scope of the Encumbered Estates Act proceedings all property which belonged to the landlord.

Section 11 provides for the publication of a notice in the specified manner specifying the property mentioned by the applicant u/s 9 as also, the property mentioned by a claimant u/s 10. By Sub-clause (1) of Section 10 it is in effect provided that any person having any claim to the property mentioned in such notice shall within a period of three months from the date of the publication of the notice in the Official Gazette, make an application to the Special Judge stating his claim, and the Special Judge shall determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

There is a proviso to this which, in effect, gives the claimant, who fails to make the application within the period of three months from the date of the publication of notice in the Official Gazette, the right to make the application up to a certain stage, provided he could satisfy the Special Judge that he had sufficient cause for not making the application within the period prescribed. The Special Judge then is enjoined to determine all claims ''made'' under this section before he proceeds to determine the amount due to any creditor u/s 14. This section clearly indicates that in the event of there being before the court a controversy in regard to any item of property or any items of properties, then the Special Judge has to determine that question and has got to come to a finding as to whether or not these properties belong to the applicant.

In the event of there being a decision by the Special Judge, the decision is given the force of a decree of a competent court. Sub-clause (3) of this section makes it perfectly clear to us that in the event of there being no claim made in respect of any property, the fact that certain properties are mentioned in the list of properties as the properties of the applicant does not by itself bring into being any kind of a decree of the Special Judge which has the effect of a decree of a competent court. Counsel for the appellant contended that that was so and the basis'' of his contention lay in the fact that the non-appearance of an objector or the non-preference of an objection had the effect of a kind of constructive ''res judicata'' in regard to the matter.

We are unable to interpret the provisions of Section 11 in this manner. In our judgment, if there is a determination of the rights in regard to property, then the section makes specific provision to give that adjudication the effect of a decision of a civil court of competent jurisdiction. The section is silent in regard to the effect that is to follow the absence of a claim by a person during those proceedings. The fact that the section is confined in its operation only to claims made is obvious by the use of the word ''made'' in Clause (3) of Section 11 itself. To hold otherwise, would be to read into the section very much more than is either expressed there or is

meant by it.

In this case there was no determination of the claim of the plaintiff in regard to the share that he now claims at partition and consequently, in our judgment, his claim could not be barred by anything in Section 11, Encumbered Estates Act. Learned counsel for the appellant, lastly, relied on the provisions of Section 19 (2). The words of Section 19 (2) are these:

"The Special Judge shall inform the Collector of the nature and extent of the property mentioned in the notice u/s 11 which he has found to be liable to attachment, sale or mortgage in satisfaction of the debts of the applicant".

Learned counsel argued that once the Special Judge has informed the Collector, as he must be deemed to have done in this particular case, then all controversy in regard to the ownership of that property or in regard to claims in respect of that property must be deemed to. be at rest so long as that property has not passed through the stage of attachment, sale or mortgage in satisfaction of the debts of the applicant. This argument of learned counsel overlooks the word "found" which, in our judgment, clearly indicates that unless and until there is a finding, a judicial finding and not a finding by implication, by the Special Judge that a particular item or particular items of property are liable to attachment, sale or mortgage in satisfaction of the debts of the applicant, the bar which is sought cannot be invoked.

11. From what we have stated earlier it appears to us that the plaintiff''s right to seek partition was not in jeopardy in any sense by the father having initiated proceedings under the Encumbered Estates Act. In our judgment, the plaintiff was entitled to seek his share, -- the share to which he was under the Hindu law entitled, --namely, a fourth share in the family properties. The lower appellate court has given him a decree to that effect, but the plaintiff is equally liable under the Hindu law for the debts incurred by his father prior to his birth as also prior to the date on which the plaintiff sought partition, of course such debts as were not tainted with immorality.

We, therefore, consider it proper to grant a preliminary decree for partition to the plaintiff of a fourth share in the family property. The plaintiff of course will be liable to the extent of his share in the debts incurred by the father prior to the partition. The question whether any of these debts are tainted with immorality or not, will undoubtedly be decided by proper proceedings when it is raised.

12. In the result, we dismiss this appeal, but with the modification that we have indicated above. Under the circumstances of this case we direct that the parties shall bear their own costs in this Court.