
(1996) AWC 555 Supp
Allahabad High Court
Case No: Second Appeal No. 808 of 1979

Kanhaiya Ji Misra

APPELLANT

Vs

Narain Ji Misra and
Another

RESPONDENT

Date of Decision: Dec. 7, 1995

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Citation: (1996) AWC 555 Supp

Hon'ble Judges: G.S.N. Tripathi, J

Bench: Single Bench

Advocate: Vishnu Sahai and B. Dayal, for the Appellant; Sudhir Prakash and Dhan Prakash, for the Respondent

Final Decision: Dismissed

Judgement

G.S.N. Tripathi, J.

This appeal has been directed against the concurrent judgment of the courts below, whereby the Plaintiffs suit has been decreed and the first appeal filed by the Defendant has been dismissed by the IVth Addl. District Judge, Ballia, vide his judgment and decree dated 5.10.78.

2. The Plaintiff Respondent filed O.S. No. 47/74 for partition of the disputed house. Admittedly, Pt. Pashupati Misra was the father of the Plaintiff No. 1 and grandfather of Defendants 1 and 2. Pt. Pashupati Misra had two sons--Brahm Dutt Misra and Vishnu Dutt Misra, Defendants 1 and 2 are the sons of Vishnu Dutt, deceased. According to the Plaintiff, the disputed property was self-acquired property of Pt. Pashupati Misra and after his death, both the sons--Brahm Dutt and Vishnu Dutt. father of Respondents (deceased) had acquired interest and they are in possession accordingly to the extent 21/2 share each but there was no partition by metes and bounds. Of late, the Defendant had disputed the Joint possession of the Plaintiff and their interest. Therefore, the suit was

filed for the reliefs aforesaid.

3. The defence mainly is that the suit property had already been partitioned amongst the members. A memorandum of the same was prepared on 21.6.72. There is nothing Joint now. in the western portion allotted to the Defendants, they have raised new constructions after investing about Rs. 10,000. Therefore, the Plaintiff had felt aggrieved about it and had filed a suit for partition, which is wrong. It is further bad for partial partition, estoppel and acquiescence etc.

4. The learned Munsif framed the following issues:

(1) Whether the disputed property had been partitioned between the parties ?

(2) Whether the suit is barred by principle of estoppel and acquiescence ?

(3) Whether the suit is bad for partial partition ?

(4) Whether the Plaintiff is entitled to any relief? and

(5) Whether the court fee paid is insufficient and the suit is undervalued?

The learned Munsif found issues No. 4, 5, and 6 in affirmative. Other issues were found in negative. The suit of the Plaintiff was decreed with costs.

5. Feeling aggrieved, the Defendant filed the appeal No. 26/78, which was heard and decided by the then ivth Addl. District Judge, Ballia vide his judgment dated 5.10.78 as aforesaid. The learned first appellate court has confirmed the findings of the learned trial court and dismissed the appeal.

6. The Defendant has felt aggrieved and has approached this Court by way of this appeal.

7. The appeal was admitted on the following alleged substantial questions of law Nos. 1 and 2.

(1) Because the courts below have committed substantial error of law in holding that the house in dispute had not been partitioned in the year 1967.

(2) Because paper No. 23A, which was admittedly signed by Brahma Dutt Misra, the father of the Plaintiff/Respondent, was a memorandum of partition, which had taken effect in the year 1967, which fully proved that western portion was allotted to Vishnu Dutt Misra and eastern portion to Brahma Dutt Misra, father of the Plaintiff Respondent, and the suit for partition, was therefore, not maintainable.

8. I have heard Sri Vishnu Sahai, learned Counsel for the Appellant and also learned Counsel for the Respondents Sri Dhan Prakash. I find that there is absolutely no force in

this appeal and it deserves to be dismissed.

9. In fact both the suggested questions as substantial questions of law, are practically questions of fact. Both the courts below have recorded a categorical finding that the property continues to be Joint.

10. The Jurisdiction of the High Court u/s 100, CPC is very limited. Unless there is substantial question of law, the High Court does not get jurisdiction to hear the second appeal. Secondly, even erroneous finding of fact based on evidence, will not entitle the High Court to interfere in an appeal u/s 100, CPC Thirdly, when two equally possible views are: possible and one of them is accepted by the learned lower court, and the High Court may not agree, even then, the High Court shall not interfere u/s 100, CPC Within this parameter of Jurisdiction, we have to see as to whether the learned lower courts have committed any substantial error of law.

11. Admittedly, the property was joint. It was allegedly partitioned in 1967 and a memorandum was prepared. So the burden of proving the private partition was on the Defendant Appellants. While discussing the evidence of Babban Pathak. D.W.3. the learned lower court has observed that Babban Pathak has stated that he came in possession of this house as a tenant in 1968. So admittedly he was not present at the time when the partition took place. His evidence was inadmissible totally. Further, he stated that he did not know as to which house the dispute related. Other witness D.W.I. Gopal Ji Misra, the Defendant, said that he was not present at the time of partition. So the learned lower court rightly concluded that he was not an eye-witness of the partition. The oral evidence was on the point of partition led by the Defendant, was accordingly rejected.

12. The alleged memorandum is not registered and It need not be registered. However, there should be substantial evidence to prove that private partition had taken place earlier. Once it is established that only a document can be treated as a memorandum of partition, then that memoranda itself cannot be a deed or basis of partition. in this case as discussed above, from oral evidence the partition of 1967 has not been proved at all. Therefore, the question of taking help of corroborative evidence does not arise.

13. While discussing the alleged memorandum of partition, the learned lower court has clearly stated at page 5 of its judgment that it has nowhere been mentioned in the alleged memoranda 23ka that partition had already taken place in 1967 or at any other anterior date. Rather the document mentioned that both the parties had been residing congenially in the house Jointly. So the question of partition having taken place in 1967 did not arise at all. Rather this statement gives a death knell to the Defendant's version that the partition had taken place earlier in 1967.

14. Much stress was laid on the existence of partition wall between the two portions of the house. But the evidence on the point of construction of this wall was totally lacking. The

learned lower court while discussing this point at page 6, has come to the conclusion that the evidence on the record did not prove that the partition wall was erected soon after the alleged partition of 1967. Referring to the statement of Babban Pathak, D.W.3, the learned lower court stated that according to him, there was an old partition wall. It means that the wall even existed at the time of partition. So the question of division through the erection of a wall to separate the parties portions by way of partition between the parties never arose and the evidence based upon it was rightly disbelieved.

15. This way, it appears that the learned lower court has come to a conclusion regarding the non-partition of the disputed property on the basis of evidence available on the record--both oral as well as documentary.

16. When the matter came up before the first appellate court, that court also considered the oral as well as documentary evidence afresh. At page 7 of the judgment, the learned first appellate court has observed as follows:

The contesting Defendant has stated that he does not know as to who was the tenant in the house in the year 1968 or even in the year 1972. In the circumstances it is strange as to how he was able to summon Babban Pathak, who has deposed that he was a tenant in a portion of the disputed house in the year 1968. The inevitable inference is therefore that Babban Pathak is a got up witness.

Babban Pathak is a witness examined by the Defendant. His statement has been rightly discarded by learned lower court.

17. While dealing with the document 23Ka, the learned lower court at page 8 of his judgment has observed as follows:

This document nowhere recites that the partition had already taken place in the year 1967. On the other hand it recites that the executants of the documents viz. Brahm Dutt Misra and Vishnu Dutt Misra, are the co-owners of the property described in the same and that they are living jointly and are jointly carrying on the agricultural operations.

The document is said to have come into existence on 27.6.72. Whereas, the partition allegedly, took place in 1967, A reading of this document goes to show that till the date of execution of this document dated 27.6.72, parties were living Jointly in the disputed house. So the question of partition having taken place in 1967 was inconsequential and based on totally false allegations. The recital in this document rightly negatives the contention of the Defendants that the partition had taken place in 1967. Merely because the document was in existence bearing the signatures of the parties, it will not prove the partition because admittedly, this was the memorandum of partition and not partition-deed itself.

It could not be a partition-deed by itself because it was not a registered document. At the best, it could be a memoranda. But when it proves that the partition had not taken place

till the date of the execution of this document, this document is of no help absolutely to the Defendants because the theory of partition having taken place in 1967 is totally blasted. The effort to prove the partition through this document must fail as it has been described as a memorandum of partition in the written statement. It cannot be admissible in evidence as a deed of partition because it is not registered. Admittedly, it involves a partition of properties valued at more than Rs.100. in this view of the matter, the categorical finding of the learned appellate court is correct that the property has remained Joint. It has not been partitioned at all.

18. This way, the learned first appellate court has also come to a conclusion that the property is Joint. His conclusions are based on material and evidence on the record. It cannot be said that the courts below have got out of the track. No substantial questions of law arises in this appeal.

19. This appeal has no force. It is accordingly dismissed with costs.