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Raj Man Singh and another Vs Ramvishal and others

Civil Revision No. 1098 of 1976

Court: Madhya Pradesh High Court

Date of Decision: Feb. 10, 1977

Acts Referred:

Hindu Succession Act, 1956 â€" Section 6

Citation: (1979) ILR (MP) 935 : (1979) JLJ 453 : (1979) MPLJ 587

Hon'ble Judges: G.P. Singh, J

Bench: Single Bench

Advocate: R.K. Shrivastava, for the Appellant; B.P. Pandey, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

G.P. Singh, J.

The suit in which this revision arises was instituted by 4 plaintiffs, namely, Rambishal, Bhagwandas, Ramkhelawan and Mst. Bhagwania. The first

three are brothers. Smt. Bhagwania is their aunt. The suit is for possession of certain portions of Khasra Nos. 244 and 301 of village Pipri. The

case as laid in the plaint is that plaintiff No. 4 Smt. Bhagwania held one-third share in these lands and the remaining two-third was held by the other

three plaintiffs. It is further alleged that the defendants forcibly took possession of the suit portions of the aforesaid Khasra numbers in July 1963.

Plaintiff No. 1 Rambishal died sometime in 1967. No application was made for substitution of his legal representatives. Plaintiff No. 2 Bhagwandas

died on 29th May 1976. An application was made on 21st June 1976 for substitution of his legal representatives. In this application, it was alleged

that plaintiff No. 1 Rambishal and plaintiff No. 3 Ramkhelawan were joint and after Rambishal"s death, Ramkhelawan became the Karta of the

family and was in that capacity competent to represent the interest of Rambishal after his death. It was prayed in the application that the legal

representatives of plaintiff No. 2 Bhagwandas be substituted and it be held that Rambishal"s death had no effect on the suit because his interest

was represented by plaintiff No. 3 Ramkhelawan. The defendants opposed this application on the ground that Rambishal left behind his widow,

sons and daughters who were his legal representatives and who ought to have been substituted within limitation in his place. It was contended that

Rambishal's interest could not be represented by plaintiff No. 3 Ramkhelawan. The allegation that Rambishal and plaintiff No. 3 Ramkhelawan

constituted a joint Hindu family was denied. It was further contended that on Rambishal"s death the suit abated in so far as his interest was

concerned and that as the interest of plaintiffs 1 to 3 was not defined, the entire suit abated. The trial Court did not hold any enquiry whether the

deceased plaintiff No. 1 Rambishal and plaintiff No. 3 Ramkhelawan were joint or separate. The trial Court assumed that they were joint and on

this assumption it was held that after the death of Rambishal, Ramkhelawan as Karta of the family continued to represent the interest of Rambishal

and there was no abatement of the suit even as regards Rambishal. By the same order, the trial Court substituted the heirs of the deceased plaintiff

No. 2 Bhagwandas in his place. It is against this order that the present revision has been filed.

I have earlier stated that the fact that the deceased plaintiff No. 1 Rambishal and plaintiff No. 3 Ramkhelawan were joint was disputed by the

defendants. The trial Court, therefore, should have held an enquiry on this point under Order 22, Rule 5, of the Code of Civil Procedure. The trial

Court was clearly wrong in assuming that they were joint without holding an enquiry. However, it is not necessary to remand the case for an

enquiry on this question because even on the assumption that Rambishal was joint with Ramkhelawan, I am of the opinion that the suit in so far as

Rambishal is concerned has abated. It is not disputed before me that Rambishal left behind his widow, sons and daughters as his heirs. Some of the

daughters are married. The interest of Rambishal, even on the assumption that he was joint with Ramkhelawan, devolved by intestate succession

and not by survivorship in accordance with the proviso to section 6 of the Hindu Succession Act. The interest of Rambishal which passed to his

heirs (widow, sons and daughters) is that share in the property that would have been allotted to him if a partition of the property had taken place

immediately before his death. This is so because Explanation 1 to section 6 by legal fiction separates the share of a deceased coparcener who

leaves behind him surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class, who claims through such

female relative. Under the Hindu law, no individual member of a coparcenary while it remains undivided can predicate that he has a defined share.

His interest is a fluctuating interest capable of being enlarged by deaths in the family and liable to be diminished by births in the family. It is only on a

partition that he becomes entitled to a definite share. Explanation 1 to section 6 fixed the interest of a deceased coparcener on the basis of a

notional portion at the time of his death. It is this defined interest which passes to his heirs. The heirs of a deceased coparcener thus do not take

any fluctuating interest in the coparcenary property, but a defined interest in accordance with the Explanation. The heirs of a deceased coparcener

cannot, therefore, be called coparceners. The heirs may include, as in the instant case married daughters and others who belong to another family.

It is, therefore, clear that the heirs of a deceased coparcener, whose succession is governed by the proviso to section 6, do not enter the

coparcenary to which the deceased coparcener belonged. The Karta of the coparcenary to which the deceased coparcener belonged cannot,

therefore, represent the heirs. The view that I have taken is in line with the view taken by the Kerala High Court in Venkiteswara Pai Rama Pai Vs.

Luis, and by the Calcutta High Court in Narayan Prasad Ruia Vs. Mutuni Kohain and Another,

The Learned Counsel for the non-applicants has relied upon Yethirajula Neelayya and Another Vs. Mudumuru Ramaswami and Another. In this

case, it has been held that after the death of a coparcener, who falls within the proviso to section 6 of the Hindu Succession Act, there is no

disruption of the coparcenary and that the Karta continues to represent the heirs of the deceased coparcener. Reference in this case is made to a

Full Bench case of the Andhra Pradesh High Court in P. Govinda Reddy and Others Vs. Golla Obulamma, . In the Full Bench case, there are

clear observations that the coparcenary property will not include the interest of a deceased coparcener which has devolved upon his heirs and the

Karta of the joint family will not be able to represent the heirs who are not coparceners. The decision in Y. Neelayya v. M. Ramaswami is, in my

opinion, contrary to the Full Bench case which was somehow distinguished. With great respect, I am unable to agree with the view taken in Y.

Neelayya v. M. Ramaswami. The petition by legal fiction brought about by Explanation 1 to section 6 is no doubt only for the purpose of the

section, but that only means that it is limited to the extent of separating the share of the deceased coparcener which is inherited by his heirs. The

coparcenary property would still continue, but it will not include the share of the deceased coparcener inherited by his heirs. Similarly the

coparcenary will also continue, but it will not include the heirs of the deceased coparceners.

On the death of plaintiff No. 1 Rambishal, as his legal representatives were not substituted within time, the suit in so far as he was concerned

abated. It is, however, contended by the Learned Counsel for the non-applicants that as the suit was for recovery of possession from trespassers,

the surviving co-sharers, who were parties to the suit, could continue the entire suit and there was no abatement even as regards the deceased

plaintiff No. 1 Rambishal. Reliance in this connection is placed on Ramnarain and Another Vs. Kishorelal, When there are more plaintiffs and any

one of them dies, if the right to sue survives to the surviving plaintiff or plaintiffs alone, there is no abatement even as regards the deceased plaintiff

and the suit proceeds at the instance of the surviving plaintiff or plaintiffs. But when the right to sue does not survive to a surviving plaintiff or

plaintiffs alone, the suit abates as regards the deceased plaintiff if, within the time limited by law, no application is made for substitution of his legal

representatives. This is the effect of Rules 2 and 3 of Order 22, Civil Procedure Code. If Rule 2 applies, there is no abatement even as regards the

deceased plaintiff but, if that Rule does not apply, the suit abates as regards the deceased plaintiff as is provided in Rule 3. The words ""where the

right to sue survives to the surviving plaintiff or plaintiffs alone" as used in Rule 2 mean that the right to sue should survive to the surviving plaintiff or

plaintiffs exclusively. If a deceased plaintiff leaves behind his legal representatives who can join as plaintiffs with the surviving plaintiff or plaintiffs, it

canot be said that the right to sue survives to the surviving plaintiff or plaintiffs alone. The word ""alone" as used in Rules 2 and 3 of Order 22 means

to the exclusion of others." This is the view which was held by Bhachawat J. (as he then was) in a Full Bench case of the Calcutta High Court [

Santosh Kumar Mondal and Others Vs. Nandalal Chakrapani and Others, . The view taken in the Calcutta Full Bench case as to the construction

of Order 41, Rule 4, is not in line with a later Supreme Court decision Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others,

. But the construction placed by Bachawat J. as to the meaning of the word ""alone"" in Rules 2 and 3 of Order 22 still stands. In Sankru Mahto and

Others Vs. Bhoju Mahato and Others, in dealing with Rules 2 and 3 of Order 22, a Division Bench of the Patna High Court held that the test

whether Rule 2 applies is to see whether ""the surviving plaintiffs can alone sue" and ""there are no others who can join as plaintiffs". Applying this

test, it is clear that the deceased plaintiff No. 1 Rambishal"s heirs could have joined as plaintiffs in the suit as his legal representatives and,

therefore, it cannot be said that the right to sue on Rambishal"s death survived to the surviving plaintiffs alone. Rule 2 of Order 22 was, therefore,

not applicable. For the same reason, Rule 3 of Order 22 applied and as Rambishal"s heirs were not brought on record as his legal representatives

in his place, the suit so far as he is concerned abated. For the reasons given above, I do not agree with the view taken by the Rajasthan High Court

in Ramnarain v. Kishorelal (supra) which does support the argument of the Learned Counsel for the non-applicants.

Learned Counsel for the applicants has contended before me that the abatement of suit as regards Rambishal had the effect of abating the suit as a

whole. In my opinion, there is no merit in this contention. As the suit so far as Rambishal is concerned has abated, the surviving plaintiffs cannot

recover the interest of Rambishal in the suit land from the defendants. The surviving plaintiffs would, therefore, be not in a position to obtain a

decree for actual possession, but there would be no difficulty in passing a decree for joint possession leaving it to the plaintiffs to get their shares

separated in a subsequent suit for partition [See Abdul Hamid and Others Vs. Durga Charan Das, . It is argued by the Learned Counsel for the

applicants that if the deceased plaintiff No. 1 Rambishal was joint with plaintiff No. 3 Ramkhelawan as is contended by the plaintiffs, the entire suit

would abate because no ascertainable interest was held by the deceased plaintiff. There is no merit in this argument. Even on the assumption that

Rambishal was joint with plaintiff No. 3 Ramkhelawan, on Rambishal"s death there came into being a notional partition separating his share in

accordance with the Explanation to section 6 of the Hindu Succession Act. As stated earlier, the interest of the deceased plaintiff No. 1 Rambishal,

therefore, got divided at the time of his death and it cannot be said that even after his death the interest that held by him was joint and indivisible

with the interests held by plaintiff No. 3 Ramkhelawan. As earlier pointed out by me, the surviving plaintiffs including the legal representatives of the

deceased plaintiff No. 2 Bhagwandas, if they otherwise succeed in establishing their title, would get a decree for joint possession against the

defendants. To that extent, there is no difficulty in continuing the suit.

The revision is partly allowed. The order of the trial Court, dated 12th October 1976, is set aside to the extent it holds that the suit has not abated

even as regards the deceased plaintiff No. 1 Rambishal. The trial Court shall proceed with the suit in the light of the observations made above on

the footing that the suit has abated as regards the deceased plaintiff No. 1 Rambishal. There shall be no order as to costs of this revision.