

Court No. - 19

Case :- SECOND APPEAL No. - 216 of 1992

Appellant :- Kalp Nath

Respondent :- Ram Sewak

Counsel for Appellant :- P.L. Mishra,Ajit Pratap Singh,Arvind Kumar Jauhari,M.G Mishra,Rahul Mishra,Ram Kumar Singh

Counsel for Respondent :- G.S.L. Verma,Ashok Kumar,Shailesh Kumar Pathak

Hon'ble Jaspreet Singh,J.

Heard Shri A. K. Jauhari, learned counsel for the appellant and Shri S. K. Pathak, learned counsel for the respondent.

This is the defendant second appeal being aggrieved against the judgment and decree passed by the lower appellate court whereby the plaintiff's appeal was allowed by means of judgment and decree dated 02.04.1992 passed by Civil Judge, Sultanpur as a result the suit for partition bearing No.263 of 1983 which was dismissed by the trial court by means of judgment and decree dated 15.09.1984 was set aside and the suit was decreed by the lower appellate court.

The instant appeal was admitted by a Co-ordinate Bench of this Court on 15.05.1992 on the questions of law as stated in the memo of appeal. Before proceedings further, it will be relevant to notice the questions of law which have been reproduced hereinafter for ready reference:-

(a) Whether a person, who admits that he remained out of country, can be held to acquire some property jointly with other person without his consent?

(b) Whether the property purchased by a person can be said to be acquired by some other person, who has admitted of remaining out of country at the time of such acquisition?

(c) Whether joint acquisition can be presumed or that the plaintiff is required to prove the same by cogent evidence?

(d) Whether in the absence of any evidence for the joint acquisition, the same can be assumed and presumed?

(e) Whether right to the open land after abolition of Zamindari can be claimed otherwise than under section 9 of the U.P.Z.A. & L.R. Act?

(f) Whether a finding of fact recorded by the trial court after appreciation of evidence can be upset by the appellate court, without recording reasons therefore?

Before advertng to the rival submissions, it will be relevant to take a glance at the facts giving rise to the instant appeal.

The original plaintiff, namely, Ram Sewak instituted a suit seeking a decree of partition before the court of Munsif South, Sultanpur impleading Kalp Nath and the Gram Sabha as a party.

In the plaint in suit, it was stated that the original plaintiff and the defendant no.1 were related; inasmuch as the defendant no.1 was the real nephew of the plaintiff (son of real brother of the father of the plaintiff). It was urged that the father of the defendant had died about 8 to 10 years ago and there was a settlement between the plaintiff and his brothers. However, the ancestral house in which the defendant no.1 was residing in the southern portion, which was on a 'Parti' land and the plaintiff had taken the property shown by the letters A, B, C, D, E, F from erstwhile Zamindar, namely, Devi Singh. It was urged that the said property continued to remain joint and in the aforesaid circumstances, it was necessary that the land and the disputed property be partitioned for which the relief was sought.

The suit came to be contested by the defendant wherein he stated that initially the father of the defendant no.1, namely, Ram Sahai alongwith his brother had acquired the property from the erstwhile Zamindar Thakur Devi Singh. It was further stated that the house of the defendant was on the southern side from the house of the plaintiff and the disputed area was the Hata and Sehan which was being utilized by the defendant and his family members for the purposes of storing grain,

fodder and also for tying domesticated animals as well as for their ingress and egress. It was further stated that the said land was acquired by the father of the defendant no.1 and it was not joint, hence there was no issue of partition, consequently the suit was liable to be dismissed.

Upon contest, the trial court framed five issues. However, the relevant issues upon which the suit was contested was:- **(i)** whether the disputed property is the joint property as alleged by the plaintiff? **(ii)** whether the disputed property is capable of being identified? In this context the parties led evidence and the trial court while dealing with the issue no.1 found that the plaintiff could not establish that the property in question was purchased jointly by the family.

It further noticed that the plaintiff could not establish the joint acquisition of property and rights whereas the defendant Kalp Nath had deposed before the court indicating separate rights including that the partition had already taken place between the father of the defendant and the plaintiff with other brothers. It also indicated that there was a corridor between the house of the plaintiff and the defendant which has been closed and this also indicated that the partition had already taken place or else there was no reason why the said corridor/gallery would be closed. Taking an overall view of the evidence led by the parties, it was held that the plaintiff could not establish his right and possession and that the property was joint, consequently, the trial court by means of judgment and decree dated 15.09.1984 dismissed the suit.

The lower appellate court after noticing the reasons given by the trial court reversed the findings on the premise that since the plaintiff and the father of the defendant no.1 was brother, hence the property was joint and it set aside the judgment passed by the trial court and granted half share to the plaintiff and half to the defendant by means of its judgment dated 02.04.1992.

In the aforesaid backdrop, learned counsel for the appellant Shri A. K. Jauhari submits that once it

was established from the record that the plaintiff was not in India but was in Burma (now Myanmar). There was no occasion for the property to have been acquired jointly. It is further urged that even assuming that the father of the defendant and the plaintiff were real brothers and they may have been a joint family but there is no such presumption available for a joint family property.

It is submitted that the property in question was taken by the father of the defendant no.1 and their shares were separated. The evidence including the site-plan annexed in forming part of the plaint in suit also indicated that the plaintiff could not have any right over the disputed land which was adjacent to the house of the defendant no.1 and beneficial for his use.

It was further submitted that between the house of the plaintiff and the defendant no.1 there was a corridor on the eastern side which was closed which also indicates that the rights between the parties were separate and there was no jointness. Since the plaintiff had filed the suit for partition, it was incumbent upon him to have established the acquisition of the property through joint funds also established that there was a common mess and the family had a joint nucleus from which the property was acquired. The plaintiff had to stand on its own leg and could not take the benefit of any weakness in the defence.

From the above perspective if the evidence is sifted, it would indicate that the plaintiff miserably failed to establish this fact and though the suit was dismissed by the trial court but the lower appellate court erred in ignoring the fact that there was no evidence led to indicate that the property was acquired by joint funds especially when the appellant himself was not in the country at the time of alleged acquisition nor it could be established that there was joint family funds from which it was acquired.

It is further urged that there was no evidence led on behalf of the appellant regarding the right of user and in the aforesaid circumstances, it could not even be held that the land which was disputed

was being held by the parties in trust for each other as joint and co-owners. In the aforesaid circumstances, without taking note of the proposition of law, the lower appellate court has reversed the judgment and decree of the trial court which is an erroneous exercise of jurisdiction, consequently the appeal deserves to be allowed after setting aside the judgment passed by the lower appellate court restoring the judgment of the trial court.

Shri S. K. Pathak, controverting the aforesaid submissions has urged that it is not in dispute that the father of the defendant no.1 and the plaintiff were real brothers. It is also not disputed that both the plaintiff and the father of the defendant were residing and both had their houses adjacent and since they belonged to the same family, there is a presumption of a joint family and the property is where also held to be joint.

It is further submitted by Shri Pathak that in the given circumstances where the evidence had been led, it clearly indicated that the property was joint and the lower appellate court after re-appreciating the evidence has recorded a finding of fact which cannot be said to be erroneous and as such the appeal being concluded by findings of fact. It is not open for the second appellate court to disturb the same, hence the appeal deserves to be dismissed.

The Court has heard the learned counsel for the parties and also perused the material on record.

It is a settled proposition of law that the plaintiff is required to stand on his own leg and cannot take benefit of the weakness of the defence. It was the specific case of the plaintiff, the plaintiff and his other brothers had separated, however, yet it claimed that the disputed property was joint between the plaintiff and the defendant no.1. It was also stated in paragraphs-2 and 3 of the plaint that the property in question initially belonged to Devi Singh the Zamindar who was having his house thereon since the time of the second settlement and after the said house had fallen down, the plaintiff and the defendant no.1 had acquired the said land by taking possession thereon and had

raised their constructions. It is in the aforesaid context, the disputed land was common and hence the suit for partition was filed.

If the basic pleading of the plaintiff is examined, it would be found that the alleged acquisition of the land does not appear to have been by any legal mode of transfer, rather it appears after the house of Devi Singh had fallen down both the plaintiff and the father of the defendant no.1 raised their constructions. Such kind of possession over the land without any legal transfer cannot be said to be a legal acquisition which may give rise to any joint acquisition of property. In this view there cannot be any jointness or co-ownership of the property. It is something akin to two person's taking possession of a third persons land and thereafter the two said persons who have taken possession claim partition amongst themselves which is legally not permissible nor recognizable.

Another fact which cannot be disputed by the counsel for the respondent that at the time of the alleged acquisition, the plaintiff was not in India but was in Myanmar. The evidence available on record including the statements of the plaintiff and his witnesses also support the aforesaid and it also goes on to indicate that the plaintiff could not even establish that the said house which was dilapidated thereafter the plaintiff and the father of the defendant no.1 had come in possession was taken by any recognized mode of transfer from the erstwhile Zamindar Devi Singh as there is contradiction in the statement regarding the name of Zamindar. The plaintiff had examined the witness to prove this fact but in his cross examination, the said witness could not indicate how he was related to Devi Singh nor he had any idea regarding the family and antecedents of Devi Singh, rather he gave a different name of the Zamindar. It is taking note of the aforesaid discrepancies and the statement made by the plaintiff including the fact that between the house of the plaintiff and the defendant no.1, there was a gallery on the eastern side which have been deliberately closed which indicates separation and not that the property was joint.

After making an overall assessment of the oral evidence, the trial court dismissed the suit. While the lower appellate court allowed the appeal, it ought to have been taken note of the reasons given by the trial court especially while decreeing a suit for partition, it ought to have been noticed whether the property in question of which partition was sought was procured legally by the persons as co-owners.

This basic ingredient is completely missing from the evidence as well as the statement made by the plaintiff. Moreover the submission that the plaintiff and the father of defendant no.1 were real brothers, thus the acquisition was of a joint family is also not the correct proposition. It is trite law that there is a presumption regarding a joint family but the said presumption does not extend to a joint family property. In this regard, this Court in the case of ***Dropadi Devi and others Vs. Shiv Chandra Dixit 2020 SCC Online Allahabad 104*** had the occasion to consider the features regarding a joint family and a joint family property. After noticing the decision of the Apex Court and this Court and it concluded that in order to establish the property was joint, it was necessary to show that the family in question was joint in living, mess and had a common nucleus of funds from which the property was acquired or was coming down from a common ancestor.

Needless to say all these ingredients are completely missing in the plaint as well as in the evidence, accordingly this Court finds that the lower appellate court committed an error in overlooking the issue including the statement of the plaintiff made in paragraphs 2 and 3 of the plaint in suit. The judgment of the lower appellate court, accordingly, cannot be sustained and is liable to be set aside.

Accordingly, the instant second appeal is **allowed**. The judgment and decree dated 02.04.1992 passed by the Civil Judge, Sultanpur in Civil Appeal No.165 of 1984 is set aside. The suit of the plaintiff-respondent bearing No.263 of 1983 shall stand dismissed and the judgment and decree passed by the trial court dated 15.09.1984 is

affirmed. In the facts and circumstances, there shall be no order as to costs. The record be returned forthwith.

Order Date :- 6.12.2023

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