

**Neutral Citation No. - 2024:AHC-LKO:41495
(Reserved)**

Court No. - 5

Case :- SECOND APPEAL No. - 359 of 1990

Appellant :- Ram Adhar Singh (Dead), through legal representatives
Lal Vishwanath Singh and Others

Respondent :- Ram Iqbal Singh (Dead) through legal representatives
Smt. Chandrakali and Others

Counsel for Appellant :- A.S. Chaudhary, M. Afzal, Mahmood, P.V.
Chaudhary, Prabhakar Vardhan Chaudha, R.N. Tilhari, Sanjai Verma

Counsel for Respondent :- Dr. G.P. Tripathi, Jai Prakash Singh Vats

Hon'ble Rajnish Kumar, J.

1. The sole respondent had died and the application for substitution filed on his behalf has been allowed by means of the order dated 15.02.2018, but the substitution has not been incorporated. It transpired during preparation of this judgment. Learned counsel for the appellant is permitted to incorporate the substitution during course of the day.

2. Heard Sri P. V. Chaudhary learned counsel for the appellants and Sri Jai Prakash Singh Vats learned counsel for the respondent.

3. This second appeal under Section 100 of Civil Procedure Code (here-in-after referred as C.P.C.) has been filed for setting aside the decree of the lower appellate court dated 28.04.1990 in Civil Appeal No.105/106 of 1982; Ram Iqbal Singh Vs. Ram Aadhar Singh passed by Special Additional District Judge, Prata as well as to restore that of trial court dismissing the plaintiff-respondent's suit with cost.

4. The substantial question of law as reformulated by this court is as under:-

"Whether the partition made by metes and bounds as admitted by both the parties can be taken into account or ignored by the Court beyond the pleadings and effect of the same."

5. Learned counsel for the appellant/defendant (here-in-after referred as the appellant) submitted that the suit for partition filed by the respondent-plaintiff (here-in-after referred as the respondent) was rightly and in accordance with law dismissed by the trial court in view of the admission of the parties that there had been a mutual partition of joint ancestral property amongst them and they are in possession of their portion accordingly because once a mutual partition has taken place the suit between the same parties is not maintainable in respect of the same property except on the ground of fraud, coercion etc. But the appellate court has committed substantial error of law and jurisdiction in setting aside the trial court decree. He further submitted that the first appellate court has committed substantial error of law in ignoring the defence of the appellants as well as evidence on record and considered by the trial court with reference to the land and building lying on the west of dotted line 'Sha' and 'Ha' in sketch map of Commissioner and in holding the same to be the joint ancestral property and setting aside the judgment of the trial court and holding that the respondent is entitled to get the partition of his share made.

6. He further submitted that the predecessor-in-interest of the appellant Pudan Singh got the land in western side of the land in dispute after the dotted line 'Sha' and 'Ha' through Zamindari Hibanama from Ram Adhin Singh, therefore the appellants are exclusive owner of the said land and the Banskot etc. on the eastern side of the land in dispute which were planted by him. The trial court, after recording categorical findings on the basis of pleadings, evidence and material on record had held that the appellants have acquired the western portion of the land in dispute after dotted line 'Sha' and 'Ha' separately, therefore, it was the appellant's exclusive property. The finding recorded by the appellate court are illegal and perverse and not tenable. Thus, the submission is that the judgment and decree

passed by the first appellate court is not tenable in the eyes of law and liable to be set-aside by this Court.

7. Per contra, learned counsel for the respondent submitted that though the parties were in possession on their portion as per their convenience on the basis of mutual partition but since there was no legal partition, therefore the suit for partition was filed by the respondent Ram Iqbal Singh on account of the interference in his possession off and on. He further submitted that the parties adduced the evidence before the trial court and it was admitted by the respondent in his evidence but the trial court ignoring the evidence on record, dismissed the suit. He further submitted that the appellants have failed to prove his exclusive title on western portion of the land in dispute after dotted line 'Sha' and 'Ha' but the trial court ignoring the same, dismissed the suit recording a finding that the land on the western side of dotted line with 'Sha' and 'Ha' is higher than the other land on the eastern side, therefore the appellants must have acquired it exclusively, whereas the western side of the land in dispute was higher on account of falling of the old construction.

8. He further submitted that Indra Bahadur Singh and Tuna Kunwari, the defendants in the suit were fighting the case together and they have also admitted the case of the respondent. During pendency of the suit Indra Bahadur Singh had died and Tuna Kunwari claimed her portion on the basis of an unregistered will executed by him prior to his death. Tuna Kunwari has also executed the will in her life time in favour of the respondent Ram Iqbal Singh of his share as well as share of Indra Bahadur Singh. The will of Indra Bahadur Singh was not proved, therefore both the parties would get 1/2 share each in the property of Indra Bahadur Singh.

9. On the basis of above, submission of learned counsel for the respondent is that since the trial court had ignored the pleadings and

material evidence on record and dismissed the suit, therefore the appeal filed by the respondent has rightly and in accordance with law been allowed after considering the pleadings of the parties, evidence and material on record. There is no illegality or error in the impugned judgment and decree. The appeal has been filed on misconceived and baseless grounds. The appeal is liable to be dismissed.

10. I have considered the submissions of learned counsel for the parties and perused the records.

11. The respondent Ram Iqbal Singh now dead had filed Regular Suit No.1 of 1981 for partition of his 1/6th share in the land in dispute and the construction situated thereon and trees and Banskot. The suit was filed alleging therein that the land in dispute and the constructions thereon are Abadi of the ancestors of the plaintiff and the defendants on which earlier their ancestors were in possession and now they are. There are three trees of neem and five Banskot in the land in dispute and the parties are the owner and in possession of these. The plaintiff who is now dead and his legal representatives are respondents in the instant appeal claimed his 1/6th share in the land in dispute, constructions, trees and Banskot and stated that the defendant nos.1 and 3 i.e. Ram Adhar Singh, the appellant in the appeal now dead and substituted by his legal representatives are appellants and Tuna Kunwari have 1/6th share each share and the defendant no.2 Indra Bahadur Singh 3/6th share. It has further been alleged that the parties are in possession on their share of the land in dispute and constructions on the basis of mutual partition as per their convenience but there is no partition from court and since the defendants used to raise dispute in regard to the possession and refused for partition through court, therefore his share may be separated. During pendency of the suit a Commission was held and the Commissioner had submitted his report alongwith sketch map of the land in dispute

which was adopted by the respondent and accordingly the suit was amended.

12. During pendency of the suit, the defendant no.2 Indra Bahadur Singh died, therefore the suit was amended to the effect that the respondent had 1/6th share and on account of death of the defendant no.2 Indra Bahadur Singh 1/2 i.e half share each is of the plaintiff and the defendant no.1 i.e. the respondent in this appeal in his share in the property in dispute. The plaintiff i.e. present respondent got 1/4th and further during pendency of the appeal the defendant no.3 Tuna Kunwari died, therefore on the basis of registered will deed executed by her, he got his 1/6th share also.

13. The suit was contested by the appellant late Ram Adhar Singh(now dead) by filing a written statement denying the pleadings made in the plaint and also the pedigree given in the plaint and stating that the pedigree given by the respondent is incomplete. It was further alleged that the suit has been filed on the basis of a notional cause of action which is not maintainable and it has been filed in regard to the part of a big number and the land in dispute is unidentifiable, therefore it is defective. It has also been alleged that the land in dispute is not part of the land no.931 and the suit has wrongly been filed including the part of plot no.856. It was also claimed that the constructed house on the western side and the thatches in front of the house therein are his separate property, which was parti land. It has been acquired by him and his real brother Ram Avtar Singh and constructions have been made. The said land is not ancestral land. It was also averred that the Banskot and other trees on the eastern side of the land in dispute are not in the Abadi land which alongwith other trees on it have been planted by him and his brother Ram Avtar Singh and after his death he is exclusive owner of the same. It has further been averred in the written statement that he has 1/2 share in the eastern portion and the 1/2 portion on the western side after dotted

line 'Sha' and 'Ha' in sketh map is separate on spot and his exclusive property. He also claimed his portion in the trees etc. In additional written statement filed by the appellant after the amendment in the suit, he claimed that the western portion of the land in dispute after dotted line 'Sha' and 'Ha' is his separate Abadi and he and his brother have got constructions made in the same and after death of his brother Ram Avtar Singh, he is the exclusive owner of the same. He also claimed the land trees and Banskot situated on the eastern side on the ground that they have been planted by him and standing.

14. A separate written statement was filed by the defendant no.2 and 3 supporting the case of the respondent i.e. the plaintiff stating that the defendant no.2 has 1/2 share and the defendant no.3 1/6th share. They stated that the court may separate their portion by partition and they are ready to pay the court fees. An additional written statement was filed by the defendant Mst. Tuna Kunwari after death of the defendant Indra Bahadur Singh on 16.06.1981 claiming his portion on the basis of unregistered will dated 14.06.1981 executed by him in her favour.

15. After exchange of pleadings, eight issues were framed by the trial court and the evidence was adduced by the parties. The trial court dismissed the suit holding that the parties have made partition by mutual consent in their ancestral property and accordingly the parties are in possession on their portion, therefore there is no need of any partition. In regard to the will executed by Indra Bahadur Singh the trial court held that the will executed by the Indra Bahadur Singh is forged and prepared during pendency of the suit, which is not believable, therefore his property would divide between the plaintiff i.e. the respondent and the defendant i.e. the appellant and they would have half share each in his property i.e. share in the land in dispute .

16. Being aggrieved by the judgment and decree passed by the trial court, the Civil Appeal No.106 of 1982 was filed by the defendant no.1 i.e. respondent Ram Iqbal Singh and another Civil Appeal No.105 of 1982 was filed by Mst. Tuna Kunwari and after her death during pendency of the appeal, the respondent Ram Iqbal Singh was got substituted in her place as she had executed a registered will in his favour of her portion with the portion of Indra Bahadur Singh.

17. The respondent had filed the suit stating that the land in dispute is the ancestral property of the respondent and the appellant, in which they are residing since the time of their ancestors and there are three trees of neem and five Banskot. The share of respondent, who was plaintiff is $\frac{1}{6}^{\text{th}}$ in and Ram Adhar Singh, the defendant no.1 i.e. the present appellant's $\frac{1}{6}^{\text{th}}$ and the share of the defendant no.2 Indra Bahadur Singh $\frac{3}{6}^{\text{th}}$ and the share of defendant no.3 Smt. Tuna Kunwari is $\frac{1}{6}^{\text{th}}$ in the property in dispute. It has further been alleged that the parties are in possession on their portion as per family partition, according to their convenience but since the defendant no.1 i.e. the appellant used to raise dispute in his possession and not ready for partition through court, therefore his $\frac{1}{6}^{\text{th}}$ share may be separated. The appellant, who was the defendant no.1 in the suit denied the averments made in the plaint and stated that the land in dispute is not part of no.931 and the house which is constructed on the western side of the land in dispute and the thatch in front thereof is in his exclusive ownership, which has been constructed by him and his real brother Ram Avtar Singh and he had constructed the same after permission from its owner and after death of Ram Avtar Singh, the appellant has become the exclusive owner. He also claimed the land of Banskot and trees situated on the eastern side of the land in dispute in his exclusive ownership and share in old house and Abadi. The defendants no.2 and 3, though have supported the case of the respondent but stated that their shares may be separated and they are ready to pay the court fees

for it. Thus it is apparent that the parties have not admitted mutual partition and no such mutual partition has been brought on record or disclosed in the pleadings in as much as the defendant no.1 i.e. the appellant claims that half partition of the land in dispute on the western side after dotted line 'Sha' and 'Ha' and the land of trees and Banskot on the eastern side of the land in dispute are his exclusive property, therefore it can not be said that there is any partition by metes and bounds between the parties and since there is no admitted partition by metes and bounds between the parties therefore it can not be taken into account by the court. Thus the suit filed for partition and separation of share by the respondent was required to be decided by the court on merit after considering the pleadings, evidence and material on record and the appellate court rightly and in accordance with law considered the case and decided.

18. The first appellate court, after considering the pleadings of the parties, evidence and material on record recorded its agreement with the findings recorded by the trial court in regard to the unregistered will executed by the defendant no.2 Indra Bahadur Singh in favour of the defendant no.3 Mst. Tuna Kunwari and held that the will was not proved, which was executed on 14.06.1981 during pendency of the suit and just prior to death of Indra Bahadur Singh on 16.06.1981 as no cogent evidence could be adduced and will could not be proved in accordance with law. The appellate court has also recorded a finding that in his opinion the admitted signatures of Indra Bahadur Singh and his signatures on the will in view of expert opinion and execution of will in presence of Mst. Tuna Kunwari also raises a serious doubt on its veracity. Learned first appellate court also found that there is a gap of about one and half inch between the contents of the will and signature of Indra Bahadur Singh and there was no justification of such a gap. There is contradiction in place of writing of will also. This Court does not find any illegality or infirmity in the findings so

recorded by the first appellate court on the basis of evidence and material on record.

19. It is not disputed that the defendant no.3 i.e. Tuna Kunwari had executed a registered will in favour of the respondent and since she had $\frac{1}{6}$ th share in the property in dispute, therefore she could have made the will of her share only because the will executed by Indra Bahadur Singh in her favour is not proved, therefore she could not have executed will of his share and share in property in dispute of Indra Bahadur Singh would be divided between the appellant, who was the defendant no.1 and the respondent i.e. the plaintiff, equally i.e. $\frac{1}{2}$ each. The first appellate court, considering it and the pedigree of the parties as per their evidence, came to the conclusion that Ram Iqbal Singh would have his whole $\frac{1}{6}$ th share and $\frac{1}{6}$ th of Mst. Tuna Kunwari and half of total share in property in dispute of Indra Bahadur Singh i.e. $\frac{1}{4}$ th. Thus the total portion of the respondent Ram Iqbal Singh would be $\frac{7}{12}$, whereas the defendant no.1 i.e. the appellant Ram Adhar Singh would have his $\frac{1}{6}$ th share and half of Indra Bahadur Singh's i.e. $\frac{1}{4}$ th total $\frac{5}{12}$.

20. The appellant, who was defendant no.1 in the suit, claimed that the land on the western side of the property in dispute after the dotted line 'Sha' and 'Ha' is higher than the land on the eastern side, which was lying parti and Ram Avtar brother of the appellant had constructed house on the same after receiving it, and after his death, the appellant is the exclusive owner of the said land and he has share in the remaining ancestral property, but he has failed to prove as to how he got it. He also claims to have planted the Banskot and other trees on the eastern side of the land in dispute. Neither any Ijazatnama has been placed on record nor any evidence to prove as to how it has been acquired by the brother of the appellant or the appellant. However, it has been stated that Ram Adhin Singh had gifted it to his brother but who was Ram Adhin Singh and as to how it was his

exclusive, it has not been clarified. However as per evidence of the defendant no.3, as considered and recorded by the first appellate court, the pedigree which emerges is that Ram Dayal Singh had four sons; Chauharja Singh, Ram Adhin Singh, Thakur Deen Singh and Bindeshwari Singh. Gajadhar Singh and Shitla Bux Singh were the sons of Bindeshwari Singh. None of them claims in this regard. It has been stated that the gift deed was executed by Ram Adhin Singh in favour of the appellant, however the gift deed which has been placed on record is in regard to the agricultural property and not Abadi, therefore it is not proved that any gift of Abadi was made by Ram Adhin Singh, therefore on the basis of said gift no rights would accrue in favour of the appellant in the property in dispute. Even otherwise no rights would accrue on the basis of the said gift deed.

21. The gift deed was executed by Ram Adhin Singh son of Ram Dayal Singh stating that he has three brothers; Bindeshwari Singh, Chauharja Singh and Thakur Deen Singh, who are living separately and in possession on their shares. Thakur Deen Singh and Chauharja Singh have no issues and among the four brothers only Bindeshwari has two sons Shitla Bux Singh and Gajadhar Singh and made the gift in favour of Pudan Singh and Chhittu Singh son of Shitla Bux Singh under his guardianship being minor. The appellant Ram Adhar Singh (now deceased) and late Ram Avtar Singh were the sons of Pudan Singh. A copy of the judgment and order dated 16.03.1927 passed in Suit No.143 of 1926; Shitla Bux Singh Vs, Pudan Singh has been placed on record as Paper No.66 G 1/1 to 66 Ga 1/13, which indicates that the suit was filed claiming for declaration of rights by Shitla Bux Singh of the property of Chhittu Singh as he had died. It is recorded in the said judgment and order dated 16.03.1927 that the gift deed made in favour of Pudan Singh and Chhittu Singh was made for defrauding the creditors of Ram Adhin Singh and it was actually never given effect to and was got declared by court to be void and inoperative by

one of the creditors of Ram Adhin Singh. However the Munsif, Pratapgarh dismissed the suit holding that setting aside of the gift deed as between the donor and the donee can not have the effect of nullifying the legal effect of that gift as against the plaintiff at any rate, therefore his possession can not be exclusive in any way merely by execution of sale deed relied on by the plaintiff. Nothing contrary to it has been shown by learned counsel for the appellant, therefore any claim on the basis of the said gift deed is not tenable because the said gift deed was declared void and inoperative by the court against the donor and the donee, therefore the appellant is not entitled for any benefit of the said gift deed. There is no challenge to the shares of the parties as determined by the first appellate court.

22. In view of above, since the appellant has failed to prove his exclusive ownership on the western portion of the land in dispute after dotted line 'Sha' and 'Ha' and on eastern side having some trees and Banskot, the partition is to be made of the total property in dispute in accordance with law, which has been made by the first appellate court by means of the impugned judgment and decree dated 28.04.1990 in accordance with law by passing a reasoned and speaking order, thus the first appellate court has recorded findings of facts on the basis of pleadings, evidence and material on record. The first appellate court is the final court of fact and the findings recorded by the first appellate court are unless perverse and totally illegal can not be interfered by this Court under Section 100 C.P.C.

23. A co-ordinate Bench of this Court in the case of **Bhagauti Singh @ Chedi Singh S/O Madhuban Singh versus Mata Prasad Singh S/O Bhaggu Singh; 2022(40)LCD2461**, has held that it is crystal clear that the High Court in exercise of power under Section 100 CPC should not interfere in the findings of fact recorded by the first appellate court, which is a final court of fact or concurrent findings of fact unless the same are based on no evidence or perverse.

24. The Hon'ble Supreme Court, in the case of **Narendra and others Vs. Ajabrao S/o Narayan Katare (dead) through legal representatives, (2018) 11 SCC 564**, has held that the High Court has jurisdiction, in appropriate cases, to interfere in finding of fact provided such finding is found to be wholly perverse to the extent that no judicial person could ever record such finding or when it is found to be against any settled principle of law or pleadings or evidence. Such errors constitute a question of law and empower the High Court to interfere in Second Appeal.

25. In view of above, this Court is of the view that the findings of facts recorded by the first appellate court considering the pleadings, evidence and material on record and the judgment and decree passed by the trial court does not suffer from any illegality, error or perversity, which may require any interference by this Court. The substantial question of law formulated by this Court is answered accordingly. The appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

26. This appeal is, accordingly, **dismissed**. No order as to costs.

(Rajnish Kumar, J.)

Order Date :- 31.05.2024
Haseen U.