

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Civil Revision No. 3280 of 2014 (O&M)
Date of decision: August 13, 2015

Rajiv Kumar and another

.. Petitioners

v.

Rakesh Kumar and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Anil Kshetarpal, Senior Advocate with
Mr. Saurabh Garg, Advocate for the petitioners.

Mr. S. S. Dinarpur, Advocate for respondent No. 1.

...

Rajesh Bindal J.

Defendants No. 1 and 2 are before this court impugning the order dated 9.4.2014, passed by the learned court below, vide which the application filed by them under Order 7 Rule 11 CPC for rejection of the plaint on account of non-deposit of requisite court fee, was dismissed.

Learned counsel for the petitioners submitted that a bare perusal of the plaint shows that the relief claimed in the plaint is regarding partition and joint possession and cancellation of the registered sale deed dated 25.5.2012. It is the admitted case of the plaintiff that he is not in possession of the property. Even if the property is joint Hindu family property and the plaintiff is claiming specific possession and partition, he is required to affix *ad valorem* court fee on the tentative value of his share in the joint property. Even mesne profits have also been claimed, which also have to be tentatively assessed and court fee paid. In support of the plea, learned counsel relied upon Asa Ram and others v. Jagan Nath and others, AIR 1934 Lah. 563; Vijay Kumar v. Harish Chand alias Hari Chand, 1991

(2) RRR 494; Lt. Col. Hargobind Singh (Retd.) v. Mr. Hargursharan Singh, 2011(1) CCC 155; Kailash Devi v. D.A.V. Senior Secondary School, 2013 (4) PLR 299 and Kuldeep Kaur v. Smt. Surjit Kaur and others, 2015(2) PLR 116.

On the other hand, learned counsel for respondent No. 1 submitted that Sita Ram and his wife Smt. Tarawanti died intestate leaving behind the plaintiff and defendants No. 1 to 5. The challenge in the suit is only to the Will allegedly projected by the defendants. The plaintiff, being joint owner in the family property, had merely claimed partition and joint possession thereof. Once the property is joint ownership, every co-owner is deemed to be in possession of every part of the property, hence, no court fee is payable. In support, reliance was placed upon Hari Nath Mittal v. Satish Kumar and others, 1985 (1) PLR 707; Vijay Kumar v. Harish Chand alias Hari Chand, 1991(2) RRR 494; Kuldip v. Babit Nayar, 2004 (2) RCR (C) 800; M/s Delhi-Assam Roadways Corpn. Ltd. v. Sita Ram Aggarwal and others, 2008(2) RCR (C) 458; Air Vice Marshal Mahinder Singh Rao (Retd.) v. Narender Singh Rao and others, 2010(4) PLR 45; Paramjit Kaur @ Pami and another v. Mohinder Singh and others, 2011(2) PLR 438; Janeshwar Kumar Jain v. Aadeshwar Kumar and others, 2014(2) PLR 292 and Smt. Santra Devi and others v. Hari Singh and others 2015(2) RCR (C) 281.

Heard learned counsel for the parties and perused the paper book.

In the case in hand, respondent No. 1-plaintiff filed the suit claiming following reliefs:

“ Suit for a decree of

(i) declaration to the effect that Sh. Sita Ram son of Sh. Ghanshyam Dass

and

Smt. Tarawanti @ Tara Rani wife of late Sh. Sita Ram, sub-caste Ralhan (Jeni), R/o Thanesar have died intestate on 29.6.2006 and 22.7.2012 respectively leaving behind the plaintiff and defendants No. 1 to 5 as their class-1 heirs and

thus got their properties from father by survivorship and from mother by inheritance described herein below in paragraphs 9, 13 and 29 with consequential relief of perpetual injunction restraining the defendants No. 1 and 2, 6 to 8 from alienating the properties detailed in paragraphs 9, 13, 14, 15 and 29 in any manner whatsoever and also from changing the existing position of the suit property by way of demolition or construction in any manner whatsoever;

(ii) Partition of suit properties by meets and bounds separating thereby share of the plaintiff and delivering it to him, and in the alternative for joint possession of those portions of the suit properties which found unfit of partition by the civil courts.

(iii) For recovery of amount found due as a profit of plaintiff on rendition of account of firm M/s Ghanshyam Dass Sita Ram and that of firm M/s Priyanka Steels, Ambedkar Chowk, Thanesar, District Kurukshetra and also of actual partition of family gold and silver ornaments.”

The property is claimed to be joint Hindu family property, in which share is being claimed. The issue as to whether in a suit filed by him seeking possession of the property to the extent of his share, court fee is leviable or not. The issue was considered by a Full Bench of Lahore High Court in Asa Ram's case (supra), where the suit was filed for partition and separate possession of moveable and immoveable properties of joint Hindu family was claimed. The question referred for consideration by the Full Bench was as under:

“1. What is the proper court fee payable on a plaint in a suit for possession of property alleged to belong to the joint family of which the plaintiff and the defendant are stated to be members and of which the plaintiff alleges to be in actual or constructive possession ?”

It was held that to enforce the right to share in joint family property, *ad valorem* court fee on the value of relief, as fixed by the plaintiff, is payable and in case of partition of joint property, where the

plaintiff alleges that he is in actual or constructive possession thereof, fixed court fee is payable. Relevant paragraph thereof is extracted below:

“The above case law on the subject shows that the concensus of opinion now is that in a suit for partition of joint property, where the plaintiff alleges joint possession, a court-fee stamp of Rs. 10 is leviable under Art. 17(6) of the Sch. 2 of the Indian Court Fees Act and that S. 7(4) (b) does not apply to such a suit; the ratio decidendi is that the plaintiff is not enforcing any right to share in joint family property but according to his own allegations, he is already in the enjoyment of his share and merely seeks to change the mode of his enjoyment of the joint property and that the relief, therefore in such a case is not capable of being valued in money. S. 7(4) (b) applies only to cases relating to joint family property where the plaintiff has been ousted from its enjoyment and seeks to be restored to joint enjoyment. If, however, he has been excluded from joint enjoyment or where he has never been in enjoyment or possession, actual or constructive of the joint property and desires to separate his share from the other co-sharers, he must sue for possession and partition and in such a case he must pay ad valorem court fee on his share.

To sum up, my view is that in a suit to enforce the right to share in joint family property i.e., a suit to be restored to joint possession or enjoyment of joint family property, court fee would be payable under Art. 7 (4)(b), ad valorem on the value of the relief as fixed by the plaintiff and in a suit for partition of joint property, whether owned by a joint family or otherwise, where the plaintiff alleges that he is in actual or constructive possession thereof, court fee payable would be Rs. 10 under Art. 17(6) of the Sch. II of the Court Fees Act.”

A perusal of the aforesaid judgment shows that in case the plaintiff is in actual or constructive possession of the suit property, fixed court fee of ₹ 10/- is payable. It is not in dispute that for the purpose of

assessment of court fee, the pleadings in the suit have to be seen. The claim made in the plaint is that the plaintiff is entitled to share in the property left by his parents, as they died intestate, hence, he being one of the legal heirs, has share in the property, partition of which has been sought.

The term “constructive” came up for consideration before Hon'ble the Supreme Court in Civil Appeal Nos. 1527-1536 of 2013--Rajasthan Housing Board v. New Pink City Nirman Sahkari Samiti Ltd. and another, decided on 1.5.2015, wherein it has been opined that constructive is a legal fiction inferred by law. In that case, the issue was regarding knowledge of an award passed by the Collector under the Land Acquisition Act. Constructive notice is a notice inferred by law, as distinguished from actual or formal notice; that which is held by law to amount to notice. Relevant para thereof is extracted below:

“17..... Constructive notice in legal fiction signifies that the individual person should known as a reasonable person would have. Even if they have no actual knowledge of it. Constructive notice means a man ought to have known a fact. A person is said to have notice of a fact when he actually knows a fact but for wilful abstension from inquiry or search which he ought to have made, or gross negligence he would have known it. Constructive notice is a notice inferred by law, as distinguished from actual or formal notice; that which is held by law to amount to notice. The concept of constructive notice has been upheld by this Court in Harish Chandra (supra).”

[Emphasis supplied]

In the aforesaid judgment, reference has been made to an earlier judgment of Hon'ble the Supreme Court in Raja Harish Chandra Raj Singh v. The Deputy Land Acquisition Officer and another, AIR 1961 SC 1500 dealing with the term “actual or constructive knowledge”. Relevant para thereof is extracted below:

“6... The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus

considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector, it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly, if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair-play and natural justice the expression “the date of the award” used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words “from the date of the Collector's award” used in the proviso to S. 18 in a literal or mechanical way.”

The principles of '*res judicata*' and '*constructive res judicata*' were considered by Hon'ble the Supreme Court in The Workmen of Cochin Port Trust v. The Board of Trustees of the Cochin Port Trust and another, AIR 1978 SC 1283, wherein it was opined that if by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when in a judgment or order a decision of a particular issue is implicit, it is deemed to have been decided by implication. When any point which might and ought to have been made a ground of

defence or attack in a former proceeding but was not so made, then such a point in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided. Relevant para thereof is extracted below:

“8. It is well-known that the doctrine of *res judicata* is codified in Section 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of *res judicata* or the principle of *res judicata* has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive *res judicata* is engrafted in Explanation IV of Section 11 of the Code of Civil Procedure and in many other situations also principles not only of direct *res judicata* but of constructive *res judicata* are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as *res judicata* and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

Reference can also be made to the judgments of Hon'ble the Supreme Court in V. Purushotham Rao v. Union of India and others, (2001) 10 SCC 305 and Ramchandra Dagdu Sonavane (Dead) by LRs v. Vithu Hira Mahat (Dead) by LRs and others, (2009) 10 SCC 273.

A Division Bench judgment of this Court in Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punjab 528 was referred with approval in a judgment rendered by five-Judge Bench of this Court in Ram Chander v. Bhim Singh and others, 2008(3) RCR (Civil) 685, wherein it was opined that possession of joint property by one co-owner, is in the eyes of law, possession of all even if but one are in actual physical possession. Meaning thereby, every co-sharer is deemed to be in possession of every inch of co-shared property even if he is not in actual physical possession. This is a presumption in law. The possession will include deemed possession of a co-sharer in joint property.

Once it is so, in terms of the Full Bench judgment of Lahore High Court in Asa Ram's case (supra), fixed court fee is payable on a suit filed by a person seeking partition and possession in a joint property even if he is not in possession of any part of it. There is no error in the order passed by the court below.

Accordingly, the present petition is dismissed.

(Rajesh Bindal)
Judge

August 13, 2015
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(Refer to reporter)