

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.1348 of 1989

Date of decision: February 19, 2015.

Mohan Lal

... **Appellant**

v.

Barma Devi etc.

... **Respondent**

CORAM: **HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON**

Argued by: Shri S.K. Pipat, Sr. Advocate with
Shri Manoj Pundir, Advocate for the appellant.

Shri Ashok Verma, Advocate for the respondents.

Dr. Bharat Bhushan Parsoon, J.

Smt. Barma Devi and Smt. Maya Devi, claiming themselves to be daughters of Jethu Ram son of Munshi Ram, had brought a suit for seeking a decree of declaration with consequential relief of possession by way of partition against the defendants claiming themselves as owners to the extent of 1/7th share each of the suit property.

Defendants No.2 to 5 (respondents No.3 to 6) are their brothers whereas defendant No.6 (respondent No.7) is the mother of the plaintiffs, respondents No.1 and 2 herein.

This suit was contested by vendee, defendant No.1, now appellant. Relationship of the plaintiffs with Jethu Ram and other

defendants was denied. It was claimed that after purchase of the suit property by him, improvements were made therein which had cost him Rs.1.50 lacs. It was claimed that even if the plaintiffs are proved to be daughters of Jethu Ram, they have no right to succeed to the dwelling house as legal heirs of Jethu Ram. Plea of bona fide purchaser for value was also taken by the vendee, defendant, appellant herein.

In the lower court, during the suit proceedings, so far as other defendants are concerned, defendants No.2 ad 3 had not made appearance and thus were proceeded against ex-parte, whereas defendants No.4 to 6 had admitted the claim of the plaintiffs.

To adjudicate rival claims of the parties, following issues were framed by the lower court on 16.2.1987:-

“1. Whether the plaintiffs are owners of the suit property to the extent of its 1/7th share? OPP

2. If issue no.1 is proved, whether the sale of this share by defendant no.2 to 6 is liable to be set aside?OPP

3. Whether the plaintiffs have no locus standi to file the present suit? OPD

4. Whether the plaintiffs are estopped by their own act and conduct to file the present suit? OPD

5. Whether the suit is not maintainable as alleged in para o.3 of the preliminary objection? OPD

6. Whether the suit is bad for deficient court fee? OPD

7. Whether the defendant is bona fide purchaser without notice of the right of the plaintiffs over the suit property, if so to what effect? OPD

Relief.”

After receiving oral and documentary evidence from the parties and providing hearing to their counsel, the lower court decided issues no.1, 2, 4, 5 and 7 in favour of the plaintiffs and against defendant No.1. The

suit was decreed and preliminary decree for partition was passed, holding them owner of 1/7th share each. They were, however, called upon to make good the deficiency in the court fee.

Aggrieved with this judgment and decree of 22.8.1988 of the lower court, vendee-defendant No.1 Mohan Lal had preferred an appeal. It was claimed that since he had made inquiries before purchasing the property from the legal heirs of Jethu Ram, sale deed Ex.D1 in his favour does not suffer from any embellishment as he was a purchaser in good faith for consideration and was protected under Section 41 of the Transfer of Property Act, 1882.

In the first appeal, an application under Order XLI Rule 27 read with Section 151 CPC for additional evidence was preferred by the appellant-vendee. In a bid to show that the suit property was ancestral, revenue record was sought to be produced. This application was dismissed holding that the property was self-acquired of Jethu Ram and it had nowhere been denied by appellant Mohan Lal in his pleadings.

Cross objections had also been preferred by the plaintiff in the appeal to the effect that *ad valorem* court fee was not payable and had thus sought refund of the court fee affixed by them in compliance with orders of the lower court. Appeal of vendee-defendant Mohan Lal, as also cross objections filed by the two plaintiffs, viz., Smt. Barma Devi and Maya Devi were dismissed. Decree passed by the lower court was upheld. It is this decree of 4.3.1989 passed by the first appellate court which is under attack in this regular second appeal.

In this appeal, it is claimed that the respondent-plaintiffs are neither legal heirs of Jethu Ram nor were entitled to 1/7th share each in the suit land. The suit was also claimed to be barred by limitation averring that

sale deed (Ex.D1) in his favour could have been challenged only within three years in terms of Article 58 of the Limitation Act, 1963. It was claimed that the plaintiffs being females, cannot claim partition in a dwelling house, particularly when they are married and even do not have a right of residence therein. It is claimed that provisions of Section 23 of the Hindu Succession Act, 1956 were ignored by the courts below. It is averred further that on 20.5.1979, i.e., the date of execution of the sale deed (Ex.D1), possession of the property was delivered to the appellant and he continues to be in possession and had also raised further construction thereon and the respondent-plaintiffs were estopped from filing the suit. It is canvassed that findings on the question of court fee are also wrong and in case of acceptance of appeal, he was entitled for refund of the court fee. Plea of bona-fide purchaser has also been reiterated.

Vide order dated 6.9.1989, while issuing notice of motion to the respondents, dispossession of the appellant-defendant was stayed in the meanwhile. When the appeal was admitted for hearing on 16.2.1990, stay was ordered to be continued.

When the appellant was called upon to satisfy this Court in terms of Section 100 CPC with regard to existence of substantial questions of law needing determination by this Court, the following substantial questions of law were framed for determination:-

“1. Whether the suit of the plaintiff/respondents stands dismissed in view of the conditional decree passed by the learned trial court, in which it was specially ordered that the preliminary decree for partition was passed subject to making good the deficiency of court fee within 10 days from the date of decision 22.8.1998, failing which the plaint shall stand rejected. Since the plaintiff/respondent has failed to make good deficiency in the court fee within 10 days, the plaint is deemed to be rejected and suit therefore stands dismissed? The appeal therefore, deserves to be accepted; and,

2. Whether the suit for declaration is barred by period of limitation especially in view of Section 58 of the Indian Limitation Act, which specify

the period of declaration challenging the sale deed is three years?

3. Whether the suit for partition was not maintainable in view of Section 23 of the Hindu Succession Act by which the plaintiff/respondents were governed at the time of filing of the suit and plaintiffs had no locus-standi to file the suit?"

The trial court had undoubtedly passed a conditional decree. Relevant portion of the lower court judgment is as under:-

"In view of my findings on above issues the suit of the plaintiffs succeeds and is decreed accordingly by way of declaration that they are owners of the suit property to the extent of 1/7th share each and preliminary decree for partition is passed provided that they make good deficient court fee within ten days from the date of decision of the case, failing which the plaint shall stand rejected. Keeping in view the facts and circumstances of the case, the parties are left to bear their own costs."

In the first appeal preferred by the appellant Mohan Lal, no such plea was taken by him. Rather, cross objections were preferred by two of the respondent-plaintiffs. Even otherwise, there is nothing on record to show that the respondent-plaintiffs had failed to comply with the conditional decree. Had it been a case of non-compliance of the orders of the lower court, the appellant-defendant was not to stop short of taking such objection in the first appeal itself.

During the course of arguments on this aspect, it has been contended by Counsel for the appellant himself that since it was a suit for declaration and partition, ad-valorem court fee was not payable but the same was to be affixed as per the jurisdictional value of the suit in terms of provisions of Section 7(iv)(c) of the Court Fee Act, 1870. When the plaintiffs have been held to be co-sharers in the suit land, they are deemed to be in possession of every inch of the same and thus are not liable to affix ad-valorem court fee. As there is no failure on the part of the respondent-plaintiffs to comply with the orders of the court but since ad-valorem court fee was not payable, parties are entitled for refund of the same.

Question No.2

Entire arguments of Counsel for the appellant were concentrated on this substantial question of law. There is concurrent finding of fact that respondent-plaintiffs are daughters of Jethu Since (since deceased) and vendor of the appellant are sons and widow of said Jethu Ram. No evidence or material worth the name could be pointed out by the Counsel for the appellant to show that respondent-plaintiff were not daughters of Jethu Ram.

When the respondent-plaintiffs based their claim in the suit on the basis of they being daughters of Jethu Ram, the suit being for inheritance, no limitation is prescribed for the same. The suit is not for cancellation of sale deed, thus not Article 58 but Article 65 of the Limitation Act, is attracted. Reference may be made to Pehalwan Singh v. Laddo Bibi and others, 2001(2) PLJ 54 (P&H) wherein a Coordinate Bench of this Court clearly held that there is no limitation prescribed for a suit based on inheritance. To the same effect is Bhim Singh and others v. Zile Singh and others, 2006(3) RCR (Civil) 97 (P&H). The suit was not for cancellation of the sale deed. With due deference to the law laid down by the Hon'ble Supreme Court in Ramti Devi v. Union of India, 1996(1) HLR 78, because of different facts of the case in hand, it does not support the cause of the appellant.

Sequel to the discussion, this substantial question of law is decided against the appellant while upholding the verdict of the lower court as well as of the first appellate court, whereby it had been held that the suit was within limitation.

Question No.3

It is not a case of partition of ancestral property. Section 23 of

the Hindu Succession Act, 1956, as it stood earlier, has no application. Case of the plaintiffs right from the very start is that it was self-acquired property of their father Jethu Ram. It has already been held that appellant Mohan Lal has nowhere denied the said fact ever during the proceedings before the lower court.

Along with this regular second appeal, an application under Order XLI Rule 27 CPC was preferred by the appellant to lead additional evidence to show that the property was ancestral. It is basic law that no one can be allowed to lead evidence beyond his pleadings. Once there is no foundation laid in the pleadings by the appellant-defendant that the property was ancestral in the context of Jethu Ram, application under Order XLI Rule 27 CPC has no merit. It is worth notice that similar application had also been made before the first appellate court by the appellant and was rightly dismissed.

It is rather interesting to note that with regard to other immovable property of Jethu Ram since deceased, mutation Ex.D1 had been sanctioned clearly in favour of all the legal heirs of Jethu Ram, showing that the respondent-plaintiffs were also legal heirs of Jethu Ram being his daughters and thus were entitled to his inheritance. Had the appellant gone through the revenue record, he could have come to know that other property of Jethu Ram had also been inherited by respondent-plaintiffs, who are his daughters, along with his vendors, viz., four sons and widow of Jethu Ram. Thus, even plea of bona fide purchasers taken by the appellant under Section 41 of the Transfer of Property Act, 1882 is not tenable and was rightly rejected by both the courts below.

In view of the discussion made above, there is no application of Section 23 of the Hindu Succession Act, 1956 as also of Section 41 of the Transfer of Property Act, 1882. The plaintiffs were rightly held to be having

locus standi to file the suit.

The appeal, being devoid of merit, is dismissed with costs.

February 19, 2015.
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[Dr. Bharat Bhushan Parsoon]
Judge

1. *Whether Reporters of local papers may be allowed to see the judgment ?*
2. *Whether to be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*