NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 911 of 1998

Trijugi Narayan, aged 49 years, S/o Ramkrishna Agrawal, occupation Service, resident of Sadar Ward Bhatapara, Post Office and Tahsil Bhatapara, District-Raipur (CG)

---- Appellant/Plaintiff

Versus

Bhimsen (Died) Through LRs.

1. Amar Arya aged about 38 years, S/o Shri Bheemsen
2. Sher Singh Arya, aged about 33 years, S/o Shri Bheemsen
3. Bahadur Arya, aged about 31 years, S/o Shri Bheemsen

All R/o Bajrang Ward, Near Circus Ground, Bhatapara, District -Raipur(CG)

(i) Bharti D/o Late Bheemsen, aged a bout 29 years.

(ii) Shakuntala, D/o Late Bheemsen, aged about 27 years.

(iii) Gunwanti D/o Late Bheemsen, aged about 25 years

All are R/o Bajrang Ward, Near Circus Ground, Bhatapara, District-Raipur (CG)

---- Respondents/Defendants

For Appellant	:	Shri Sourabh Sharma, Advocate
For Respondents	:	Shri Mahendra Dubey, Advocate

S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava

Judgment on Board

13/07/2017

1. This appeal is directed against the impugned judgment dated 7.8.1998 passed in Civil Appeal No.36-A/1998 by the Second Additional Judge to the Court of Additional District & Sessions Judge Balodabazar, District-Raipur, whereby the appellant's appeal against judgment dated 24.12.1985 passed

by the trial Court has been dismissed.

2. The appellant filed a suit before the trial Court praying for a decree of eviction of defendant from the land in dispute and recovery of possession along with mesne profits. The plaintiff case was that the plaintiff owned extensive land in village Lewai of Bhatapara, Revenue Circle -Bhatapara, Tahsil-Balodabazar, District -Raipur. It was further pleaded that towards recovery of arrears of sales tax, proceedings of recovery were initiated by the State Sales Tax Department because the firm M/s Santosh Kumar Sunil Kumar failed to deposit the tax as demanded by the State Sales Tax Department. It was further pleaded that later on, revenue recovery proceedings were initiated by the revenue authority and property of the firm as well as that of the plaintiff and property in dispute which exclusively belonged to the plaintiff was also attached and sold by way of auction in revenue proceedings under the M.P. Land Revenue Code, 1959 and sale was confirmed in favour of defendant and sale certificate issued. The plaintiff's case was that the plaintiff's property could not be attached and sold towards realization of tax which was the sole liability of the firm M/s. Santosh Kumar Sunil Kumar because the property was not a joint family property but the plaintiff's own property and it could not be attached merely because the plaintiff happened to be the father of the partners of the firm. According to the plaintiff, he was not given any notice and as the plaintiff was not any defaulter, no tax could be recovered by selling of his property by way of auction in revenue proceedings and therefore, proceedings were illegal even under the provisions of Land Revenue Code.

3. The defendant took the plea that he is the auction purchaser. He pleaded that the property was sold in auction by the revenue authority after following due provision of law towards recovery of tax dues of the firm M/s Santosh Kumar Sunil Kumar.

4. On the basis of the pleadings of the parties, learned trial Court framed as many as 12 issues. Four issues namely issue No.1, issue No.2, issue No.3 and issue No.4 were decided as preliminary issue vide order dated 11.2.1982. The first issue related to valuation of the suit. The second issue was whether the State of Madhya Pradesh, Sales Tax Officer, Sales Tax

Inspector were necessary party in the suit and whether suit was not maintainable for non-joinder of necessary party. The third issue was whether the suit was maintainable. The fourth issue was whether without seeking declaration that the auction sale certificate and auction proceedings were illegal and liable to be declared void, the suit in its present form, was maintainable. These four issues were decided in favour of the plaintiff. The defendant aggrieved by the order deciding aforesaid four issues as preliminary issue, preferred a revision before the High Court of Madhya Pradesh which was registered as Civil Revision No.728/1982. The challenge was confined only in so far as issue No.1-valuation of the suit and issue No.2- necessary parties were concerned. The defendant did not choose to challenge the legality and validity of finding recorded by the trial Court on preliminary issue No. 3 & 4 which related to jurisdiction and maintainability of the suit without seeking any declaration against the auction sale, issuance of auction sale certificate and auction proceedings. Vide order dated 10.8.1983, the High Court of Madhya Pradesh dismissed the revision, upholding the finding recorded on the issue relating to valuation and necessary parties. The trial Court, thereafter, proceeded and passed judgment and decree on 24th December, 1985 by which the plaintiff's suit was dismissed.

5. Aggrieved by the said judgment and decree, an appeal was preferred which was also dismissed by the impugned judgment passed by learned lower appellate Court on the finding inter alia that without seeking a declaratory decree against the auction sale, a suit for mere recovery of possession was not maintainable. Learned lower appellate Court also held that property was joint family property of the plaintiff Trijugi Narayan along with his two sons Santosh and Sunil. Therefore, towards recovery of tax liability of partnership firm M/s. Santosh Kumar Sunil Kumar, the joint family property could be attached and sold towards realization of sales tax.

6. This second appeal was admitted on 19.8.2000 on following two substantial questions of law which are reproduced as under :

> “(a) whether the auction sale was illegal for not following the mandatory provisions of M.P.LR. Code 1959 and the rules framed thereunder ?

(b) Whether the said auction sale can be questioned in Civil Court ?

(c) Whether the defaulter firm had no saleable interest in the disputed property sold ?"

7. Learned counsel for the appellant/plaintiff argued before this Court that the learned trial Court committed gross illegality and perversity in dismissing the suit and learned lower appellate Court committed gross illegality in dismissing the appeal by holding that without seeking any declaratory decree mere suit for recovery was not maintainable because this issue was already raised as a preliminary issue and decided in favour of plaintiff vide order dated 11.2.1982 of the trial Court and the defendant did not challenge the finding on these preliminary issues of the trial Court. The next submission of learned counsel for the appellant/plaintiff is that proceedings towards recovery under the Land Revenue Code could be drawn only when the appellant was liable towards payment of tax dues due of the firm M/s Santosh Kumar Sunil Kumar. He submits that no notice was given and the appellant being not a defaulter towards payment of tax, no proceedings of recovery as arrears of land revenue could be drawn under the Land Revenue Code. He submits that the recovery of tax as arrears of land revenue is permissible only when there is a tax liability and not otherwise. As there was no tax liability and no notice was given to the appellant, no proceedings could be drawn for attachment and sale of land in dispute which exclusively belong to the appellant. The next submission is that the learned Courts below have committed gross perversity in recording a finding that property was a joint family property without there being any legally admissible evidence and contrary to the documentary evidence clearly proving that the property was recorded in the exclusive name and title of the appellant and not in the name of his two sons namely Sunil Kumar and Santosh Kumar who were the partners of the defaulting firm against which recovery were drawn. In support of his contention, learned counsel for the appellant relies upon the decision of the High Court of Madhya Pradesh in the case of **Jagdish Prasad & Anr. Vs. State of M.P. & Ors. (1988) Revenue Nirnay 131.**

8. On the other hand, learned counsel for the respondent-defendant supported the impugned judgment and decree by submitting that the plaintiff was the father of two partners namely Santosh Kumar and Sunil Kumar of the partnership firm which was engaged in the business and had incurred tax liability for payment of tax to the Sales Tax Department of the State. The Courts below have rightly recorded a finding that property in dispute was joint family property, relying upon the oral testimony of the plaintiff –Trijugi Narayan (PW1) himself who has admitted that property in dispute was joint family property. Next submission of learned counsel for the respondent/defendant is that the auction proceedings are sacrosanct and could not be challenged by way of civil suit. He submits that recovery of tax under Madhya Pradesh General Sales Tax Act, 1958, cannot be challenged in a suit in view of provision contained in Section 37 of the said Act and as far as the recovery proceedings are concerned, provision contained in Section 257 (e) of the M.P. Land Revenue Code bars suit. Therefore, in any case, suit was not maintainable. It is next submitted that once it is held that the property was joint family property, the plaintiff having submitted his objection and heard by the revenue authorities at various stages of revenue proceeding, it cannot be said that recovery was made without following the mandatory provisions of Land Revenue Code and Rules framed thereunder.

9. I have considered the rival submission made by learned counsel for the parties and perused the records of the Courts below.

10. In the present case, as the records of the Court below show, four issued were decided as preliminary issue. They are issue No.1, 2, 3, & 4 which are reproduced as below:

> “(1) क्या न्याय शुल्क एवं क्षेत्राधिकार हेतु इस दावे का सही मूल्यांकन किया गया है यदि नहीं –तो मूल्यांकन किया गया है, प्रभाव ?
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> (2) क्या म0प्र0 शासन, विक्रय कर अधिकारी, विक्रयकर निरीक्षक, इस दावे में आवश्यक पक्षकार हैं, यदि हां तो क्या आवश्यक पक्षकारों के अमीलन के कारण यह दावा वर्तमान स्परूप में पोष्य नही है ?
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> (3) क्या यह दावा इस न्यायालय के अवकारता बाह्य है ?
>
> (4) क्या विक्रय कुरकी वसूली में वादग्रस्त मामलों के किये गये घोष विक्रय और दिये गये विक्रयप्रमाण पत्र की कार्यवाही और आदेश को रद्द कराये बिना यह

दावा वर्तमान स्वरूप में पोष्य है ?”

11. The learned trial Court, in its order dated 11.2.1982, not only held that the suit was properly valued, but also held that it was not liable to be dismissed for non-joinder of the necessary party, it had jurisdiction to try the suit and that the suit was maintainable even without seeking any declaration and cancellation of auction sale, auction proceedings and auction sale certificate. The defendant, however, chose to challenge finding only on issue relating to valuation and necessary party by filing a Civil Revision before the High Court of Madhya Pradesh, though unsuccessfully, as the revision was dismissed by the High Court of Madhya Pradesh vide order dated 10.8.1983. Learned counsel for the respondent/defendant could not satisfy and there is nothing on record to show that those finding were challenged by him in any other proceedings. If that be so, it is difficult for this Court to accept the finding of the Court below that the suit was not maintainable for any reason. Though learned trial court did not give any specific finding that suit was not maintainable, learned lower appellate Court dismissed the appeal holding the suit to be not- maintainable on the ground that without claiming a declaratory decree, a mere suit for recovery of possession was not maintainable. This issue was not open for the appellate Court because the trial Court had earlier decided the issue of jurisdiction as a preliminary issue and the defendant did not challenge the findings on this preliminary issue though it had filed Civil Revision challenging finding on two other preliminary issues.

12. In fact, the appellant/plaintiff sought protection of his own right by seeking recovery of possession on the ground that he was not defaulter and the property in dispute which was put to auction was not the property of the firm which was under the liability for payment of tax and in realization of which demand notice was issued, followed by recovery proceedings as arrears of land revenue under the provision of MP Land Revenue Code. In any case, the respondent/defendant having not challenged the decision and finding of the trial Court on these issues, tried as preliminary issue, the learned lower appellate Court could not have gone into this issue. Therefore, question No.-B is answered in favour of the appellant-plaintiff and against the respondent-defendant.

13. The next question which arises for consideration is whether the defaulting firm had any saleable interest in the disputed property? The appellant/plaintiff has come out with specific case that the land in dispute belongs to the plaintiff as he was the exclusive owner thereof. In this regard, the plaintiff Trijugi Narayan (PW1) has deposed in his evidence that the land belongs to him and his name has been recorded in the revenue records and shown to be in his possession. In support of this, plaintiff led Ex.P1 & Ex.P-2 which are the revenue documents, which show that the plaintiff is the recorded bhumi-swami of the land in dispute. It does not contain the name of any of the partners of firm M/s. Santosh Kumar Sunil Kumar . It is not even recorded as the joint family property. He has further emphatically deposed that partners of the firm namely Sunil Kumar and Santosh Kumar had no title or interest in the property nor the property belongs to the firm. He further deposed that he is not the partner of the firm. In his cross-examination, at first breath, he says that property in dispute is his ancestral's property but he then states that he himself has purchased the land. He has denied suggestion that he succeeded to his property from his father and therefore it has to be treated as ancestral's property. He further deposed that though Santosh and Sunil are his sons, he goes on to say that they are living separately and conducting their business separately since 1971. Radhe Shyam (PW2) has supported the case of the plaintiff that the property belongs to the plaintiff. Defendant-Bheemsen was examined as DW-1, Natthanlal was examined as DW-2 and Laxmandas as DW-3 . From the oral and documentary evidence led by the defendant, there is no document much less credible oral evidence to support the case of the defendant that property was a joint family property. The Courts below seems to have arrived at this finding based on a contrary oral testimony of the plaintiff in his cross-examination where at some place, he says that it is ancestral's property and the he again says that he himself purchased it. Therefore, on this contradictory oral evidence, recording a finding of joint family property, ignoring authenticated revenue records, which only record the name of the plaintiff, showing that the property in dispute was recorded in the name of plaintiff alone and there being nothing to show that it was a joint family property, I find myself unable to concur with the finding of learned Courts below that the property was a joint family property. From the pleadings and

documents on record and the oral evidence led before the Court, it is vividly clear that the plaintiff was not one of the partners in the firm of M/s Santosh Kumar Sunil Kumar. It is true that the plaintiff was the father of the partner Santosh Kumar and Sunil Kumar, the firm has got its own separate juristic entity. Unless it is proved from clinching evidence that the property in dispute was the property of the family or any of its partners, plaintiff's property could not be sold towards recovery of tax dues merely because he happened to be father of the partners of the defaulting firm M/s Santosh Kumar Sunil Kumar.

14. Once the property is found to be that of the plaintiff, it is found that there is no clinching evidence that the property in dispute was joint family property much less property of plaintiff's two sons Santosh and Sunil, partners of defaulting firm M/s.Sanoth Kumar Sunil Kumar, the entire proceedings of recovery by attachment and sale of plaintiff's property are illegal.

15. In view of the aforesaid categoric finding, it is not necessary for this Court to go into the first issue of the procedural defect in proceedings, because the plaintiff was not the defaulter and therefore his property could not be sold in auction.

16. In view of the above finding, the second appeal deserves to be allowed and is accordingly allowed. Judgments passed by the learned Courts below are set aside and the suit of the plaintiff is decreed. The appellant/plaintiff is entitled to recovery of the property from the possession of respondent-defendant. The plaintiff shall also be entitled to mesne profits of Rs.18120/- with interest @ 6% per annum from the date of institution of suit till date of realization of the money. Costs as may be certified.

17. Let decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)

Judge

Praveen