

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No. 43/2007**

% **15th May, 2017**

BHARAT BHUSHAN SHARMA & ORS. Appellants

Through: Ms. Shalini Kapoor, Ms. Promil
Seth, Ms. Ruhini Dey and Mr.
Dikshant Khanna, Advocates.

versus

MOHINDER BAL (DECEASED) THROUGH LR'S & ORS.

..... Respondents

Through: Mr. S.C. Juneja, Advocate for
LRs. of R-11.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the First Appellate Court dated 5.10.2006. By the judgment dated 5.10.2006 the first appellant court held that issue no. 5(b) framed by the trial court with respect to the parentage of one of the plaintiff Sh. Mohinder Bal (respondent no.1 in this appeal, and who is now deceased and represented by his legal heirs) ought not to have been framed and no finding could be given with respect to issue no. 5(b),

and which issue is left to be decided in appropriate independent civil proceedings.

2. The subject suit was a suit for possession filed by one Smt. Sham Pyari for part of property bearing no. 3068-69, Sir Sayed Ahmed Road, Darya Ganj, Delhi. During the pendency of the suit Smt. Sham Pyari died on 7.3.1968. Smt. Sham Pyari died issueless and her husband had already pre-deceased her. The suit property, therefore, survived as per the Hindu Succession Act, 1956 on collaterals of Smt. Sham Pyari. Sh. Mohinder Bal is one of the legal heir of the collateral as he claimed to be the son of one of the deceased sister of the original plaintiff Smt. Sham Pyari. Issue no. 5(b) was framed because Sh. Mohinder Bal, who was substituted as one of the plaintiffs in place of Smt. Sham Pyari, claimed that he was the son not of Sh. Tara Chand, who was brother of Smt. Sham Pyari, but that he was the son of Sh. Inder Bal who was the husband of the deceased sister Smt. Soma Devi of Smt. Sham Pyari.

3. Issue no. 5(b) has been decided by the trial court in its judgment dated 6.7.1983 by observing as under:-

“Issue No. 5(b)

Mahinder Bal plaintiff who is PW2 in this case claims himself to be the son of Inder Bal. He has stated that Shri Tara Chand was his uncle. He is supported in his statement by PW Jyoti Sarup, another son of Tara Chand, and from the service record of Mahinder Bal produced by PW V.K. Sood. Mahinder Bal, however, admitted in his statement having lived in house No.

8182, Chimni Mill, Bara Hindu Rao, Dehli with Tara Chand before shifting to the suit premises. He further stated that he had no brother and his father had a verified claim which was included in the sale deed in which his parentage is mentioned as of Inder Bal. The sale deed is Ex. P6 W1/3. In the ration card Ex.P6W1/4 his parentage is given as of Inder Bal. All the above record is after the record of the school and college. As per college record produced by PW Kishan Lal, Clerk of Hindu College, Amritsar Ex.PW1/1 his parentage is given as of Tara Chand, and the date of birth is 28.9.24. His statement was not controverted in cross-examination by Shri Mahinder Bal. He has stated that he was nine years old in 35, but he could not be so in view of his date of birth given above. Shri Inder Bal has given his parentage through his advocate in reply dated 21.3.71 as of Tara Chand which is Ex.PW2/4. It was a typing mistake, as stated by Mahinder Bal, he did not get it corrected. There is no certificate from the Custodian that he is the son of Inder Bal. In my view Shri Mahinder Bal is bound by his admissions of the college record as well as vakalatnama which were prepared at his instance. In the post card of September, 1942 which is a document more than 30 years old and requires no proof, the parentage is given that of Tara Chand. There is no horoscope or birth certificate filed by him. In my view, the college record which is prior in time and which has more evidentiary value should be referred before the other evidence discussed above. So the parentage of Mahinder Bal is not that of Inder Bal, but that of Tara Chand, and the said issue is answered accordingly.”

4. The suit was decreed by granting the following relief:-

“Relief.

In view of my above discussion on all the issues the suit of the plaintiffs for possession is decreed with costs against the defendants and a decree for possession is passed in their favour against the defendants from a part of property No. 3068-69, Sir Sayyed Ahmed Road, Darya Ganj, Delhi shown as red in the site plan which is presently occupied by Roshal Lal, Jugal Kishore and their families.”

5. In the first appellate court the appeal was argued only as regards *inter se* disputes between the legal heirs of the original plaintiff Smt. Sham Pyari as regards issue no. 5(b) i.e whether or not one of the co-plaintiff Sh. Mohinder Bal was the legal heir of Sh. Tara Chand or was the legal heir of Sh. Inder Bal, husband of Smt. Soma Devi the sister of original plaintiff Smt. Sham Pyari. In this regard, the first

appellate court below has held that issue no. 5(b) need not have been framed and this issue is to be decided in appropriate independent proceedings. The relevant paras of the first appellate court's impugned judgment are paras 8 to 10, and the same read as under:-

“8. But in the present case, on perusal of the amended plaint filed by the plaintiffs including Mohinder Bal and Sushila Devi, it is clear that there was no averment in the plaint regarding the parentage of plaintiff no. 6 (Mohinder Bal). Similarly, in the written statement filed by the defendants, they had not uttered even a single word about the parentage of plaintiff no. 6. In other words, as per the pleadings of both the parties, there was no dispute between them regarding the parentage of plaintiff no. 6. Due to that reason, no relief was sought by the plaintiff about the parentage of plaintiff no. 6 (Mohinder Bal). As there was no pleadings before the Ld. Trial Court about the parentage of appellant Mohinder Bal, hence, there was no occasion for the Trial court to frame the issue regarding the parentage of appellant Mohinder Bal.

9. From the amended plaint, it is further clear that at the time of signing the plaint, plaintiff no. 8 Sushila made endorsement below her signature that she had signed the same subject to parentage of plaintiff no. 6. If plaintiff no. 8 had any dispute about the parentage of plaintiff no. 6, she should move proper application to implead herself as defendant. Rather from the record, it is clear that earlier plaintiff no. 8 along with plaintiff no. 7 & 9 were as defendant no. 3 to 5, but on their request, they were permitted to become plaintiffs vide order dated 7.11.79. Once defendant no. 3 to 5 decided to become plaintiffs, they were not supposed to raise the dispute of parentage of co-plaintiff in the plaint. Admittedly, in the present case, even in the plaint, no averment was made about the parentage of plaintiff no. 6.

At the time of framing additional issue regarding the parentage of Mohinder Bal, Ld. Trial Court fixed the onus upon plaintiffs and defendant no. 3 to 5, which shows that the said issue was framed before filing the amended plaint, because in the amended plaint there was only two defendants namely Roshan Lal and Manohar Lal. This proves that the Ld. Trial court had not considered the amended plaint and amended written statement of the defendants before framing the issues. If the issue had been framed before the amended pleading of the parties, it was the duty of the court to see whether the issue needs any amendment in view of the amended pleadings of the party. But it appears that the Ld. Trial court failed to amend the issues in accordance with the amended pleadings of the parties. As there was no averment in the pleading of the parties about the percentage of plaintiff no. 6, hence, in my opinion, there was no occasion for Ld. Trial court to frame the additional issue about the parentage of plaintiff no. 6.

If plaintiff no. 8 had any dispute about the parentage of plaintiff no. 6, she should prayed appropriate relief from the record but in the present case no relief had been prayed by the plaintiffs about the parentage of plaintiff no. 6

which further proves that there was no controversy between the parties about the parentage of appellant.

10. In view of the aforesaid discussion, I am of the considered opinion that Ld. Trial court had committed error at the time of framing the additional issue no. 5(b) regarding the parentage of appellant. Accordingly, the findings of Ld. Trial Court in respect of the said issue cannot be sustained in law. Thus, I hereby set aside the finding of Ld. Trial Court in respect to Issue no. 5(b) given in the judgment dated 6/7/83. It is clarified that if any person including the LR's of respondent Sushila Devi have any dispute regarding the parentage of the appellant, they have right to take appropriate remedies under the law."

6. Learned counsel for the appellants has drawn the attention of this Court to Order XXII Rule 5 Proviso and as per which provision once there is a dispute *inter se* legal heirs of a deceased party, then such issue is to be framed and decided by the court after leading of evidence. Order XXII Rule 5 CPC with its proviso reads as under:-

"Order XXII Rule 5. Determination of question as to legal representative.- Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that court may, before determining the question, direct any subordinate court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons there for, and the Appellate Court may take the same into consideration in determining the question."

7. I completely agree with the arguments urged on behalf of the appellants, inasmuch as, Rule 5 of Order XXII CPC specifically exists in order to determine the question as to legal representation of estate of a deceased party in the suit, and which issue if is a disputed issue of fact, the same is decided after leading of evidence. Evidence was in fact led in the trial court with respect to whether or not Sh.

Mohinder Bal was the son of Sh. Tara Chand or was the son of Sh. Inder Bal, and this issue was decided after leading of evidence as required by the Proviso of Order XXII Rule 5 CPC. The first appellate court therefore, in my opinion, has fallen into an error in setting aside the findings with respect to issue no. 5(b) as arrived at by the trial court vide its judgment dated 6.7.1983.

8. I may note that this appeal is only with respect to *inter se* disputes between the legal heirs of the original plaintiff Smt. Sham Pyari and the original defendant no. 1 in the suit against whom the suit for possession was decreed is not a contesting party in this appeal, inasmuch as the issue with respect to the suit for possession having been decreed against the main contesting defendant in the suit namely Smt. Krishna Devi and the first appeal against the judgment of the trial court decreeing the suit for possession was allowed and against the judgment of the first appellate court an RSA No. 368/2006 is already pending in this Court, and which will be decided when the same comes up for hearing.

9. Most of the legal heirs of the original respondent no. 1/ Sh. Mohinder Bal, and who had died *pendent lite*, have been served in this appeal, but inspite of service they have not appeared. The factum with respect to service of almost all of the legal heirs of respondent no.

1/Sh. Mohinder Bal, and for whom CM No. 21148/2014 was filed, is recorded by the Joint Registrar in his order dated 23.9.2015. I, therefore, hold that the estate of respondent no. 1/Sh. Mohinder Bal is adequately represented in this appeal, inasmuch as, most of his legal heirs were duly served in the present appeal.

10. In view of the above, this appeal is allowed and the impugned judgment of the first appellate court dated 5.10.2006 is set aside and the judgment of the trial court dated 6.7.1983 is restored to the extent of findings and conclusion on issue no. 5(b) with respect to parentage of Sh. Mohinder Bal/original respondent no. 1 herein. Parties are left to bear their own costs.

MAY 15, 2017

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VALMIKI J. MEHTA, J