

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.518 of 1987 (O&M)

Date of Decision: January 24th, 2019

Sohan Lal & another

...Appellants

Versus

Meharban Singh & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. Animesh Sharma, Advocate,
for appellant No.2.

None for the respondents.

AMIT RAWAL, J.

The present Regular Second Appeal at the instance of the appellant-defendants is directed against the judgment and decree of the Lower Appellate Court, whereby suit of the respondent-plaintiff dismissed by the trial Court, has been decreed.

Respondent-plaintiff in the year 1983 instituted the suit for setting-aside the judgment and decree dated 19.03.1981 passed in Civil Suit No.3 of 1980 titled as Sohan Lal and Mangat Rai (arrayed as defendant Nos.1 and 2 in the present suit) Versus Asha Devi alias Asa Devi, *inter-alia* on the ground that vide sale deed dated 05.01.1968 registered on 18.01.1968, Asha Devi, mother of the plaintiff, purchased from defendant No.3 Satya Wati, mother of defendants No.1 and 2, a house No.69, situated in Mohalla No.27 of Jalandhar Cantonment and obtained the possession thereof. She used to live at Nairobi in Kenya along with the plaintiff and died there on 11.10.1979. Plaintiff was legal heir and inherited her estate

including the house. Defendant Nos.1 and 2, i.e., appellants herein, instituted the suit on 05.01.1980 against Asha Devi and defendant Nos.3 to 7 obtained the decree for possession of 2/3rd share of house. Said decree was null and void as Asha Devi had already, at the time of institution of the suit, died and right to sue did not survive as Asha Devi was the owner of the land. Defendant Nos.1 and 2 had the knowledge that Asha Devi was residing in Kenya and were aware of the address as well, much less the death of Asha Devi, but despite that filed the litigation against her. Plaintiff came to know about the aforementioned fact in second half of October, 1981 and when came to India was informed by Ram Lal, brother of Asha Devi about the impugned decree and, therefore, instituted the suit.

Appellant-defendants contested the suit by raising numerous preliminary objections. It was stated that the suit had not been filed by the plaintiff but the attorney as similar objections were filed to the impugned judgment and decree which were dismissed and, therefore, the suit was not maintainable. Plaintiff Meharban Singh son of Jagat Singh son of Sunder Singh was party to the suit being the legal heir of Asha Devi, therefore, the address given in the suit to be resident of Village Pandori Naga, Tehsil Phagwara, District Kapurthala and the service was duly effected on them but did not intentionally appear resulting into passing of the ex-parte judgment and decree. In such circumstances, separate suit was not maintainable.

On merits, it was stated that Salamat Rai son of Diwan Chand, grand-father of the defendants was owner in possession of the house in dispute. After his demise, the property was inherited by his three sons, Pt.Shiv Narain, Pt. Hari Kishan and Pt.Brahm Shanker. Pt.Shiv Narain died

issueless, whereas Pt.Hari Kishan and Pt. Brahm Shanker inherited the property in equal shares by rule of survivorship. Defendant Nos.1 and 2 are the sons of Smt.Satya Wati widow of Hari Kishan and inherited the property in equal share as Hari Kishan died in 1971. After death of Brahm Shanker, Romesh Kumar, Naresh Kumar, his sons, Smt.Suroj, Smt.Vinod, his daughters succeeded to his half share as Brahm Shanker died in 1954. The house in dispute was, as such, the property of defendant Nos.1 and 2 to the extent of half share and heirs of Brahm Shanker half share.

In the first week of February, 1963, an oral family settlement had taken place and the house fell to the share of defendant Nos.1 and 2 in equal share, i.e., 1/3rd share each, which was duly acted upon by the parties and, therefore, Satya Devi could not have sold the entire house to Asha Devi as she had only 1/3rd share. The rest of the averments were denied.

Plaintiff filed the replication and reasserted the averments taken in the plaint.

The trial court, on the basis of the pleadings, framed the following issues:-

- “1) Whether the suit of the plaintiff is properly valued for the purposes of court fee and jurisdiction? OPP*
- 2) Whether the plaintiff has no locus standi to file the present suit? OPD*
- 3) Whether the present suit is barred by the principle of resjudicata? OPD*
- 4) Whether the plaintiffs are estopped by their acts and conduct from filing the present suit? OPD*
- 5) Whether the suit of the plaintiff is not maintainable? OPD*
- 6) Whether the decree passed by Sh.S.C.Marwaha, Sub Judge Jalandhar dated 19.3.1981 is null and void, collusive,*

unenforceable and is obtained by way of fraud as alleged in the plaint. If so, its effect? OPD

7) *Relief.”*

Plaintiff, in support of the averments, examined the following witnesses:-

a) PW-1 Brij Mohan Record Clerk of Sub Registrar Office, Jalandhar, who proved the certified copy of the sale deed Ex.P2;

b) PW-2 Chet Ram, attesting witness of the sale deed Ex.P1;

PW-3 Hari Chand;

PW-4 Ram Lal attorney of the plaintiff, who produced on record copy of the attorney as Ex.P3.

In rebuttal, the plaintiff produced the judgment and decree impugned as Ex.PA and Ex.PB.

On the other hand, defendant No.2 appeared as DW-1.

The trial Court, on the preponderance of the suit, dismissed the suit. However, the Lower Appellate Court reversed the findings.

Mr. Animesh Sharma, learned counsel for the appellant-defendant No.2, by referring to the record pertaining to Civil Suit No.3 of 1980, drew the attention of this Court to the memorandum of parties, whereby the legal representative, i.e., the plaintiff herein was impleaded as legal heir. Even if the suit was filed against the dead person, the bonafide plea, i.e., factum of Asha Devi having left to Kenya and died there was not brought to their notice. The suit could not have been dismissed on account of limitation, much less substitution of the legal heir in view of the proviso to sub-section (1) of Section 21 of the Limitation Act and would relate back to the institution of the suit. In support, relied upon various case law. The suit, as such, was not maintainable as the plaintiff had a remedy to file an

appeal or an application under Order 9 Rule 13 CPC.

PW-4 Ram Lal, attorney of the plaintiff, admitted that defendants, who were plaintiffs in the previous suit Ex.P1 resulting into judgment and decree Ex.PA and Ex.PB, were not informed about the shifting of Asha Devi to Kenya and her demise. Mark A death certificate has not been proved in accordance with law. The Lower Appellate Court dismissed the application under Order 41 Rule 27 CPC, but despite that had taken the death of Asha Devi in the year 1979. Satya Devi had only 1/3rd share in the property and could not have sold the entire share in view of the fact that the appellant-defendants had 2/3 share, i.e., 1/3rd share each, which had been proved through the documentary evidence.

The address given in the present suit and as well as in the previous suit of the plaintiff herein and defendant therein is identical. Filing of the suit was nothing but an act of outcome of greed. All these factors have erroneously been ignored by the Lower Appellate Court, thus, there is gross illegality and perversity. Filing of the suit could not have been held to be barred by law of limitation and, thus, urged for determination of the following substantial questions of law:-

- “1) Whether the substitution of the legal heirs on demise of Asha Devi would attract proviso to sub-section (1) of Section 21 of the Limitation Act. If so, whether the suit can be dismissed being barred by law of limitation?
- 2) Whether the independent suit on account of the availability of the alternative remedies, i.e., filing of independent application or appeal, was maintainable?
- 3) Whether the plaintiff discharged the onus with regard to

the death of Asha Devi as per the provisions of Section 101 of the Indian Evidence Act?

Plaintiffs, as per the record of the case, were represented by Shri R.K.Mahajan, Advocate and Shri P.C.Goyal, Advocate. The previous orders spanning from 15.02.2017, 18.11.2015, 26.08.2015 show that there was no representation on behalf of the respondent No.1 being the contested respondent as service of respondent Nos.2 to 5, as per order dated 10.04.1987, was dispensed with being co-defendants. Since the appeal is of 1987 and there is no representation on behalf of respondent No.1 despite service, I accordingly proceed to decide the appeal on merits.

The pith and substance of the judgment and decree of the Lower Appellate Court reveal that the suit was barred by law of limitation. In order to appreciate the aforementioned controversy, it would be in the fitness of things to extract Section 21 of the Limitation Act. The same reads thus:-

“21. Effect of substituting or adding new plaintiff or defendant.

—
(1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party;

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a

plaintiff.”

The proviso to the aforementioned Section protects the interest of the plaintiff in case the suit was filed under bonafide belief against the defendants and substitution of the defendants at the later point of time, would relate back to filing of the suit. In order to have further clarification, it would be in the fitness of things to extract the memo of parties in Civil Suit No.3 of 1980 and as well as in the present suit. The same read thus:-

“Suit No.3 of 1980

Sohan Lal, Mangat Ram, sons of Hari Kishan son of Pt.Salamat Rai, son of Pt.Dewan Chand, residents of Village Jamsher, Tehsil & District Jullundur.

Plaintiffs

Versus

- 1. (i) Jagat Singh husband of defendant No.1 resident of Pandori Nanga, Tehsil Phagwara Distt. Kapurthala.*
- (ii) Kuku son of Jagat Singh resident of Pandori Nanga, Tehsil Phagwara Distt. Kapurthala.*

Legal Representatives of Smt.Assa Devi, wife of Jagat Singh, resident of Pandori Nanga, Tehsil Phagwara, District Kapurthala.

- 2. Smt.Satya Wati wd/o Pt.Hari Kishan son of Salamat Rai,*
- 3. Romesh Kumar, 4. Naresh Kumar sons of Pt.Braham Shanker son of Pt.Salamat Rai 5. Smt. Saroj, 6. Smt. Vinod daughters of Pt.Braham Shanker son of Salamat Rai, residents of village Jamsher, Tehsil and Distt.Jullundur.*

...Defendants”

Suit No.81 of 1983

- 1. Meharban Singh son of Jagat Singh son of Sunder Singh, resident of vill.Pandori Naga, Tehsil Phagwara, Distt. Kapurthala at present 207, Westemd Road, South Hall, Middlex London (England) Thro: Ram Lal General Attorney, House No.69 Moh.No.27, Jullundur Cantt.*

...Plaintiff

Versus

1. Sohan Lal, 2. Mangat Rai sons and 3. Satya Wati (or Wanti) wd/o Hari Kishan s/o Salamat Rai, (4) Ramesh Kumar (5) Naresh Kumar sons and (6) Saroj and (7) Vinod daughters of Braham Shanker son of Salamat Rai, all residents of village Jamsher, Tehsil and Distt.Jullundur.

...Defendants”

On juxtaposition of the aforementioned, the address of the respondent-plaintiff in the present suit and that in the previous suit is the same as he was impleaded as a party. In view of the amendment caused by the Punjab and Haryana High Court after existing Rule 2 by inserting Rule 2-A and 2-B, it is the duty of the legal representatives of the deceased-defendant to be brought on record as heirs of the deceased and not of the person who is *dominus litis*. Simultaneously by substituting the existing sub-rule (2) of Rule 3 of Order 22 caused by the Punjab and Haryana High Court, in case application for bringing on record the legal heirs is not made, the suit shall not abate and such principle also applies in case of demise of the defendant as the existing Rule 3 in view of the substitution for the existing sub-rule (3) to Rule 4 of Order XXII. The same read thus:-

“ORDER XXII

1. No abatement by party's death, if right to sue survives.-

xxx

xxx

xxx

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.-

xxx

xxx

xxx

2-B. The duty to bring on record the legal representatives of the deceased-defendant shall be of the heirs of the deceased and not of the person who is dominus litis (Vide Not.No.GSR.39/C.A.5/1908/S 12257, w.e.f. 11-4-1975).

3. Procedure in case of death of one of several plaintiffs or of

sole plaintiff.-

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xxx

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Rule 3(2): Where within the time limited by law no application is made under sub-rule (1), the suit shall not abate as against the deceased plaintiff and the judgment may be pronounced notwithstanding his death which shall have the same effect as if it has been pronounced before the death took place, and the contract between the deceased and the pleader in that event shall continue to subsist.”

4. Procedure in case of death of one of several defendants or of sole defendant.-

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xxx

xxx

Punjab, Haryana and Chandigarh.(i) In its application to the State of Punjab, Haryana and Chandigarh, the following shall be substituted for the existing sub-rule (3) to Rule 4 of Order XXII:

“Where within the time limited by law no application is made under sub-rule (1) the suit shall not abate as against the deceased defendant and judgment be pronounced notwithstanding the death and shall have the same force and effect as it had been pronounced before the death took place.”

(ii) The following shall be inserted as sub-rule (4), (5) and (6) to Rule 4 of Order XXII:

“(4) If a decree has been passed against a deceased-defendant a person claiming to be his legal representative may apply for setting aside the decree qua him and if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record, the Court shall set aside the decree upon such terms as to costs or otherwise as it things fit.”

“(5) Before setting aside the decree under sub-rule (4) the Court must be satisfied prima-facie that had the legal representative been on the record a different result might have been reached in the suit.”

“(6)” The provisions of Section 5 of the Indian Limitation Act

(36 of 1963) shall apply to applications under sub-rule (4).”

Once the legal heirs of Asha Devi had already been brought on record and they were served and no such evidence had been led on record, whether they were actually served or not. The plaintiff miserably failed to discharge the onus and, therefore, the suit in 1983 was, in my view, an act of aggrandizement. It was obligatory upon the plaintiff to prove the death of Asha Devi in 1979. The death certificate mark A remained unproved. Even if the aforementioned document had been exhibited, it is settled law that mere exhibition does not dispense with the proof. The aforementioned view of mine is derived from the ratio of Hon'ble Supreme Court in **Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others**, AIR 1971 SC 1865.

The law with regard to representation of the estate is also no longer *res integra* in view of the ratio decidendi culled out by the Division Bench of this Court in **Sardara Singh & another Versus Harbhajan Singh & others**, 1974 AIR Punjab 345. Once the report came that Asha Devi had died, the respondent-plaintiff, who was arrayed as defendant was impleaded as legal heir. No explanation has come forth in not defending the suit. Their impleadment, in my view, would relate back to the institution of the suit in the year 1980 and, therefore, the findings of the Lower Appellate Court that their impleadment was barred by law are wholly erroneous and perverse.

There is more to add to it. Plaintiff did not step into the witness box but contested the suit through his attorney, i.e., maternal uncle PW-4 Ram Lal. In cross-examination, he admitted that it might be correct that Satya Devi had a right only to dispose of 1/3rd portion of the property in

dispute. No such information regarding the death of Asha Devi was ever sent to defendant Nos.1 and 2 nor did Asha Devi give any information to the appellant-defendants No.1 and 2 before leaving to Africa (Nairobi). The relevant portion of the cross-examination is extracted herein below:-

“No information regarding the death of Asha Devi was ever sent to defendants No.1 & 2. Asha Devi did not give any information to defendants No.1 & 2 before living to Africa (Nairobi).

It might be correct that Satya Devi had the right only to dispose of 1/3rd portion of the property in dispute. It is wrong to suggest that I have deposed falsely.”

The Lower Appellate Court being the last court of fact and law had not referred to the aforementioned provisions of law and the oral evidence, much less the pleadings, therefore, there is abdication.

As an upshot of my aforementioned observations, judgment and decree of the Lower Appellate Court is set-aside and that of the trial Court is restored. The substantial questions of law framed above are answered in favour of the appellant-defendants and against the respondent-plaintiff. Resultantly, the appeal is allowed

January 24th, 2019
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No