

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE

(S.B: HON. SHRI JUSTICE VIVEK RUSIA)

Second Appeal No.356/2016

Sheela D/o Ramibai and another
Vs.
Bhagudibai and another

Shri A.S. Garg, learned Senior Counsel with Shri Satish Jain, learned counsel for the appellants.

Shri Mohanlal Patidar, learned counsel for the respondent No.1.

Whether approved for reporting: Yes

JUDGEMENT

(Passed on 19/03/2019)

1] Appellants have filed the present appeal being aggrieved by the judgement and decree dated 17/08/2015 passed by 1st Civil Judge, Class-I, Neemuch and judgement dated 18/03/2016 passed by Additional District Judge, Neemuch whereby the suit as well as first appeal both have been dismissed.

2] The appellants are legal heirs of Rami Bai who died during the pendency of the suit. Late Rami Bai and defendant No.1 Bhagudi Bai are real sisters and they jointly owned the land survey No.799 area 0.03 Hectare and land survey No.800 area 0.78 Hectare, in total 0.81 Hectare situated at village Chaldu, Tehsil Neemuch (hereinafter referred to as "suit land"). Late Rami Bai filed a civil suit against the defendant No.1 for permanent injunction and partition alleging that she is having ½ share in the

suit land and the defendant No.1 is trying to raise a construction over the part of the land attached to the highway and the remaining portion is leaving for the plaintiff which is having lesser value. It has been alleged that on 05/02/2009, the defendant No.1 has started construction and because of which the dispute arose. The plaintiff filed a suit on 10/02/2009 seeking relief of permanent injunction that the defendant No.1 be restrained to raise any construction without partition and she be given ½ share in the suit land by way of partition.

3] The defendant No.1 filed the written statement by submitting that the partition between them had already been taken 22 years back and she is in possession of her share by constructing a house and residing in it with her family. The plaintiff is also in possession over the part of suit land of her share. The defendant No.1 had filed an application before the Tehsildar in which order of partition dated 08/07/2009 was passed. The Sub Divisional Officer remanded the case to the Tehsildar for deciding afresh but later-on, the same has been dismissed in default due to non-appearance, but the fact remains that the plaintiff and defendant No.1 are in possession over the land of their respective shares.

4] During the pendency of the plaint, the plaintiff has expired on 16/02/2012 and the present appellants filed an application under Order 22 Rule 3 read with Section 151 of the CPC on 19/04/2012 for bringing their name as legal heirs of the plaintiff on the basis of registered will dated 11/03/2011. The said application was opposed by the defendant No.1 but vide order dated 28/07/2012, the learned trial Court allowed the application and they have been permitted to continue the litigation as legal representatives (Hereinafter they are referred as plaintiffs). By order dated 31/07/2012, the plaintiff No.1(A) was permitted to act

as a guardian of plaintiff No.2(B).

5] The plaintiff No.1 examined herself as PW/1, Balvindar Singh as PW/2, Bhanwarlal Jain as PW/3 and Deepak Kumar as PW/4. The plaintiffs got exhibited 14 documents as Exhibit P/1 to Exhibit P/14. In defence, the defendant No.1 examined herself.

6] After appreciating the evidence came on record, learned Civil Judge, Class-I has dismissed the suit vide judgment and decree dated 17/08/2015 with a findings that the civil suit is barred under Section 250 of M.P.L.R. Code and without claiming the relief of declaration, the decree of partition cannot be granted. The plaintiffs have been permitted to continue the suit as legal representatives but their rights and title on the basis of will over the property cannot be decided in this suit.

7] Being aggrieved by the aforesaid judgement and decree, the plaintiffs preferred a first appeal before the District Judge and vide judgement dated 18/03/2015, the District Judge has dismissed the appeal affirming the findings recorded by the learned Civil Judge.

8] Hence, the present appeal before this Court on the ground that both the Courts below have wrongly held that the suit is not maintainable under Section 250 of the M.P.L.R. Code.

The plaintiff No.1 is having registered will in her favour, therefore, she succeeded $\frac{1}{2}$ share in the suit property and entitled to claim the partition. The original plaintiff Late Rami Bai was co-owner of the property, therefore, she was not required to claim the decree of title and the suit for partition and permanent injunction is maintainable.

9] Shri A.S. Garg, learned senior counsel appearing for the appellants in support of the aforesaid ground has placed reliance over the judgement passed by the Apex Court in case of **Jagraj**

Singh Vs. Birpal Kaur reported in AIR 2007 SC 2083, in which the Apex Court has held that once the Court holds that it has no jurisdiction in matter, it should not consider the matter on merits. He has further placed reliance over the judgement of Apex Court in case of **Chhote Khan and others Vs. Mal Khan and others reported in AIR 1954 SC 575**, in which it has been held that right of co-owner to claim the partition cannot be resisted by the defendant. He has also placed reliance over the judgement passed by the Apex Court in the case of **Sardar Singh Vs. Dardar Singh reported in M.P.W.N. 1990 (II) 246** in which it has been held that jurisdiction of Civil Court cannot be barred under Section 9 of the CPC. In the case of **Mahtab Singh and another Vs. Nandlal and another reported in 1999 RN 56**, this Court has been held that the Civil Court is having jurisdiction to grant the relief of perpetual injunction. No revenue Court can try such suit. He further submitted that if the trial Court was of the opinion that the suit is not maintainable, then it ought to have been returned to the plaintiffs for presentation before the revenue Court.

Appellants have proposed following substantial questions of law involved in the appeal:-

“i Whether, the Learned Courts below committed legal error in by not holding tat the suit for partition, possession and injunction was maintainable especially when the joint ownership was admitted?

ii Whether, the learned Courts below committed legal error by not considering the section 8 and 10 of hindu succession act wherein the appellants and deceased plaintiff became owner by operation of law?

iii Whether the Learned Courts below committed error of law in not considering the admission of respondent?

- iv Whether the Learned Courts below committed error of law in recording the finding of facts against the record and evidence produced?
- v. Whether, the learned Courts below committed legal error by not holding that the appellants are not only the legal representatives but became owner by survivorship and operation of law?
- vi Whether the findings of the Lower Courts suffer from misreading of evidence adduced either by the parties?
- vii Whether the judgement and decree passed by the learned Courts below are illegal, perverse and against the evidence and facts on the record?
- vii Whether under the facts and circumstances of the case learned Lower Court while passing the judgement and decree considered all the issues and evidence produced?"

10] Shri M.L. Patidar, learned counsel appearing for the respondent/defendant submitted that Late Rami Bai remained unmarried during her life time and in plaint, she had mentioned the name of her father. PW/2 Balvindar Singh was not married to her and the plaintiff No.1 Sheela, plaintiff No.2 Neelu are the daughters of Balvindar Singh but not the daughters of Rami Bai. The plaintiffs have failed to prove the factum of marriage of Rami Bai and Balvindar Singh. He further emphasised that both the Courts below have rightly dismissed the suit as well as the appeal and there is no substantial question of law involved in this appeal.

11] I have perused the records of both the Courts below and considered the arguments of both the counsel. It is not in dispute that the original plaintiff Rami Bai and defendant No.1 Bhagudi Bai are the real sisters and they jointly owned the suit land. After the death of Rami Bai, the only issue survive that whether the

plaintiffs have succeeded right in the property left by Late Rami Bai. In the pending suit plaintiffs did not claim any relief by way of amendment that now they have succeeded the ½ share of Late Rami Bai in suit land. By allowing the application under Order 22 Rule 3, they were given limited right to continue the suit.

12] The Apex Court in the case of **Jaladi Suguna (dead) through L.R.s Vs. Satya Sai Central Trust & others reported in AIR 2008 SC 2866** has held that the determination as to who is the legal representative under Order 22 Rule 5 will be for the limited purpose of representation of the estate of the deceased for objection of that case. Such determination for such limited purpose will not confer on the person held to be a legal representative, any right to the property which is subject matter of the suit. Para 10 is reproduced below:-

“10. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-...-vis other rival claimants to the estate of the deceased.”

13] In case of **Suresh Kumar Bansal Vs. Krishna Bansal and another reported in (2010) 2 SCC 162**, the Apex Court has held that the determination of question as to who is legal representative of deceased plaintiff or defendant under Order 22

Rule 5 of the CPC is only for the purpose of bringing legal representative on record for conducting those legal proceedings only and does not operate as *res-judicata* in an *interse* dispute between the rival legal representative. Para 20 is reproduced below:-

“It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as *res judicata* and the *inter se* dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.”

14] In a recent judgement in the case of **Mahanth Satyanand @ Ramjee Singh Vs. Shyam Lal Chuhan and others** passed in civil appeal No.6318/2010, the Apex Court has also held that the determination by the Court would be limited to the question, as to who should be brought on record in place of deceased for the purpose of continuing the suit alone and nothing beyond that. The inquiry under 225 of CPC is summary in nature and for limited purpose. Para 12 is reproduced below:-

“Although we are apprised of the fact that alleged legal representatives relying on certain customs to prove whether a Grihastya could be a Guru under the relevant sampradaya. We need not concern our self with the aforesaid findings on merit given by the trial court at this stage. It is for the High Court to consider the aforesaid report of the trial Court and determine the disputed question of fact. It may not be out of context to note that the determination under Order XXII Rule 5 of the CPC is summary in nature and for limited purpose. Order passed on the impleadment applications, determining a particular person as legal representative has no effect of final decision or operates as *res-judicata* between the legal representatives as to the question of who

should ascend as Guru. At the cost of repetition, we may note that the determination by the High Court would be limited to the question, as to who should be brought on record in the place of deceased for the purpose of continuing the suit alone, and nothing beyond that.”

15] In view of the above, it is clear that the present appellants/plaintiffs were brought on record as legal representatives of Late Rami Bai by virtue of will, but after become a party, they ought to have established their right over the suit property. Execution of will in favour of plaintiff No.1 and marriage of Rami Bai with PW/2 were specifically denied by the defendant No.2 by way of reply to the application filed under Order 22 Rule 3 of CPC. The suit property was a joint property of plaintiff Late Rami Bai and defendant No.1 and after death of one co-owner, Bhagudi Bai being a real sister has become the exclusive owner of the suit property until and unless the will is proved by the plaintiffs. Therefore, both the Courts below have not committed any error while dismissing the suit on the ground that the present appellants are not entitled to claim any relief in the suit.

16] Admittedly, the suit land is an agricultural land and under Section 178 of the M.P.L.R. Code, the Tehsildar is a competent authority to pass the order of partition. Therefore, both the Courts below have rightly held that the suit is not maintainable for the relief of partition. Both the Courts below have also rightly held that the plaintiffs have made contradictory pleadings in one way, she was making averments for implementation of the undertaking given by the defendant No.1 in earlier suit filed by her and in other hand she is pleading that there was no partition between them.

17] In view of above, I do not find any question of law involved

in this appeal, which is accordingly **dismissed**.

(Vivek Rusia)
Judge

Krjoshi

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JUDGMENT

(Reserved on 07/03/2019)

POST FOR:- _____/03/2019

(Vivek Rusia)
Judge

_____/03/2019