

Smt. Prema Devi and ors. Vs. Ashok Kumar Seth and ors.

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Court : Allahabad

Decided On : May-24-2004

Reported in : 2005(1)ARC550; 2004(4)AWC3528

Judge : Devi Prasad Singh, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 41, Rule 27

Appeal No. : Second Appeal Nos. 585 and 596 of 1997

Appellant : Smt. Prema Devi and ors.

Respondent : Ashok Kumar Seth and ors.

Advocate for Def. : R.K. Sharma, ;P.L. Mishra, ;R.N. Gupta and ;A.B. Mishra, Advs.

Advocate for Pet/Ap. : D.C. Mukharji, Adv.

Judgement :

Devi Prasad Singh, J.

1. The Civil Second Appeal No. 585 of 1977 and Second Appeal No. 596 of 1977 have been filed against the same judgment and decree of the court below. Hence, they are heard together. I have heard the learned counsel for the appellant Sri D. C. Mukharji in Second Appeal No. 585 of 1977 and Sri R. K. Sharma, learned

counsel for the respondent as well as Shri P. L. Mishra, learned counsel for respondent in Second Appeal No. 596 of 1977.

2. The controversy for adjudication in two second appeals relates to two houses belonging to one late Sri Govind Prasad. The first house is situated at Railway Ganj, Central Bank Road, Hardoi and another house is situated at Railway Ganj, Vaish Pathshala Road, Hardoi. The undisputed factual matrix of the case is that late Sri Govind Seth was having four sons, namely, Kanhaiya Lal, Nanhey Lal, Ram Narayan and Ram Lal. Shri Kanhaiya Lal was having one son, namely, Ashok Kumar and Shri Nanhey Lal was bachelor.

3. Sri Ashok Kumar son of late Sri Kanhaiya Lal has filed a Regular Suit No. 47 of 1969 claiming half of share of his father's right accruing in two houses situated in District Hardoi. There is no dispute that all four sons of late Shri Govind Prasad were entitled for 1/4th share for property. In the Regular Suit written statement was filed by Shri Kanhaiya Lal and none of the defendants in the regular suit had raised objection relating to 1/2 share of Sri Ashok Kumar out of share of Shri Kanhaiya Lal. Accordingly, the suit was decreed and the temporary decree was issued by the trial court on 10th October, 1973.

4. At the stage of final decree two lots were prepared by Amin. In first lot, the shares of Shri Ashok Kumar, Kanhaiya Lal and Nanhey Lal were clubbed together and in the second lot the share of Ram Lal and Ram Narayan were clubbed into one. At final decree stage it was provided that the occupier of first lot shall get front portion of the house situated at Railway Ganj, Central Bank Road, Hardoi. The share holder of first lot shall get back portion of the house situated at Vaish Pathshala Road, Hardoi.

5. It was further provided at final decree stage that the holder of second lot shall get the back portion of the house situated at Central Bank Road, Hardoi. They will also get the front portion of the house situated at Vaish Pathshala Road, Hardoi.

6. It has been submitted by the parties that lots of Kanhaiya Lal and Nanhey Lal and Ashok Kumar were prepared with mutual consent. Similarly the lots of Ram Lal and Ram Narayan were also prepared with mutual consent.

7. Though there was no dispute between the parties relating to the preparation of lot but an objection was filed by the appellants of both the second appeals against the Scheme proposed by the Amin on various grounds including for the portion of house allotted to them. It was also submitted by the appellant while filing objection that the portion of house allotted to them at Vaish Pathshala Road, Hardoi, was under tenancy and the valuation assessed for both the houses were Incorrect.

8. The Civil Judge seized with the matter with Regular Suit No. 74 of 1969, had rejected the objection and decreed the suit In terms of scheme submitted by the Amin vide judgment and order dated 9.10.1976.

9. The first appeal was filed by the appellant which was registered Civil Appeal No. 52 of 1976. The first appeal was dismissed by Illrd Additional District Judge, Hardoi, vide judgment and decree dated 2nd September, 1977. Against the aforementioned judgment and decree second appeal under Section 100 of C.P.C. has been filed.

10. During the pendency of the present second appeal Shri Nanhey Lal as well as Shri Kanhaiya Lal died.

11. After the death of Shri Nanhey Lal an amendment, application was moved by the appellant and by order dated 5th November, 2003, another substantial question of law was added with the permission of Court indicating therein as to whether after the death of Shri Nanhey Lal his entire share will devolve on the appellants as well as respondents of both the appeals. The substantial question of law in Second Appeal No. 596 of 1977 numbered as serial No. 5, for convenience is reproduced as under :

'5. Whether in view of the death of Nanhey Lal respondent No. 3 issueless during the pendency of the second appeal whose share was included in lot (qurra) No. 1 and jointly allotted to respondents Ashok Kumar. Kanhaiya Lal and Nanhey Lal the lots prepared by the learned courts below are legally liable to be set aside as the share of said Nanhey Lal devolved upon the appellants and surviving respondents according to the admitted pedigree and the lots have to be prepared afresh.'

12. Now one of the only question for adjudication is that whether the share of Shri Nanhey Lal will go to all the four sons or the heirs or late Shri Govind Prasad or it shall be inherited by only Ashok Kumar on account of the execution of a Will in his favour.

13. Learned counsel for the appellant Shri D. C. Mukharji has submitted that at second appeal stage ordinarily it cannot be adjudicated upon as it shall require to decide the disputed question of fact.

14. Sri R. K. Sharma, learned counsel for the respondent has submitted that he had filed a photo copy of the registered Will dated 16.6.1981, executed by Shri Nanhey Lal. According to the said Will Shri Nanhey Lal has transferred his future rights to Shri Ashok Kumar son of late Kanhaiya Lal.

15. Shri R. K. Sharma advocate has further submitted that keeping in view the share lot prepared by Amin while preparing the final decree with the consent of parties, the present appeal may be decided and rights of the parties may be settled. He has further submitted that the preparation of lot at final decree stage in which shares of Shri Ashok Kumar, Kanhaiya Lal and Nanhey Lal were clubbed together relating to both the houses amounts to the confirmation of Will and there is no need of fresh trial as the preparation of lot reflects last Will and wishes of late Shri Nanhey Lal.

16. Sri D. C. Mukharji and Shri P. L. Mishra had denied the genuineness of Will dated 16.6.1981 and submitted that the Will was not executed by Shri Nanhey Lal. Thus, authenticity of Will dated 16.6.1981 is in dispute and requires fresh adjudication by a competent court.

17. This is a second appeal filed under Section 100 of C.P.C. For convenience under Section 100 of C.P.C. is reproduced hereunder :

'Section 100. Second Appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial

question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard only on the question so formulated, and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if It is satisfied that the case involves such question.'

18. Under Section 100 of C.P.C. only substantial question of law can be looked into, I have gone through the memo of second appeal so far substantial question of law No. 5 is concerned, which was later on added by way of amendment consequent to death of Nanhey Lal and Kanhaiya Lal and relates to applicability of registered Will. The other substantial question of law Nos. 1 to 4 relates to finding of fact call for no interference at the stage of second appeal.

19. Now coming to submission relating to applicability of Will and its genuineness etc. I feel that normally while exercising power under Section 100 of C.P.C. this Court is not a proper forum to decide a disputed question of fact.

High Court may not enter into disputed question of fact.

After the death of Kanhaiya Lal, his legal representatives have been substituted and they are on record. Accordingly no occasion arises to send back the case to appellate trial court to decide the factum, relating to legal representative of Shri KanVaiya Lal. However, Shri D. C. Mukharji, advocate submits that the genuineness of Will cannot be adjudicated by this Court and accordingly the

matter should be relegated to trial court or first appellate court under Order XL1 Rule 27 of C.P.C. Order XLI Rule 27 is reproduced as under :

'27. Production of additional evidence in appellate court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court, but if :

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted ; or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed ; or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such evidence or document to be produced, or witness to be examined,

(2) Wherever additional evidence is allowed to be produced by an appellate court, the Court shall record the reason for its admission.'

20. The Rule 27 of Order XLI referred hereinabove shows that the appellate court may permit to adduce evidence for following reasons ;

(i) In case the appellate court had refused to admit evidence which ought to have been admitted.

(ii) In case the parties seeking to produce additional evidence, proves that inspite of due diligence such evidence was not within the knowledge or could not be produced when the decree appealed against was passed.

(iii) Or the appellate court requires any document to be produced or witness to be examined to enable it to pronounce judgment or for any other substantial cause.

21. The present case is not covered by all the three ingredients mentioned in Rule 27 of Order XLI of Code of Civil Procedure viz. the first appellate court had not refused to admit an evidence. The circumstances relating to filing of registered Will was not attracted or necessitated during the pendency of first appeal against which the present second appeal is being preferred. The circumstances relating to existence of third condition was not available during the pendency of controversy before the first appellate court.

22. At least one condition out of three could be satisfied for relegating the present case to the first appellate court or trial court. All the conditions given under Rule 27 Order XLI relates to the period during the pendency of the case before the first appellate court. Learned counsel for the appellant relied upon the judgment of Apex Court in M. M. Kasim v. Manohar Lal Sharma. AIR 1981 SC 1113 and submitted the present controversy may be relegated to the first appellate court to decide the right of parties relating to the property of late Shri Kanhaiya Lal who expired during the pendency of the present second appeal.

23. The judgment of the Apex Court does not apply under the facts and circumstances of the present case. In the case of M. M. Kasim the additional evidence, for which the case was remanded to the first appellate court by the Apex Court was related to original relief claimed by the plaintiff and which was relating to applicability of a partition decree. In the present case, the death of late Shri Kanhaiya Lal occurred during the pendency of the second appeal does not affect the original dispute for controversy arisen from the suit in question. It is a different cause of action based on different material and facts. The death of late Shri Kanhaiya Lal in no way affects the original issue before trial court. After his death in case a person claims right or title as an heir of late Shri Kanhaiya Lal he will have right to file a Regular Suit to install his claim. A person who claims right through Will or through natural heirship and successor may accordingly file a suit for declaration and partition of the property left over by late Shri Kanhaiya Lal. Since the substitution application has been allowed and natural heirs of late Shri Kanhaiya Lal are on record, the interested person may file appropriate suit before the competent court and the competent court shall have right to decide the controversy after considering the genuineness of Will as well as the pleading of

the parties relating to the property and share of late Shri Kanhaiya Lal.

24. The present second appeal is pending since 1977 and the relegation of the matter to the court below will further prolong the litigation as I find no substantial question of law exist to render the judgment of the first appellate court as illegal.

25. Subject to above, the present second appeals are dismissed. Cost made easy. Parties will have right to file a fresh suit to claim the share of late Shri Kanhaiya Lal either in pursuance through Will or as natural heir or successor. The Judgment and decree of first appellate court dated 2nd September, 1977 in First Civil Appeal No. 51 of 1976 as well as 52, 1976 are affirmed. No cost.

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