

Durga Singh and ors. Vs. Mal Singh and ors.

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Court : Rajasthan

Decided On : Oct-21-1982

Reported in : 1982WLN(UC)371

Judge : Dwarka Prasad Gupta, J.

Appeal No. : S.B. Civil Revision No. 238/82

Appellant : Durga Singh and ors.

Respondent : Mal Singh and ors.

Disposition : Petition allowed

Judgement :

Dwarka Prasad Gupta, J

1. The plaintiff, Malchand, filed a suit on 11-7-77 in the court of Civil Judge, Nagour for declaration to the effect that sale of one half of disputed property by defendant No. 3 in favour of defendants Nos. 1 and 2 was void and illegal and that the plaintiff may be put into possession of the portion of the suit property. It was also prayed that a decree for pre-emption for the other one half of the disputed property may be granted in favour of the plaintiff. The basis of the plaintiff's suit was that he was the adopted son of Nemichand, husband of defendant No. 3 and after the death of Nemichand the plaintiff Malchand and defendant No. 3 were equally entitled to 1/2 share each in the disputed property, which was sold by

defendant No. 3 to defendants Nos. 1 and 2 by a sale-deed dated 4.6.77.

2. After the lapse of over 4 years, the plaintiff filed an application on 14.12.81 under 6 Rule 17 CPC for incorporating a plea that a decree for possession be based in favour of the plaintiff in respect of the entire disputed property, as a will has been executed by Nemichand deceased on Chet badi 5 Samvat 1989 in respect of all his moveable and immoveable properties in favour of Malchand and his wife Smt. Achuki. The basis of the plea, which was now sought to be introduced in the plaint by way of amendment was an alleged will which is said to have been executed by Nemichand deceased in favour of the plaintiff and his wife Smt. Achuki. The trial court allowed the amendment application on the ground that the document, which was said to be the alleged will executed by Nemichand deceased has already been admitted into evidence Order 13 Rule 2 CPC by the order dated 28.8.81.

3. In this revision petition, it is urged by the learned Counsel for the petitioner that a totally new and inconsistent case is sought to be introduced by means of amendment and that too after a lapse of 4 years. The trial court appears to have allowed the amendment merely on the ground that the document claimed by the plaintiff to be a will has been admitted in evidence by the earlier order dated 28.8.81. The alleged will was in favour of the plaintiff Malchand and his wife Smt. Achuki and, thus, both of them could claim to be the joint owners of the disputed property on the basis of the alleged will, if the said document was at all a will and if the same was proved to be a genuine document. The plaintiff came to the court on the basis of his alleged adoption by Nemichand deceased and admitted, in the plaint that the widow of Nemichand Smt. Jiwani defendant No. 3 was the owner of the other one half of the disputed property. On the basis of adoption it was claimed that the plaintiff was entitled to possession of one half of the property in dispute and the sale-deed executed by defendant No. 3 Smt Jiwani in favour of defendants Nos. 1 and 2 was void and not binding on the plaintiff in respect of his one half share in the suit property. But in respect of the other one half share of the property in dispute, while acknowledging the ownership of Smt. Jiwani, defendant No. 3, the plaintiff claimed only a decree for pre-emption after payment of one half of the said price in respect of sale made by defendant No. 3 in favour of

defendants Nos. 1 and 2. Now by amendment the plaintiff claimed that he and his wife Smt. Achuki are the absolute owners of the property in dispute by virtue of the will alleged to have been executed in their favour by Nemichand deceased and thus according to the case sought to be introduced by amendment in the plaint Smt. Jiwani, defendant No. 3 had no right to the disputed property or even to one half share thereof. Thus, it is apparent that the case, which is sought to be introduced by amendment by the plaintiff, is not only a new one but is totally inconsistent with which the plaintiff came to the court. The plaintiff cannot be allowed by means of amendment to wipe out an admission made by him in respect of the ownership of defendant No. 3 Smt. Jiwani at least relating to one half of the disputed property. In *Ma Shwe Mya v. Mung Ma Haung* AIR 1922 P.C. 249, it was laid down by the Privy Council as under:

All rules of Courts are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.

4. In the case before their lordships of the Privy Council, a suit for specific performance of a verbal agreement made in 1912 was sought to be converted into one for breach of contract made in 1903. Their Lordships of the Privy Council refused to allow the amendment and held that a plaintiff who came to the court on the basis of one contract could not be permitted to set up and establish another independent contract. In the present suit, the real question in controversy between the parties is in the matter of alleged adoption of the plaintiff Malchand by Nemichand deceased. If the amendment is allowed as has been done by the trial court, the entire basis of the suit would be changed and the new basis which the defendant would have to meet, would be that the plaintiff and his wife Smt. Achuki have become the absolute owners of the entire suit property on the basis of a will alleged to have been executed by Nemichand deceased in their favour. Thus, the whole controversy between the parties would be altered and a new and distinct case will then be allowed to be introduced in the plaint by way of amendment.

5. In *Modi Spinning & Weaving Mills Co. Ltd and Anr. v. Ladha Ram & Co.* : [1977]1SCR728 , their Lordships of the Supreme Court held that an amendment introducing an entirely different and new case and seeking to displace the party from its admission made earlier in its pleadings cannot be allowed. As I have already pointed out above that the plaintiff had admitted in the original plaint that defendant No. 3 Smt Jiwani had one half share in the suit property & on now the basis of the amendment sought to be introduced the plaintiff claims to be the full owner of the entire disputed property along with his wife, to total exclusion of Smt. Jiwani defendant No. 3, the plaintiff cannot be allowed to displace the admission made by him in the original plaint regarding the ownership of Smt. Jiwani in respect of one half of the disputed property. If such an amendment is introduced, the defendant No. 3, Smt. Jiwani would be irretrievably prejudiced and that entirely new and different case in the alternative would be incorporated in the plaint, which will cause surprise and prejudice to the defendants. No doubt inconsistent pleas in the alternative can be taken in the original pleading, but to displace the admissions made by the plaintiff in the original pleadings by means of amendment introducing a new and inconsistent case in the alternative can never be permitted.

6. Learned Counsel for the opposite party relied upon a decision of the Punjab & Haryana High Court in *Raghvir Prashad etc. v. Chet Ram*. 1971 Current Law Journal 612 in which the plaintiff originally based his suit for possession of the ground of natural succession and by amendment sought to introduce a claim for possession of the same property on the basis of sale. *Raghvir Prasad's* case (3) is distinguishable from the case before me, as the plaintiff has claimed on the basis of an alleged will to be the exclusive owner & has sought possession over the entire property in dispute by means of the amendment, although in the original plaint the title to only one-half of the property was claimed on the basis of inheritance. Not only that a new and inconsistent case is sought to be introduced by way of amendment but the admissions of the plaintiff made in the original pleadings are sought to be wiped out by means of an amendment. In the original plaint, the plaintiff having admitted that Smt. Jiwani defendant No. 3 was the rightful owner of one half of the disputed property by inheritance, he could not now be allowed to go back upon his admission & claim the entire property as his own by means of an amendment in the plaint. In my considered view, the trial court acted erroneously

in allowing the amendment in the present case.

7. For the reasons mentioned above, the revision petition is allowed, The order passed by the learned Civil Judge, Nagaur dated July 15, 1982 is set aside and the plaintiff's application for amendment of the plaint is dismissed. The trial court is directed to proceed with the trial of the suit on the basis of the original plaint. The suit was filed in the year 1977 and the trial court is directed to expedite the trial of the suit. The parties are left to bear their own costs.

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