

Bhagwandas Vs. Debi Ram

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Court : Himachal Pradesh

Decided On : Oct-13-1952

Reported in : AIR1953HP25

Judge : Chowdhry, J.C.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115; ;Himachal Pradesh (Courts) Order, 1948 - Section 32 and 32(1); ;Limitation Act, 1908 - Schedule - Articles 142 and 144

Appeal No. : Second Appeal No. 45 of 1952

Appellant : Bhagwandas

Respondent : Debi Ram

Advocate for Def. : D.N. Vaidya and; Thakur Prasad, Adv.

Advocate for Pet/Ap. : Hiralal, Adv.

Disposition : Appeal dismissed

Judgement :

Chowdhry, J.C.

1. This is a second appeal by the plaintiff Bhagwandas against the judgment and decree of the learned District Judge of Mahasu, dated 15-4-1952, dismissing his

appeal and affirming the judgment and decree of the Subordinate Judge whereby his suit for a declaration that he was the sole proprietor of the lands in dispute was dismissed.

2. The defendant-respondent Debi Ram is plaintiff-appellant's uncle. The land in suit consists of 59 bighas 12 biswas 9 biswansis of cultivatory and 1 bigha 12 biswas and 12 biswansis of pasture land in village Bair in ilaqa Kunhwal, 5 bighas 10 biswas and 6 biswansis of cultivatory land in village Galyanda Behna and 8 bighas 1 biswa and 5 biswansis of cultivatory land in village Ghorī Dhar, the two latter villages being in ilaqa Ghasnu. They stand recorded in the names of the parties in equal shares. The defendant applied to the appropriate revenue authority for partition of the land according to the recorded shares. The plaintiff opposed that application on the ground that he was the sole proprietor of the entire land. He was directed to have his title established, and thereupon he filed the present suit for the aforesaid declaration.

2. It appears that a partition of joint family properties was effected among the defendant Debi Ram, plaintiff's late father Kundan and a third brother of theirs named Bakshi Ram by agreement under a deed of partition dated 14 Bhado Samvat 83 Kham, which year corresponded to Samvat 1963 Bikrami or 1907 A. D. The property partitioned consisted, amongst other properties, of the land in suit. It was allotted in equal shares to Debi Ram and Kundan, the third brother Bakshi Ram having been allotted land elsewhere. The self acquired properties of the brothers were specifically excluded from partition in the deed. About two months later plaintiff's father Kundan wrote a letter to the defendant Debi Ram. He referred to the facts that land in Kunhwal had been allotted to them in the family partition, that one Pir Sahai who used to manage the land was not willing to do it any more, and that for a proper management of their respective shares it was necessary to separate them. Accordingly, he suggested to the addressee that they both go to Kunhwal the following day and divide the land equally tenant-wise and also the existing stock of grain there. Suggestion relating to land in Kunhwal alone was made, but not to that in ilaqa Ghasnu. Debi Ram sent his reply the same day on the back of that very letter, and it was to the following effect: 'The submission of Debi Ram to brother Randan is as follows: As I submitted the other day, I shall

take no share in land. All this has been acquired by you. Therefore my request to you is to go to Kunhwal & take possession of it after securing all the papers from brother. Whatever you think proper act according to that. I shall maintain myself on coarse grain earned by my own hands. This submission is made by Debi Ram on 16th Katik 83 Kham.'

3. The plaintiff filed the present suit on two grounds: that the defendant had relinquished his share in the land in suit by his said reply, and that, in the alternative, the plaintiff had acquired title to the defendant's share by adverse proprietary possession. Both the Courts below have repelled these contentions, and the plaintiff has now come up in second appeal to this Court.

4. The learned counsel for the defendant-respondent took the preliminary objection that a second appeal is in this case not maintainable. If this objection be well-founded, there is no doubt that the plaintiff would fail on the mere ground that even if the decision of the lower appellate Court, arrived at on a thorough consideration of the relevant facts and law, be wrong on both the said points, it could not be set aside in revision.

5. The relevant provision relating to second appeals is paragraph 32 of the Himachal Pradesh (Courts) Order, 1948, which runs as follows :

'(1) A second appeal shall lie to the Court of the Judicial Commissioner in any of the following cases from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit, namely:

(a) in a small cause suit or unclassified suit, (i) if the value of the suit is one thousand rupees or upwards, or the decree involves directly some claim to, or question respecting, property of like value, and the decree of the District Court varies or reverses, otherwise than as to costs the decree of the Court below, or

(ii) if the value of the suit is two thousand five hundred rupees or upwards, or the decree of the District Court involves directly some claim to, or question respecting, property of like value;

(b) in a land suit,

(i) if the value of the suit is two hundred and fifty rupees or upwards, or the decree involves directly some claim to, or question respecting, property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below, or

(ii) if the value of the suit is one thousand rupees or upwards, or the decree of the district Court involves directly some claim to, or question respecting property of like value.

(2) The provisions of Order 41 of the Code of Civil Procedure, 1908 (Act 5 of 1908), other than Rule 35 of the said Order, shall apply, as far as may be, to a second appeal under this paragraph and to the execution of a decree passed on any such appeal.'

The present being a land suit, and the decree appealed from having affirmed the decision of the trial Court, the present appeal falls under sub-para (1) (b) (ii) of the paragraph. In order that the present second appeal be competent it is therefore necessary either that the value of the suit be Rs. 1000 or upwards, or that the decree appealed from involves directly some claim to, or question respecting, property of like value. The suit was valued for jurisdictional purposes at Rs. 250/-, that being thirty times the land revenue of the land. In order to make this second appeal competent the appellant has filed an affidavit that the market value of the land, in suit is more than Rs. 1,000/-, and that affidavit has not been challenged. Relying however upon the decision of this Court in -- 'Hari Das v. Mt. Lachhmi', Second Appeal No. 19 of 1951, it was argued by the learned counsel for the defendant-respondent that as the decision appealed from confined itself to the particular property which was the subject-matter of the suit and did not affect the appellant's rights in other properties, the first and not the second alternative contained in the said sub-para was applicable, but as the value of the suit was only Rs. 250/- the present appeal did not fall under the first alternative either. I have reconsidered the said decision of this Court and, thanks to the arguments of the learned counsel for the present defendant-appellant, I am able to say that that decision, so far at least as the view expressed therein relating to the first

alternative is concerned, was wrong.

6. The said alternatives, which appear in all the classes of cases enumerated in para 32 of the Himachal Pradesh (Courts) Order, 1948, correspond to the first portion of para 1 and to para 2 of Section 110, Civil P. C. And the said decision of this Court was founded on certain authorities relating to the provisions of that section. A number of rulings were cited by the learned counsel for the plaintiff-appellant in support of the contention that para 2 of Section 110 was an alternative to only the second portion, but not to the whole, of the first paragraph of that section. It is however not necessary to consider the rulings because, so far as the relevant provisions of the Himachal Pradesh (Courts) Order are concerned, there is no provision therein corresponding to the second portion of Section 110 of the Code and therefore there are only two alternative situations, namely, a certain value of the suit or the decree appealed from involving directly some claim to, or question respecting, property of like value. It follows, therefore, as already stated, that in order that a second appeal may be competent it must satisfy the one or the other of the two alternatives. Furthermore, I still adhere to the view, expressed in the former decision, that the property referred to in the second of the two alternatives is not confined to the subject-matter of suit but covers in addition rights in other properties as well which may be affected by the decision appealed from, though I do not adopt the reasoning employed in that case for arriving at that conclusion. The view expressed in that case that if the conditions of the first alternative were not satisfied it would not be open to the appellant to take the benefit of the second, because to allow him to do so would be to render the first alternative nugatory, is not correct. That reasoning was adopted from certain rulings which seem to have proceeded on the view that the condition contained in para 2 of Section 110 of the Code, wherever its applicability was called for, must be satisfied in addition to that contained in the first part of para 1. As already stated, however, it is not necessary to resort to that reasoning here since under the aforesaid provisions of the Himachal Pradesh (Courts) Order, 1948, there are two clear-cut alternatives so that the case must fall under the one or the other. That being so, any interpretation which has the effect of rendering the two alternatives identical must necessarily be wrong. That will, however, be the case if the property in the second alternative is interpreted as meaning nothing more than

the property which is the subject-matter of the suit. It follows, therefore, that that term in the second alternative must mean any property, and not only the property which is the subject-matter of the suit, a claim to, or question respecting, which is involved in the decree appealed from. It may be stated here in passing that the phrase 'value of the suit' means the amount or value of the subject-matter of the suit, as I shall show presently.

7. A hypothetical illustration will elucidate the position. A sues B for recovery of Rs. 100/- as rent of house X on foot of lease-deed relating to houses X and Y. The market value of the two houses is above Rs. 1,000/-. B denies the tenancy. The District Court affirms the trial Court's decree dismissing the suit, holding that the lease-deed created no tenancy. Here a second appeal is not competent under the first alternative since the value of the suit is less than Rs. 1,000, but it would be competent under the other alternative because as a result of the decree A would be debarred from recovering rent from B in respect of both the houses, and therefore the decree involved a claim to, or question respecting, properties valued at more than Rs. 1,000. It follows, therefore, that where the decision appealed from does not go beyond awarding relief in respect of the property which was the subject-matter of the suit by affecting rights in other properties, the appellant will not have the benefit of that alternative, and he have a right of second appeal only if he can have the benefit of the first alternative.

8. It was in the interpretation of the first alternative, however, that a mistake was committed in the previous decision. It was held that the words 'value of the suit' in the first alternative were not synonymous with the words 'value of the subject-matter of the suit' in Section 110 of the Code. It escaped attention of counsel and Court alike in that case that the said words 'value of the suit' were defined in para 2(vii) of the Order itself as meaning the amount or value of the subject-matter of the suit. The Court, therefore, fell into the error of interpreting the words 'value of the suit' as meaning value of the suit for jurisdictional purposes. That is why it was held that the value of the suit in that case was Rs. 800 odd, that being thirty times the land revenue, and not more than Rs. 1,000, which was stated in the affidavit of the appellant as the market value of the land. The view is well established that under the corresponding provision in Section 110 of the Code, the applicant is not

bound by the fiscal standards under the Court-fees and Suits Valuation Acts, by which the suit may have been valued, but is entitled to show the actual market value of the claim. 'Lakshminarasimhacharyulu v. Ratnam', AIR 1949 Mad 739 (FB) and -- 'Kishan Chand v. Lachhmi Chand', AIR 1933 All. 15.

9. The revised view of this Court in regard to maintainability of second appeals under para 32 of the Himachal Pradesh (Courts) Order, 1948, is this. If the value of the suit, which means the amount of the subject-matter of the suit or the market value of the property which is the subject-matter of the suit, satisfies the condition of the money value under the relevant provision of the said paragraph, the appeal will be maintainable under the first alternative of the value of the suit, and in that case it will not be necessary to call in aid the other alternative of the decree appealed from involving directly some claim to, or question respecting, property of like value. The latter alternative can, however, be availed of where the decision, beyond awarding relief in respect of the particular property which is the subject-matter of the suit, affects rights in other properties as well, and, on the same principle, this alternative may also apply in cases where the matter in dispute is one which is incapable of valuation, as in the case of easements.

10. According to the above interpretation of the provisions, irrespective of the fact that the jurisdictional value of the suit in the present case was only Rs. 250, as the market value of the subject-matter of the suit was more than Rs. 1,000, the present second appeal is clearly competent.

11. Coming to the merits of the case, I am of the opinion that the findings of the Courts below on both the points were correct. As regards relinquishment, the defendant has come into the witness-box and explained his aforesaid reply to the letter of his brother Kundan by saying that he wrote it only sarcastically due to the partition not having been effected fairly. It can be said that he offers this explanation because now it suits his purpose to do so. But the reply itself does not lend itself to the interpretation sought to be placed on it by the plaintiff. It no doubt said that the defendant would take no share in the land, but the reason which he gave for not taking any share in the land, namely, that it had been acquired by Kundan, was against the terms of the deed of partition. In the partition deed the

land excluded from partition on the ground of its being the self-acquired property of one brother or another was some other land, and the land in suit was not so excluded but partitioned as joint family property liable to partition. It is also clear that in describing the land as Kundan's self-acquired property the defendant was stating something which was against his own interests and in favour of the interests of Kundan. The irresistible conclusion, therefore, is that the defendant's remarks that he will take no share in the land as it was Kundan's self-acquisition were nothing but ironical. Furthermore, the defendant also left it to Kundan to do as he thought proper, and as the latter also never treated the defendant's reply as amounting to a relinquishment (for he allowed the defendant's name to continue to be recorded as a co-sharer with him in equal share), it is manifest that the property never changed its true character of property in which shares had been defined by agreement though it had not been divided by metes and bounds, or property held by the parties as tenants-in-common. '*Balkishan Das v. Ram Narain*', 30 Ind App 139 (PC). The appellant's plea of relinquishment by the defendant has therefore been rightly rejected by both the Courts below.

12. His plea of acquisition of title is equally untenable. A plethora of rulings were cited in this case, but the point is so well-settled that I need not discuss them. As between co-sharers or tenants in common, in the absence of ouster possession of one is tantamount to possession of all. If any support for this view be needed, I might refer to -- '*Vishnu Janardan v. Mahadev Keshav*', AIR 1942 Bom 44 and -- '*Usuf Hasan v. Raunaq Ali*', AIR 1943 Oudh54. Now in this case the plaintiff's father Kundan took possession of the defendant's share after the partition and, as already shown, despite the said ironical letter of the defendant, as a tenant-in-common with him and therefore not adversely to him. There is no proof of any ouster thereafter.

It was, however, contended by the learned counsel for the plaintiff-appellant that mere long possession of Kundan and on his death of the plaintiff, which meant possession for forty years, amounted by itself to an ouster of the defendant. In support of this contention the learned counsel cited certain rulings of which two may be cited as typical of all: -- '*Khemchand v. Dayaram*', AIR 1941 Sind 50 and -- '*Basu v. Mt. Nanhi*', AIR 1924 All. 920. But long possession had to be coupled with

other circumstances to constitute an ouster. And that for the obvious reason that possession of one co-sharer or tenant-in-common being possession of all, unless something happens to alter it, such possession will retain its character during the entire tenure of its existence. In the present case, no such other circumstance has been pointed out. That being so, mere length of possession did not amount to ouster. I find support for this view from the said 1943 Oudh case. Not only was there no ouster in the present case, but about eight years after the partition, in the course of the settlement operations in 1915, although Kundan at first stated in the absence of the defendant that the latter had no share, he admitted on a subsequent date when the defendant put in appearance that the latter had a moiety share. This record relates to the land in village Galyanda Behna only, but the said statement of Kundan was preceded then and there by that of his nephew Jaikishan, son of Bakshi Bam, in which the fact of defendant's share being half was based on the family partition of Samvat 83 Kham, which related to all the property in suit. This statement of Kundan also negatives the theory of relinquishment of eight years before.

13. In the result, therefore I agree with the Courts below in holding that the defendant-respondent had neither relinquished his share in the land in suit nor lost title to it by adverse possession of Kundan and the plaintiff. The appeal is accordingly dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.