Sanjay Kumar Vs. Subhash and Others

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Court : Himachal Pradesh

Decided On : Aug-11-2011

Judge : V.K. Ahuja

Appeal No. : RSA. No. 186 of 1999

Appellant : Sanjay Kumar

Respondent : Subhash and Others

Judgement :

V.K. Ahuja, J.:

1. This is a regular second appeal filed by the appellant/plaintiff under Section 100 CPC against the judgment and decree, dated 21.5.1999, passed by the learned Additional District Judge(I), Kangra at Dharamshala, whereby he reversed the judgment and decree, dated 17.6.1997, passed by the learned Sub Judge Ist Class(II), Kangra, decreeing the suit of the plaintiff for declaration.

2. Briefly stated, the facts of the case are that the appellant (hereinafter also referred to as the plaintiff) filed a suit for declaration and permanent injunction as against the original defendant Maya Dass, now represented by his legal representatives, hereinafter referred to as the defendant. It was alleged by the plaintiff that he was a minor under the guardianship of his mother Began Devi, who is the natural guardian of the plaintiff and as such has no adverse interest against him. It was alleged by the plaintiff that the land in suit, as detailed in the plaint, is

situated at Mohal Kaler, Tehsil and District Kangra. Defendant had filed a civil suit for possession by way of preemption in regard to the suit land claiming his rights against the plaintiff being agnate co-sharer with vendor. The sale in favour of the present plaintiff was made on 24.12.1982, which was challenged. The preemption right was claimed and the said suit filed by the defendant was contested by the plaintiff through Shri Bodh Raj, his father and natural guardian. The said suit was decreed in favour of the present defendant vide judgment dated 29.10.1986. The said judgment and decree were challenged being wrong, inoperative, un-executable and being a nullity for the reasons that the guidelines were laid down by the Hon'ble Supreme Court in the year 1986. It was alleged that since the suit was filed against a minor, who was still a minor on the date of grant of decree, the provisions of Order 32 Rule 7 CPC were not followed, no affidavit or certificate was placed on record and no explanation was given as to how the decree and judgment was in the interest of the minor. The compromise was also not reduced into writing and the defendant and Bodh Raj, the guardian of the plaintiff, colluded with each other and accordingly execution petition was filed by the defendant. The plaintiff filed an application for review of the said judgment and decree which was disallowed and the court had directed the plaintiff to file a separate suit, hence the suit filed by the plaintiff.

3. Defendant took up preliminary objections in regard to the maintainability, act and conduct, cause of action etc. On merits, he pleaded that the sale was got registered through Bodh Raj and the suit for possession was also contested by said Bodh Raj, father of the plaintiff and was reconciled by him. The suit was defended by Bodh Raj to the best interest of the plaintiff and it was reconciled and an executable decree was passed which is binding and is not nullity, hence the suit is liable to be dismissed.

4. On the pleadings of the parties, the following issues were framed by the learned trial Court:

1. Whether the decree and judgment in case No.367 of 1983 dated 29-10-1986 passed by the ld. Sub Judge Ist Class Kangra is against the law and guidelines laid by Hon'ble Supreme Court of India and as such liable to be set aside, as

alleged, if so to what effect? OPP

2. Whether the plaintiffs is entitled to the relief of injunction as claimed? OPP

3. Whether the decree and judgment in case No.367/1983 is the result of fraud, misrepresentation, undue influence and as such are inoperative, in-executable and nullity as alleged? OPD

4. Whether the suit is not maintainable as alleged? OPD

5. Whether the act, conduct and acquiescence and silence of the plaintiff is a bar to the present suit? OPD

6. Whether the plaintiff has got no cause of action and locus standi to sue? OPD

7. Whether the suit has been properly valued for the purposes of court fee and jurisdiction? OPP

8. Whether the Hon'ble Court has got no jurisdiction to try the present suit? OPD

9. Whether the suit is within time? OPP

10. Whether the title has been vested with the defendant on deposit of the pre-emption amount, as alleged? OPD

11. Relief.

5. Parties led their evidence and the learned trial Court vide its impugned judgment decided issues No.1, 2, 9 and 10 in favour of the plaintiff and as against the defendant and consequently decreed the suit of the plaintiff in full. On appeal, those findings were reversed by the learned Additional District Judge.

6. I have heard the learned counsel for the parties and have gone through the record of the case.

7. The submissions made by the learned counsel for the appellant were that the plaintiff in that case i.e. the defendant in the present case had no right to file a suit for preemption in view of the judgment of the Hon'ble Supreme Court. It was

further submitted that the appellant was minor at that time and his guardian Shri Bodh Raj did not protect his interests and acted in a gross callous and negligent manner and the provisions of Order 32 Rule 7 CPC were not complied with. It was also submitted that the compromise was not reduced into writing and as such the judgment and decree was a nullity. It was also submitted that a review application was filed but the learned Sub Judge held that the decree and judgment had to be challenged and as such the suit was maintainable. The appellate Court had come to a wrong conclusion that the suit was not maintainable and as such the findings to the contrary are liable to be reversed and the decree of the learned trial Court is liable to be restored.

8. On the other hand, the learned counsel for the respondent had supported the impugned judgment and decree for the reasons recorded therein.

9. The appeal in question was admitted on the following substantial questions of law by this Court:

“1.Whether a party, who has not pressed a particular issue before the trial Court is entitled to raise the same question before the appellate court?

2. Whether a compromise by the guardian for and on behalf of the minor, without the leave of the court can be sustained?”

10. The submissions made by the learned counsel for the parties had to be considered in light of the substantial questions of law, which arise in this appeal and are to be determined by this Court. I will take up substantial question No.2 firstly as to whether the compromise by a guardian, for and on behalf of a minor, without the leave of the Court, can be sustained. To substantiate his point that no leave of the court was taken and the same was necessary, the learned counsel for the appellant had placed reliance upon the decision in **Asharfi Lal vs. Smt.Koili (dead) by LRs., AIR 1995 Supreme Court 1440,** wherein it was observed by their Lordships as under:

“……In the instant case, the High Court has proceeded on the basis that it is permissible for a minor to file a suit to set aside a decree on the ground of

gross negligence on the part of his next friend. We are in agreement with the said view."

The observations made in paras 14 and 15 are also relevant, which may be reproduced below:

"In cases where an inference of fraud or collusion can be drawn form the negligence or gross negligence of the next friend it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking S.44 without taking resort to a separate suit for setting aside the decree or judgment. If a judgment falls within the ambit of S.44 it can be avoided in the proceedings in which it is sought to be relied upon and it is not necessary to have it set aside by instituting independent proceedings in a competent Court. In the instant case, what was required to be considered was whether the judgment in the earlier declaratory suit fell within the ambit of S.44 and for that purpose it was necessary to examine whether an inference of fraud or collusion could be drawn from the gross negligence on the part of the next friend of the minor, in conducting the earlier declaratory suit. If such an inference can be drawn the minor would not be bound by the judgment in the earlier declaratory suit but if such an inference cannot be drawn he would be bound by the said judgment till it is set aside by the competent Court in an appropriate proceeding."

11. Reliance was also placed upon the decision in **Banwari Lal versus Smt.Chando Devi (through L.R.) and another, AIR 1993 Supreme Court 1139.** The observations made in paras 13 and 14 are relevant and are being reproduced below:

"A party challenging a compromise can file a petition under proviso to R.3 of O.23, or an appeal under S.96(1) of the Code, in which he can now question the validity of the compromise in view of R.1A of O.43 of the Code. If the agreement or the compromise itself is fraudulent then it shall be deemed to be void within the meaning of the explanation to the proviso to R.3 and as such not lawful. In the instant case the plaintiff challenged the order recording compromise on the ground his counsel in collusion with defendant of the said suit had played a fraud on him by filing a fabricated petition of compromise although no compromise had been

effected between him and he defendant. Further details of fraud were mentioned in the said petition and it was stated that the alleged compromise itself was void, illegal and against the requirement of O.23, R.3. Therefore the entertaining of the application filed on behalf of plaintiff and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise, by the trial Court was proper. Since the material produced on the record showed that the compromise was not lawful within the meaning of R.3, the order recording compromise could be recalled."

12. On the other hand, the learned counsel for the respondents had submitted that no separate suit lies and the remedy was to file an appeal against the order dismissing review application. It was also submitted that there is no evidence of any collusion in between the natural guardian of the plaintiff, namely, Bodh Raj and the defendant and no inference of collusion can be drawn to hold that the decree in question was not valid.

13. To substantiate his case, the learned counsel for the respondents relied upon the decision in **Tilak Raj and others versus Banka Ram and another, 2009(3) Shim.L.C. 111,** which shows that the decree in preemption suit was passed on 13.7.1971 and had been upheld upto the Hon'ble Supreme Court. It was held that the judgment rendered by the learned Sub Judge stood merged in the judgment of the Apex Court after dismissal of the Special Leave Petition preferred by the judgment debtors, though no decree could be passed for preemption after commencement of the Act in the year 1987. However, the judgment of the learned Sub Judge stood merged in the judgment of the Apex Court and, therefore, the objections to the execution petition were liable to be accepted. The submissions in that case were made by the learned Senior Advocate, who is counsel for the respondents in the present case also, that in view of the judgment rendered in the civil suit, objections were bound to be accepted and the decree cannot be executed, in view of the judgment of the Hon'ble Supreme Court in Atam Parkash versus State of Haryana and others, AIR 1986 SC 859.

14. Reliance was also placed upon the decision in **Dayal Singh versus Smt.Rukmi Devi and others, 2006(2) Shim.LC 84.** The observations made in para 9 are relevant and are being reproduced below:

“In view of the provisions of Order 23 Rules 3 and 3-A C.P.C. and the law laid down by the Hon’ble Supreme Court in Banwari Lal’s case (supra), in my opinion, both the Courts below were perfectly justified in holding that the present suit filed by the plaintiffs was not maintainable and no fault could be found with the same, especially when the earlier suit was decreed on the basis of a compromise and a compromise decree was passed. I am further of the opinion that there is no scope for interfering in the present Regular Second Appeal, especially when no question of law, much less a substantial question of law, arises for determination in this appeal.”

15. It is clear from the submissions made by the learned counsel for the parties that the point in question is legal one and the facts of the case are not in dispute. The judgment and decree decreeing the suit of the defendant was passed by the learned Sub Judge on 29.10.1986. The compromise decree was dated 29.10.1986 and according to the submissions made by the learned counsel for the appellant, the relationship of agnate and co-sharer was illegal after the guidelines set out by the Hon’ble Supreme Court. While holding the law in regard to preemption rights of the co-sharers as ultra vires, it was observed by their Lordships in para 13 of Atam Parkash’s case (supra) as under:

“There is no justification for the classification contained in section 15 of the Act of the Kinsfolk entitled to pre-emption. The right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to pre-emption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and clauses ‘First’, ‘Secondly’ and ‘thirdly’ of S.15(1)(a), ‘First’, ‘Secondly’ and ‘thirdly’ of S.15(1)(b). Clauses ‘First’ ‘Secondly’ and ‘thirdly’

of S.15(1)(c) and the whole of section 15(2) are, therefore, ultra vires the Constitution."

16. It is, therefore, clear that no right of preemption vested in a co-sharer after the judgment was passed by the Hon'ble Supreme Court in Atam Parakash's case (supra) decided on 27.2.1986. The compromise decree based upon the statement of the parties was passed on 19.10.1986 and on that date, no right of preemption existed in favour of the present defendant. The decree in question was passed on the basis of the compromise arrived at by the parties and the statement of natural guardian of the plaintiff, on 29.10.1986 when no such right existed in favour of the defendant to preempt the suit property. It is, therefore, clear that the statement was made by the plaintiff's natural guardian Bodh Raj conceding the right of preemption of the defendant about 8 months after the passing of the judgment when the right of preemption in favour of the co-sharer did not exist as per the law laid down by the Hon'ble Supreme Court as on the date of the statement. Thus, it is clear that the statement was made by the natural guardian of the plaintiff in a callous manner ignorant of the fact that no right of preemption exists in favour of the defendant and only conclusion that can be drawn is that this statement was made in a callous manner, not knowing the law and therefore, such statement cannot be said to have been made in the interest of the minor. There is no necessity of proving collusion but in case the natural guardian acts in a callous manner contrary to the interests of the minor, an inference can be drawn that this statement was not made to protect the interests of the minor.

17. Coming to the question that the certificate of the counsel was not attached with the compromise that it was in the interest of the minor, a reference has to be made to the record of the case. A perusal of Ext.P-5, order allowing the compromise decree passed on 29.10.1986, reads as under:

"In view of the compromise effected by the parties, I pass a compromise decree in favour of plaintiff for possession of land comprised in Khata No.8, Khatauni No.15, Khasra No.1443, 1461, 1441, 1464 and Khata No.7, Khatauni No.12, Khasra No.1463 area 0-46-56 Hect. to the extent of 0-11-64 Hect situate at Mohal Kaled, Mauza Kaled, Thesil and Distt. Kangra, on payment of Rs.9330.00 i.e. Rs.1700.00

already deposited and Rs.7630/- be deposited within one month from today……."

18. The decree Ext.P-6 was accordingly prepared as has been proved in evidence. There is nothing in the order sheet passed by the learned Sub Judge that the compromise was reduced to writing or written compromise was produced. There is nothing on the record also to substantiate that at the time of making statements, any application was filed by the guardian of the plaintiff accompanied by a certificate of the counsel as required under Order 32 Rule 7 CPC. Order 32 Rule 7 CPC reads as under:

"**7. Agreement or compromise by next friend or guardian for the suit. -** (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(1-A) An application for leave under sub-rule (1) shall be accompanied by an affidavit of the next friend or the guardian for the suit, as the case may be, and also, if the minor is represented by a pleader, by the certificate of the pleader, to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of the minor:

Provided that the opinion so expressed, whether in the affidavit or in the certificate shall not preclude the Court from examining whether the agreement or compromise proposed is for the benefit of the minor.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be viodable against all parties other than the minor."

19. It is, therefore, clear that neither any application was filed by the guardian nor it was accompanied by the certificate of the pleader to the effect that the compromise proposed is, in his opinion, for the benefit of the minor. Both these circumstances go against the respondents and, therefore, the findings of the learned trial Court holding that the compromise in question was not in the interest of the minor and the decree passed in the suit cannot be assailed.

20. Coming to the question that the application for review was decided against the plaintiff and he could have filed an appeal against that order, I am of the opinion that when his application for review was dismissed, the plaintiff had the remedy to file a civil suit. This right was available and as such he could have filed a separate suit also in view of the above discussion. Therefore, the suit in question was maintainable.

21. Coming to the findings, the learned trial Court under Issue No.4 had held that the suit in question was not maintainable by simply observing that these issues have not been pressed before him by the learned counsel for the defendant and accordingly this issue was decided in favour of the plaintiff apart from the other issues. It was submitted that no concession was given and this has to be decided by the court that the suit was maintainable. However, the learned Appellate Court had held that the suit was not maintainable since the remedy available to the plaintiff was to file an appeal, but he was not entitled to institute a separate suit, which findings, to my mind, are not correct since the suit, as has been observed above, is maintainable and, therefore, it is held that the present suit was maintainable and was competent.

22. In view of the above discussion, I accordingly hold that the judgment and decree passed by the learned trial Court was liable to be affirmed, which has been wrongly set aside by the learned First Appellate Court. Accordingly, the appeal filed by the appellant is allowed and the findings of the learned trial Court are restored after setting aside the findings of the learned First Appellate court.

23. The appeal stands disposed of accordingly. However, the parties are left to bear their own costs.