Kewal Ram

Vs

Smt. Ram Lubhai and Others

Civil Appeal No. 15 of 1974

Smt. Ram Lubhai

Vs

Kewal Ram and Others

Civil Appeal No. 1875 of 1974

(G. L. Oza, V. Khalid JJ)

26.03.1987

JUDGMENT

V. KHALID, J. -

1. These two appeals arise from the same suit and can be disposed of by a common judgment. The facts necessary to understand the question involved in the appeals can be briefly stated as follows :

2. One Kalu Ram was the owner of 90 canals of land. He sold this land in favour of three brothers, Kewal Ram, Chet Ram and Kuldip Ram for a consideration of Rs. 65,000 by a registered sale deed dated August 1, 1966. Kewal Ram is residing in Village Badala in Jullunder District. Chet Ram and Kuldip Ram were residing at 71, Windsor Road, Forest Gate, London-E7.

3. Smt. Ram Lubhai, minor daughter of Kalu Ram, the vendor, filed a suit, from which these appeals arise, for possession of the land on the ground that she being the daughter of the vendor had superior right of pre-emption as against the vendees who were strangers. Kewal Ram alone was served in the suit. The other two were not served. Substituted service was, therefore, taken for service on them by publication in a vernacular paper. The suit was decreed on July 31, 1969 against all the three defendants, ex-parte against Chet Ram and Kuldip Ram. Kewal Ram filed an appeal against this decree and judgment. He made his brothers Chet Ram and Kuldip Ram as proforma respondents giving their village address for service. In the appeal also they were served by substituted service. The appeal was heard on January 5, 1971 and was dismissed.

4. On March 24, 1971, Kuldip Ram and Chet Ram filed an application under Order 9. Rule 13 of CPC in the trial court for setting aside the ex-parte decree against them on the ground that they were neither served in the trial court not in the appellant court. This application was resisted by the plaintiff on the ground that the application before the trial court was incompetent since the decree had merged in the appellate decree. Evidence was taken and after hearing the parties the trial court set aside the entire decree. The trial court held that Kuldip Ram and Chet Ram were residing in England and no attempt was made to serve them personally. That being so, the application was

competent in the trial court as they were neither served in the trial court nor in the appellate court.

5. Against this order dated January 10, 1972, the plaintiff filed a revision petition in the High Court of Punjab and Haryana as C.R.P. No. 147 of 1972. The High Court felt that there was not error of jurisdiction in the order sought to be revised, but held that since Kewal Ram had contested the suit, there was no ground to set aside the decree against him. On this ground, the petition was partly allowed. The decree against Kewal Ram was allowed to stand but was set aside against the other two.

6. Not being satisfied with this order, the plaintiff filed an application for review on the ground that the decree for possession by way of pre-emption was joint against all the defendants, that there was neither specification of the shares in the land for the three different vendees nor specification of the purchase price paid by them and that as such the order setting aside the decree in part was bad. For this purpose reliance was placed on a Full Bench decision of the Lahore High Court in Ghulam Qadir v. Ditta (AIR 1945 Lah 184 : 47 PLR 224 : 220 IC 231). Reliance was also placed on the proviso to Order 9, Rule 13 CPC. This review petition was dismissed by the High Court by order dated May 30, 1973, relying upon the Full Bench decision of the Punjab and Haryana High Court in the case of Kartar Singh v. Jagat Singh (ILR (1971) 2 P&H 110). Hence these appeals by special leave, the earlier (C.A. 15/74) by Kewal Ram and the other (C.A. 1875/74) by the plaintiff.

7. The learned counsel for the plaintiff contended that the two brothers of Kewal Ram were at all relevant times aware of the pendency of the suit and that the courts below committed an error in sending aside the decree against them. To reinforce this contention, he brought to our notice the fact that even in the appeal filed by kewal Ram, the address given of his brothers was the village address. He further submitted that the application under Order 9. Rule 13 made before the trial court was incompetent since the decree passed by the trial court had merged in the appellate decree. He feebly put forward a case of complicity between the two brothers to defeat the plaintiff.

8. Kewal Ram who is the appellant in the other appeal contended that the decree was a joint decree and it was impermissible to set aside the decree in part and keep the decree intact in part. According to him when the decree was set aside against his two brothers it should have been set aside against him also.

9. Since the decree in question is one based on the right of pre-emption it would have been possible for us to get rid of it and dispose of the appeals by a short judgment relying upon the Constitution Bench decision of this Court in Atam Prakash v. State of Haryana ((1986) 2 SCC 249), by which decision the Punjab Pre-emption Act, 1913 was struck down except to a small extent. But that course is not open to us in view of the following observation by this Court in the above said Judgment : (SCC p. 263, para 14)

We are told that in some cases suits are pending in various courts and, where decrees have been passed, appeals are pending in appellate courts. Such suits and appeals will not be disposed of in accordance with declaration granted by us. We are told that there are a few cases where suits have been decreed and the decrees have become final, no appeals having been filed against those decrees. The decrees will be binding inter partes and the declaration granted by us will be of no avail to the parties thereto.

Since the decree has become final, the principle of the decision is not attracted in this case.

10. That takes us to the question, whether the application under Order 9, Rule 13 before the trial court, when the matter had been decided by the appellate court, is proper. We proceed on the finding that neither Kuldip Ram nor Chet Ram was served either in the suit or in the appeal.

11. A feeble contention was put forward that fraud was practiced upon these two persons in not getting service effected on them. We do not propose to consider this aspect of the case since this case was not properly pleaded or proved. For the purpose of this judgment, we accept the conclusions arrived at by the court below that these two persons were not served either in the suit or in the appeal. If so, what is the position ? It is well settled that when a decree of the trial court is either confirmed, modified or reversed by the appellate decree, except when the decree is passed without notice to the parties, the trial court decree gets merged in the appellate decree. But when the decree is passed without notice to a party, that decree will not, in law, be a decree to which he is a party. Equally so on the case of an appellate decree. In this case these two person were not served in the suit. A decree was passed ex-parte against them without giving them notice of the suit. In law, therefore, there is not decree against them. In the appeal also they were not served. If they had been served in the appeal, thing would have been different. They could have put forward their case in appeal and got appropriate orders passed. But that is not the case here. That being so, there is not bar for an application by them before the trial court under Order 9, Rule 13, to set aside the ex-parte decree against them. This is the only point that arises in the appeal filed by the plaintiff. The appeal has to fail and is dismissed.

12. The appeal by Kewal Ram is based on the plea that the decree passed by the trial court and the appellate court, against him and his two brothers, was a joint and indivisible decree and as such the decree cannot be set aside in part, by allowing the application under Order 9, Rule 13. He pressed into service a Full Bench decision of the Lahore High Court in Ghulam Qadir v. Ditta (AIR 1945 Lah 184 : 47 PLR 224 : 220 IC 231). We do not pause to consider the principle settled in that decision because it has no application to the facts of this case. Here, the plaintiff has obtained a decree against Kewal Ram, based on the right of pre-emption, That decree has to stand, so fat as Kewal Ram's right in the property is concerned. She will have to work out her remedies either in execution or by a partition suit to get her share in the properties. There is no merit in Civil Appeal No. 15 of 1974 either. This appeal is also dismissed.

13. The plaintiff will be entitled to get back two-thirds share of the amount of consideration paid for the property, form Kuldip Ram and Chet Ram. The parties are directed to bear their costs.

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