

SUPREME COURT OF INDIA

Gangajal Kunwar

Vs.

Sarju Pandey

C.A.No.4489 of 1992

(Ajay Prakash Misra and S. N.Variava JJ.)

15.02.2001

ORDER

1. The present appeal is directed against the judgment and order of the High Court dated 23rd September, 1987 in first appeal where the High Court set aside the trial Court judgment by which plaintiffs-respondents' suit was dismissed.

2. In order to appreciate the controversy we are herewith giving certain essential facts. The plaintiffs-respondents' case is, both parties devolve from common ancestor, namely, Pandey Kishan Ram. The genealogical table is reproduced below to understand the relationship between the parties.

3. The plaintiffs' case is, both parties are joint and jointly cultivating the suit land hence suit for partition by metes and bounds. Because of denial of such right by the principal defendant (Defendant No. 1) who is appellant before us, the present suit is filed. The suit property devolved from the ancestral is not in dispute. In the year 1930 according to principal defendant, partition took place giving 1/3rd share each to the aforesaid three branches shown in the genealogy. Thus as per the partition, Pandey Lallu Ram of the first branch got 1/3rd share, Bansi Ram Pandey and Gopi Ram Pandey of the second branch got separate takhta of their 1/3rd share while Pandey Sukdeo of the third branch got 1/3rd with Rajwanti Kuer as maintenance holder.

4. The case of the appellant is, after the death of Sukhdeo Ram in the year 1934 under a Will Smt. Rajwanti Kuer became the sole owner of land of 1/3rd of the third branch. Later on Rajwanti Kuer made raiyati settlement of plot No. 1542 having an area of 0.22 acres with Jadunandan Choudhary as far back in the year 1942. After vesting of the zamindari interest in the State of Bihar under the Bihar Land Reforms Act and in terms of the said transfer in favour of Jadunandan Choudhary his name is recorded in Register II of the State of Bihar and he has been regularly paying rent to the State of Bihar. Smt. Rajwanti Kuer transferred her entire estate to the extent of her 1/3rd share, excluding what she transferred earlier to Jadunandan Choudhary through two registered sale deeds dated 23rd May, 1950 and 19th June, 1952. The case of the appellant is that in spite of full knowledge of the plaintiffs about

partition in the year 1930 and the transfers made by Smt. Rajwanti Kuer, they have included all these lands in their claim in the partition suit. Since Rajwanti Kuer sold her entire interest in the property in favour of present appellant through the aforesaid two registered sale deeds, inclusions of these properties in the suit is without any foundation. In fact, as a consequence thereof, the present appellant came in possession of the land possessed by the said Rajwanti Kuer. Rajwanti Kuer died on 20th December, 1957. It is also submitted, in any case after coming in force of the Hindu Succession Act, 1956 on 17th July, 1956 she became absolute owner of the said property. The case set up by the present appellant before the trial Court was that after vesting of the land in favour of the State of Bihar under the aforesaid Bihar Land Reforms Act on 26th January, 1955, the plaintiffs have been filed return in 'K' form. Further plaintiffs knew that they had only 1/3rd share in the zamindari property, so they were filing returns for their 1/3rd share only in form 'K' while present appellant was filing return for his 2/3rd share, 1/3rd for his own of the second branch and 1/3rd having received from Smt. Rajwanti Kuer of the third branch through two sale deeds as aforesaid. On the contest of the parties five issues were framed which are recorded hereunder.

- “1. Has the plaintiff any cause of action for the suit?
2. Is the suit maintainable as framed?
3. Is there unity of title and possession between the parties?
4. Is the suit barred by previous partition?
5. To any other relief or reliefs to which the plaintiffs may be entitled.”

5. The main issues are Issue Nos. 3 and 4 which refer to unity of title and possession between the parties and the question whether the suit is barred by previous partition. The trial Court disposed of these issues extensively referring the oral and documentary evidence on record.

6. The Trial Court records :

"With reference to the case of the plaintiff about fraud being played upon him because he was illiterate. The submission that his left thumb was obtained in blank piece of paper which was subsequently converted into return."

7. This was with reference to the filing of return in form "K" for the aforesaid 2/3rd and 1/3rd share. On this the trial Court records :

"No evidence has been led by the plaintiff on this point of fraud because it was beyond the scope of claim made by him."

In face of these documents of possession and title it was very material for plaintiffs to prove as to how he claims 1/2 share in the property. The primary point not

proved by the plaintiff was that he was jointly and severally in possession of the suit property. "

8. After discussing finally the trial Court records the following findings :

"A careful analysis of oral evidence examined on behalf of the plaintiffs has shown that there has been no unity of title and possession of the suit land. The documentary as well as oral evidence adduced by the defendant show that the plaintiffs have never been in possession of the suit land since last 25 years when the sale deed was executed by Mst. Rajwanti Kuer in favour of the present appellant-defendant No. 1."

9. And finally trial Court records that defendants have proved that they were in continuous possession of the suit land since the year 1952 and that the suit is barred by previous partition. Aggrieved by this the plaintiff filed appeal before the High Court which has set aside the trial Court judgment and decreed the suit of the plaintiff, which is impugned before us.

10. Having heard learned counsel for the parties, we find that the foundation of decision by the High Court is based on the finding that the Will in favour of Rajwanti Kuer was not probated, hence she would have no right and title and thus she would have no right to execute the two registered sale deeds. Learned counsel for the appellant challenges the judgment of the High Court primarily on the ground that it while setting aside the trial Court judgment has not adverted to the relevant evidence and points on which trial Court dismissed plaintiff's suit. It cursorily allowed the appeal, set aside the trial Court judgment by holding, both the aforesaid Will and two sale deeds not to be valid. On the other hand learned counsel for the plaintiff submits that the appellate Court has referred to all the submissions made by the parties and has rightly drawn the conclusion that there is unity of title and possession between the parties. The Will itself has not been probated, or proved thus no right would flow over the properties of the third branch in favour of Rajwanti Kuer, hence transfer made by her in favour of the appellant through the said two sale deeds could be of no consequence. In order to succeed the appellant has to prove that the said transfer is valid, which is not. Hence the decision of the High Court does not call for any interference by this Court.

11. It is interesting to record that the High Court records that these sale deeds are admitted. When it refers to these sale deeds, then it also includes the sale deed in favour of the said Jadunandan Choudhary. If Rajwanti Kuer could not have transferred the property in favour of present appellant then how she could have transferred it to Jadunandan Choudhary, which is upheld by the High Court. This apart, we find from the plaint itself, there is no challenge of the said two sale deeds nor there is any issue on it. Then for the first time, how High Court could have decided it for the first time. By doing so High Court misled itself and fell into error. The High Court further records that it is difficult to say that Rajwanti Kuer got title and possession of the land of Sukhdeo by virtue of the said Will. High Court disbelieves the Will as, it holds not proved not probated. We find so far this Will also, there is no challenge made in the plaint, no issue raised, hence the High Court for the first time should not have recorded this finding which cannot be sustained. Once the said two sale deeds and the Will cannot be

disbelieved or set aside as they have not been challenged, the claim of the plaintiff cannot succeed. We further find that submissions on behalf of the appellant has also merit when it is submitted that the appellate Court in the present case has not adverted to those documentary and oral evidence on which the trial Court has based its finding.

12. We further find the High Court records :

"The earlier partition in the year 1930/31 between the brothers of the ancestors has not been challenged." After recording this finding, it finally concludes, the suit is not barred by previous partition. Once the partition in 1930 is not challenged, which means the partition has taken place between the parties then the finding that suit is not barred by previous partition is conflict in itself. This cannot be sustained. To meet this faintly it was also submitted yes there was partition but that was partial partition of the house but not of the agricultural land. We do not find any such finding recorded by any of the two Courts below. Hence this submission also cannot be sustained. It is also interesting to record, on one hand the appellate Court upholds unity of title and possession by disbelieving the said two sale deeds executed in favour of the present appellant holding Smt. Rajwanti Kuer had no title but simultaneously upholds the sale deed by her in favour of Jadunandan Choudhary. This itself is contradictory.

13. For all the aforesaid reasons we find that the judgment given by the High Court in appeal cannot be sustained and is accordingly quashed. Findings recorded by the trial Court is based on considerations of evidence for which it has given good reasons. Hence, we uphold its judgment. The appeal is accordingly allowed. Costs on the parties.

Appeal allowed.