**RAJASTHAN HIGH COURT**

Dulichand

Vs.

Bhandari Das

Civil Second Appeal No. 330 of 2001
(Prakash Tatia, J.)

28.10.2003

**JUDGEMENT**

**Prakash Tatia, J.**

1. Heard learned counsel for the parties.

2. Brief but interesting facts of the case are that one sri Bhandari Das- respondent No. 1 filed a suit for recovery of a petty amount and the trial Court passed the decree for total amount of Rs. 2658.50 of 30th May, 1974. The respondent No. 1 is yet to get this petty amount of Rs. 2658.50 and interest from the judgment debtor even after about 30 years.

3. In execution of the said decree, the property in dispute was attached and the property was put to auction from 20th July to 22nd July, 1982. The appellant objector submitted an objection petition before the Executing Court under Order 21, Rule 58, Civil Procedure Code on 21st July, 1982. The objection petition was allowed by the Executing Court by the judgment dated 29th Sept., 1993 after about more than 11 years. During this proceeding before the Executing Court, an objection was raised about the admissibility of a partition deed, which was relied upon by the objector. The trial Court refused to admit the partition deed as it was neither registered nor it was on proper stamps. The appellant- objector preferred a revision petition (No. 270/1985) against the said order, which was decided promptly by the High Court by order dated 18th Sept. 1985 holding that the disputed document cannot be admitted in evidence for main purpose but it could be used for collateral purpose under Section 49 of the Registration Act merely for showing the nature and character of possession of the parties.

4. The objection against sale of the attached property was that the property sought to be sold in execution of the decree obtained by the respondent No. 1 is the ancestral property of the appellant and the respondent No. 2 judgment- debtor. The said property was partitioned somewhere in the year 1974 and the property in dispute fell in the share of present appellant. Though, in the year 1974, no document evidencing partition was executed and it was only an oral partition but subsequently, a deed was executed on 7th Sept., 1976 (the document, which was found to be not admissible in evidence for main purpose - to prove the partition and for the purpose of claiming any title on the basis of the said deed). The Executing Court after framing the issues and permitting parties to lead their evidence, reached to the conclusion that the appellant became owner of the property as the property in dispute fell in the share of the appellant. The Executing Court, therefore, declared that the property in question cannot be sold out in execution of the decree obtained by the respondent No. 1. The Executing Court also declared that the appellant is owner of the property in dispute.

5. The decree holder-respondent No. 2 preferred the appeal against the judgment of the Executing Court dated 29th Sept., 1993. The appeal was allowed by the first appellate Court by judgment dated 4th Sept., 2001. The appellate Court reversed the finding recorded by the Executing Court and held that the appellant is not owner of the property as no partition took place between the appellant and respondent No. 2. The appellate Court dismissed the objection petition.

6. The appellant, who wants to save his house from sale in execution of the decree for Rs. 2659.50 preferred this second appeal. It will be worthwhile to mention here that the Civil Procedure Code was amended in the year 1999 and again in the year 2002. The Section 102 has been substituted by the Act No. 46 of 1999 and again by the Act of 22 of 2002 and a restriction has been put against the second appeal where original suit is for recovery of money and the amount involved does not exceed Rs. 25,000/-. In this case the original suit amount appears to be either Rs. 2490/- only or less than that, but since it is an objection petition filed by a stranger to the suit under Order 21, Rule 58, Civil Procedure Code involving the title of the objector, therefore, Section 102 Civil Procedure Code has no application. But the fact relevant is that even suit for recovery of money having involvement of less than Rs. 25,000/- and where the legislature wisdom thought fit to impose a restriction against the second appeal, the execution proceedings are there where entire object of curtailing the multiplicity of litigation and the proceedings can be frustrated even in the cases where involvement of money is less than Rs. 25,000/-. Be that as it may be, this Court is to examine and

consider the points raised by the appellant in second appeal while challenging the judgment of the first appellate Court dated 4th Sept., 2001.

7. According to learned counsel for the appellant, the Court below committed a grave illegality in reversing the finding of the Executing Court by holding that the appellant has not acquired title to the property in dispute, which he is claiming because of the partition in the year 1974. According to learned counsel for the appellant, this Court permitted for production of the partition deed and that was produced and admitted in evidence. Coupled with this fact, there is one more document i.e. sale deed dated 27th Feb, 1981 executed by the judgment-debtor respondent No. 2 in favor of his and appellant's mother from which also the partition of the property in dispute in the year 1974 stands proved. The appellant produced the witnesses also, to prove the oral partition, which took place in the year 1974. The trial Court recorded the finding of fact in favor of the appellant, but the first appellate Court, under absolutely misconception of the law, held that there cannot be any oral partition and only on this ground, reversed the finding recorded by the trial Court. It is also submitted that in the alternative, even if the appellant failed in proving the partition, then also he is co-sharer in the property, therefore, his share in the property cannot be sold out in execution of the decree against the judgment-debtor respondent No. 2. Learned counsel for the appellant heavily attacked about the conduct of the respondent No. 2 and submitted that the respondent No. 2 judgment-debtor himself gave an undertaking before the Executing Court that he will not transfer any property, but he transferred some of his property including one by deed dated 22nd Feb. 1981. It is also submitted that not only this but the respondent No. 2 submitted before the Executing Court that the property involved in this litigation may be attached. This clearly shows that the respondent No. 2 is in collusion with the decree holder and wants to harm the appellant.

8. It will be worthwhile to mention here that the entire case of the appellant-objector is that the property in dispute fell in the share of the appellant in partition between him and his brother-judgment debtor-respondent No. 2. The partition claimed was oral, which is of the year 1974.

9. I perused the documents placed on record by the appellant himself in support of his this plea of partition. In the partition deed dated 7th Sept. 1976, it is clearly mentioned that "now we are distributing the property as per the possession of both the brothers." Before that, it is clearly mentioned that both the brothers are living in this property and are in possession of the property jointly. In view of this document produced by the

appellant himself, the appellant destroyed his case of oral partition of the year 1974. Therefore, only on this count alone, the objection petition of the appellant should have been dismissed by the Courts below, but the Executing Court did not read the admitted document produced by the appellant himself and held that the appellant became owner of the property by virtue of partition.

10. So far as the alleged partition deed dated 7th Sept., 1976 is concerned, admittedly the said partition deed dated 7th Sept., 1976 is neither on proper stamps nor was registered, therefore, this document cannot help the appellant. However, it is relevant to mention here that this Court in revision petition already held that this partition deed cannot be read in evidence for the main purpose i.e. for the purpose of proving partition of the property in dispute, therefore, the alleged partition deed dated 7th Sept., 1976 is of no help to the appellant. In view of the documentary evidence produced by the appellant i.e. the alleged partition deed dated 7th Sept. 1976 containing admission of the appellant himself that till 1976 both the brothers i.e. appellant as well as respondent No. 1 were not only in joint possession of the property, but were living together as owners of the property, no oral evidence produced by the appellant can be considered, which is contrary to the documentary evidence contracting the relevant fact in issue. In the light of the above, if the first appellate Court did not narrate the oral evidence of the parties and rejected the plea of the appellant about the oral partition, the judgment of the first appellate Court may be lacking in details, but cannot be set aside as the appellant failed to prove that even if, the observation of the first appellate Court that there cannot be oral partition is set aside, still the appellant cannot get any relief.

11. So far as the conduct of the respondent No. 2 is concerned, it cannot detain this Court for long because of the reason that the conduct of the respondent No. 2, who is judgment-debtor in the case of the respondent No. 1 cannot disentitle the decree-holder from proceeding with the execution and in execution for recovery of the amount by sale of the property of the judgment- debtor. The conduct of the respondent No. 2, in the facts of this case, cannot confer any title of the property in favor of the appellant, therefore, the appellant may have grievance against his own brother and if the appellant feels that the appellant was put to loss by the respondent No. 2, the remedy lies against the respondent No. 2 and the respondent No. 1 cannot be deprived to take benefit of the decree, which he obtained in the year 1974, that too, for petty amount of Rs. 2659.50.

12. It is also submitted by learned counsel for the appellant that if it is found that the

appellant is not absolute owner or sole owner of the property in dispute, then also the entire property cannot be put to auction in execution of the decree and the appellant has right to protect his share in the property in dispute. At the cost of repetition and further repetition, it may be observed that the total decretal amount is less than Rs. 3,000/-. The property involved in the dispute is a house. The appellant has neither disclosed his share in the property nor disclosed his alternative case. The appellant even did not disclose that who are the other co-sharers. It has come on record in evidence that the appellant's sisters are also there. It cannot be presumed that in execution of the decree for Rs. 2659.50 + interest, if the house in dispute is sold out, then nothing will remain to pay the share of the appellant after the sale of the house. The respondent No. 1 is seeking recovery of the decretal amount and not claiming more than the decretal amount. The rest of the amount can certainly give the share of the appellant, if it is there as in the objection petition neither there was case set up by the objector nor an issue was framed by the Executing Court nor it was prayed by the appellant before the Executing Court to determine the share of the appellant. Therefore, now it is too late (after 30 years) in second appeal to raise such a ground.

13. In view of the above discussion, the appeal of the appellant is dismissed with costs of Rs. 5,000/-.

Appeal dismissed.