
(2002) 04 P&H CK 0110

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal 2650 of 1980

Abdul Rehman (Deceased) and Others

APPELLANT

Vs

Jumma Khan and Others

RESPONDENT

Date of Decision : 30-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 7 Rule 10

Citation : (2002) 3 CivCC 6 : (2002) 3 RCR(Civil) 177

Hon'ble Judges : N.K. Sodhi, J

Bench : Single Bench

Advocate : Gurcharan Singh,s No. 1 and 2 and J.L. Malhotra,s No. 3 and 4, for the Appellant; Sarabjit Singh, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Sodhi, J.—This is defendants' second appeal directed against the judgment and decree dated 29.10.1980 passed by the Additional District Judge. Gurgaon affirming that of the trial court whereby the suit for possession of agricultural land filed under Order 1 Rule 8 of the CPC (for short the Code) was decreed. Facts giving rise to this appeal may first be noticed.

2. One Ismail a Mohammedan Meo by caste was the owner of the suit land. On his death his widow Smt. Suhagi inherited the same as a limited owner. It is alleged that according to the agricultural custom governing the parties, a widow had only a life interest in the estate of her husband and that she had no right to alienate the same by way of sale, mortgage, gift, will or otherwise. It is further alleged that in the absence of heirs "reversioners. the proprietors of the Patti in which the property is situated succeed and in the absence of the proprietors of the Patti, the proprietors of the whole village inherit the same. According to the plaintiffs, Smt. Suhagi died issueless leaving no male or female relatives of her husband and, therefore, the proprietors of Patti Sahaura inherited "the land in dispute. They alleged that the defendants who are neither proprietors in the Patti nor related to Smt. Suhagi or Ismaili, had taken possession of the land on the

basis of a will allegedly executed in their favour of Smt. Suhagi. The plaintiffs alleged that the will, if any, was unauthorized, against the custom and without the consent of the re-versioners. On receipt of notice of the suit the defendants appeared and contested the same. They claim to be agnate collaterals of Ismail and their case is that the parties are not governed by custom and that Smt. Suhagi was competent to alienate the suit land by way of will. They also alleged that the will was challenged by Noor Bux, Mandril and Noor Ilahi on whose behalf the present suit has been filed by the Patti. The will is said to have been upheld and the suit field by them dismissed. The defendants also denied that Smt. Suhagi was a limited owner or that the plaintiffs were the proprietors of Patti Sahaura. The locus standi of the plaintiffs to file the suit was also challenged and it is pleaded that the suit has not been properly filed under the provisions of Order 1 Rule 8 of the Code. It is also pleaded that the suit was barred by time and the same was collusive as it had been filed at the instance and for the benefit of Noor Bux, Mandru and Noor Ilahi who had earlier lost the litigation. The plea of res judicata was also pressed into service. Pleadings of the parties gave rise to the following issues:-

- "1. Whether the plaintiffs have locus standi to file the suit? OPP
2. Whether deceased Suhagi was a limited owner of the suit land and could not alienate the same? OPP
3. Whether the plaintiffs and deceased Suhagi are governed by custom in matters of alienation and succession? If so, what this custom is? OPP
4. Whether the suit has been filed properly u/o 1 Rule 8 CPC? OPP
5. Whether the suit is within time? OPP Onus objected to.
6. Whether the suit is benami and collusive? OPD
7. Whether the suit is barred by res judicata? OPD
8. Whether the plaintiffs are estopped from filing this suit by their act and conduct? OPD
9. Whether the suit is not maintainable? OPD
10. Whether the defendants are agnates and collaterals of Ismail the husband of , deceased Suhagi? If so, its effect? OPD
11. Whether the deceased Suhagi executed a valid will in favour of the defendants? If so. its effect? OPD
12. Relief.

3. The trial court decided issue No. 1 in favour of the plaintiffs and field that they have locus standi to file the suit. Issues No.2 and 3 were also decided in favour of the plaintiffs and it was held that Smt. Suhagi was a limited owner of the suit land which she could not alienate and that the parties were governed by custom in the matters of alienation and succession according to which Patti of the village succeeds to the estate in the absence of a male lineal descendant of the last

male holder. Issues No. 4 and 5 were also decided in favour of the plaintiffs and issues No.6 to 11 were answered against the defendants. The trial court decreed the suit for possession on 20.5.1980. Feeling aggrieved by the decree the defendants filed an appeal before the lower appellate court which dismissed the same affirming the findings of the trial court on all the issues. Hence, this second appeal.

4. The first contention raised by the learned counsel for the appellants is that the present suit was not properly instituted under Order 1 Rule 8 of the Code inasmuch as the procedure prescribed thereunder had not been strictly complied with. It is urged that in the absence of any permission granted by the trial court under Sub-clause (a) of Clause (I) of Rule 8 of Order 1 of the Code, the suit was not maintainable. After hearing counsel for the parties, I find no merit in this contention. It is not necessary under the law that the permission referred to in Sub-clause (a) of Clause (1) of Rule 8 of Order I of the Code should be expressly recorded. Permission can be inferred from the proceedings in the trial court. In the instant case, the plaintiffs had filed an application under Order 1 Rule 8 of the Code and the trial court passed the following order on 19.5.1978:-

"It has been brought to my notice that the plaintiff has filed this suit in representative capacity. An application under Order I Rule 8 CPC is also on the file. As the number of plaintiffs is numerous and it is not possible to serve each of them individually, so I order that they all be served by Munadi. Expenses to be deposited within 3 days and Munadi u/o I Rule 8 CPC be got effected by 8.6.78."

From the aforesaid order it may be clearly inferred that the trial court granted permission to the plaintiffs to tile the suit in a representative capacity, what is really important in such a suit is the issue of a proper notice under Sub-clause (2) of Rule 8 of Order 1 of the Code. This sub-rule casts upon the court a duty to give notice of the institution of the suit to all persons having the same interest therein. In the absence of such a notice, grave injustice may result in the form of a decree against persons who were never told that a case is pending against them. It is for this reason that the courts have held that this part of the rule is mandatory and a sine qua non for the applicability of Rule 8 of Order 1 of the Code. In the case before us, it is not in dispute that in pursuance to the order dated 19.5.1978 a proclamation by beat of drum was made in the village on 30.6.1978 giving notice to all the proprietors of the Parti that a suit had been filed in the court of Sub Judge Gurgaon and that any member of the Patti having any objection could appear in the court and take further proceedings in accordance with law. A copy of the proclamation is Ex. P2 on the record. I am therefore, satisfied that the provisions of Order 1 Rule 8 of the Code were strictly complied with and, therefore, the suit was properly instituted. The contention of the learned counsel for the appellants is. therefore, rejected.

5. It was also contended by the learned counsel for he appellants that the plaint was first presented in Gurgaon and since courts there did not have the territorial jurisdiction, the plaint was transferred to Palwal and that the provisions of Order

1 Rule 8 of the Code were not complied with by the court at Palwal and, therefore, the suit could not proceed. This argument is again misconceived. Under Rule 10-A of Order 7 of the Code the court returning the plaint fixes a date for appearance of the parties in the court in which the plaint is proposed to be presented and give to the plaintiff and to the defendant notice of such date for appearance. On such notice being given, it is not necessary for the court in which the plaint is presented to effect fresh service of summons unless the court for reasons to be recorded directs otherwise. In view of these provisions, it was not necessary for the court at Palwal to follow the procedure of Sub-rule (2) of Rule 8 of Order 1 of the Code again when it had been followed by the court at Gurgaon before returning the plaint. This contention also stands rejected.

6. The finding on issue No.1 as recorded by the courts below was also challenged before me in this appeal. It is contended that the plaintiffs- respondents have no locus standi to file the suit out of which the present appeal has arisen because the custom which they alleged has not been proved. Here again, I am unable to agree with the learned counsel for the appellants. The case of the plaintiffs- respondents is that they are governed by customary law according to which if the proprietor dies issueless leaving no relation agnates or cognates then the proprietors of the Patti inherit his estate. In order to prove this custom they produced Jumma PW1, Usman PW3, Ibrahim PW4 and Mandru PW5. The statements of these witnesses were read in court and they have clearly deposed about the custom and their statements have not been challenged in cross-examination. The fact that the parties are governed by custom being Meos of Gurgaon district has also been admitted by the witnesses produced by the appellants. Abdul Rehman DW1 and Yakub DW2 have both admitted that they follow the custom of Meos of Gurgaon district in the matters of inheritance and marriages etc. It is, therefore, proved that the parties are governed by custom in the matter of succession. The Riway-i-Am of Gurgaon district will show whether the plaintiffs- respondents have the locus standi to file the suit. In Ujagar Singh Vs. Jeo, it was laid down by their Lordships of the Supreme Court that ""Now it is well established that Ri-waj-i-am entries are to be taken as referring to customs relating to succession to ancestral properties unless it is stated to be otherwise." Tribal custom of Meos of Gurgaon district compiled by Wilson regarding the persons entitled to succeed where there is no relation of last male holder is stated as under: -

"They say that first the Thok or Patti would succeed, next the got, and next the village."

This rule of custom makes it clear that in the absence of any male lineal descendants Thok or Patti of the village would succeed to the estate of the last male holder who dies issueless.

7. The question then arises is whether Smt. Suhagi the widow of Ismail could alienate the property by will. According to the Rewaj-i-Am of Gurgaon district regarding the powers" of alienation of a widow, her interest in the estate of her

husband is only a life interest and her powers of alienation are restricted both in regard to ancestral and self acquired properties. She cannot alienate without the consent of her husband's relatives. In the case before us, Ismail died issueless without leaving any male descendants and, therefore, his estate will be inherited by the Patti Sahaura. It has not been disputed before any of the courts below that the plaintiffs-respondents are the proprietors of Patti Sahaura in village Malai. Smt. Suhagi the widow of Ismail had no power to alienate the property by will in favour of the appellants she being a limited owner. In this view of the matter, the plaintiffs-respondents were entitled to succeed to the estate of Ismail deceased and had the locus standi to file the present suit for possession of the land. This issue has been rightly decided by the courts below and their findings are affirmed.

8. The next challenge of the learned counsel for the appellants was to the findings recorded under issues No. 6 and 7. It is contended that Noor Bux, Mandru and Noor Ilahi had earlier filed a suit against the defendants challenging the will executed by Smt. Suhagi on the ground that they were the cognates of her deceased husband and were entitled to succeed to the property in preference to the defendants and that the will was illegal and that according to the custom governing the parties Smt. Suhagi could not execute the will and since that suit was dismissed, the present suit which is collusive is not maintainable and the judgment in the earlier suit copy of which is Ex.D1 operates as resjudicata. This argument is equally devoid of merit. The plaintiffs in that suit claimed to be the heirs of Smt. Suhagi but they failed to prove the relationship and, therefore, the suit was dismissed. The present suit has been filed by the proprietors of Patti Saliaura in a representative capacity and, therefore, the two suits are not between the same parties and the cause of action is also different. The present suit can neither be described as collusive nor can the judgment in the earlier suit operate as resjudicata between the parties. The findings recorded by the courts below on these issues are affirmed.

9. Lastly, it was half heartedly argued by the learned counsel for the appellants that Smt. Suhagi had executed a valid will in favour of the appellants-defendants and the same had been affirmed by the court in the earlier litigation giving rise to the judgment Ex.D1. I am unable to accept this contention either. As already observed, the earlier judgment is not relevant in the present proceedings as the parties in the two suits were different. Be that as it may, the defendants have failed to prove the execution of the will in the present case. They have neither produced a copy of the will nor examined the writer and the attesting witnesses in whose presence the said will was allegedly executed. In this view of the matter, no fault can be found with the findings of the courts below on issue No.11.

10. No other point was raised.

11. In the result, the appeal fails and the same stands dismissed with no order as to costs.