

(2012) 10 MP CK 0077

In the Madhya Pradesh High Court

Case No : Second Appeal No's. 174 and 395 of 2005

Abdul Wasid (Dead) through L.Rs. Hanifa Begum and Others APPELLANT
Vs

Munni Bai and Others
 Munni Bai and Others Vs Abdul RESPONDENT
Wasid (Dead) through L.Rs. (Hanifa Begum and Others) and
Others

Date of Decision : 01-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 2
Limitation Act, 1963 — Section 6, 7, 8
Specific Relief Act, 1963 — Section 34, 42

Citation : (2013) 1 JLJ 263 : (2013) 1 MPLJ 325

Hon'ble Judges : Anil Sharma, J

Bench : Single Bench

Advocate : D.K. Agrawal in Second Appeal No. 174 of 2005 and Mr. Rajendra Sagoria in Second Appeal No. 395 of 2005, for the Appellant; D.K. Agrawal, Advocate in Second Appeal No. 395 of 2005 and Shri Rajendra Sagoria, Advocate in Second Appeal No. 174 of 2005, for the Respondent

Judgement

Justice Anil Sharma, J.—This judgment shall dispose of Second Appeal No. 174 of 2005 and 395 of 2005 filed against the judgment and decree dated 13.12.2004 passed by learned Additional District Judge, Chanchoda Camp Guna District Guna in Civil Appeal No. 33-A of 2004 which was filed against the judgment and decree dated 21.7.1998 passed by learned First Civil Judge Class-II, Guna in Civil Suit No. 288-A of 1996. The brief facts of the case are that Sampat Bai (plaintiff No. 1), Heera Lal (Plaintiff No. 2), Bharon Lal (plaintiff No. 3) and Gajanand (Plaintiff No. 4) filed a suit for declaration and permanent injunction mainly against defendant no. 1 Abdul Wasid. Plaintiffs No. 2, 3 and 4 were minors at the relevant time, therefore, they were represented through Smt. Sampat Bai. Originally, the suit was filed against Abdul Wasid and Permanand defendants no. 1 and 2 respectively. Defendant no. 1 Abdul Wasid is appellant in Second Appeal No. 174 of 2005 and defendant no. 2 Permanand is respondent no. 1 in the said appeal. Sampat Bai has died on 18.2.1990, therefore, she was represented by

her two daughters namely Munni Bai and Smt. Binna Bai. During pendency of first appeal, defendant no. 2 Permanand also died, therefore, he represented by his two daughters and a son namely Pishta Bai, Sunita Bai and Kewal Chand respectively.

2. Plaintiffs filed the suit alleging that the plaintiffs and defendants are joint family members and defendant no. 2 being only male member of the family, was sole manager and Karta-Dharta of the family. Plaintiff no. 1 Sampat Bai jointly with one Moolchand purchased total 2.944 Hectares land on 29.7.1976 for consideration of Rs. 35,000/- from one Ramniwas Sharma. The consideration was paid by Sampat Bai by selling her land situated at Chaudhary Mohalla, Guna and ornaments of Parmanand's wife and herself generated the income. The land was purchased in the name of Permanand, and Moolchand purchased the land in the name of his four sons namely Man Singh, Hariom, Devi Singh and Ram Babu. Sampat Bai and Moolchand were having equal share and were owner of 1.472 and 1.472 Hectares of land bearing Survey No. 401 and 402 which is referred as "disputed land". One Shyamlal was growing vegetables on the land since 1976 for plaintiff No. 1 Sampat Bai and thus, the plaintiffs are in possession of the disputed land. Due to habit of drinking of defendant no. 2 Permanand, Sampat Bai was managing affairs of family and also looking after welfare of Permanand's wife and children. On 24.12.1982, defendant no. 1 Abdul Wasid came to plaintiff no. 1 Sampat Bai and informed that defendant no. 2 Permanand lost the land in gambling and he I.e. Abdul Wasid has purchased the land. The plaintiff came to know that Permanand sold the land to defendant no. 1 Abdul Wasid on 3.11.1982 in drunken condition, when she asked Permanand, he replied that the land has not been sold but mortgaged because, he lost heavy amount in gamble. The disputed land was of the ownership of the joint family of the plaintiff no. 1 and defendant no. 2, therefore, the land could not be sold by Permanand alone. On 4.1.1983, Abdul Wasid snatched keys of the house and threatened to take possession from the plaintiffs, therefore, the plaintiffs filed the suit for declaration and permanent injunction.

3. Defendant no. 1 Abdul Wasid in his written statement denied the allegations of the plaint and pleaded that the land in dispute was sold by defendant no. 2 to defendant no. 1 Abdul Wasid for consideration of Rs. 20,000/- and defendant no. 1 Abdul Wasid is in possession of the disputed land from the date of purchase. Permanand not only executed the registered sale deed in the office of Registrar but he has also executed an affidavit for the mutation of the name of defendant no. 1. It is further contended that the suit is barred by Benami Transaction Prohibition Act, therefore, the suit is not maintainable. The land in dispute has been mutated in the name of defendant no. 1 and hence, plaintiffs are not entitled for any relief.

4. The trial Court has decreed the suit by holding that the sale deed dated 3.11.1982 is really a mortgage transaction and defendant no. 2 has not sold the land. The disputed land was purchased by plaintiffs Benami in the name of

defendant no. 2. It is further held that the value of disputed land is one lac and sale deed is partially without consideration. Defendant no. 2 was not having any right to sell the disputed land and the plaintiffs have a right to take possession.

5. Being aggrieved by the judgment of trial Court, defendant no. 1 has filed an appeal. Learned lower appellate Court by impugned judgment and decree dated 13.12.2004 partially allowed the appeal by holding that the plaintiffs are entitled for cancellation of the sale deed in respect of half of the portion of the disputed land on payment of Court fee of Rs. 10,000/- and for remaining half portion, the sale deed shall remain valid and effective on the ground that Permanand was having half share in the disputed land. Being aggrieved by the judgment and decree passed by learned lower appellate Court, the respondents have filed separate appeals.

6. Appellant Abdul Wasid has challenged the impugned judgment on the ground that learned lower appellate court while reversing the finding of trial court has made out a case which was neither pleaded nor proved. The relief which was never sought, has been given by learned lower appellate Court. The learned Court below has failed to appreciate that there cannot be any transaction with the joint Hindu family and therefore, there should be cogent evidence on record for that purpose and the land purchased in the year 1976, was without any basis believed to be joint Hindu family property.

7. The appellants in Second Appeal No. 395 of 2005 have challenged the impugned judgment passed by learned lower appellate Court on the ground that the learned lower appellate Court has failed to discharge its duties by reversing well reasoned judgment of trial Court without coming close into four corners of the reasonings of the trial Court. Therefore, the judgment and decree passed by learned lower appellate Court is bad in law and is liable to be set-aside. Learned lower appellate Court has acted illegally in not making distinction between money received by HUF and the money received by members of HUF in their personal capacity. Learned lower appellate Court has failed to understand the concept of Benami transaction. Since the suit property was purchased in the name of Permanand and sons of Moolchand with the aid of HUF money, it would obviously be a transaction in favour of HUF and would be a Benami transaction vis-a-vis Permanand. Learned lower appellate Court has committed illegality in holding contrary. Learned lower appellate Court has further committed illegality in holding that the husband is entitled to the proceeds received on account of sell of wife's ornaments. Learned lower appellate Court has further erred in law in over looking the fact that the sell of HUF property cannot be legally upheld without proving legal necessity. In the present case, defendant/respondent no. 1 has nowhere pleaded existence of legal necessity at the time of purchase of land by him.

8. Following substantial question of law has been framed vide order dated 1.10.2007 in Second Appeal No. 174 of 2005 :

Whether, a suit filed on 4.1.1983 for declaration, injunction and relief of possession sought by way of amendment on 3.2.1998 (wrongly written as "3.2.1988" in the order sheet aforesaid), was barred by limitation under Article 65 of the Limitation Act and the Courts below have committed error in granting decree for possession to the respondents No. 1 to 5.

and following substantial questions of law have been framed vide order dated 1.10.2007 in Second Appeal No. 395 of 2005 by this Court :

(i). Whether, a purchaser of undivided share of HUF property can be allowed to retain possession without getting the property partitioned?

(ii). Whether, the lower appellate Court has committed an illegality in upholding the sale of HUF property without pleadings and proof of legal necessity on the part of purchaser?

9. Substantial question of law framed in Second Appeal No. 174 of 2005 :

Learned counsel for the appellant in Second Appeal No. 174 of 2005 has submitted that learned lower appellate court without considering the reasons assigned by learned trial court in the impugned judgment has partly allowed the appeal by making out a new definition of Article 65 in para 33 of the impugned judgment by holding that under Article 65 of the Limitation Act, 1963, there can be no adverse possession against a woman and a minor, and a minor can also file suit for possession after he becomes major. Therefore, the plaintiffs can claim relief of possession and such a relief is not barred by Limitation Act. Therefore, the amendment application by which relief of possession has been claimed, is not barred by limitation.

10. Learned counsel for the appellant Abdul Wasid has submitted that according to the evidence, after execution of sale deed in favour of the defendant no. 1 by defendant no. 2, possession was handed over to the defendant no. 1 in the year 1982 and application for claiming relief of possession under Order 6 Rule 17 CPC has been filed on 3.2.1998, which was within the knowledge of plaintiffs at least after filing of the written statement on 4.2.1983 that defendant no. 1 is in possession of the suit land, therefore, relief claimed by the plaintiff for possession by amending plaint is time barred. Learned trial Court is not justified in allowing the application for amendment after expiry of the period of limitation and learned lower appellate Court has further not justified in confirming the order of amendment dated 7.2.1998 by making out a new definition. There is no law which makes a provision that there can be no adverse possession against a lady. Further, minor plaintiffs have been represented through plaintiff no. 1 Sampat Bai. It is further submitted that even if it is taken to be true that some of the plaintiffs would be minor at the time of filing of the suit, the age of youngest plaintiff Gajanand was eight years at the time of filing of the suit and he became major on attaining the age of 18 years I.e. in the year 1993. u/s 6 and 7. of the Limitation Act, prescribed period of limitation is available to a minor or insane from the date, he becomes major but there is rider placed upon him by Section 8

of the Limitation Act which reads as under :

8. Special exceptions- Nothing in Section 6 or in Section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application.

From the above, it is apparent that a minor co-plaintiff is entitled for extension of period of limitation only for three years from the date of cessation of disability i.e. up to the date, he becomes major. Therefore, the period if it is for limitation for plaintiffs in any condition was available up till 12 years that is till February, 1995 or at the most for three years from 1993 when plaintiff no. 4 became major i.e. till January, 1996.

11. Learned counsel for the appellant has cited a judgment of Hon"ble Apex Court in the matter of Revajeetu Builders and Developers Vs. Narayanaswamy and Sons and Others, in which, it has been held that the Courts have very wide discretion in the matter of amendment of pleadings but the Court's power must be exercised judiciously and with great care. While deciding applications for amendments, the Courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/ or dishonest amendments. While discussing the basic principal which ought to be taken into consideration while allowing or rejecting the application for amendment, it is further held that as a general rule the court should decline amendment if a fresh suit on the amended claims would be barred by limitation on the date of application. The fact that the claim is barred by law of limitation, is but one of the factors to be taken into account by the court in exercising the discretion as to whether the amendment should be allowed or refused but it does not affect the power of the court if the amendment is required in the interest of justice.

12. Learned counsel for the appellant Abdul Wasid has also cited judgment of this Court in the matter of Pushpa Arora Vs. Dr. (Smt.). Anita Arora and others 2012 (2) MPHT 317 in which, while relying upon the judgment rendered by the Hon"ble Apex Court in the case of Revajeetu Builders and Developers (Supra), it has been held as under :

In view of the well settled position dealing with the prayer for amendment of the pleadings the following important factors are required to be borne in mind by the Court dealing the application for amendment :

(i). Whether, the amendment is necessary for proper and complete adjudication of the controversy involved in the suit;

(ii). Whether the application has been made bonafide or with malafide intention to protract the proceedings;

(iii). Whether the proposed amendment, if allowed, would cause any prejudice to either side which cannot be compensated in terms of money;

(iv). Whether, by the proposed amendment a party is setting up a new case or cause of action which changes the nature and character of the case;

(v). The application for amendment should not be rejected merely on the ground that delay alone, if the other side can be compensated in terms of cost;

(vi). The amendment which is barred by limitation should not be allowed;

(vii). In case of post trial amendment, the Court has to come to the conclusion that in spite of due diligence party could not have raised the matter before the commencement of the trial;

13. Learned counsel for the appellant Abdul Wasid has further submitted that the defendant no. 1 has purchased the suit land by registered sale deed, therefore, the recital made in the registered deed regarding handing over of possession are to be taken as correct in the absence of any evidence in rebuttal and it should be presumed that the registered document was validly executed. In support of his argument, he has cited judgment of the Hon''ble Apex Court in the case of Prem Singh and Others Vs. Birbal and Others,

14. Learned counsel for the appellant has further submitted that the suit was initially filed by the plaintiffs for declaration and perpetual injunction after knowledge of execution of sale deed by defendant no. 2 in favour of the defendant no. 1 by registered document mentioning that the possession has been handed over to the defendant no. 1. The suit filed only for declaration of title and permanent injunction without claiming relief for possession is not maintainable and it is barred by law. He has cited judgment of Hon''ble Apex Court in the matter of Vinay Krishna Vs. Keshav Chandra and another, in which, considering the provisions of Section 42 of the Specific Relief Act, it has been held that in a suit for declaration of share in property, the plaintiff was not in exclusive possession of the property because two other persons and also tenants were in occupation and failure of plaintiff to claim relief of possession, discretion of court in granting decree for declaration is barred. Mere prayer in plaint that such other relief be granted to plaintiff without specific pleading for possession is not sufficient.

15. Learned counsel for the appellant has also cited judgment of Hon''ble Apex Court in the matter of Munilal Vs. Oriental Fire and General insurance Co. Limited 1996 (I) MPWN 101 in which, it has been held that time barred relief cannot be allowed to be incorporated by amendment under Order 6 Rule 17 CPC as it takes valuable right of the defendant and it has further been held that the suit for mere declaration without seeking consequential relief u/s 34 of the Specific Relief Act, 1963 has rightly been dismissed. Even the amendment to seek consequential relief has rightly been refused being barred by limitation.

16. Learned counsel for the appellant has further submitted that the plaintiffs in their amended pleadings have not mentioned the date on which, they were dispossessed, therefore, in the absence of specific pleading as to when the

dispossession took place even after amendment, the suit is barred by time. In support of his argument, he has cited judgment of the Hon'ble Apex Court in the matter of Shyam Lal @ Kuldeep Vs. Sanjeev Kumar and Others, in which, in a suit for declaration, it has been held that the mutation was illegal, null and void, no pleading or evidence as to date on which plaintiff had derived knowledge about mutation and/or will suit, rightly held as barred by limitation considering the pleadings as to whose as set out in plaint.

17. Learned counsel for the appellant Abdul Wasid has further submitted that recital of handing over of possession in the registered sale deed is binding not only on the executant of the sale deed but also on the family members. In support for his contention, he has cited judgment of this Court in the matter of Chainsingh Vs. Ramchandra and Others 1992 RN 277 in which, this court has held that recitals in a registered sale deed about plea of possession and payment of consideration contained therein, such a recitals are binding upon the executant to the deed and also upon his family members unless explaining away satisfactorily.

18. Learned counsel for the respondents/plaintiffs has submitted that both the courts below are justified in allowing the application for amendment for the relief of possession but as discussed above, application for amendment was barred by limitation and plaintiffs were having knowledge that the defendant no. 1 has claimed possession in his written statement and the plaintiffs have pleaded their dispossession after filing of the suit which has not been proved by reliable evidence and recital of handing over of possession in the registered sale deed as discussed above is binding on the plaintiffs who are family members of the defendant no. 1 who was Karta of the family. Therefore, both the courts below have erred in allowing the application for amendment by which, relief of possession has been claimed without considering the fact that it is time barred relief. Learned lower appellate Court has also erred in confirming the order of learned trial court dated 7.2.1998 by which, amendment application for relief of possession had been allowed on the ground that no limitation is applicable for woman or minor plaintiffs without considering provisions of Section 8 of the Limitation Act and in the absence of any provision of law, giving any exemption from limitation to a woman. Therefore, both the courts below have committed error in granting decree of possession in favour of respondents No. 1 to 5, the suit filed on 4.1.1983 for declaration and injunction in which, relief of possession was sought by way of possession on 3.2.1998 was barred by limitation under Article 65 of the Limitation Act. Therefore, substantial question of law framed in Second Appeal No. 174 of 2005 is decided in favour of the appellant Abdul Wasid.

19. Substantial questions of law No. 1 and 2 framed in SA No. 395 of 2005 :

Learned counsel for the appellant/plaintiffs have submitted that the property purchased by the plaintiff Sampat Bai and defendant no. 2 Permanand has been purchased from the funds of HUF, therefore, Permanand was having right to sell his share only and without partition, such a share could not be shown and both

of the share of Permanand cannot be handed over to the defendant no. 1. It is further submitted that learned lower appellate Court has committed illegality in upholding the sale of HUF property without pleading and proof of legal necessity on the part of purchaser.

20. It is an admitted fact by the plaintiffs that the defendant no. 2 being eldest member was Karta of family and disputed land was purchased in the name of defendant no. 2 jointly with one Moolchand. The land was not purchased in the name of plaintiffs along with defendant no. 2.

21. Learned counsel for the defendants/respondents has submitted that the registered sale deed Ex. P/1 has been executed by Permanand mentioning the fact that for payment of loan, he required money for which, he has sold the land for consideration of Rs. 20,000/- to Abdul Wasid. The plaintiffs have not given any reliable evidence that there was no debt which was required to be paid by Permanand. Permanand was examined as (PW4) and he has stated that he was in a habit of drinking and gambling and therefore, in order to settle the dues arise out of the gamble, the land has been sold by him without any consideration. Since Permanand has admitted execution of the sale deed, recitals made by him in the registered sale deed are binding upon him considering the judgment cited by learned counsel for the appellant in Second Appeal No. 174 of 2005. As mentioned above, he has not admitted sell of land before Magistrate. His thumb impression was taken there but he has further admitted that he has not reported anywhere for forged sale deed having got executed in his name. It is important to note that according to the copy of registered sale deed Ex. P/1, Permanand has put his signatures on the sale deed. Further, defendant no. 1 has proved execution of sale deed by producing Bundel Singh (DW3), who has typed the sale deed, although in cross-examination, he has given same statement regarding the fact that on refund of amount, the land will be returned back to Permanand but Permanand himself has not stated that on return of amount, the land was to be returned back to him. Execution of sale deed has been confirmed by Bhagwanlal (DW4). Bundel Singh (DW3) in his evidence has admitted that he has typed (prepared) the sale deed on direction of the seller Permanand. Therefore, his evidence in cross-examination against recitals made in the sale deed cannot be treated as reliable.

22. Learned counsel for the plaintiffs has stated that the suit land was purchased for consideration of Rs. 35,000/- in the year 1976 and the sale of land in the year 1983 for consideration of Rs. 20,000/- itself shows that consideration was not proper looking to the value of the land, therefore, the sale deed has been executed for security of loan. But Permanand himself has not admitted any loan even he appeared as a witness from the plaintiffs side. Therefore, argument of learned counsel for the appellants/plaintiffs has no force.

23. Learned counsel for the defendant no. 1 has cited judgment of the Apex Court in the matter of AIR 2003 3800 (SC) , in which, it has been held that while considering the question of joint family property or self acquired, property cannot

be presumed to be joint family property merely because of existence of a joint family and burden to prove the property to be joint lies on the person who asserts so.

24. So far as question of less consideration amount is concerned, defendant no. 1 has purchased half land by paying consideration of Rs. 17,500/- out of total consideration of Rs. 35,000/-, rest of which was paid by Moolchand. Defendant no. 2 has sold the land for payment of debt and he was not himself cultivating the land, therefore, it cannot be said that the consideration amount was too less looking to the value of the land in the year 1983.

25. Learned counsel for the respondent/defendant no. 1 has further submitted that learned lower appellate Court is not justified in partly allowing the appeal without any prayer for such a relief by the plaintiffs. He has cited judgment of this Court in the matter of Ikrar Mohammad Vs. Isub Khan, 2010 (2) JLJ 351 in which, it has been held that under Order 6 rule 2 of CPC decision of a case cannot be based on grounds out side pleadings and without amendment of plaint, no relief can be granted which was not asked for.

26. Learned counsel for the respondent/defendant no. 1 has also cited judgment of the Apex Court in the case of Ram Saran and Another Vs. Smt. Ganga Devi, in which, it has been held that where the defendant is in possession of some of the suit properties and the plaintiff in his suit does not seek possession of those properties but merely claims a declaration that he is the owner of the suit properties, the suit is not maintainable. Learned lower appellate Court has further committed error in allowing appeal partly to the extent of share of the plaintiffs and by holding that the suit was within limitation and provisions of Article 65 of the Act are not applicable to the women and minors for adverse possession. The plaintiffs have failed to prove that defendant no. 1 has purchased undivided share of HUF property. Learned lower appellate Court has not committed any illegality in up holding the sell of disputed property without pleading and proof of legal necessity on the part of purchaser. The legal necessity has been mentioned in the sale deed Ex. P/1 and as a Karta of the family, Permanand was having every right to sell the property for payment of debts as mentioned in the sale deed Ex. P/1 itself. Therefore, both the questions of law framed in Second Appeal No. 395 of 2005 are decided in favour of the respondent/defendant No. 1 Abdul Wasid and against plaintiffs and defendant no. 2.

27. As a result of above findings, the judgment of learned lower appellate Court by which, appeal of defendant no. 1 was partly allowed and partly dismissed, is set-aside, the judgment and decree passed by learned trial Court is also set-aside and the suit filed by the plaintiffs is dismissed. The plaintiffs and defendant No. 1 Permanand shall bear the costs of their suit and shall pay costs of appeal to appellant/defendant no. 1 Abdul Wasid. Counsel fee be calculated according to rules if pre-certified.