

(1997) 04 DEL CK 0040

In the Delhi High Court

Case No : First Appeal No. 129 of 1996

Kanwar Pratap Singh

APPELLANT

Vs

Surat Singh and Others

RESPONDENT

Date of Decision : 11-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1

Citation : (1997) 4 AD 115 : (1997) 67 DLT 367

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Mukul Rohatagi, Ravi Gupta and N.S. Vashisth, for the Appellant;

Judgement

K.S. Gupta, J.

(1) This appeal by the plaintiff-appellant is directed against the order dated January 3, 1996, of a learned Single Judge dismissing I.As. No. 6035/ 93 filed under Order Xxxix Rules 1 & 2 and Order XI Rule 1 read with Section 151, Cpc and I.A. No. 4580/95 moved under Order XI Rule I and Section 151, CPC in Suit No. 1413/93.

(2) The suit out of which the present appeal arises was filed inter alia, on the allegations that defendant-respondent No. 1 is the father of the appellant and defendants-respondents 2-4 and they constituted a Hindu undivided family. Huf owns and possesses ancestral properties mentioned in the schedule annexed to the plaint and the appellant and the respondents have 1/5th share each therein. Amongst the ancestral properties is the land comprised in Khasra No. 102/2, measuring 1 bigha at Raj Pur Chhawani, Delhi. It is alleged that in the first instance appellant took agency of Burmashell (lateran med as Bharat Petroleum) and started running a petrol pump on that land. Later on, respondent No. 1 joined the appellant. After some time respondent No. 1 dropped the appellant and joined respondent No. 2 in the business. Later on, respondent No. 1 was also dropped by respondent No. 2 and at present respondent No. 2 is controlling the

business of the petrol pump. Money for starting the petrol pump was provided out of the ancestral funds. It is further alleged that besides the properties mentioned in the schedule, Hu own large tracts of agricultural and other lands which have since been acquired and compensation in respect of some of the lands has already been received by respondent No. 1. Some of the compensation cases in respect of the acquired lands are still pending in various Courts. It is stated that an attempt to partition the ancestral properties was made in the year 1980 and an agreement dated February 6, 1980 was also executed in between the appellant and respondents 1 to 3. However, this agreement was never acted upon by the parties and it is, thus, void and invalid. It was prayed that preliminary decree(s) for partition of the ancestral properties, rendition of accounts in respect thereof as also the business of the petrol pump may be passed in favor of the appellant and against the respondents.

(3) Respondent No. 1 in his written statement alleged that the properties mentioned at Serial Nos. 1,2,3,5 and 7 of the schedule annexed to the plaint are his self-acquired properties while property at Serial No. 4 of the schedule bearing No. 167, Raj Pur Gur Mandi, Delhi, was constructed by him though the land underneath the same was ancestral. Property at Serial No. 6 of the schedule is ancestral. It is alleged that the appellant has not disclosed the other properties as mentioned at Serial Nos. 8 & 9 of the schedule, nor has given the particulars of the acquired properties mentioned at Serial No. 10. Properties at Serial Nos. 1,2,3,5 & 7 and the structure of property at Serial No. 4 being self-acquired are not subject to partition and, Therefore, the suit to that extent is liable to be dismissed. It is emphatically denied that respondent No. 1 is Realizing income of any ancestral property. It is, however, not disputed that the appellant and respondents 2 to 4 are the sons of respondent No. 1 and business of petrol pump is being controlled exclusively by respondent No. 2, as alleged. It is pleaded that on the intervention of the relations, a family arrangement was arrived at between the appellant and respondents 2 & 3 on the one hand and respondent No. 1 on the other hand but it was not legal. It is stated that the appellant and respondents 2 & 3 are collecting the rents. Appellant also sold out plot No. 25A, G.T. Karnal Industrial Area, Delhi and appropriated proceeds thereof.

(4) Respondents 2 & 3 in their joint written Statement alleged that a partition of the ancestral properties had already taken place and as a result thereof the parties arrived at family settlement as far back as February 6,1980 and the present suit for partition etc. is, Therefore, not tenable. After the family settlement, parties are in possession of their respective properties. It is stated that the appellant and respondent No. 1 took agency of Burmashell and started running a petrol pump on the land comprised in Khasra No. 102/2, measuring 1 bigha at Raj Pur Chhawani and the funds for petrol pump were provided out of the ancestral properties. After the family settlement dated February 6,1980 petrol pump fell to the share of respondent No. 2. A letter was sent to Bharat Petroleum Corporation Limited intimating that respondent No. 2 and his wife are now the partners in the business. By the letter dated August 4,1981, Bharat

Petroleum Corporation Limited approved the reconstitution of the partnership and the income from the petrol pump is being assessed in the name of the partnership firm whereof respondent No. 2 and his wife are the partners. It is not denied that the appellant and respondents 1-3 constituted an Huf and the Huf owned and possessed ancestral properties as noted in the schedule annexed to the plaint. It is stated that the appellant and respondent No. 1 even sold properties which fell to their respective shares in the partition. It is emphatically denied that the family settlement dated February 6, 1980, is invalid, as alleged.

(5) In the suit is Nos. 6035/93 and 4580/95 were filed by the appellant and those were contested by respondents 2 & 3 on the pleas identical to those taken by them in their joint written statement.

(6) We heard the learned Counsel for the parties at length.

(7) By an order dated May 9, 1995 parties were directed to bring on record details of the tenants along with the rate of rent payable by them and also to file affidavits disclosing the details of any property which may have been alienated since February 6, 1980 within a period of four weeks.

(8) In compliance of this order appellant and respondents 1-3 filed separate affidavits. In his affidavit appellant stated that he is in possession of a part of property No. 73. Raj Pur Gur Mandi, mentioned at Serial No. 1 in the schedule annexed to the plaint and no rent whatsoever in respect of any of the properties is being received by him. It is in the affidavit of respondent No. 2 that only Sobti Packers is the tenant under him and he is paying Rs. 1,000.00 as rent. He denied having alienated any property after February 6, 1980. In his affidavit respondent No. 3 averred that he is in possession of a part of property No. 73 and 82 to 95 situated within the revenue estate of Raj Pur Gur Mandi and 24 tenants in those properties are paying rent to him. Total amount of the rent received is shown as Rs. 6,250.00. He too denied having alienated any property after February 6, 1980. In his affidavit respondent No. 1 gave the details of the various tenants under him along with the monthly rent paid by them. It is further in his affidavit that as per the family settlement dated February 6, 1980 parties were responsible for payment of the income tax, house tax etc. of their respective shares in the properties. Although Khasra No. 73 was allotted to respondent No. 1 but he is still paying house-tax in regard to it. Similarly property No. 80 fell to the share of respondent No. 3 as per the alleged family settlement but it is he who is paying house-tax thereof. In support of that averment copies of the receipts in regard to payment of house tax to the Municipal Corporation of Delhi have been filed by the respondent No. 1.

(9) Copies of the family settlement in question is placed on the file and it goes to show that in addition to property No. 73 portion marked Abcd, 37% share in properties Nos. 82 to 95 on the east site situated at Raj Pur Gur Mandi also fell to the share of the appellant. Respondent No. 3 besides the portion marked Cefghi of property No. 73 was shown to have been allotted 62% share in said

properties Nos. 82 to 95 from the portion under the tenancy of one Omi and also property No. 80, Raj Pur Gur Mandi, Delhi. From the affidavits filed pursuant to the order dated May 9, 1995 of the appellant and respondent No. 3 it may be noted that it is respondent No. 3 who has been Realizing rent of said properties Nos. 82-95 to the exclusion of the appellant who was having 37% share therein as per the family settlement dated February 6, 1980. Had the family settlement in question been acted upon between the parties there was no occasion for respondent No. 3 to have realised rent of the portions of the said properties which fell to the share of the appellant. Further, as is evident from the affidavit of respondent No. 1 he is still paying house-tax of a portion of property No. 73 which came to the share of respondent No. 2 and property No. 80 which fell to the share of respondent No. 3 as per the aforesaid family settlement. Realisation of rent by respondent No. 3 of the share of the appellant in aforesaid properties Nos. 82-95 and payment of house-tax in regard to properties Nos. 73 & 80 of the shares of respondents 2 & 3 respectively by respondent No. 1, prima facie, suggest that the family settlement in question was not acted upon between the parties as was urged on behalf of the appellant.

(10) This takes us to yet another question. Is the appellant entitled to any of the reliefs as claimed in I.A. Nos. 6035/93 and 4580/95 ? In *T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others*, reference whereof also made in the impugned order, principles governing appointment of Receiver were laid down thus :

"THE appointment of a Receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute, it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceedings; "*Mathusri v. Mathasri*", 19 Mad. 120 (PC) ; *Sivagnanathammal v. Arunachallan Pillai*, 21 Mad Lj 821 ; *Habibullah v. Abtiakallah*, Air 1918 Cal 882 , *Tirath Singh v. Shromani Gurudwara Prabandhak Committee*, Air 1931 Lah 688 ; *Ghanasham v. Morabe*, 18 om 474; *Jagat Tarini Dasi v. Nabagopal Chaki*, 36 Cal 305; *Ry. Sivaji Raja Sahib and Another Vs. Ry. V. Aiswariyanandaji Sahib and Others*, ; *Prasanno Moyi Devi v. Beni Madhab, Rai*, 5 All 556; *Sidheswari Debi v. Abhaveswari Dabi*, 15 CAL 818,"*Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das*, Air 1925 Lah 349; *Bhupendra Nath Mookerjee Vs. Monohar Mukherjee*, . The Court should not appoint a Receiver except upon groof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. *Dhurni v. Nawab Sajjad Ali Khan*, Air 1923 Lah 623 ; *Firm of Raghubir Singh Jaswant v. Narinjan Singh*, Air 1923 Lah 48; *Siaram Das v. Mohabir Das*, 27 Cal 279 ; *R.E. Muhammad Qasim Ravuther Vs. R.G. Nagaraja Moopnar and Others*, ; *Banwarilal Chowdhury v. Motilal* Air 1922 Pat 493 20. Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some

emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a Receiver merely on the ground that it will do no harm. "Manghanmal Tarachand v. Mikanbai, Air 1933 Sind 231 (Z21); Bidurramji v. Keshormaji, Air 1939 Oudh 61 (Z22); Sheoambar Ban v. Mohan Ban, Air 1941 Oudh 328 (Z23). An order appointing a Receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs, possession by Receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by Receiver for the security of the property. It would be different where the property is shown to be in media that is to say, the enjoyment of no one, as the Court can hardly do wrong in taking possession it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less "in dedio" is sufficient to vest a Court with jurisdiction to appoint a receiver; Nilambar Das Vs. Mabal Behari Das and Others, ; Alkama Bibi and Others Vs. Syed Istak Hossain and Others, ; Mathuria Debyav. Shibdayal Singh", 14 C W 252 (Z26); Bhuvaneshwar Prasad Narain Sinha Vs. Rajeshwar Prasad Narain Sinha and Others, . Otherwise a Receiver should not be appointed in supersession of a bonafide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred. The Court, on the application of a Receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disintitiled himself to the equitable relief by laches. Delay, acquiescence etc."

The aforementioned principles have been followed without any change and the question deserves to be answered on the applicability of those principles.

(11) Admittedly, family settlement in question was reduced into writing on February 6,1980 while the suit out of which the present appeal arises, was filed by the appellant on July 5,1993. Obviously during this period of more than 12 years rent of said properties Nos. 82-95 was being realised by respondent No. 3 and business of petrol pump being carried by respondent No. 2 to the exclusion of the appellant without any resistance from the appellant. In the light of these salient features and taking note of the law enunciated in T. Krishnaswamy Chetty's case (supra) we are inclined to agree with the view expressed by the learned Single Judge that the appellant has not made out a prima facie case for appointment of a Receiver.

(12) However, it will not be out of place to mention here that besides seeking appointment of Receiver, the appellant in is No. 6035/93 had claimed relief under Order Xxxix Rules 1 & 2, CPC. Respondents 2 & 3 in their joint written statement have admitted that the business of petrol pump was started with Huf funds. In his affidavit respondent No. 2 also admitted that he alone has been Realizing rent from the tenants of properties Nos. 82-95 situated in the revenue estate of Raj Pur Gur Mandi wherein the appellant as per family settlement, was having 33"% share. That be so, interest of the appellant with respect to the rent realised by respondent No. 3 and the business of petrol pump carried by respondent No. 2 needs to be protected pending decision of the suit. Impugned order is completely silent in regard to the relief claimed under Order Xxxix Rules 1 & 2, CPC which was independent of the prayer seeking appointment of a Receiver under Order XI Rule 1, CPC. Thus, the impugned order requires slight modification so as to allow some relief under said Order Xxxix Rules 1 & 2, CPC to the appellant.

(13) For the foregoing reasons, appeal is partly accepted and I.A. 6035/93 is partly allowed. Pending suit respondents 2 & 3 are directed to keep true and accurate accounts of the business of the petrol pump and the rent realised from the aforesaid properties Nos. 82-95 respectively. They are directed to continue placing on the suit record copies of the accounts after every six months regularly. During the pendency of the suit respondent No. 1 is restrained from transferring, alienating, parting with possession or creating any charge on the petrol pump in question in favor of a third party. In the circumstances of the case there will be no order as to costs.