

(1971) 07 AHC CK 0025
In the Allahabad High Court
Case No : Civil Revision No. 34 of 1970

Karuna Shanker Dube

APPELLANT

Vs

Krishna Kant Shukla and Others

RESPONDENT

Date of Decision : 29-07-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 23 Rule 3

Citation : AIR 1972 All 478

Hon'ble Judges : O.P. Trivedi, J

Bench : Single Bench

Advocate : P.S. Dwivedi, for the Appellant; Jagdish Narain and D.N. Srivastava for Opposite Parties Nos. 2 and 5, for the Respondent

Final Decision : Allowed

Judgement

O.P. Trivedi, J.—Plaintiff-opposite party No. 1 Krishna Kant Shukla filed a suit in the Court of the Civil Judge, Lucknow against opposite parties 3 to 5 in respect of certain property situate in the city of Lucknow alleging that they are the co-sharers of this property and claiming determination and declaration of their shares and a decree for partition. During the pendency of the suit Krishna Kant Shukla, the present petitioner, filed an application before the Civil Judge on 11-9-1967 under Order 1, Rule 10, CPC for being made a party-defendant to the suit on the ground that he was a co-sharer in the disputed property. No orders were passed on this application by the Civil Judge and while it was pending on 2-6-1969 the parties to the suit, namely, opposite parties 1 to 5 came to a private settlement and filed a compromise which was accepted by the Court and a decree in terms of the compromise was ordered to be prepared. It is against this order of the Civil Judge that the present revision has been filed.

2. Learned counsel for the petitioner raised one short point: It was argued that the trial Court was bound, having regard to the nature of the suit, to dispose of first the petitioner's application under Order 1, Rule 10, CPC and should not have decreed the suit in terms of the compromise without doing so. It is

submitted that the petitioner's application under Order 1, Rule 10, CPC is still on record undecided. After hearing learned counsel for the parties I am of the opinion that the submission of the petitioner is full of force. The plaint gave a pedigree showing that the disputed property belonged originally to Thakurdin, father of Hublal and it was the ancestral property of the four sons of Hublal, namely, Ram Lal, Kamta Prasad, Saligram and Durga Prasad Dube. According to the family tree given in the plaint itself Karuna Shanker petitioner is one of the grandsons of Saligram deceased. The plaint proceeds with the averment that Saligram had separated from his other three brothers and his share in the disputed house was separately carved out. According to the plaint it is this separate share of Saligram that has been inherited by Karuna Shanker petitioner and on the basis of the separation of Saligram set up by plaintiff-opposite party No. 1 it was claimed that the branch of Saligram had no share in the disputed property and the opposite parties were the only co-sharers. In the application under Order 1, Rule 10, CPC however, Karuna Shanker contested that there was any separation of Saligram with his other brothers and it was maintained on his behalf that the disputed property still continues to be joint family property of the opposite parties and the petitioner. The basis of the plaintiff's claim is the alleged separation of Saligram. Unless the separation of Saligram is proved by the plaintiff it cannot be said that Karuna Shanker is not a sharer in the property. There is a presumption of jointness under Hindu Law and therefore there is no presumption of partition or separation and it has to be proved allude by the plaintiff-opposite party. It is admitted in the plaint itself that at a certain stage the disputed property was the ancestral property of Saligram, ancestor of Karuna Shanker. On the plaint allegations themselves, in the absence of proof of separation set up by the plaintiff Karuna Shanker would be a co-sharer in the property in which case it would appear that Karuna Shanker would possess direct interest in the property and any compromise by which the opposite party sought a declaration of title or status and also partition in respect of the property in respect of Karuna Shanker, a third person to the suit, would be unlawful because such a compromise would be invalid in that it covers the interest of a person not party to the suit. The wordings of Order 23, Rule 3, CPC are :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith....."

The relevant words are "lawful agreement or compromise". In the case of *Malchand Boid and Others Vs. Osman Ali Mandal and Others*, it was observed:

"It is incumbent on the Court to pass a decree in accordance with the agreement or compromise, only if the agreement or compromise is lawful, in other words, if it is enforceable in law. One test may be applied to determine whether the agreement or compromise is lawful; were the parties competent to enter into the full agreement or compromise in order to achieve the purpose they had in view?"

Applying the above test it will appear that the parties to the suit were incompetent to enter into an agreement or compromise in respect of a share which may, upon determination, be found by the Court to belong to Karuna Shanker. In that case A had sued B and C who was a second mortgagee and joined as a party defendant. A and B entered into a compromise whereby A agreed to pay B more than what he was entitled. The Court refused to pass a decree in terms of the agreement on the ground that the compromise was detrimental to the interest of C and it was not therefore lawful within the meaning of this rule. There is yet another consideration and it is this that according to the allegations contained in the application under Order 1, Rule 10, CPC the petitioner Karuna Shanker had been deliberately omitted from the array of parties in the suit. It was alleged that the parties were designing a collusive compromise in the suit in order to harm the interest of the petitioner. These fears which were voiced by the petitioner in his application for implement as far back as on 11-9-1967 came out to be true when the compromise was filed late in June, 1969. The opposite parties have all the time been fighting shy of impleading Karuna Shanker in this suit for a complete and effective determination of the status of the opposite parties including the question of co-sharership of Karuna Shanker. This provides room for the argument that the compromise" was mala fide. In the case of *Hukum Chand v. Raja Ran Bahadur Singh* AIR 1919 Pat 146 it was observed that the Court before recording a compromise should see whether it is bona fide or merely to prevent purchaser from setting up defences open to him and the Court should, refuse to record if compromise is mala fide. I am in respectful agreement with these observations.

3. Learned counsel for the opposite parties referred to certain authorities which may now be noticed. The respondents' argument is that the parties having compromised their disputes it was not open to the Court any more to keep the trial open by permitting implement of the petitioner. The first authority is the case of *B. Raja Rajeswara Muthuramalinga Sethupathi Avergal, Rajah of Ramnad Vs. The Secretary of State for India in Council and Another*, In that case it was held that under Order 23, Rule 3, CPC the Court is bound to pass a decree in terms of the compromise if it is legal and valid and it cannot add a party to the proceedings if the original parties terminated the suit by such a lawful compromise. This dictum so far as it goes is unexceptionable inasmuch as the question in view of the language of Order 23, Rule 3 always is whether the compromise arrived at between the parties to the suit is legal and valid. In the present case, as I have already said, the compromise sought to cover certain share in the property which was claimed by the petitioner. It cannot be said to be a valid compromise unless the Courts found that the separation set up by the plaintiff was factually correct. This ruling therefore must be distinguished on facts. Then there is another case: *Laraiti Vs. Ch. Shiam Sunder Lal and Another* . In that case it was observed that the word lawful in Rule 3 refers to agreements which in their very terms or nature are not "unlawful" and may therefore include agreements which are voidable at the option of one of the parties on the ground

of undue influence, coercion or fraud and it was held that an application by a third party that the compromise between the parties to the suit should not be accepted as it affected his rights acquired by purchase pendent lite and that he should be made a party to the suit should be rejected and a decree in terms of the compromise should be passed. The broad proposition laid down in that case also was that the word "lawful" means and implies that the terms or nature of the agreement is not unlawful. I have already expressed opinion that the terms and nature of the compromise made by the opposite parties cannot be said to be lawful if upon proof the petitioner Karuna Shanker is found also to be a co-sharer. This ruling is distinguishable because in that case the transfer having been made pendent lite was only voidable and not void which is not the case here. Lastly, the learned counsel referred to the case of The Union of India (UOI) Vs. S. Raghbir Saran and Others, . The facts of that case were that a suit was filed by the plaintiffs for recovery of certain amount from the defendant, Union of India. During the pendency of the suit the Union of India offered a certain sum of money in full satisfaction of the plaintiffs' claim which was accepted by the plaintiffs and they applied to the Court to record it. Then the defendant objected to the adjustment being recorded on the ground that it was later discovered that it was procured by fraud. As this plea arose not from the pleadings of the plaintiffs or the admitted case of the parties but from a plea raised by the defendant only it was held that this collateral question need not be gone into by the court and the compromise should be enforced under Order 23, Rule 3, Code of Civil Procedure. In the present case on the other hand, as I have already said, from the plaint allegations themselves some support is received to the petitioner's claim or interest in the property and it cannot be said that the plea raised by the petitioner denying the partition was collateral matter. In fact it was a basic issue in the suit for a decree for declaration and partition. Upon all these considerations I am of the opinion that in the peculiar facts of this case the lower court ought to have first decided the petitioner's application under Order 1, Rule 10, CPC and should have dealt with the compromise only after that was done. As matters stand the revision must be allowed.

4. The revision is accordingly allowed. The order of the Civil Judge dated 2-6-1969 is set aside and the case is remanded to him with the direction that he shall proceed to decide first the application of the petitioner Karuna Shanker under Order 1, Rule 10, CPC and thereafter deal with the compromise according to law. The parties shall bear their own costs of this revision.