
(2012) 03 RAJ CK 0034

In the Rajasthan High Court

Case No : Civil Second Appeal No. 474 of 2006

Mohd. Hussain and Another

APPELLANT

Vs

Saleem and Others

RESPONDENT

Date of Decision : 06-03-2012

Acts Referred:

Citation : (2012) 03 RAJ CK 0034

Hon'ble Judges : Kailash Chandra Joshi, J

Bench : Single Bench

Advocate : Rakesh Arora, for the Appellant; Mishri Lal Chhangani with Mr. Ashok Chhangani, for the Respondent

Final Decision : Dismissed

Judgement

Kailash Chandra Joshi

1. This civil second appeal preferred by appellant-plaintiffs Mohd. Hussain and Mohd. Hasan is directed against the judgment and decree dated 30.09.2005 passed by learned District Judge, Pali in Civil Appeal No. 87/2004, by which the learned lower appellate court allowed the appeal filed by the respondent-defendants and quashed and set aside the judgment and decree dated 09.08.2004 passed by learned Civil Judge (Senior Division), Pali in Civil Original Suit No. 8/2002, by which the learned trial court decreed the suit filed by the appellant-plaintiffs for partition, possession and permanent injunction. The brief facts of the case are that the appellant-plaintiffs filed a suit against the defendant-respondents for partition, possession and permanent injunction. It was averred in the plaint that there is a house situated at Kheradiyon Ka Mohalla, Busi Ki Gali, Pali in the name of plaintiffs' grandfather Ibrahim @ Lal Mohammed. The pedigree of Ibrahim is as under :-

2. It was further averred in the plaint that Ibrahim @ Lal Mohammed and his all three sons are no more. Hence, the appellants and the defendant No.1, who are grandsons of Ibrahim are the common shareholders in the aforesaid house

because no partition has yet taken place. It is also stated that plaintiffs' father executed a release-deed in favour of his brothers Mohd. Shafi and Mohd. Hanif in respect of the house in question. Mohd. Shafi was bachelor and as such having no child. In such circumstances, the share of Mohd. Shafi, which was given by Mohd. Umar (father of the plaintiffs) came back to plaintiffs' father. It was further stated that the plaintiffs are having 1/3rd share in the aforesaid house and accordingly, a decree of partition may be passed and they may be ordered to be given possession of their share.

3. The defendant-respondents filed written statement denying the averments made in the plaint. It was averred that the defendant No.1 and 2 are the only owner of the property in question. It was also averred that Mohd. Umar executed a release-deed on 28.09.1963 in favour of his two brothers, namely, Mohd. Shafi and Mohd. Hanif and the said release-deed was registered on 30.09.1963. Thereafter Mohd. Shafi died. It was averred that since release-deed had been executed by the father of the plaintiffs, therefore, they have no right to claim any share in the property. Hence, it was prayed that the suit may be dismissed.

4. Ex parte proceedings were conducted against the defendant No.4.

5. On the basis of the pleadings of the parties, two issues were framed by the learned trial court and the evidence of the parties was recorded. Plaintiffs Mohd. Hussain and Mohd. Hasan examined themselves as P.W. 1 and P.W. 2 respectively. Defendants Mohd. Saleem and Abdul Shakur examined themselves as D.W. 1 and D.W. 2 respectively. In addition to oral evidence, documentary evidence was also recorded.

6. After hearing the arguments of the parties, the learned trial court decreed the suit in favour of the plaintiffs vide the judgment and decree dated 09.08.2004 and held the plaintiffs entitled for 1/3rd share in the property in question and further held that the sale-deed (Ex. A/2) executed by the defendants No.1 and 2 in favour of the defendant No. 3 will have no adverse effect over the rights of the plaintiffs.

7. Being aggrieved by the judgment and decree passed by the learned trial court, the respondent-defendants preferred an appeal before the learned lower appellate court, which was allowed vide the judgment and decree dated 30.09.2005 and the judgment and decree dated 09.08.2004 passed by the learned trial court were quashed and set aside.

8. Being aggrieved by the judgment and decree passed by the learned lower appellate court, the appellant-plaintiffs have preferred this civil second appeal.

9. The learned counsel for the appellant-plaintiffs contended that the learned lower appellate court has erred in passing the judgment and decree dated 30.09.2005 inasmuch as it has not properly considered the material available on record and the evidence adduced by both the parties. It is contended that the learned first appellate court has erred in reversing the judgment and decree

dated 09.08.2004 passed by the learned trial court. It is contended that the finding of the learned trial court on the issue No.1 was right and correct, by which it was held that since Mohd. Shafi died leaving no legal heir behind him, his share in the property is to be partitioned equally among all his nephews, but the learned first appellate court reversed this finding by holding that since Mohd. Umar, father of the plaintiffs, had already relinquished his rights and given his share to his brothers, the defendants No.1 and 2 are the only persons entitled to the share of deceased Mohd. Shafi. It is contended that this finding is absolutely wrong. The learned counsel for the appellant-plaintiffs further contended that the learned first appellate court has erred in holding that since Abdul Hanif (brother of Mohd. Shafi) died after the death of Mohd. Shafi, hence, as per the table of residuaries in order of succession, the share of Mohd. Shafi goes to Hanif (brother). It is contended that the basis for arriving at this finding is also erroneous. The learned counsel for the appellant-plaintiffs contended that even from the statement of D.W. 1 Mohd. Saleem, it can very well be presumed that Mohd. Hanif died after the death of Mohd. Shafi because D.W. 1 Mohd. Shafi in his cross-examination stated that on the death of Mohd. Shafi, the entire expenditure was incurred by him and his mother.

10. The learned counsel for the appellant-plaintiffs has proposed the following substantial questions of law in the memo of appeal :

- (i) Whether the averment made in the plaint which is not proved by evidence, can be taken into consideration ?
- (ii) Whether the first appellate court is justified in ignoring the statement of plaintiff made on oath which remains uncontroverted or unrebutted ?
- (iii) Whether the first appellate court is justified in giving share in not equally distributing the share among all the nephews when the share holder died intestate ?

11. Per contra, the learned counsel for the respondent-defendants contended that the judgment of the learned first appellate court cannot be said to be erroneous, perverse or against the material available on record because in the plaint itself it has been pleaded that Mohd. Shafi died earlier to Mohd. Hanif and in the evidence it has been stated that Mohd. Hanif died in the year 1987 and Mohd. Shafi died later on. Thus, in view of the variance in the pleadings and the evidence of the parties, the suit cannot be decreed and learned first appellate court rightly reversed the findings of the learned trial court and allowed the appeal of the respondent-defendants.

12. The learned counsel for the respondent-defendants in support of his contentions has relied upon the following judgments :

- (i) Vinod Kumar Arora Vs. Surjit Kaur,
- (ii) Syed and Co. and Ors. v. State of Jammu and Kashmir and Ors.

(iii) Janak Dulari Devi and Another Vs. Kapildeo Rai and Another,

(iv) Surjit Verma VS. Bawa Jung Bahadur [2003 AIHC 252]

(v) Thayammal Vs. K. Subramaniam,

13. I have considered the rival contentions made by the learned counsel for the parties and perused the judgments of the learned trial court as well as the first appellate court so also the judgments cited by the learned counsel for the respondents. It is an admitted fact that there is variance in the pleadings and the evidence of the appellant-plaintiffs and on this basis the learned first appellate court decided the issue No.1 against the appellant-plaintiffs and I see no reason to have a different view than the one taken by the learned first appellate court. It is settled principle of law that when there is variance in the pleadings and the evidence, the suit fails. In the present case, there is no evidence available on record to prove the facts pleaded in the plaint regarding time of death of Mohd. Shafi and Mohd. Hanif. In my considered view, on the basis of the statement of D.W. 1 Mohd. Saleem, it cannot be presumed that Mohd. Hanif died earlier to Mohd. Shafi. No substantial question of law is involved in this appeal. In view of the discussion made hereinabove, this civil second appeal is devoid of any merit and deserves to be dismissed. Accordingly, the same is dismissed and the impugned judgment and decree dated 30.09.2005 passed by learned District Judge, Pali in Civil Appeal No. 87/2004 is affirmed. No order as to costs.