
(1994) 04 MP CK 0037

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 2 of 1993

Naresh Kumar @ Naresh Chandra

APPELLANT

Vs

Balmukund

RESPONDENT

Date of Decision : 25-04-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 5, 2(11)

Citation : (1994) 2 DMC 376

Hon'ble Judges : T.S. Doabia, J

Bench : Single Bench

Advocate : R.A. Roman, for the Appellant; A.M. Naik, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Doabai, J.—One Ramratan had certain properties situated Sarafa Bezar, Lashkar, Gwalior. He had a wife by the name of Achrajbai. Ramratan had in adopted son Balkishaa. Balkishan was a lunatic. This Balkishan was married to one Radhabai. They had an adopted son Naresh. Ramratan died sometime in the year 1940 and Balkishan died in the year 1974. Thus, Radhabai, Naresh and Achrajbai became the legal heirs of Balkishan under the law. It may be mentioned that so far as the factum of adoption of Naresh is concerned was disputed but this issue was settled by this Court in favour of Naresh.

2. As Balkishan was a lunatic--there is no dispute regarding this disability suffered by him his property was managed by trustees consisting of one Banshidhar, brother of Achrajbai, Jagannath Prasad and Bhajanlal. Jagannath Prasad and Bhajanlal died. It is alleged that half of the property was handed over to Naresh and the remaining half was being managed by Achrajbai.

3. Achrajbai executed three Wills, By two Wills, she created two trusts and by third Will she give all her property to Balmukund s/o Banshidhar, This Banshidhar is none else but a brother of Achrajbai.

4. The property which was being managed by Achrajbai, there was a dispute

pending in Court of law. This dispute had commenced during her life time. Achrajbai died in the year 1980. On her death, Balmukund filed an application under Order 22, Rule 3 of the Code of Civil Procedure, 1908. His prayer was that there being a will executed by Achrajbai in his favour, he is entitled to be brought on record as legal representative. This application was opposed by Naresh who laid title to the estate on the ground that he was vaildly adopted son of Balkishan and a grand-son of Achrajbai and therefore, he had a claim to represent the estate of Achrajbai. This application of Balmukund was allowed by the Trial Court. This was set aside by this Court in Civil Revision No. 327/84 and an order was passed to this effect on 24-4-1985. A direction was given that an enquiry be held to the status of the parties.

5. Another fact which has been highlighted is that an application was filed by Balmukund under Order 40, Rule 1 of the Code of Civil Procedure. In this, a prayer was made for the appointment of a receiver. This application was also opposed by Naresh and the Trial Court rejected this application by an order dated 6th of November, 1991. This led to a miscellaneous appeal being preferred in this Court. This bearing No. 143/91. In this miscellaneous appeal, a direction was given that so far as the question as to whether the Will is genuine or not, the same can be decided by the probate Court alone. A mention was, however, made that the status of Balmukund as intermeddler be examined. Thus, when the matter was so remitted back to the Trial Court, the Trial Court came to be conclusion that Balmukund was entitled to be brought on record as intermeddler. It is this order passed on 29th of September, 1992, which is subject-matter of this miscellaneous appeal.

6. The contention raised by the learned Counsel for Naresh is that Balmukund cannot be treated as a legal representative of the estate of Achrajbai and her estate can be represented only by an heir who is duly recognised under the Hindu Succession Act, 1956.

7. A preliminary objection is raised by the learned Counsel for the respondent that this appeal preferred under Order 43, Rule 1 of the CPC is not maintainable. This objection should not detain me for long as it is settled law that there is ample power with this Court to treat a matter which has been filed as an appeal as a revision. Reference in this regard may be made to a decision given by the Supreme Court in The Reliable Water Supply Service of India Vs. Union of India (UOI) and Others, This appeal is, accordingly, treated as a revision u/s 115 of the Code of Civil Procedure, 1908.

8. The statutory provisions on the basis of which the claim of respondent is to be decided may be noticed. Section 2(11) defines the term "legal representative" and it reads as under :--

"2(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who inter meddler with the estate of the deceased and where a party sues or sued in a representative character the

person on whom the estate devolves on the death of the party so suing or sued."

Reliance has again been placed on the provisions of Order 22, Rule 3 of the Code. This provision may also be noticed.

"3, Procedure in case of death of one of several plaintiffs or of sole plaintiff.--(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole-surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

Reference may also be made to the provisions of Order 22, Rule 5 of the Code.

"5. Determination of question as to legal representative.--Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant question shall be determined by the Court;

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any Subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question."

9. From the narration of the facts given above, it becomes apparent that there is a dispute between an heir who is claiming right under a validly enacted law and a person who is claiming his right through a Will. The Will is yet to be probated. The Trial Court has permitted Balmukund to represent as an intermeddler and in doing so it was guided by a decision given between the parties by this Court in Miscellaneous Appeal No. 143 of 1991. The proper course for the Trial Court was to hold a summary enquiry under Order 22, Rule 5 of the Code of Civil Procedure. A decision so taken is relevant only for the purposes of a particular dispute leaving the parties to get final verdict from proper Forums. A decision under Order 22 Rule 5 of the CPC is given with a view to see that proceedings in that particular dispute are conducted in an orderly manner. However, this procedure has not been resorted to in this case. Only the claim of Balmukund to represent the estate and intermeddler has been decided. In the fitness of things as the present appellant is only claiming to be an heir under the Hindu Succession Act, 1956, this question should have been decided under Order 22, Rule 5. In *S. Charanjit Singh and Anr. v. Bharatinder Singh and Ors.*, AIR 1998 Punjab and Haryana 123, there was an inter se dispute between rival legal

representatives. One was claiming under a Will and the other was claiming under the ordinary law of succession. It was observed :--

"In view of this, the proper course to follow is to bring all the legal representatives on record so that they vouchsafe the estate of the deceased for ultimate benefit of the real legal representatives."

10. Thus, without going into the question whether the Will is genuine or not, Balmukund has been permitted to represent the estate of Achrajbai. In doing so, the definition of legal representative as given in Section 2(11) of the CPC has been taken into consideration. Balmukund's right to represent the estate in pending proceedings would no doubt be there if the vide is genuine. Nobody has gone into this question so far. This was most probably because of the decision given by this Court in H.A. No. 143/91. As at present advised, I am not inclined to express any view to the contrary. Balmukund may also continue to represent the estate of Smt. Achrajbai.

11. This appeal is dismissed. Appellant Balmukund shall take steps to get his right established vts-a-vis a Will in a Probate Court at the earliest. If this is not done and no final verdict is given by the Probate Court within a period of six months then an enquiry shall be held by the Trial Court in these proceedings under Order 22, Rule 5. This shall be completed within a period of six months. The result of the enquiry so made under Order 22, Rule 5 would govern the fate of these proceedings. There shall be no order as to the costs.