
(2010) 04 AHC CK 0119
In the Allahabad High Court

Purshuttam

APPELLANT

Vs

B.R.

RESPONDENT

Date of Decision : 19-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2010) 5 AWC 5058

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—One Devi Din was the common ancestor of the parties who had three sons Tulsi, Shyam Nath and Shyam Sunder.

2. Parshottam (since deceased), petitioner herein, claimed himself as son of Tulsi and therefore, he claimed his share in the property left by Devi Din, his ancestor. This issue has been set at rest finally and now no longer is in dispute that the petitioner is son of Tulsi. Shyam Nath died issue-less leaving behind no heirs.

3. The respondents herein represents the branch of Shyam Sunder who instituted suit No. 169 of 1966 against Parshottam giving rise to the present petition alleging that he is the exclusive owner in possession of the property in dispute left by Devi Din in view of the family settlement arrived at between the parties dated 1st of May, 1957. The said plea did not find favour either with the trial Court or with the First Appellate Court. Consequently, the Courts below dismissed the suit and the first appeal by the judgments dated 19th of August, 1968 and 30th of April, 1974 respectively.

4. However, the second appeal No. 684 (2) of 1968-1969 : Shyam Sunder v. Parshottam etc., was allowed by the Board of Revenue by its judgment dated 10.2.1978, impugned in the present petition. It has been held that the said family settlement is binding on the parties, as it has been acted upon. It relied upon judgement and decree passed in the civil suit No. 18 of 1967 filed by

Parshottam's sons for cancellation of the compromise deed dated 1st of May, 1957, wherein the Civil Judge has held that the compromise was valid and binding on the parties and dismissed the suit and the judgment of the trial Court has been confirmed by the District Judge, Azamgarh in appeal. The compromise dated 1st of May, 1957 which was in the nature of family settlement, was accepted and held to be valid and it was declared binding on the parties.

5. To appreciate the controversy involved in the present writ petition, it is apt to notice the background facts of the case in brief. Suffice it to say that the present litigation is fifth litigation between the parties. The parties are litigating since the year 1950.

6. Two suits one being O.S. No. 167 of 1950 was filed by Shyam Sunder and Shyam Nath, the sons of Devi Din, against Parshottam for declaration that he is not son of Tulsi and has got no share in the ancestral properties. The another suit numbered as Suit No. 229 of 1950 was filed by Parshottam against Shyam Sunder for partition of his one third share in the ancestral property left by Devi Din. In these suits, it was held that Parshottam is son of Tulsi and is entitled for one third share in the ancestral properties left by Devi Din. Consequently, O.S. No. 167 of 1950 filed by Shyam Sunder and Shyam Nath against Parshottam was dismissed and the suit No. 229 of 1950 filed by Parshottam was decreed on 22nd of September, 1952. The said decree was affirmed by the First Appellate Court and the Second Appellate Court as well.

7. In execution of the decree passed in O.S. No. 229 of 1950, the parties entered into a compromise. The said compromise deed is dated 1st of May, 1957 and the suit was decided in terms of compromise by providing that it shall form part of the decree.

8. Under the said compromise, certain property was allocated in the share of Parshottam as was mutually agreed by the parties. For the rest of the properties Parshottam agreed that he will have no right, title or interest therein.

9. Thereafter a third suit for declaration being suit No. 138 of 1965, u/s 229 B of the U.P.Z.A. & L.R. Act was instituted by Parshottam against Shyam Sunder in respect of Plot Nos. 46/338, 46/033 and 45/275 situate in village Kodar Azamatpur Tappa Athaisi, Pargana Nizamabad, District Azamgarh. In the said suit initially a written statement was filed by Shyam Sunder disputing the claim of Parshottam by asserting that Parshottam is not son of Tulsi. However, at the subsequent stage, he filed a consented document accepting the claim of Parshottam. The suit was consequently decreed on 31.12. 1965 and it was held that the compromise dated 1st of May, 1957 is final and binding on the parties. This was the third litigation.

10. The fourth litigation being suit No. 169 of 1966 was instituted by Shyam Sunder against Parshottam in respect of the properties which fell in his share under the compromise dated 1st of May, 1957. The present writ petition arises out of this suit and as noticed herein above, the suit was dismissed by the trial

Court and the First Appellate Court as well but has been decreed in the second appeal by the Board of Revenue giving rise to the present writ petition.

11. The fifth suit being suit No. 18 of 1967 was instituted by sons of Parshottam for division of 1/4th share in the entire property disputing and challenging the compromise dated 1st of May, 1957 arrived at between their father Parshottam and other family members. This suit was filed before Civil Court. The said suit was filed on the allegations that the family settlement is invalid and has not been acted upon and as it is an unregistered document. This suit was dismissed by the trial Court by the judgment dated 19th of May, 1968 and the judgment of the trial Court has been confirmed in Civil Appeal No. 426 of 1968: Vindhyachal v. Shyam Sunder and eighteen others by the judgment and decree dated 30th April, 1974. Resultantly, the suit filed by the sons of Parshottam who are petitioners herein stood dismissed, wherein it was held that the compromise dated 1st of May, 1957 is valid and binding on all the parties concerned as it has been acted upon and given effect to and it does not require any registration.

12. Sri B.B. Paul, learned Counsel, in support of the writ petition submits that the impugned judgment passed by the Board of Revenue is a judgment of reversal and it is vitiated for the reasons that it has not taken into consideration the findings recorded by the two courts below, below to it. No substantial question of law as required under amended Section 100 C.P.C. has been framed. Lastly, the principle of res judicata shall not apply in as much as the properties in the earlier litigations were different. He further submits that the finding that the suit is barred by limitation was also recorded by the trial Court but the said finding has not been reversed by the Board of Revenue.

13. Sri Prakash Gupta, learned Counsel appearing on behalf of the plaintiff respondents, on the other hand, submits that the plea with regard to framing of substantial questions of law was not raised before the Board of Revenue nor it has been so raised in the present writ petition. Therefore, the said plea is no longer open to the petitioner. The second appeal before the Board of Revenue was filed under unamended Section 100 C.P.C and at that point of time framing of substantial questions of law in the memo of second appeal was not required. The objection that a substantial question of law has to be framed in a second appeal, was not urged during the course of argument before the Board of Revenue and had it been so urged, the substantial questions of law would have been framed. Non framing of substantial questions of law itself is not sufficient to vitiate the judgment of the Second Appellate Court. Parshottam has died during the pendency of the present writ petition and in his place his sons and other legal heirs have been ordered to be substituted who have already lost the suit No. 18 of 1967 challenging the legality and validity of the compromise dated 1st of May, 1957 and the said decree having become final, it is no longer open to them to dispute the said compromise/family settlement.

14. Considered the respective submissions of the learned Counsel for the parties and perused the record.

15. The learned Counsel for the petitioner has submitted that in view of the decision of AIR 2001 SC 965, Santosh Hazari v. Purshottam Tiwari. and Ors. cases in the same volume on pages 1273; Kulwant Kaur v. Gurdial Singh Mann (dead) by Lrs. and 1720; K. Raj and Anr. v. Muthamma, the judgment is vitiated being in violation of Section 100(4) of C.P.C. as no substantial question of law has been framed.

16. Before advertng to the legal aspect, it may be noted that no such plea has been even whispered in the entire writ petition. The writ petition consists of 18 paragraphs and contains as many as six grounds. Neither in the body of the writ petition nor in the grounds of the writ petition, the petitioner has raised any such grievance regarding non framing of the substantial questions of law. It may be noted that the present writ petition was filed in the year 1978 and the second appeal before the Board of Revenue was filed sometimes in the year 1968-69. At that time, there was no such requirement of law.

17. Section 100 of C.P.C as is in the present form was substituted by Act No. 104 of 1976 w.e.f. 1st of February, 1977. For the first time, it was provided that the second appeal will lie if the High Court is satisfied that the case involves substantial question of law and it shall formulate that question. Sub-section (4) of Section 331 of the U.P.Z.A. & L.R. Act which provides for cognizance of suits etc. under the Z.A. & L.R. Act, says that a second appeal shall lie on any of the grounds specified in Section 100 of C.P.C from the final order or decree passed in an appeal under Sub-section (3), to the authority, if any, mentioned against it in column 6 of the Schedule. By virtue of Sub-section (4) of Section 331, the provisions of Section 100 C.P.C have been made applicable for the purposes of the grounds of second appeal. The learned Counsel for the petitioner submits that in view of subsequent amendment in Section 100 C.P.C, the amended Section 100 C.P.C will be applicable for the purposes of Section 341 (4) of the U.P.Z.A. & L.R. Act and as such the requirement that the judgment should indicate the substantial questions of law, is mandatory. The Apex Court in the case of Nangali Amma Bhavani Amma v. Gopal Krishnan Nair : (2004) 8 SCC 785 has noticed that although the High Court has not framed substantial questions of law in the strict sense but that is not itself sufficient to set aside the judgment of the High Court which is in substantial compliance with the requirement of Section 100 C.P.C.. In that case, the Apex Court noticed that in paragraph 3 of the judgment of the High Court, the High Court had indicated the question of law which arose out of the decision of the First Appellate Court and which required determination u/s 100 of C.P.C..

18. In Kannan v. V.S. Pandurangam and Ors. (S.C.) 2008 (70) ALR 692, the question of non framing of substantial question of law in a second appeal was again cropped up before the Apex Court. The Apex Court after examination of its earlier judgment has held as follows:

14. In the present case, the parties knew well that the question of adverse possession has been pleaded by the defendant appellant and evidence was led

on this issue. Hence no prejudice has been caused to the appellant by non-framing of a substantial question of law by the High Court. In our opinion, the ratio of the decisions on Order XIV, Rule 1, C.P.C. will also apply when a judgment of the High Court is challenged on the ground that a substantial question of law was not formulated by the High Court as required by Section 100(4), C.P.C. In our opinion, this Court should not take an over technical view of the matter to declare that every judgment of the High Court in second appeal would be illegal and void, merely because no substantial question of law was formulated by the High Court. Such an over technical view would only result in remitting the matter to the High Court for a fresh decision, and thereafter the matter may again come up before us in appeal. The judiciary is already overburdened with heavy arrears, and we should not take a view which would add to the arrears.

19. Now, coming to the facts of the present case, it may be noticed that only issue which was debated before the Courts below including the Board of Revenue and in the present writ petition is with regard to the admissibility and legality of the compromise/family settlement dated 1st of May, 1957 arrived at in between Parshottam, the petitioner and the plaintiff respondents. Paragraph 8 of the impugned judgment indicates the legal issue which was involved in the second appeal that .

20. The decision of the appeal now hinges solely on the question whether the compromise dated 1.5.1957 is valid and binding on the parties or not.

21. The above extracted portion from the judgment of the Board of Revenue clearly shows the substantial question of law which was involved for determination in appeal itself before the Board of Revenue. The above portion is indicative of the substantial question of law which was involved in the appeal. Therefore, if formally no substantial question of law has been formulated in the judgment, in my considered view, it amounts only irregularity and the irregularity is not of such a grave nature which may vitiate the judgment itself. Importantly, it may be noticed that the learned Counsel for the petitioner could not point out prejudice, if any, caused to the petitioner for non-framing of substantial question of law. In view of the ratio laid down in the aforesaid two judgments of the Apex Court, on the facts of the present case and taking into consideration that the suit giving rise to the present petition was filed in the year 1966 and the original parties have expired in the course of litigation (Both the plaintiff and defendant have expired . One generation has gone), it would be travesty of justice to remand the matter back for fresh adjudication after framing the substantial question of law. Even otherwise also, in view of the four litigations referred to above between the parties in respect of the properties left by their deceased ancestor Devi Din, no useful purpose is going to be served by asking the parties to reappear before the Board of Revenue for adjudication afresh as the merit of case can conveniently be considered and the issues involved therein may be set at rest in the present writ petition itself. Having said

so, the above argument of the petitioner is, therefore, rejected.

22. Most vital argument urged by the petitioner is that the compromise dated 1st of May, 1957 is not binding on the petitioner who has died during the pendency of the writ petition as the said compromise is not in respect of the properties in question. Elaborating the argument, it was submitted that the agricultural plots were not subject matter of other litigations and therefore, having held so conclusively that the petitioner is son of Tulsi, he is entitled to seek one third share in the properties left by Tulsi's father namely Devi Din.

23. Before advertng to the said question, it may be added that the learned Counsel for the petitioner did not challenge legality and validity of the said compromise dated 1st of May, 1957 on other grounds such as want of registration etc. which were urged before the Courts below. To put it differently, now the only question which was argued with regard to the said compromise is that the said compromise is not in respect of the properties presently in dispute, although the disputed properties originally belonged to Devi Din. There reasons more than one to repel the above contention.

24. Firstly, a finding has been recorded by the Board of Revenue in the impugned order which was not challenged before me that the compromise dated 1st of May, 1957 has been acted upon by the parties including the petitioner. The petitioner, admittedly, entered into the said compromise in the course of execution proceedings of suit No. 299 of 1950. A copy of the said compromise has been annexed as Annexure-3 to the writ petition. It was not the case of the petitioner at any stage of the litigation that the said compromise was not entered into by him. Its clause No. 6 provides that except the property which has been given to the decree holder (Parshottam), he has no concern and will have no concern in future with the other properties. The said clause -6 unequivocally exhibits the intent and purport of the intention of the parties to the compromise deed. In no uncertain term, the petitioner with his wide open eyes has declared that whatever he has got under the compromise is in lieu of his interest, if any, with the other properties. To put it simply, he has relinquished his right, title and interest, if any, in respect of other properties, not allotted to him. The petitioner is bound by his declaration and the terms and conditions of the said compromise deed/family settlement. Not only this, indisputably, the compromise was acted upon and was given effect to as is evident from the judgment and decree passed in suit No. 138 of 1965 filed by the petitioner against Shyam Sunder. The said suit, as noticed herein above, was decreed on 31st of December, 1965 and the compromise/family settlement dated 1st of May, 1957 was held to be valid. There is, thus, clinching evidence on record to show and has been found by the Board of Revenue also that the compromise/family settlement dated 1st of May, 1957 was a valid compromise and was acted upon by the parties. That is why no attempt was made by the petitioner to dispute the said compromise in the present writ petition.

25. Besides above, the suit No. 18 of 1967 was filed by the sons of Parshottam

for division of one fourth share in the entire properties solely on the basis that the properties are ancestral properties and they being members of Hindu Undivided Family are entitled for a share and for cancellation of the compromise/family settlement as well. The said suit has been dismissed and the decree of the trial Court has been confirmed in appeal No. 426 of 1968. The learned District Judge has taken great pains to discuss the each and every aspect of the case while deciding the appeal and has devoted eighteen pages in delivering the judgment. He has noted that after the compromise, Parshottam also executed the sale deeds in respect of the properties which fell in his share. Ultimately, he has reached to the following conclusion:

I, therefore, hold that the compromise did not require registration; that the plffs have failed to prove any negligence or to show that the compromise is unfair, inequitable or unconscionable, that their father has acted upon the compromise and has benefited from the same and that the plffs are not entitled to claim a fresh partition.

26. The above finding of the Civil Court, between the parties will operate as res judicata and will bind the parties as they had agreed upon under the family settlement/compromise dated 1.5.1957.

27. After death of Parshottam, the petitioner, his sons have been substituted through whom the aforesaid suit No. 18 of 1967 was filed. The judgment and decree of the appellate court has attained finality. These sons have stood in the shoes of their father Parshottam (since deceased) and therefore, at any rate, they are bound by the judgment of the Civil Court passed in their suit referred to above. When this was pointed out to the learned Counsel for the petitioner, he could not give any reply except that the properties involved in the suit were different, without specifying any thing further in support of the above plea.

28. The question whether the properties are the same or different in the various litigations referred to above, has been sought to be raised for the first time in the present writ petition. It is a new plea which was not raised earlier. It is essentially a question of fact and no attempt has been made even in the body of the writ petition to show as to how the properties are different. No such plea has been mentioned in the writ petition or in the grounds thereof. Assuming for the sake of argument, that the properties might be different, in my considered view, it is not material for applicability of principles of res judicata. It is the legal title under whom the parties have litigated, is relevant. Parshottam and his sons, both claimed the properties in dispute under the same legal title as being son and grandsons of Tulsi son of Devi Din. Their case is that these properties originally belonged to Devi Din, their ancestor and after death of Devi Din, Tulsi got one third share and after death of Tulsi, Parshottam inherited the share of Tulsi and his sons inherited after death of Parshottam.

29. The issue was settled by way of compromise/family settlement dated 1st of May, 1957 in revenue suit No. 299 of 1950. Again in revenue suit No. 138 of

1965 and by the Civil Court in suit No. 18 of 1967 which was filed by the sons of Parshottam for division of one fourth share in the properties. This being so, it is but obvious that the plea sought to be raised by the petitioner has been conclusively and finally adjudicated upon by the Revenue Courts and Civil Court as well in the suits referred to above. The petitioner in full and final settlement of his claim of one third share in the entire properties left by the deceased Devi Din had agreed to accept the house and the groves as described by the boundaries in the compromise/family settlement deed dated 1st of May, 1957. The petitioner is not entitled to any property beyond it. This being so, I find no merit in the above contention of the petitioner that the said compromise/family settlement will not come in the way of the petitioner, in respect of other ancestral properties. .

30. A feeble attempt was made that the judgment of the Board of Revenue is vitiated as it was found by the trial Court that the suit is barred by time and the said finding has not been reversed by the Board of Revenue and that the judgment of the Board of Revenue being judgment of reversal, it has failed to consider the each and every reasonings given by the Courts below to it. None of the above contentions has any force. A bare perusal of the judgment of the trial Court would show that without assigning any reason, in one sentence, it has observed that the suit is barred by time, under issue No. 4 on the ground that the entries in the name of Parshottam are of more than six years. How the suit is barred by time, could not be substantiated by the learned Counsel for the petitioner. The learned Counsel could not refer any statutory provision or Article or Entry to the effect that such a suit is barred by time. The decision given by the trial Court under issue No. 4 is far from satisfactory. This appears to be the reason for not raising any such grievance in the writ petition. No such ground has been raised therein. Except making a general argument that the Second Appellate Court has not met out the reasonings and findings as were recorded by the First Appellate Court, the learned Counsel for the petitioner could not point out any finding recorded by the First Appellate Court which remained untouched by the Board of Revenue. A reading of the judgment of the Second Appellate Court, as a whole, would show that it has considered the arguments which were put forward by the respective counsel. It is not the grievance of the petitioner that any particular argument though advanced before the Second Appellate Court but has been left unnoticed. No illegality could be pointed out in the impugned judgment.

31. No other point was pressed.

32. It is not out of place to mention here that this writ petition was got dismissed twice in default. It was dismissed in default on 9th of October, 2007 and the matter was restored. Thereafter, the writ petition was dismissed in default on 21st of July, 2009 and was restored on 11th of November, 2009 and has been pending in this Court over about 32 years.

33. Viewed as above, I do not find any merit in the present writ petition. The judgment of the Board of Revenue is well considered judgment and does not call

for any interference in the present writ petition. The writ petition is dismissed with cost of Rs. 10,000/-payable by the petitioners to the contesting respondents i.e. to the heirs of the respondent No. 5 within a period of one month, failing which it will be recovered by the Collector as arrears of land revenue and shall be paid to the contesting respondents.