
(2019) 08 SHI CK 0064

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 233 Of 2007

Rattan Chand (deceased) through his LRs & Anr

APPELLANT

Vs

Rishi Kesh & Anr

RESPONDENT

Date of Decision : 27-08-2019

Acts Referred:

Registration Act, 1908 — Section 17, 17(2)
Evidence Act, 1872 — Section 69

Citation : (2019) 08 SHI CK 0064

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : N.S. Chandel, Vinod Kumar Gupta, Anand Sharma, Karan Sharma

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J

1. Plaintiffs are the appellants who having lost before both the Courts below have filed the instant second appeal.

The parties hereinafter shall be referred to as the "plaintiffs" and the "defendants".

2. The plaintiffs filed a suit for permanent prohibitory injunction on the allegations that they alongwith defendant and other co-sharers are joint owners in possession of the suit land comprised in Khata No. 529, Khatauni No. 595 bearing Khasra Nos. 5836, 5862, 5863, 5864, Mohal Chamba Town-II, H.B. No. 176, Pargna Panjla, Tehsil and District Chamba and the suit land is still unpartitioned between the parties, but the defendant without prior consent of the plaintiffs and other co-sharers started digging the foundations with a clear motive to raise new construction of his house over the best portion of the land in suit and despite requests not to raise any construction, was insisting for the same. Hence, this suit.

3. The defendant resisted and contested the suit by filing written statement-cum-counter claim, inter alia, raising preliminary objections like estoppel and maintainability etc. On merits, it was contended that the revenue entries regarding Khasra Nos. 5836, 5862, 5863, 5864, 5865 measuring 580-2 sq. yards, showing the land in suit to be still joint between the parties are wrong and illegal and the defendant was exclusive owner in possession thereof vide partition deed dated 13.05.1958, which was effected by Shri Narotam, grand-father of the parties. Shri Narotam had two sons, namely, Harua and Parmanand and one daughter Mugti and in the family partition the property/house comprising Khasra Nos. 5893, 5894 was given to Parmanand and after his death the father of the plaintiffs had disposed of the property comprising Khasra Nos. 5893, 5894 in favour of Narain Dass with the consent of Smt. Mugti and Harua, father of the defendant for a sale consideration of Rs.2800/- received by Shri Parmanand out of which Parmanand had purchased another house adjoining house of the defendant. It was further averred that the construction over this land in suit was already completed by the defendant in the year 1991-92 to the knowledge of the plaintiffs and the defendant neither dismantled the old structure nor raised any structure over the same. It was further contended that the notice issued to the defendant was illegal and suit of the plaintiffs was not maintainable as no cause of action arose to them and prayed that the counter claim of the defendant be decreed while the suit of the plaintiff be dismissed.

4. In the replication, the plaintiffs controverted the assertions made in the written statement and reiterated and re-affirmed the averments of the plaint. Likewise the defendant in replication filed to the written statement to the written statement-cum-counter claim denied the assertions made in the said written statement and re-affirmed and reiterated the averments made in his written statement-cum-counter claim.

5. From the pleadings of the parties the learned Trial Court on 15.03.1999 framed the following issues:-

1. Whether the suit property is jointly owned and possessed by the parties as alleged?OPP
2. Whether the plaintiffs have a cause of action to file the present suit?OPD
3. Whether the plaintiff are estopped from filing the present suit by their own act and conduct?OPD
4. Whether the suit is not maintainable in the present form?OPD
5. Whether the revenue entries are wrong and illegal as alleged?OPD
6. Whether the defendants have a cause of action for the counter claim?OPD
7. Relief.

6. After recording evidence and evaluating the same, the learned trial Court dismissed the suit of the plaintiffs constraining them to file an appeal before the

learned first Appellate Court, which too, vide judgment and decree dated 28.02.2007 dismissed the appeal so filed. It is against both these judgments and decrees that the plaintiffs have filed the instant appeal.

7. During the pendency of the appeal, plaintiff No. 1 Rattan Chand died and consequently his LRs were ordered to be brought on record.

8. The appeal came up for consideration on 25.04.2008 and was admitted on the following substantial questions of law.

1. Whether Ext. PW4/A (the partition deed) later on translated and marked as Ext. DW5/A was required to be ignored from consideration for want of registration as required under Section 17 of the Registration Act, 1908 and also for want of payment of required Stamp Duty under Stamp Act?

2. Whether documents Ext.DW4/A (Partition deed), Ext. D-1 (sale deed) could not have been relied for want of required proof of their execution as required under Section 69 of the Indian Evidence Act, 1872?

3. Whether on the basis of evidence and other material available on record more especially jamabandi Ext.P-3 to P-9, admission of DW-4 Duni Chand and the statements of the witnesses of the plaintiffs/appellants it stood conclusively proved that the suit property is in joint ownership and findings to the contrary in favour of the defendant are unsustainable and illegal?

Substantial Questions No. 1 to 3

9. All these questions are intrinsically interlinked and interconnected, therefore, they are taken up together for consideration and are being disposed of by way of a common reasoning.

10. The records reveal that the questions raised in this appeal had, in fact, never been agitated either before the learned Trial Court or before the learned first Appellate Court.

11. The questions being mixed questions of law and facts cannot be permitted to be raised for the first time in the second appeal. In taking this view, I am fortified by the judgment of the Hon'ble Four Judges of the Hon'ble Supreme Court in Banarasi Dass & Ors. vs. Kanshi Ram & Ors., AIR 1963 SC 1165.

12. That apart, even if the partition deed Ext. DW5/A is seen, it is in the nature of family settlement and the same, therefore, does not require to be either registered or stamped under the provisions of the Indian Registration Act or Indian Stamp Act. This was so held by the Hon'ble Supreme Court in Kale and Ors. vs. Deputy Director of Consolidation & Ors., AIR 1976 SC 807, wherein it was observed as under:-

25. It would be seen that when the name of the appellant No. 1 Kale was mutated in respect of the Khatas by the Naib Tahsildar by his order dated December 5, 1955 which is mentioned at p. 4 of the Paper Book respondents 4

and 5 filed an application for setting aside that order on the ground that they had no knowledge of the proceedings. Subsequently a compromise was entered into between the parties a reference to which was made in the compromise petition filed before the Revenue Court on August 7, 1956. A perusal of this compromise petition which appears at pp. 15 to 18 of the Paper Book would clearly show two things - (1) that the petition clearly and explicitly mentioned that a compromise had already been made earlier; and (2) that after the allotment of the Khatas to the respective parties the parties shall be permanent owners thereof. The opening words of the petition may be extracted thus:

"It is submitted that in the above suit a compromise has been made mutually between the parties."

It would appear from the order of the Assistant Commissioner, Ist Class, being Annexure 4 in Writ Petition before the High Court, appearing at page 19 of the Paper Book that the parties sought adjournment from the Court on the ground that a compromise was being made. In this connection the Assistant Commissioner, Ist Class, observed as follows:

"On 11th January 1956 Mst. Har Piari and Ram Piari gave an application for restoration in the court of Naib Tahsildar on the ground that they were not informed of the case and they were aggrieved of his order passed on 5th December 1955. On this application he summoned the parties and an objection was filed against the restoration application. The parties sought adjournment on the ground that a compromise was being made. The parties filed compromise before the Naib Tahsildar according to which two lists were drawn, one of these is to be entered in the name of Kale and the other in the name of Har Piari and Ram Piari."

This shows that even before the petition was filed before the Assistant Commissioner informing him that a compromise was being made, the parties had a clear compromise or a family arrangement in contemplation for which purpose an adjournment was taken. These facts coupled together unmistakably show that the compromise or family arrangement must have taken place orally before the petition was filed before the Assistant Commissioner for mutation of the names of the parties in pursuance of the compromise. The facts of the present case are therefore clearly covered by the authorities of this Court and the other High Courts which laid down that a document which is in the nature of a memorandum of an earlier family arrangement and which is filed before the Court for its information for mutation of names is not compulsorily registrable and therefore can be used in evidence of the family arrangement and is final and binding on the parties. The Deputy Director of Consolidation respondent No. 1 as also the High Court were, therefore, wrong in taking the view that in absence of registration the family arrangement could not be sustained. We might mention here that in taking this view, the High Court of Allahabad completely overlooked its own previous decisions on this point which were definitely binding on it. This, therefore, disposes of the first contention of the learned counsel for the

respondents that as the family arrangement having been reduced into the form of a document which was presented before the Assistant Commissioner was unregistered it is not admissible and should be excluded from consideration.

13. It was otherwise settled law that a settlement between the members of the family should generally be given sanctity and the party should be bound by the same. Reference may be made to the judgment of the Hon'ble Supreme Court in Kale's case (supra), which has consistently been followed by the Hon'ble Supreme Court in Manish Mohan Sharma & Ors. vs. Ram Bahadur Thakur Ltd. & Ors., (2006) 4 SCC 416 and Hari Shankar Singhania and Ors. vs. Gaur Hari Singhania & Ors., (2006) 4 SCC 658.

14. In Hari Shankar's case (supra), the Hon'ble Supreme Court after referring to the various judgments on the issue observed as under:-

42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eyes of law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well being of a family.

43. The concept of 'family arrangement or settlement' and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation etc should not be put at risk of the implementation of a settlement drawn by a family, which is essential for maintaining peace and harmony in a family. Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into ally disputes existing or apprehended and even any dispute or difference apart, if it was entered into bona fide to maintain peace or to bring about harmony in the family. Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in the case of Ram charan v. Girja Nandini.

44. In Lala Khunni Lal v. Kunwar Gobind krishna Narain, the Privy Council examined that it is the duty of the courts to uphold and give full effect to a family arrangement.

45. In Sahu Madho Das and Ors. v. Pandit mukand Ram and Anr. [vivan Bose jagannadhadas and BP Sinha JJ.] placing reliance on Clifton v. Cockburn and William v. William, this Court held that a family arrangement can, as a matter of law, be implied from a long course of dealings between the parties. It was held that ". so strongly do the courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement. "

46. The real question in this case as framed by the court was whether the appellant/plaintiff assented to the family arrangement. The court examined that

"the family arrangement was one composite whole in which the several dispositions formed parts of the same transaction"

47. In *Ram Charan Das v. Girja Nandini devi*, (supra) , this Court observed as follows:

"Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family- the consideration for such a settlement will result in establishing or ensuring amity and good will amongst persons bearing relationship with one another. "

48. In *Maturi Pullaiah v. Maturi narasimham*, this Court held that:

"[T]hough conflict of legal claims in praesenti or in future is generally a condition for the validity of family arrangements, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims, will suffice. Members of a joint hindu family may, to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an arrangement is entered into bona fide and the terms thereof are fair in the circumstances of a particular case, courts will more readily give assent to such an arrangement than to avoid it. "

49. Further in *Krishna Biharilal v gulabchand*, this Court reiterated the approach of courts to lean strongly in favour of family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all. This approach was again re-emphasised in *S. Shanmugam Filial v. K. Shanmugam pillai* where it was declared that this Court will be reluctant to disturb a family arrangement.

50. In *Kale and Ors. v. Deputy Director of consolidation and Ors.* [vr Krishna Iyer, R. S. Sarkaria and S Murtaza Fazal Ali, JJ.] this court examined the effect and value of family arrangements entered into between the parties with a view to resolving disputes for all. This Court observed that:

"By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made the object of the arrangement is to protect the family from long drawn litigation or perpetual strives which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and therefore, of the entire country, is the prime need of the hour.... the courts

have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement. . The law in England on this point is almost the same. "

(emphasis supplied)

51. The valuable treatise Kerr on Fraud at p. 364 explains the position of law:

"The principles which apply to the case of ordinary compromise between strangers do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend. "

Halsbury's Laws of England, Vol. 17, third edition at pp. 215-216.

52. In *KK Modi v. KN Modi and Ors.* , [sujata Manohar and DP Wadhwa, JJ.], it was held that the true intent and purport of the arbitration agreement must be examined - [para 21] Further the Court examined that:

"A family settlement which settles disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of understanding has been substantially acted upon and hence the parties must be held liable to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. "

53. Therefore, in our opinion, technical considerations should give way to peace and harmony in enforcement of family arrangements or settlements.

15. It was further held that even if the family settlement was not registered, it would operate as complete estoppel against the original plaintiff, who is a party to such family settlement.

16. In *Sita Ram Bhama vs. Ramvatar Bhama* (2018) 15 SCC 130, the Hon'ble Supreme Court while referring to Kale's case (supra), observed as under:-

11. Pertaining to family settlement, a memorandum of family settlement and its necessity of registration, the law has been settled by this Court. It is sufficient to refer to the judgment of this Court in *Kale and others vs. Deputy Director of Consolidation and others*, 1976 3 SCC 119. The propositions with regard to family settlement, its registration were laid down by this Court in paragraphs 10

and 11:

"10. In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

11. The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently."

17. As regards the revenue entries, it is more than settled that these entries are only for fiscal purpose and cannot be relied upon to determine the question of title.

18. Now, advertng to the so called admission made by DW4 and the statements of the witnesses of the plaintiffs, these statements nowhere suggest that the suit land is still joint amongst the parties, rather the sale deed Ext.D1, which had

been executed after the partition deed, also clearly proves that the property being sold was given in partition to the predecessor of the plaintiffs.

19. All the substantial questions of law are answered against the appellants by holding that the family settlement was not required to be either registered or stamped under the law.

20. In view of the aforesaid discussion, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.