

(2004) 11 MP CK 0014
In the Madhya Pradesh High Court
Case No : S.A. No. 47 of 1987

Saudrabai and Another (dead) through LRs. Manak Bai and Others APPELLANT

Vs

Seetabai and Others RESPONDENT

Date of Decision : 29-11-2004

Acts Referred:

Transfer of Property Act, 1882 — Section 53A

Citation : (2005) 1 MPLJ 37

Hon'ble Judges : S.K. Gangele, J

Bench : Single Bench

Advocate : G.M. Chaphekar, with D.S. Kale, for the Appellant; Mehta, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gangele, J.

This is plaintiffs" Second Appeal against the judgment and decree dt. 20-11-1986 passed in Civil Appeal No. 157-A/81 by Xth Additional District Judge, Indore, partially modifying the judgment and decree dt. 27-7-1981, passed in C.S. No. 49-A/76.

The appeal was admitted on the following substantial question of law vide order dt. 5-8-1987:

Whether both the lower Courts have committed an error in dismissing the plaintiffs suit without considering the rights of Parvati Bai through whom her daughter, namely the defendants have claimed their right to the disputed property.

It is an admitted fact that during the pendency of the appeal, the appellant had died and her legal representatives were brought on record vide order dt. 21-9-1990. The plaintiffs filed a suit for declaration that they are owners of the

suit property and are entitled to be recorded as "Bhumiswamis" in the revenue records and for permanent injunction against the defendants restraining them from interfering with the possession of the suit property of the plaintiffs. The plaintiffs pleaded that the plaintiff No. 1 is the wife of Kanhaiyalal and plaintiff No. 2 is the son of Kanhaiyalal and father of Kanhaiyalal was Onkar Lal. Kanhaiyalal had two sons namely Ramnarayan and Mangilal Parwatibai was the wife of Ramnarayan, she died in the year of 1973. Parwatibai had two daughters namely Sitabai and Gitabai - defendant No. 1 and 2.

It is pleaded by the plaintiffs that Kanhaiyalal had died in the year of 1927 and after the death of Kanhaiyalal Ramnarayan and Mangilal became the owners of the property of Kanhaiyalal. Ramnarayan had died in the year of 1935. It is mentioned that after his death the name of Parvatibai was also recorded as "Bhumiswami".

It is further pleaded that after the death of Ramnarayan, Parvatibai had relinquished her right in the suit property in favour of the plaintiff No. 2, and left for the place "Atyana" which is her ancestral home. The plaintiffs pleaded that they were using the suit property without any resistance and have perfected their title on the basis of adverse possession and relinquishment of right by Parvatibai.

Respondent No. 1 and 2 filed a written statement and denied the pleadings of the plaintiffs. They have specifically denied that Parvatibai relinquished her right in favour of the plaintiffs. It is said that as the family was a joint one, the members are entitled to equal rights in the property. The name of Parvatibai was recorded in the Revenue Records throughout upto her death, she used to go to the place and after her death, the defendants' name were recorded in the Revenue records after mutation.

The learned trial Judge has framed three issues:

- (1) Whether after the death of Ramnarayan, his widow Parvatibai relinquished her right in favour of the plaintiffs and went away?
- (2) Whether the plaintiffs have perfected their title on the basis of adverse possession? And
- (3) Whether in view of the Hindu Succession Act, 1956 the plaintiffs became the owner of the land?

All the issues were negatived by the trial Court. However, it partially decreed the suit of the plaintiff. It has been held that the plaintiffs are not entitled to record their names as owners over the suit property.

Against the judgment and decree the plaintiffs filed an appeal. The learned Appeal Judge dismissed the appeal and also set aside the judgment and decree of the trial Court with regard to grant of 1/3rd share in the disputed property to the plaintiffs. Consequently, the whole of the suit of the plaintiffs was dismissed.

The second appeal was admitted on a new substantial question of law. This question was neither raised before the trial Court nor before the appellate Court. No issue was framed on this substantial question of law before the trial Court. However contrary to this, it is specifically pleaded in the plaint that Parvatibai has relinquished her right in the suit property in favour of the plaintiffs, which itself amounts to an admission of the plaintiffs that Parvatibai had a right in the property.

It is also clear from para 5 of the judgment of the First Appellate Court that no such argument was raised before the learned First Appellate Court. The pleas which were raised by the learned counsel for the appellants have been mentioned by the learned Appeal Judge in para 5 and 6 of the judgment which is as under:

The plaintiffs' learned counsel vehemently argued that the trial Court has not minutely scanned the evidence on record. The plaintiffs have proved that after the death of Ramnarayan, Parwatibai relinquished all her rights in the disputed property and went away to live with her parents in village Attyana. According to him, it is an admitted fact that thereafter she never came back to village Depalpur, she died in Attyana, she married her both the daughters in Attyana. She never claimed any right of the disputed land from the plaintiffs nor they ever gave her any share.

In the alternative he strongly canvassed that the plaintiffs have successfully proved that since 1935, they are in adverse possession of the disputed land and have thus perfected their title therein. He commented that the trial Court is misled by this wrong notion that there was never be adverse possession of a co-owner. According to him even co-owner can be in adverse possession against another co-owner. If one co-owner is in exclusive possession and enjoyment of the property within the knowledge of the other co-owner so as to constitute ouster, he becomes owner by adverse possession. For this proposition, he has relied on *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, . Relying on *Mst. Kamlabai vs. Shivshankaraiya*, AIR 1958 SC 314

He further contended that a Hindu widow can surrender her rights in the property in favour of any other heir.

It is specifically mentioned in para 14 of the judgment that "no other point is pressed before me". In these circumstances, it has to be seen whether for the first time a plea can be raised in a second appeal as a substantial question of law, which has been framed in the present appeal.

The learned counsel for the appellants has submitted that pure question of law can be raised in the second appeal for the first time. He further submitted that there are pleadings in the plaint with regard to title and ownership of the plaintiffs over the suit property. He has further submitted that Ramnarayan, husband of Parvatibai died in the year 1935 and at that time only male surviving member of family had a right in the property and Parvatibai had no right in the

property. The property came in the ownership of Mangilal. Hence this is a pure question of law which can be raised at any time. The learned counsel relied on Nagubai Ammal and Others Vs. B. Shama Rao and Others, :

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.

The learned counsel has further relied on Bhagwati Prasad Vs. Shri Chandramaul, . He has made specific reliance on the following para of the judgment.

If a plea is not specifically made and yet it is covered by an issue by implication involved by the parties know that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleading would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to read evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

He has also relied on Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, . Learned counsel also relied on Union of India (UOI) Vs. Motilal Padampat Sugar Mills Co., (P) Ltd., , The State of Rajasthan vs. Rao Raja Kalyan Singh (dead) by L.R.S., AIR 1979 SC 2018, Rangubai Vs. Laxman Lalji Patil, .

From the perusal of the above case laws it is clear that although a specific plea has not been raised in the proceedings, but the parties went on trial with full knowledge and had opportunity to adduce their evidence, and fully availed the said opportunity. Hence not raising of the said plea is an irregularity, has not resulted in any prejudice to the parties. In my opinion this is the gist of the case mentioned by the learned counsel for the appellant. It has specifically been held

in para 10 of the judgment in Bhagwati Prasad Vs. Shri Chandramaul, as under:

But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties but where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did they lead evidence about it? if it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter.

To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

Contrary to the submission of the learned counsel for the appellant, learned counsel for the respondents submitted that no such plea can be taken in the second appeal for the first time because the defendant respondent had no opportunity to rebut the claim. This is a mixed question of fact and law. He relied on following decisions of the Ram Kumar Agrawal and Another Vs. Thawar Das (Dead) Through Lrs., :

Plea u/s 53A of the Transfer of Property Act raises a mixed question of law and fact and therefore cannot be permitted to be urged for the first time at the stage of second appeal.

Learned counsel relied on Sri Babu Ram Alias Durga Prasad Vs. Sri Indra Pal Singh (Dead) by Lrs.,

In second appeal u/s 100 the High Court has no jurisdiction to give a finding on an issue which was not present in the trial Court. So far as the finding as to a new contract is concerned, there was no issue or evidence. The evidence was to the contrary. Accordingly the findings would be liable to be set aside.

Learned counsel further relied on Union of India Vs. E.I.D. Parry (India) Ltd.,

The suit was filed for the recovery of excess demurrage allegedly charged by the appellant from the respondent. The claim depended upon Goods Tariff Rules, specially the Rule quoted above, which authorises the respondent to claim damages in respect of the entire block of wagons supplied to a party who does

not empty those wagons at the siding within the time permitted for that purpose. There was no pleading that the Rule upon which the reliance was placed by the respondent was ultra vires the Railways Act, 1890. In the absence of the pleadings to that effect, the trial Court did not frame any issue on that question, the High Court of its own proceeded to consider the validity of the Rule and ultimately held that it was not in consonance with the relevant provisions of the Railways Act, 1890 and consequently held that it was ultra vires. This view is contrary to the settled law that a question, which did not form part of the pleadings or in respect of which the parties were not at variance and which was not the subject matter of any issue, could not be decided by the Court. The scope of the suit was limited. The pleadings comprising of the averments set out in the plaint and the defence put up by the present appellant in their written statement did not relate to the validity of the rule struck down by the High Court. The High Court therefore travelled beyond the pleadings in declaring the Rule to be ultra vires. The judgment of the High Court therefore, on this question can not be sustained.

The Hon"ble SC in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs.,

At the hearing of a second appeal the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law not earlier formulated by it, is not taken away subject to the twin conditions being satisfied. (1) the High Court feels satisfied that the case involved such question, and (ii) the High Court records reasons for its satisfaction.

It is clear from the above principle of law that a mixed question of fact and law cannot be agitated for the first time in a Second Appeal.

Now from the evidence and facts on record of the case, it is to be seen whether the defendants had an opportunity to rebut the claim of the plaintiff which has been put forth by them in the Second Appeal. Nowhere in the plaint or in the evidence, the plaintiffs have submitted that Parvatibai had no right in the said property. Contrary to this, they have pleaded in para 10 of the plaint that Parvatibai had relinquished her right in the property in favour of the plaintiff No. 2 which itself is an admission that the defendants had a right in the property. The plaintiffs also filed the Khasra entries right from 1935 upto 1975 upto the death of Parvatibai. In all of the Khasra entries, the name of Parvatibai has been mentioned.

21A. The plaintiff entered into the witness box and his evidence has been recorded as P.W. 4. In para 20 of his cross-examination, he has specifically submitted that he had personally seen the entries with regard to name of Parvatibai in the year 1940 and inspite of that he did not take any steps for

changing the entries in the Tehsil Office. In para 12 he has also admitted that after the death of Ramnarayan, the name of Parvatibai was recorded. But he had not taken any steps to delete the name of Parvatibai upto the filing of the suit. From the above evidence of the plaintiff, it is clear that he had accepted the right of Parvatibai in the property and it can safely be inferred from the above evidence and pleadings that the plaintiff has waived his right of property in favour of Parvatibai. There is also an evidence of D.W. 3 Sitabai, the daughter of Parvatibai. She has deposed in para 10 of her statement that her mother asked about the possession in the property. Mangilal said that she has to reside here, means along with him.

The learned appellate Court in para 10 of the judgment has held as under:

Marshalling this evidence the trial Court has rightly held that the story of surrender by Parwatibai is improbable and cannot be relied on. Further it is pertinent to note that till her death in 1973, her name continued to remain in the village papers as co-owner of the disputed land. If she would have surrendered her right in 1935, plaintiffs would have moved the Tahsil authorities, to delete her name from the khata and khatoni as co-owner. But till the defendant No. 1 moved the petition for partition they kept mum. Their utter silence is indicative of the falsity of the above plea of Parwatibai's surrender. I find that the trial Court was rightly decided this issue against the plaintiff, hereby confirm that finding.

I have recorded these findings of which may constitute waiving of rights of property by the plaintiff in favour of Parwatibai, only to show that whether any prejudice will be caused to the respondent defendant if the appellant be permitted to raise the substantial question of law which has been formulated for the first time in this present appeal.

The Hon'ble Supreme Court in Commissioner of Customs, Bombay Vs. Virgo Steels, Bombay and Another, Relying on the earlier judgments of the Supreme Court Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , S. Raghbir Singh Gil vs. Gurucharan Singh Tohra, 1880 Supp. SCC 53, Krishan Lal Vs. State of Jammu & Kashmir, , Martin and Harris Ltd. Vs. Vith Additional District Judge and Others, and judgment of Privy Council Vellayam Chettiar vs. Govt. Province of Madras, 1947 P.C. 147 held as under:-

From the ratio laid down by the Privy Council and followed by the Court in the above cited judgments, it is clear that even though a provision of law is mandatory in its operation, if such provision is one which deals with the individual rights of the person concerned and is for his benefit, the said person can always waive such a right.

It is clear from the above principles of law and facts and circumstances of the case that question of law framed in the present case is not a pure question of law. It is a question of fact and law and if it be permitted to be raised for the first

time in the appeal, the rights of the defendant - respondent will be affected adversely and she will be prejudiced because she had no opportunity to rebut the same.

On the basis of above findings I am declined to answer the question of law and hold that the question of law which has been framed in the present appeal does not arise in the facts and circumstances of the case. Consequently, the appeal fails and is dismissed with costs.

The plaintiff has to bear the costs throughout.