
(2007) 08 AHC CK 0041
In the Allahabad High Court
Case No : Second Appeal No. 1450 of 1975

Sheva Ji and Others

APPELLANT

Vs

Bajnath Singh and Others

RESPONDENT

Date of Decision : 13-08-2007

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 110, 97(2)

Citation : (2011) 114 RD 186

Hon'ble Judges : S.P. Mehrotra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.P. Mehrotra, J.—List has been revised. Learned Counsel for the parties are not present.

2. As the second appeal is an old one being of the year 1975, the Court is proceeding to pass appropriate orders in the second appeal.

3. It appears that a suit being suit No. 468 of 1970 was filed by the plaintiffs-appellants against the defendants-respondents, inter alia, seeking decree for cancellation of sale-deed dated 27.12.1969 executed by the defendant-respondent No. 2 (defendant second set in the suit) in favour of the defendant-respondent No. 1 (defendant first set in the suit).

4. It was, inter alia, alleged in the said suit that the disputed land were the "Khudkasht" of the plaintiffs, defendant second set and defendant third set in the said suit before abolition of Zamindari, and after the abolition of Zamindari, the disputed land were their "Bhumidhari" and they were in possession of the disputed land in proportion to their shares in the same.

5. It was, inter alia, further alleged in the said suit that the share of the defendant second set in the land included in Schedule "A" was 1/19, in Schedule "B" 1/8, and in Schedule "C" she had no share.

6. It was, inter alia, further alleged in the said suit that the defendant second set executed sale-deed dated 27.12.1969 in favour of the defendant first set, which was void as the defendant second set had no right to sell the property of Schedule "C" and she had executed the sale-deed of the property included in Schedule "A" and Schedule "B" more than her share therein; and that the sale-deed was without consideration and it was obtained by fraud.

7. The defendant first set and the defendant Nos. five and six filed written statements in two sets. The defendant Nos. 2, 3 and 4 did not file any written statement, and the suit proceeded ex-parte against them.

8. The defendant first set in his written statement, inter alia, alleged that the share of the defendant second set in the land included in Schedule "A" was 1/16, and not 1/19; and that the share of the defendant No. 2 in the land included in Schedule "B" was 1/4 and not 1/8; and that the defendant No. 2 had 1/4th share in the land included in Schedule "C" as well; and that the defendant No. 2 had been in possession of her said shares, and she executed sale-deed in respect of her said shares; and that the defendant No. 1 was in possession of the land included in the sale-deed from the date of execution of the sale-deed.

9. The defendant Nos. 5 and 6 in their written statement, inter alia, alleged that the share of the defendant No. 2 was 1/16 in the land included in Schedule "A" and 1/4 in the land included in Schedule "B" and 1/4 in the land included in Schedule "C", and that the defendant No. 2 had been in possession thereof; and that the defendant No. 2 executed the sale-deed in respect of her share and put the defendant No. 1 in possession thereof.

10. The Trial Court framed the following issues:

1. Whether this Court has got no jurisdiction to try the suit ?
2. Whether the suit is under-valued and C.F. paid in insufficient ?
3. Whether the sale-deed dated 27.12.69 is liable to be set aside as alleged in para 6 of the plaint ?
4. Whether the suit is barred by time?
5. Whether the suit is barred by estoppel ?
6. To what relief, if any, are the plaintiffs entitlement ?

11. The Trial Court by its judgment and order dated 30.4.1973 dismissed the said suit of the plaintiffs with costs.

12. As regards Issue Nos. 1 and 2, the same were decided as preliminary issues by the Trial Court by its order dated 2.5.1972.

13. As regards Issue Nos. 3 and 5, the Trial Court held that the plaintiffs were estopped from denying the fact that the share of the defendant No. 2 in the property included in Schedules "A", "B" and "C" was 1/16, 1/4 and 1/4,

respectively; and that the defendant No. 2 had executed the impugned sale-deed only to the extent of her share in the disputed property and not more.

14. As regards Issue No. 4, the Trial Court held that the suit was not barred by time.

15. As regards Issue No. 6, the Trial Court held that the plaintiffs were not entitled to any relief.

16. In view of the said findings, the Trial Court, as mentioned above, dismissed the said suit of the plaintiffs with costs.

17. Against the said judgment and decree dated 30.4.1973 passed by the Trial Court, the plaintiffs filed appeal being Civil Appeal No. 110 of 1973.

18. The Lower Appellate Court by its judgment and order dated 2.6.1975 dismissed the said Civil Appeal No. 110 of 1973 with costs.

19. On a consideration of the material on record, the Lower Appellate Court upheld the findings recorded by the Trial Court, and held that the defendant No. 2 had 1/16th share in the land included in Schedule "A", 1/4th share in the land included in Schedule "B" and 1/4th share in the land included in Schedule "C".

20. Thereafter, the plaintiffs filed the present Second Appeal.

21. The present second appeal was admitted by the order dated 29.10.1975. Therefore, in view of the provisions contained in Clause (m) of sub-section (2) of section 97 of the CPC (Amendment) Act, 1976, the present second appeal would be governed by the provisions of section 110, as the same stood prior to its substitution by the said Amendment Act with effect from 1.2.1977.

22. During the pendency of the pre-sent second appeal, it appears that the plaintiffs-appellants No. 8 and 9 expired. However, no substitution application was filed for bringing on record the respective heirs and legal representatives of the plaintiffs-appellants No. 8 and 9.

23. In the circumstances, the Court passed the following order dated 16.5.2007:

A perusal of the order dated 6.11.1986 shows that on the said date the learned Counsel for the plaintiffs-appellants informed the Court regarding the death of the plaintiffs-appellants Nos. 8 and 9. The Office Report dated 12.4.2007/23.4.2007/ 10.5.2007 shows that no substitution application has as yet been filed for bringing on record the heirs and legal representatives of the plaintiffs-appellants Nos. 8 and 9.

In the circumstances, the second appeal at the instance of the plaintiffs-appellants Nos. 8 and 9 stands abated.

This fact will be brought to the notice of the Court at the time of hearing of the second appeal.

The appeal will now be listed for hearing in due course.

24. It is thus, evident that the second appeal at the instance of the plaintiffs-appellants No. 8 and 9 has stood abated.

25. Question arises as to whether the second appeal can still be heard and decided on merits at the instance of the remaining plaintiffs-appellants, namely, plaintiffs-appellants No. 1 to 7 or as to whether the second appeal is liable to be dismissed in view of the abatement of the second appeal at the instance of the plaintiffs-appellants No. 8 and 9.

26. Having regard to the nature of the pleadings of the parties and the issues involved in the suit and keeping in view the nature of the decree passed by the Trial Court, which was upheld by the Lower Appellate Court, I am of the opinion that in view of the abatement of the second appeal at the instance of the plaintiffs-appellants No. 8 and 9, it is not possible to proceed to hear and decide the second appeal on merits at the instance of the remaining plaintiffs-appellants, namely, plaintiffs-appellants No. 1 to 7, as the same will lead to contradictory decrees in the same suit in regard to the same subject-matter.

27. This is because, the second appeal at the instance of the plaintiffs-appellants No. 8 and 9 having abated, the decree of the Trial Court dismissing the suit of the plaintiffs-appellants, which was upheld by the Lower Appellate Court, has become final as against the plaintiffs-appellants No. 8 and 9. Now, if this Court proceeds to hear the second appeal at the instance of the remaining plaintiffs-appellants, namely, plaintiffs-appellants No. 1 to 7, and decides the second appeal on merits, and allows the second appeal, sets aside the judgments and decrees passed by the Courts below, and decrees the suit of the plaintiffs, the same will, evidently, lead to contradictory decrees in the same suit in regard to the same subject-matter.

28. Reference in this regard may be made to the decision of this Court in *Ram Gopal and others v. Bhuluwa and others*, 2007 (1) ALJ 639. and the case-law cited in the said decision.

29. In the said decision in *Ram Gopal* case (*supra*), this Court laid down as under (paragraph 31 of the said ALJ):

31. It is settled" that in case, an appeal at the instance of one or more of the appellants stands abated on account of failure to bring their heirs and legal representatives on re-cord, the entire appeal stands abated if deciding the appeal in favour of the remaining appellants would read to inconsistent decrees in the same suit.

30. In the circumstances (*sic*) I am of the opinion that the view of the statement of the second appeal at the instance of the plaintiffs-appellants No. 8 and 9, the second appeal at the instance of the remaining plaintiffs-appellants, namely, plaintiffs-appellants No. 1 to 7 cannot be proceeded with and decided on merits, and, therefore, the second appeal is liable to be dismissed in entirety.

31. The second appeal is accordingly dismissed in entirety with costs.