(1997) 03 P&H CK 0038

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 2120 of 1979

Smt. Multi Devi — APPELLANT

Vs

Amar Singh and Another — RESPONDENT

Date of Decision : 10-03-1997

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11

Citation : (1997) 117 PLR 131

Hon'ble Judges : B. Rai, J

Bench : Single Bench

Advocate : Mani Ram, for the Appellant; P.C. Mehta and R.N. Lohan, for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

B. Rai, J.—This is plaintiffs Regular Second Appeal against the judgment and decree, dated February 23, 1979, of the learned Additional District Judge (II), Hissar, dismissing the appeal of the plaintiff and affirming the judgment and decree, dated June 1, 1978 of the Court of Senior Subordinate Judge, Hissar.

2. Brief facts of the case are that Smt. Multi Devi had filed a suit seeking perpetual injunction against defendant No.2 that he be restrained from making the payment of the provident fund etc. to defendant No.1 and in the alternative, a decree for mandatory injunction directing defendant No.1 to hand over the amount of provident fund and gratuity to her after receiving the same from the State of Haryana, She alleged that she is daughter of the brother-in-law of deceased Chandu Ram. Chandu Ram was working as Peon in the office of Deputy Commissioner, Hissar, Chandu Ram executed a registered Will, November 6, 1974 bequeathing his entire estate in favour of the plaintiff; that she being heir of Chandu Ram is entitled to get the amount of provident fund and gratuity of said Chandu Ram; that defendant No.1 alleges himself as nominee of Chandu Ram for getting the provident fund; and that in earlier Suit No. 142 of 1975 between the plaintiff and Amar Singh defendant No.1 etc. and decided in appeal

on August 27, 1976, Amar Singh defendant has been declared as nominee of Chandu Ram. It was further pleaded that in any case the plaintiff is entitled to get the amount of provident fund and gratuity from Amar Singh defendant after he receives the same from the Government as she is heir of Chandu Ram on the basis of Will that notice u/s 80 of the CPC was served upon defendant No.2 but to no effect. Hence, she filed the suit for perpetual injunction and in the alternative for mandatory injunction, as mentioned earlier.

3. The suit was contested by Amar Singh. He denied that Multi Devi is heir of Chandu Ram deceased on the basis of Will or otherwise. He claimed himself to be a nominee of Chandu Ram and, thus, was entitled to claim the amount of provident fund etc. for himself. It was also pleaded that the suit was barred by principles of res judicata and also under Order II, Rule 2, Code of Civil Procedure. He also raised the objection that the plaint was not properly valued for the purpose of court-fee and jurisdiction that the suit was not maintainable in the present form; and in notice u/s 80, Code of Civil Procedure, served by the plaintiff on defendant No. 2, he was not a party. On these allegations, he prayed for dismissal of the suit.

4. Pleadings of the parties gave rise to the following Issues:

1) Whether the deceased Chandu Ram has left any valid will in favour of the plaintiff? OPP

2) If issue No. 1 is proved whether the plaintiff is entitled to recover the amount of gratuity and provident fund? OPP

3) Whether there was any valid nomination for the amount in favour of defendant No. 1, if so to what effect ? OPD(1)

4) Whether the notice u/s 80 C.P.C. is not valid? OPD (2)

5) Whether the suit is barred by res judicata? OP Parties

6) Whether the suit is barred under Order 2 Rule 2 CPC? OPD (1)

7) Whether the suit is not valued correctly for the purpose of court-fee and urisdiction? OPD

8) Whether the suit is not maintainable in the present form? OPD (Onus objected to)

9) Relief.

5. In view of the findings recorded in the earlier suit (No. 142 of 1975) and after considering the evidence led by the parties, under Issue No.1 it was held that the factum and validity of the Will Copy Exhibit P1 executed by Chandu Ram in favour of the plaintiff was not contested whereby Chandu Ram had bequeathed his entire estate in favour of the plaintiff to the exclusion of all heirs and relations and a finding was returned that Chandu Ram had executed a valid Will in favour of the plaintiff in respect of his entire estate. Issue No. 3 was not contested

before the trial Court as in the earlier suit Araar Singh defendant was held to be validly appointed nominee in the relevant form by Chandu Ram in respect of provident fund amount and recorded a finding that there is valid nomination in respect of the amount of provident fund lying in the account of Chandu Ram and he is entitled to receive the said amount from the State Government as nominee of Chandu Ram. Under Issue No. 5, it was held that the suit was barred by principles of res judicata and under Issue No. 6, the suit qua defendant No. l was held to be barred under Order II, Rule 2, Code of Civil Procedure. Under Issue No. 2, it was held that subject to the finding on Issue No. 5 being in favour of the plaintiff, the plaintiff is entitled to recover the amount of the provident fund etc. from, Amar Singh defendant. Issues 4, 7 and 8 were taken up together. It was held that valid notice u/s 80, Code of Civil Procedure, was served by the plaintiff on defendant No. 2, that the plaint was properly valued for the purposes of court-fee and jurisdiction; and that the suit was maintainable in the present form.

In view of the findings on Issues 5 and 6, the suit of the plaintiff against defendant No. 1 was dismissed. It was further held that defendant No. 2 is bound to pay the amount in question to defendant No. 1 who is the nominee of Chandu Ram deceased. The suit against defendant No. 2 was dismissed. Consequently, the entire suit was dismissed with costs.

6. Neither plaintiff Smt. Multi Devi nor Amar Singh defendant No. 1 were satisfied with the judgment and decree, dated June 1, 1978 of the Senior Subordinate Judge, Hissar. Smt. Multi Devi filed Civil Appeal No. 100-CA of 18.7.78, while Amar Singh defendant No. 1 filed Cross-Objections No. 157-CA of 7.10.78. As the Appeal and Cross-Objections were directed against the same judgment and decree, dated June 1, 1978, both these were heard and dismissed by the learned Additional District Judge (II), Hissar, vide judgment and decree, dated February 23, 1979. Hence, this Regular Second Appeal at the instance of Multi Devi, unsuccessful plaintiff, as indicated in the opening paragraph of this judgment.

7. I have heard the learned counsel for the parties and have carefully gone through the record. Before me, the execution of valid Will Copy Exhibit PI by Chandu Ram bequeathing his entire estate in favour of Multi Devi plaintiff was not disputed. It was also not disputed that Amar Singh was nominated by Chandu Ram to receive the amount of provident fund and gratuity. It was also not disputed that Multi Devi filed Civil Suit No. 142 of 1975 against Amar Singh which was dismissed. Appeal filed by Multi Devi and Cross-Objections filed by the defendants were also dismissed. It was pointed out by the learned counsel for the appellant that while recording finding on Issue No. 2, the trial Court in paragraph 12 of its judgment, held that the plaintiff is beneficial owner of the amount of provident fund etc. on the basis of Will executed in her favour by Chandu Ram and Amar Singh defendant as nominee can only collect the said amount for the benefit of the plaintiff. In paragraph 13 thereof, it was held that in this situation subject to the finding on Issue No. 5 being in favour of the

plaintiff, the plaintiff was entitled to recover the amount of provident fund etc. from Amar Singh defendant. It was argued that in view of these firm findings, the suit of the appellant could not be dismissed. Similarly the first appellate Court equally erred in law in affirming the judgment and decree of the trial Court. It was emphasised that once the trial Court came to the conclusion that Chandu Ram had executed a valid Will bequeathing his entire estate in favour of the appellant, Amar Singh being nominee of Chandu Ram could only receive the amount of provident fund and gratuity of Chandu Ram and could not appropriate for himself. He was bound to hand over the same to the appellant, she being the legatee under the Will. In support of his contentions, he was placed reliance on Koruprolu Talupulu Vs. Dasetti Narasamma and Others, , M. Malati and Others Vs. M. Dharma Rao and Another, and Hardev Kaur Vs. Jodh Singh, . In Koruprolu Talupulu''s case (supra), the learned judge of the Andhra Pradesh High Court relying on In Re: Goods of Stanley Austin Cardigan Martin, , "held that, "that would not be an asset of the deceased in the hands of the nominee. It is the property belonging to the nominee. Admittedly, the respondent was the nominee of the Provident Fund. The Provident Find amount which he got after the death of the deceased would be his and could not be treated as an asset of the deceased in the hands of the respondent." It was further observed that "Assuming, therefore, that the house was constructed out of this amount, even then that house docs not belong to the deceased." Therefore, this authority is not of any help to the appellant. In Malati''s case (supra), a Division Bench of the High Court, interpreting the provisions of Provident Funds Act, 1925 after scanning various decision of Orissa and other High Courts held that, "The legal position is therefore well settled that the provident fund amount received by the nominee is this case vests absolutely in her to the execution of any other heir." It was further held therein that, "Apart from the legal position, from the point of view of social justice, there also appears to be good reasons in support of such a view. The depositor is called upon to make such deposits with some personal hardships and sacrifice, so that at the end of his service the money may be available for such use for which it was primarily intended. He may place the funds in the hands of such heirs or dependents or even a stranger who is in his opinion, can make the best use of the funds for such purposes as he desired. The object of the depositor is likely to be frustrated in case the fund is made available for distribution like any of his other assets amongst his heirs." This decision was rendered while interpreting the provisions of the Provident Funds Act, 1925 and rules framed thereunder. In the instant case, the interpretation of the provisions of the Provident Funds Act, 1925 or rules framed thereunder is not in question. Therefore, this authority on fact is not applicable to the case in hand. In Smt. Hardev Kaur''s case (supra) in paragraph 17 of the report, it was held, "That provident fund can be disposed of by will is also a view of Division bench of Walmsley and Chakravarti, JJ. in Kalisadhan Mitra and Another Vs. Prafulla Chandra Mittra, . In that case, a person holding a deposit in the Railway Provident Fund filed a declaration in favour of a person who in the event of his death was entitled to receive payment, and it was added by the subscriber that

"I make this my will so far as regards such deposit". It was held that the rules of the Fund did not prevent a declaration from being treated as a will. Apart from the rule on which Mr. Alma Ram has relied that the money becomes payable to a dependant if there is no nomination, there is no provision in the relevant rules to suggest that the deceased officer did not have disposing power over his provident fund. Nor do we see our way to accede to his submission that the widow is at any rate entitled to the benefit of the provident fund under Sub-section (2) of Section 3 of the Act. The observations in some of the rulings that the provident fund is to be administered in accordance with the relevant rules, do not preclude the legal right of a subscriber to dispose it by a will." In Smt. Hardev Kaur''s case (supra), the provisions of the Provident Funds Act, 1925 and Defence Services Officers Provident Fund Rules were under consideration before the Division Bench of this Court which have no role to play in the case in hand. Therefore, this authority also is not of any assistance to the appellant.

8. It was next argued by the learned counsel that the parties in the former suit were different, while the parties in the second suit are different and that Civil Suit No. 142 of 1975 was suit for declaration, whereas the present suit is for perpetual injunction and mandatory injunction. Therefore, cause of action in the former suit and the present suit is different and the parties also being different, neither the principles of res judicata nor the provisions of Order II, Rule 2, Code of Civil Procedure, were attracted. In the instant case, cause of action accrued to the plaintiff-appellant when Amar Singh defendant made an application to make the payment of provident fund and gratuity. In the former suit, valid Will was executed by Chandu ram. According to the learned counsel, both the Courts below were not justified in holding that the suit is barred by the principles of res judicata and under the provisions of Order II, Rule 2, Code of Civil Procedure.

9. It was also urged that a perusal of the provisions of Order II, Rule 2, Code of Civil Procedure, would show that a plaintiff must omit or intentionally relinquish a portion of his claim before he can be debarred from suing in respect thereof, but in the instant case, there was no omission on the part of the plaintiff-appellant to sue in respect of the claim for relief of perpetual injunction and mandatory injunction against Amar Singh defendant-respondent No.1. There was also no waiver on the part of the plaintiff-appellant to that effect. In support of his contentions, the learned counsel placed reliance on a Division Bench decision of this Court in Kuldip Kaur and Ors. v. Chand Kaur 1977 P.L.J. 223 and also Single Bench decision in Gurjit Singh v. Bant Singh 1995 P.L.J. 513.

10. There is no force in the submission of the learned counsel. Section 11 of the Code of Civil Procedure, reads as under :

"11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any , of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation IV to Section 11 of the CPC provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. A copy of the judgment in the former suit (No. 142 of 1975) is Exhibit D3. That suit was filed by Smt. Multi Devi for declaration to the effect that the plaintiff is entitled for the receipl of provident fund and gratuity of Chandu Ram son of Chuni Lal son of Mansa Ram Mali of Hissar through a registered Will executed on November 6, 1974 and that the defendant has no concern whatsoever with the movable and immovable property of deceased Chandu Ram. The instant suit was filed by her for perpetual injunction restraining Amar Singh defendant from receiving the amount of provident fund and gratuity from the respondent-State and in the alternative, he be directed to hand over the amount after receiving the same from the State of Haryana. Admittedly, a valid Will executed by Chandu Ram was in favour of the plaintiff and cause of action for reaping the benefit under the Will had occurred to the plaintiff on the death of Chandu Ram. Therefore, the claim that in case Amar Singh nominee is held to be entitled to receive the amount of provident fund and gratuity from the Authorities, he be directed to hand over the same to her, should have been laid in the former suit. All the pleas to secure that relief should have been taken, but in the former suit neither any such plea was taken nor any such claim was laid which was directly and substantially in issue in the former suit between the same parties. The contention of the learned counsel that in the former suit the controversy was between the present appellant and Amar Singh defendant and in the instant case relief has also been claimed not only against Amar Singh but also against the State of Haryana, therefore, the parties not being the same, principles of res judicata are not applicable, is not acceptable, as the Authorities concerned had already directed the plaintiff to get the controversy decided from the competent Court and in the instant suit the State of Haryana, keeping in view the decision in the former suit, is only a pro forma defendant qua the substantial relief claimed. Therefore, it can safely be said that the present suit has been rightly held by both the Courts below as barred by the principles of res judicata with specific reference to Explanation IV to Section 11, Code of Civil Procedure.

11. At the time of institution of the former suit, the appellant was aware that she was lying claim to the amount of provident fund and gratuity of Chandu Ram deceased on the basis of a Will executed by him in her favour. Therefore while seeking declaration, she could also seek a direction that the amount of provident fund and gratuity should be paid to her and in case Amar Singh nominee is found to be entitled to receive the same, he be directed to hand over the same to her. Sub-rule (1) of Rule 2 of Code of Civil Procedure, reads an under :-

"2. Suit to include the whole claim - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in jurisdiction of any Court.''

In view of the specific provision of law, Multi Devi was required to include the whole of the claim which she was entitled to make but it was not so done by her. Therefore, both the Courts below have rightly come to the conclusion that the instant suit of Multi Devi is also hit by the provisions of Order II, Rule 2, Code of Civil Procedure.

The appeal being meritless is dismissed. In the peculiar facts and circumstances of the case, the parties are left to bear their own costs.