

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMP(M) No. 657 OF 2016
in
Regular Second Appeal No. 57 of 2006

Order reserved on : 20.07.2016

Date of Decision : 02.08.2016

Jagdish alias Maru ...Appellant

Versus

Inder Singh alias Dilbhag Singh & others
...Respondents

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur.

*Whether approved for reporting?*¹ Yes

For the appellant : Mr. G.C. Gupta, Senior Advocate,
with Mr. Bhuvnesh Sharma,
Advocate, for the appellant.

For the respondent : Mr. Ashwani K. Sharma, Senior
No.1 & 2 Advocate, with Nishant Thakur,
Advocate, for respondents No. 1 &
2.

For the respondent : Mr. G. D. Verma, Senior
No. 3 & 4 Advocate with Mr. B.C. Verma,
Advocate, for respondents No. 3 &
4.

Whether reporters of Local Papers may be allowed to see the judgment? Yes

ORDER IN CMP(M) NO. 657 OF 2016.

Respondents No.1 & 2 (hereinafter referred to be as '**plaintiffs**') had filed a suit for declaration and permanent prohibitory injunction claiming that respondents No.1 was son and respondent No. 2 was wife of deceased appellant (hereinafter referred to be as '**defendant No.1**') and they were coparcener in Hindu Joint Family and having right over half of suit property existing in the name of appellant-defendant No.1. It was further claimed that defendant No.1 had no right, title and interest to transfer any part of suit land to anybody in any manner except for legal necessity of Joint Hindu Family and General power of Attorney was never executed by defendant No.1 in favour of one Krishnu Ram (defendant No.2) and in case that was found to be executed by defendant No.1, then, same was procured by defendant No. 2 by fraud, misrepresentation and undue influence.

2. Deceased Appellant/defendant No.1 had refuted claim of Respondents/plaintiffs No. 1 & 2 by contending that

neither Respondent/plaintiff 1 was his son nor Respondent/plaintiff No. 2 was wife of defendant No.1 as plaintiff No. 2 had solemnized second marriage and she was not residing with deceased Appellant/defendant No.1 but with others and deceased-appellant had sold land out of necessity to meet the expenses incurred during the litigation as there was no other means except to dispose of land sold to defendant No. 3 and further that defendant No. 2 had successfully contested the case on behalf of defendant No. 1 and defendant No.1 was residing with defendant No.2 with his sweet-will without any pressure or threat. It was further stated that defendant No.1 had executed power of attorney in favour of defendant No. 2 to save his property and defendant No. 2 had defended cases on behalf defendant No.1 retaining suit land with defendant No.1 and during this exercise defendant No. 2 had incurred expenses worth Rs.1.00lac to save the property of defendant No.1.

3. After adjudication of case suit was decreed in favour of plaintiffs. Appeal filed by defendant No.1 had been dismissed. Therefore, the present Regular Second Appeal had been preferred by deceased Appellant/defendant No.1.

4. During the pendency of present appeal Appellant/defendant No. 1 had expired on 31.12.2015 and Applicants/proposed appellants who are sons of defendant No.2 have filed present application to implead them as legal representatives of deceased Appellant/defendant No.1 on the basis of duly registered 'WILL' of deceased Appellant/defendant No.1 executed by deceased Appellant/defendant No.1 in their favour.

5. Respondents No. 1 & 2 have opposed impleadment of Applicants/proposed appellants as legal representatives on the ground that right to sue was personal to deceased appellant and now right to sue does not survive in favour of applicants. It has been further contended that respondents No. 1 & 2 had claimed half share in coparcener property and

there are concurrent findings that suit land is ancestral and coparcener property and could not lawfully declined by deceased Appellant/defendant No.1 and therefore no legal and valid right has devolved upon them on the strength of alleged 'WILL'. Therefore proposed Applicants/proposed appellants are not entitled to be substituted in place of deceased Appellant/defendant No.1.

6. Averments alleging execution of 'WILL' in suspicious circumstances on the basis of fraud undue influence and misrepresentation on the part of applicants have also been made in reply of respondents No. 1 & 2. It is claimed that after death of appellant his estate is to be devolved upon respondents No.1 & 2 and therefore dismissal of application filed by the Applicants/proposed appellants has been prayed for. Respondent No. 3 has also filed separate reply opposing impleadment of proposed appellants. Arguments addressed on behalf of respondents No. 1 & 2

have been supported and adopted on behalf of respondent No.3.

7. It has been argument on behalf of Applicants/proposed appellants that the estate owned and possessed by appellant has devolved upon them by virtue of registered 'WILL' duly executed by the deceased Appellant/defendant No.1 in their favour. It is also submitted that in any case, but without admitting, if it is considered only for argument sake that respondents No. 1 & 2 are having right over half share of property owned and possessed by Appellant/ No.1, even then Applicants/proposed appellants are entitled to claim right over remaining half share of suit property on the basis of 'WILL' executed by deceased appellant and further Applicants/proposed appellants, on account of WILL, have entered in shoes of appellant-defendant No.1. and therefore Applicants/proposed appellants have right to sue. It is also submitted that Applicants/proposed appellants are covered under definition

of 'Legal Representative' defined in Section 2(II) of Code of Civil Procedure and they are entitled to be impleaded as appellants by substituting deceased appellant.

8. Constitution bench of Hon'ble Supreme Court in case Andhra Bank Ltd. Versus R. Srinivasan and others reported in AIR 1962 Supreme Court 232 has held as under:-

"18. Mr. Sastri concedes that a universal *legatee would be a legal representative and he does not challenge that the person who intermeddles even with a part of the estate of the deceased is also a legal representative; but his argument is that a legatee who obtains only a part of the estate of the deceased under a will cannot be said to represent his estate and is therefore not a legal representative under s. 2(11). We are not impressed by this argument. The whole object of widening the scope of the expression "legal representative" which the present definition is intended to achieve would be frustrated if it is held that legatees of different portions of the estate of a deceased do not fall within its purview. Logically it*

is difficult to understand how such a contention is consistent with the admitted position that person who intermeddle with a part of the estate are legal representatives. Besides, if such a construction is accepted it would be so easy for the estate of a deceased to escape its legitimate liability to pay the debts of a deceased debtor only if the debtor takes the precaution of making several legacies to different persons by his will. Besides, as a matter of construction, if different intermeddlers can represent the estate different legatees can likewise represent it. In regard to the intermeddlers they are said to represent the estate even though they are in possession of parcels of the estate of the deceased and so there should be, no difficulty in holding that the clause "a person who in law represents the 'estate of a deceased person" must include different legatees under the will. There is no justification for holding that the "Estate" in the context must mean the whole of the estate.

9. Hon'ble Supreme Court in case Jaladisugunda (Deceased) through LRs. Versus Satya Sai Central Trust and

others, reported in (2008) 8 Supreme Court Cases 521 has held as under:-

"12 'Legal representative' according to its definition in section 2(11) of CPC, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Thus a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative.

"15The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-vis other rival claimants to the estate of the deceased".

10. Hon'ble Supreme Court in case Suresh Kumar Bansal Vs. Krishna Bansal and another reported in (2010) 2 Supreme Court Cases 162 has held as under:-

"20. It is now well settled that determination of the question as to who is the legal representatives of the deceased plaintiff or defendant under Order XXII Rule 5 of the Code of Civil Procedure is only for the purposes of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.

21. In order to shorten the litigation and to consider the rival claims of the parties, in our view, the proper course to follow is to bring all the heirs and legal representatives of the deceased plaintiff on record including the legal representatives who

are claiming on the basis of the Will of the deceased plaintiff so that all the legal representatives namely, the appellant and the natural heirs and legal representatives of the deceased plaintiff can represent the estate of the deceased for the ultimate benefit of the real legal representatives. If this process is followed, this would also avoid delay in disposal of the suit.

22. *In view of our discussions made hereinabove, we are, therefore, of the view that the High Court as well as the trial Court were not at all justified in rejecting the application for impleadment filed at the instance of the appellant based on the alleged Will of the deceased plaintiff at this stage of the proceedings.*

23. *Before parting with this judgment, it is necessary to consider the decision of this Court in the case of Jalai Suguna (deceased) through L.Rs. v. Satya Sai Central Trust and Others, [(2008) 8 SCC 521] cited by the learned senior counsel for the appellant. In Jalai Suguna (supra), this Court held that the intestate heir (husband) and the testamentary legatees (nieces and nephews),*

seeking impleadment as the heirs of the deceased respondent in an appeal have to be brought on record before the Court can proceed further in the appeal. Furthermore, in that decision it was also held that a legatee under a Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased testator, will be a legal representative.

24. *In view of the aforesaid discussions and in view of the decision reported in Jalai Suguna (supra), we are also of the view that in an eviction proceeding, when a legatee under a Will intends to represent the interest of the estate of the deceased testator, he will be a legal representative within the meaning of Section 2(11) of Code of Civil Procedure, for which it is not necessary in an eviction suit to decide whether the Will on the basis of which substitution is sought for, is a suspicious one or that the parties must send the case back to the probate Court for a decision whether the Will was genuine or not”.*

11. Question that Applicants/proposed appellants are legal representatives of deceased Appellant/plaintiff or not is

to be determined according to provisions of Order 22 Rule 5 of the Code of Civil Procedure. As per these provisions in case of necessity Appellate Court may before determining question direct any Subordinate Court to try the question and to return record together with evidence, if any, recorded at such trial, its findings and reasons to the Appellate Court. Appellate Court may take into consideration in determine the question.

12. In present case Applicants/proposed appellants are claiming their right on the basis of registered 'WILL' duly executed by deceased Appellant/plaintiff and there is nothing on record to show that said 'WILL' is under challenge in any Court of law or the said 'WILL' has lost its enforceability by suffering any judgment/order of competent court of law. It is pertinent to mention that Applicants/proposed appellants are son of Krishnu Ram who was defendant No. 2 in original suit and in whose favour deceased Appellant/plaintiff had executed power of attorney and had taken a specific stand in written statement that property of Appellant/defendant No. 1

was defended by the said defendant No. 2 Krishnu Ram. The validity of 'WILL' is not to be decided while determining question of impleadment/substitution of 'legal representatives' of deceased Appellant/plaintiff. As per ratio laid down by Hon'ble Supreme Court referred supra, impleadment of any person as 'legal representatives' on the basis of determination under Order 22 Rule 5 of the Code of Civil Procedure will be only for the purpose of adjudication of the case/appeal in which the legal representatives is impleaded.

13. In present lis, deceased Appellant /defendant No. 1 was denying the right of Respondents/plaintiffs No. 1 & 2 and was pursuing the litigation against them. Whereas, the Respondent/plaintiffs No. 1 & 2 were claiming right in property of deceased Appellant/defendant No.1 as son and wife. The said claim was not admitted by the deceased Appellant/defendant No.1. Applicants/proposed appellants are claiming their right, title and interest in the suit property flowing from duly registered 'WILL' executed by deceased

Appellant/defendant No.1. In these circumstances, the Applicant/proposed appellants are entitled to be substituted as 'legal representatives' of deceased Appellant/defendant No.1. for the purpose of adjudication of present lis only. It is clarified that there is difference in determining question of 'legal representatives' and deciding issue of 'Legal heirs' of deceased Applicants/proposed appellants are to be brought on record for deciding present appeal only. In case there are other right holders in estate of deceased then 'legal representatives' are considered to be representing estate of deceased on behalf of all of such right holders. It is also made clear that in this order legality and validity of 'WILL' has not been adjudicated. Prima facie on the basis of registered 'WILL' the Applicants/proposed appellants are being impleaded for purpose of adjudication in present appeal only.

14. As per proviso to Rule-5 of Order 22 of Code of Civil Procedure, Appellate Court may direct subordinate court

to try the question as to whether any person is or is not 'legal representative' of a deceased party to the proceedings. It is clear from language of Rule 5 that Court in which case is pending, has to determine such question before proceeding further as Rule 5 mandates that such question '**shall**' be determined by the Court. However, reference of such question as provided in proviso of said rule to subordinate court to try the question is not mandatory but directory as in the proviso the word '**may**' has been used. The use of word '**shall**' for determining the issue in rule 5 and use of word '**may**' in the proviso for referring questions to subordinate Court to try before determining the question clearly indicates that sending the matter to subordinate court is directory and decision for such reference will depend upon fact and circumstances of each case. The matter should be sent to Subordinate Court to try the question only in that case in which material before court to determine such question is not sufficient or lengthy evidence is required to be

recorded or otherwise it there are compelling reasons to have finding and reason of subordinate Court. Further finding and reasons of subordinate Court are not binding on Appellate Court and it's discretionary for Appellate Court to take finding and reasons of subordinate into consideration or not. When such question can be determined in Appellate Court, on the basis of material before it, the matter should not be referred to subordinate court to avoid unnecessary delay.

15. On the basis of material on record, question of impleading Applicants/proposed appellants as appellants substituting deceased appellant can be determined. Therefore, there is no necessity to send this case to subordinate courts to try and to have findings of that Court for determining the question of legal representatives. Merit of rival contentions and claims of applicants/appellants and respondents is not to be adjudicated upon in this application.

In view of the above facts and circumstances, present application is allowed and Applicants/proposed appellants are

impleaded as appellants in place of deceased Appellant/defendant No.1. Application stands disposed of. Amended Memo of parties be filed within two weeks.

August 02, 2016.
****brb****

(Vivek Singh Thakur),
Judge.

