

**HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT
JAIPUR**

S.B. Civil First Appeal No.15/2009

Krishan Kumar Agarwal Son of Late Chaudhary Kailash Chand, By
caste Agarwal Vaishya, Resident of Hanuman Tiraha, Dholpur,
District Dholpur (Raj.)

-----Plaintiff-Appellant

Versus

1. Mohan Lal Agarwal Son of Late Chaudhary Kailash Chand, By
caste Agrawal Vaishya, Resident of Mittal Colony, Bari Road,
Dholpur, District Dholpur (Raj.).

2. Ramesh Chand Son of Late Chaudhary Kailash Chand, By caste
Agrawal Vaishya, Resident of Ayodhaya Kunj, Sepau Road,
Dholpur, District Dholpur (Raj.).

3. Sh. Mahaveer Rastogi Adopted Son of Sh. Biharilal Rastogi, By
Caste Rastogi, Resident of Rastogi Gali, Kothi Dholpur, District
Dholpur (Raj.)

4. Aditya Sharma (Minor) Son of Sh. Sudhir Sharma, By Caste
Brahmin, Resident of Gurudwara Dholpur, Through his Father &
Natural Guardian Sh. Sudhir Sharma Son of Sh. Shivnarayan
Sharma By Caste Brahmin, Resident of Gurudwara, Kothi Dholpur
(Raj.)

-----Defendants-Respondents

For Appellant(s) : Mr. Sudesh Bansal

For Respondent(s) : Dr. P C Jain

HON'BLE MR. JUSTICE PRAKASH GUPTA

Judgment

2/07/2018

1. The instant first appeal has been preferred against the
judgment and decree dated 12.12.2008 passed by the learned
Additional District Judge (Fast Track) No.1, Dholpur (hereinafter
"the trial court") whereby the suit filed by the plaintiff-appellant
for partition of joint immovable properties was dismissed.

FACTS IN BRIEF

2. The facts giving rise to this first appeal can be briefly stated
as thus: That the plaintiff-appellant filed a suit for partition of joint

immovable properties against the defendants-respondents. It is the case of the plaintiff-appellant that the defendants-respondents No.1 & 2 are his real brothers and together, they are the legal heirs of his father late Sri Kailash Chand, who passed away on 12.05.1996. The father of the plaintiff and defendants owned several movable and immovable properties. The details of the property which form the subject-matter of the appeal are mentioned in Para 2(A) of the plaint. It was stated in the plaint that since the plaintiff is one of the legal heirs with defendants No.1 & 2, he is entitled to 1/3rd share in the said properties and now he wants to get the properties partitioned by meats and bounds so as to get separate and exclusive possession over the 1/3rd share. On the basis of these averments, the plaintiff-appellant prayed that the properties, the details of which have been given in Paragraph 2(A) of the plaint, be partitioned by meats and bounds and he be put in separate and exclusive possession of his 1/3rd share.

3. The defendants-respondents No.1 & 2 resisted the suit by filing written statement. While the factum of their father having purchased the properties mentioned in the plaint was admitted, it was averred in the written-statement that the defendants-respondents No.1 & 2 were the sole owners of the said properties by virtue of a Will allegedly executed by their father on 30.07.1995. It was further stated that as per the said Will, the plaintiff-appellant has no interest, right or concern with the properties in dispute. Further, some of the properties left behind by their father were sold by them as per the direction given in the

Will so as to clear the outstanding dues that their father owed to some creditors. It was also stated in the written statement that the plaintiff-appellant was actually given comparatively more share in the properties of their father, which he occupied forcefully. The defendants-respondents also raised objections regarding the sufficiency of the court fees. Based on the said averments, they prayed for the suit to be dismissed.

4. Since a new fact regarding the existence of the Will allegedly executed by Late Sri Kailash Chand was brought on record, the plaintiff-appellant sought the permission of the court to file a rejoinder. However, the learned trial court vide its order dated 03.05.2007 allowed the application and instead of permitting the plaintiff-appellant to file a rejoinder, allowed him to incorporate additional facts in the plaint by way of an amendment. The plaintiff-appellant thus, amended the plaint and incorporated the additional facts through which he denied the execution as well as the existence of any Will. In order to further bolster his averments, he stated that a joint application was filed by the plaintiff and defendants No.1 and 2 for obtaining succession certificate in respect of Rupee 50,000 deposited by their father with the State of Bank of India and also in respect of Rupees 2,00,000 which was the amount of final bill for the work that Late Sri Kailash Chand had done for PWD, Dholpur. During the pendency of the succession certificate proceedings, no such Will was disclosed by the defendants. On the contrary, Ramesh Chand (Defendant No. 2 herein) in his statement dated 10.09.1996 admitted that no Will had been left by their father i.e. Late Sri

Kailash Chand. Noting these statements, the Succession Certificate in the name of all three sons i.e. the plaintiff-appellant and defendants-respondents, was finally issued by the learned District Judge, Dholpur vide his order dated 27.09.1996. Reference was also made to certain arbitration proceedings wherein all the three brothers had approached the arbitrator and the outstanding dues that the PWD owed towards Late Sri Kailash Chand were jointly taken by them.

5. In the amended plaint, the plaintiff also mentioned the fact regarding portion "B" of the property having been sold by the defendants-respondents No.1 and 2 to defendants-respondents No.3 and 4.

6. To counter the above averments, the defendants-respondents No.1 and 2 contended that at the time of institution of the arbitration proceedings, the Will was not in their knowledge and the same came to their knowledge only after the instant suit was instituted.

7. Defendants No.3 and 4 also their written statements and stated that they are bonafide purchasers for valuable consideration of some part of the disputed properties and after the purchase, they have also raised construction over the same.

8. On the basis of the pleadings, the trial court framed following issues:-

1. आया वादी व प्रतिवादी संख्या 1 व 2 के पिता चौ.कैलाशचन्द ने तारीख 30.07.95 को वसीयत निष्पादित की व वसीयत के आधार पर परिशिष्ट "अ" की सम्पत्ति प्रतिवादी संख्या 1 व 2 के स्वामित्व की है ?

—प्रतिवादी 1 व 2

2. आया प्रतिवादी संख्या 3 व 4 के पक्ष में प्रतिवादी संख्या 1 व

2 द्वारा किये बयनामें वादी व प्रतिवादी संख्या 1 व 2 के मध्य हुए बाहमी बंटवारे के आधार पर वादी की सहमति से हुए हैं?

—प्रतिवादी 3 व 4

3. आया न्यायशुल्क कम अदा किया है ? —प्रतिवादी 1 व 2

4. आया वादी द्वारा अपने आधिपत्य की सम्पत्ति उल्लेखित वसीयत के पैरा नं.1 में वर्णित दुकान, मकान व दुकान में लगी धन सम्पत्ति के बारे में दो दुकान हलवाई खाने की उनके पिता द्वारा किराये पर ली गयी व संयुक्त उपयोग उपभोग की रही तथा वसीयत के पैरा संख्या 4 में उल्लेखित कृषि भूमि का उल्लेख वादपत्र में नहीं किया इससे वादपत्र खारिज किये जाने योग्य है ? —प्रतिवादी 1 व 2

5. अनुतोष ?

Both the parties adduced oral as well as documentary evidence.

Thereafter, hearing both the sides, the learned court dismissed the suit of the plaintiff-appellants vide judgment and decree dated 12.12.2008. Hence the instant first appeal.

SUBMISSIONS BY COUNSELS

9. Sri Sudesh Bansal, learned counsel appearing on behalf of the plaintiff-appellant contended that the learned trial court failed to frame necessary issues, therefore, the whole trial is vitiated. Only on this ground, the appeal should be allowed and the matter may be remanded to trial court for fresh decision. It is submitted that the primary defence of the defendants-respondents is the Will (Ex.A/1) that was allegedly executed by Late Sri Kailsah Chand on 30.07.1995. However, the existence and execution of the said Will shrouded in suspicion. It is submitted by Mr. Bansal that the defendants-respondents have nowhere in their written statement claimed the Will allegedly executed on 30.7.1995 to be a hand-

written/holographic Will. Further, the factum of the existence of the said Will was disclosed only after the institution of the suit, that too after the defendants-respondents had taken adjournments thrice for filing their written statement. The inordinate delay of more than twelve years is a huge chasm in the way of the defendants-respondents and has not been overcome by laying the bridge of any suitable explanation. The fact that the Will was brought to the knowledge of the court after taking three adjournments further shows that the Will is forged and fabricated and was nothing but an afterthought to sway the mind of the court towards dismissing the suit.

10. The counsel further submitted that in the rejoinder, the plaintiff-appellant has explicitly stated that even in other legal proceedings, especially the proceedings related to Succession Certificate, there was no whisper of any such will. Keeping this in account, it is abundantly clear that the plaintiff-appellant vehemently denied the existence of the Will and the finding of the trial court on Issue No.1 that the plaintiff never denied the Will absolutely perverse and against the material on record. Even in his testimony the plaintiff Krishan Kumar (P.W.1) stated unequivocally that he was acquainted with the hand-writing of his father and the Will (Ex.A/I) was not in the hand-writing of his father. The existence of the Will was denied by him in his cross-examination as well. The counsel further submitted that not only were the defendants-respondents able to satisfactorily explain the delay in disclosing the Will, they also failed to disclose and prove when, how and from what source they got to know about the Will.

11. Furthermore, impugning the oral evidence of the defendants-respondents, Mr. Bansal contended that Mohan Lal (D.W.1) admitted in his cross-examination that the Will was not written in his presence. He could not even remember the date on which the Will was allegedly written. Censuring the testimony of Ram Narain Bansal (D.W.2), Mr. Sudesh Bansal contended that the statements of this witness do not satisfy the essential requirement of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. This witness is said to be a close family friend of the Late Sri Kailsah Chand and the alleged Will was written by Sri Kailsah Chand in his presence but contrary to human nature, this witness failed to disclose the existence of the said Will to the sons of late Sri Kailash Chand even after his death. Mr. Bansal further contended that the burden to prove the alleged Will being a holographic Will was on the defendants-respondents and since there were too many suspicious circumstances, the onus lies on the person who claims the genuineness of the Will to explain such suspicious circumstances to the satisfaction of the court.

11. Regarding the theory developed by the defendants-respondents that the property described in Schedule-B was sold to clear the outstanding dues and loan of Late Sri Kailash Chand, Mr. Banal contended that the said theory is absolutely concocted as neither any details of any outstanding dues nor any accounts have been produced on record. So far as issue no. 2 related to the oral partition of the properties left by late Sri Kailash Chand is concerned, the issue has been framed on the basis of the defence of defendants-respondents No.3 and 4 while there is no such

defence in the written-statement of defendants-respondents 1 and 2. Therefore, both the sale-deeds (Ex.18 and 19) which were executed after the institution of suit for partition are hit by the principles of lis-pendence.

12. Finally, challenging the compromise said to have been arrived at between the parties, Mr. Bansal submitted that the same is in dispute as the appellant Krishan Kumar did not appear in person and did not agree to the terms of the compromise. The compromise does not even relate to the property in dispute or the oral partition of the properties or the issue of Will which is in dispute in the instant case. Neither the mediator nor the court has attested the compromise.

13. The learned counsel for the defendants-respondents Dr. PC Jain on the other hand, supported the judgment passed by the trial court. Dr. Jain submitted Sri Kailash Chand passed away on 12.05.1996 and the Will came into existence on 30.07.1995. The defendant-respondents came to know about the Will on 28.02.2007 and despite disclosing the existence of the Will to the plaintiff, the plaintiff has nowhere denied that the said Will was not written in the hand-writing of late Shri Kailash Chand. Referring to the evidence of the parties, Dr. PC Jain contended that since the Will is a holographic Will, it is a speaking document from the mouth of the deceased which tells the whole truth of his life, his good and bad experiences and also contains the advice to his sons. To prove the genuineness of the Will, Dr. Jain relied on the evidence of Mohan Lal (D.W.1), Ram Narain (D.W. 2) and Bhagwati Prasad (D.W. 3). Dr. Jain contended that the evidence of

all these witnesses was unshaken and not rebutted.

14. Regarding the proving of holographic Wills, reliance was placed on a number of judicial pronouncements including a Constitution Bench of the Hon'ble Supreme Court in **Shashi Kumar Banerjee Vs. Subodh Kumar Banerjee AIR 1964 SC 529**. The said decision was relied on by Dr. Jain to contend that a Holographic Will stands on a different footing than ordinary Wills and there could be a strong presumption of it being duly executed and attested. If there is hardly any suspicious circumstances attached to the Will, it will require "very little" evidence to prove due execution and attestation of such a Will.

Lastly, it was argued by Dr. P.C. Jain, learned counsel for the respondents that the matter was referred to Mediator and parties were present there. They have entered into a compromise, therefore, the matter may kindly be disposed of in terms of the aforesaid compromise.

I have heard the counsels and perused the material on record.

15. So far as compromise is concerned, it is revealed that the matter was referred to Mediator, Rajasthan High Court, Jaipur where a compromise was arrived at. But the said compromise was not attested by the Court. Since, the said compromise was not attested by the court as per Order 23 Rule 3 CPC, it will not be binding on the parties. All the applications, which are pending in this regard, stand disposed of.

16. Though detailed arguments have been advanced from both sides, I do not think necessary to deal with them.

I think this is a case where I am bound to exercise the powers under Order 41 Rule 23A C.P.C. The appellate court may remit the case back to the trial court if the trial court from whose decree the appeal is preferred has adjudicated the matter on merits and the said decree is set aside in appeal and the appellate court considers the re-trial necessary, the latter court shall have the same powers as are enunciated in order 41 Rule 23. Further, I do not think that the evidence placed on record is sufficient enough to finally adjudicate the matter on merits after resettling the issues, as required under Order 41 Rule 24 C.P.C. Hence, this court deems it proper to proceed under Rule 23A C.P.C.

17. In the instant case, the learned trial court omitted to frame not only one but also several material issues, which in my opinion not only go to the roots of the matter but are also essential for fair adjudication of the dispute. Thus, I deem appropriate and necessary to exercise powers of remand under Order 41 Rule 23A, for the reasons mentioned hereunder:-

I. The first reason as to why this court was compelled to exercise powers under Order 41 Rule 23A is that the learned trial court omitted to frame any issue related to partition. As is clear from the pleadings, the suit was instituted by the plaintiff-appellant for getting certain immovable properties partitioned, which he claimed to be joint Hindu Family properties. However, no issue has been framed by the trial court as regards this point. In the absence of an issue as to whether the plaintiff was entitled to seek the partition of the property and claim

1/3rd share therein, the suit could not and should not have been decided. Because of this glaring error, the plaintiff-appellant has been severely prejudiced

II. Another essential issue which the trial court omitted to frame issue on is regarding the contentions contained in Paragraph 2 (a) of the Written Statement. As per the said Paragraph, the defendants-respondents sold the property mentioned in Schedule-B to carry out the directions in the Will allegedly made by their father on 30.7.1995. The plaintiff-appellant on the other hand did not only deny the existence of the Will but also raised objections regarding any outstanding dues that his father Late Kailash Chand owed to creditors. For the want of any issue related to the property mentioned in Schedule B, no finding has been given regarding the point as to whether the property so mentioned in this schedule could also be partitioned or not.

III. The third point the trial court has failed to frame any issue is regarding the partition that has already allegedly been done in pursuance of the Will dated 30.07.1995 as per the averments contained Paragraph 11 of the Written-statement. This also a moot contention between the parties and an issue which goes to the roots of the matter.

IV. Another bone of contention between the parties is the other properties that Late Kailsah Chand owned and have allegedly been taken in possession by the plaintiff-appellant. Since, the said properties have not been

included in the partible estate, the defendants have contended that the suit itself was not maintainable. An issue had to be framed regarding this as well since a suit for partial partition is not tenable in the eyes of law.

V. Lastly, the trial also omitted to frame an issue as to whether defendants-respondents No.3 and 4 were bona fide purchasers for valuable consideration. This issue also needed to be framed and adjudicated upon.

18. In view of the above, this court deletes all the issues framed by the learned trial court and resettles the following issues:-

1. आया परिशिष्ट अ व ब में वर्णित सम्पत्ति वर्णित चरण संख्या-2 व 2(ए) वादपत्र में वादी एवं प्रतिवादी क्रम 1 व 2 का प्रत्येक का 1/3-1/3 हिस्सा है और वादी अपने 1/3 हिस्से का बंटवारा करवाकर एकान्तिक कब्जा प्राप्त करने का अधिकारी है ?

—वादी

2. आया स्वर्गीय कैलाशचन्द जी की वसीयत दिनांक 30.07.1995 के द्वारा परिशिष्ट-अ में वर्णित सम्पत्ति में प्रतिवादी क्रम 1 व 2 को 1/2-1/2 हिस्सा प्राप्त हुआ और परिशिष्ट-ब में वर्णित सम्पत्ति कर्जा चुकाने के लिए प्रस्तावित है ? —प्रतिवादी संख्या 1 व 2

3. आया पिताजी की वसीयत द्वारा उभयपक्षकारान को यथा संभव हिस्सा दिया गया है जिसमें वादी को प्रतिवादीगण से अधिक हिस्सा प्राप्त हुआ है जो वादी द्वारा जबरदस्ती प्राप्त किया गया है सो वसीयत के ताबे वादी का वाद सव्यय निरस्त किये जाने योग्य है ?

—प्रतिवादी संख्या 1 व 2

4. आया प्रतिवादी 1 व 2 ने पिता की वसीयत के मुताबिक परिशिष्ट-ब में वर्णित सम्पत्ति प्रतिवादी संख्या 3 को विक्रय पत्र दिनांक 08.05.2007 के जरिये एवं प्रतिवादी संख्या 2 ने प्रतिवादी संख्या 4 को विक्रय पत्र दिनांक 24.03.2007 के जरिये अपने वैध स्वत्वों के तहत

विक्रय की है और उक्त विक्रय पिता के ऋण को चुकाने के लिए
सद्भावनापूर्वक किया जाकर प्राप्त धन को ऋण चुकाने में अदा किया
है। जिसके लिए वादी समान रूप से उत्तरदायी है। प्रतिवादी संख्या 1
व 2 के साथ वादी भी इन विक्रयपत्रों से पूर्णतया पाबन्द है ?

—प्रतिवादी संख्या 1 व 2

5. आया प्रतिवादी संख्या 1 व 2 द्वारा प्रतिवादी संख्या 3 व 4 के
हक में दोनों विक्रयपत्रों के जरिये, सभी भाईयों के मध्य बाहमी तौर पर
बंटवारा सम्बन्धी समझौता होकर उनके अधिकार, हिस्से तथा
एक्सक्लुजिव पजेशन में आई हुई जायदाद का विक्रय किया है जो सही
व जायज है तथा प्रतिवादी संख्या 3 व 4 ने वादी की सहमति के
पश्चात्, बिना किसी आपत्ति के जायदाद प्रतिवादी संख्या 1 व 2 से
खरीदी है और वे सद्भाविक क्रेता हैं ?

—प्रतिवादी संख्या 3 व 4

6. आया वादी ने जवाबदावे की विशेष आपत्तियों में वर्णित 13, 14 व
15 के मुताबिक वादी के आधिपत्य में आई सम्पत्तियों का खुलासा
वादपत्र में नहीं किया है और वादपत्र में इन सम्पत्तियों को छिपाया है
सो दावा वादी निरस्त किये जाने योग्य है ?

—प्रतिवादी संख्या 1 व 2

7. आया वाद कारण के अभाव में दावा निरस्त होने योग्य है ?

—प्रतिवादी संख्या 1 व 2

8. आया वादग्रस्त सम्पत्ति का मूल्यांकन न्यून किया गया है तथा
न्यायशुल्क अति न्यून दिया है, इस कारण पर्याप्त न्यायशुल्क के अभाव
में दावा चलने योग्य नहीं है ?

—प्रतिवादी संख्या 1 व 2

9. अनुतोष ?

19. Consequently, the appeal is allowed and the matter is
remanded back to the trial court for deciding the matter afresh
after giving an opportunity to both the sides to adduce additional
evidence on the issues resettled by this court. The parties are
directed to remain present before the trial court on 03.08.2018.

(PRAKASH GUPTA) J.

RAJASTHAN HIGH COURT



सत्यमेव जयते