

ITEM NO.1-A

COURT NO.1

SECTION IV

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

CIVIL APPEAL NO. 1621 OF 2004

DASHRATH RAO KATE

Appellant (s)

VERSUS

BRIJ MOHAN SRIVASTAVA

Respondent(s)

Date: 03/11/2009 This Appeal was called for pronouncement of
judgment today.

For Appellant(s) Mr. Ashok K. Mahaajan, Adv.

For Respondent(s) Dr. Kailash Chand, Adv.

Hon'ble Mr. Justice V.S. Sirpurkar pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Markandey Katju and His Lordsip.

The impugned judgment is set aside and judgments of the Trial Court and Appellate Court are restored. The appellant/plaintiff, therefore, succeeds with costs of Rs.25,000/-.

(R.K. Dhawan)
Court Master

(Shashi Bala Vij)
Court Master

(Signed Reportable Judgment is placed on the file)

2

"REPORTABLE"

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1621 OF 2004

Dashrath Rao Kate

.... Appellant

Versus

Brij Mohan Srivastava

.... Respondent

J U D G M E N T

V.S. SIRPURKAR, J.

1. The judgment of the High Court, allowing the Second Appeal is in challenge by way of this Appeal. The Second Appeal was filed by the respondent/defendant challenging the judgment of the Appellate Court, whereby the Appellate Court had confirmed the decree passed by the Trial Court.

The High Court framed two questions of law, they were:

- "(1) Whether the Court below erred in law in treating the finding recorded in the proceedings under Order XXII Rule 5, CPC to be binding and omitting to decide the question in regard to the locus standi and entitlement of the plaintiff on merits considering the specific pleas urged by the defendant in the written statement subsequent to the substitution of the new plaintiff? and;
- (2) Whether the Court below erred in law in granting

3

a decree on the basis of the ground contemplated under Section 12 (1) (c) of the M.P. Accommodation Control Act even though the alleged disclaimer could not be taken to be anterior to the filing of the suit?"

2. Two other substantial questions proposed by the appellant (respondent herein) before the High Court by the respondent herein were:

- "(1) Whether the defence contained in the written statement did constitute a ground under Section 12 (1) (c) of the M.P. Accommodation Control Act?
- (2) Whether the ground under Section 12 (1) (c) is available to a derivative title holder?"

3. The High Court, however, took into consideration the first question of law and held that if that question of law was answered in favour of the appellant (respondent herein), then the Second Appeal would have to be allowed in favour of the tenant-respondent. It is only on that ground that the appeal came to be allowed. In paragraph 7 of the impugned judgment, the High Court expressed that the gist of the first question was whether the evidence recorded by the Court below before allowing the application under Order 22 Rule 5 of the Code of Civil Procedure (hereinafter referred to as 'CPC', for short) could be looked into also for passing a final decree against the appellant-defendant (respondent herein). It, however,

observed that if that evidence was ignored, then the plaintiff (appellant herein) had not led any evidence to show that he had locus standi to continue the suit.

4

4. Few facts would have to be considered. Sukhiabai [sometimes referred to as Sankhyabai] who was the sister of the grandfather of the appellant/plaintiff, owned the house. She was issueless and the appellant/plaintiff was brought up by Sukhiabai and was living with her. The house in dispute was let out to the respondent herein as a monthly tenant and a written rent note was executed for that purpose. An application came to be filed initially in the year 1990 vide case No. 125/84-85/90-7 before the Rent Control Authority for eviction against the present respondent. That eviction application was allowed by the Rent Control Authority and hence a Revision came to be filed vide C.R.No.198/96 in the High Court. It was during the pendency of this Revision that Sukhiabai died. The respondent impleaded one Arun and Ramesh claiming themselves to be class I heirs of Sukhiabai and eventually the Revision was allowed by the High Court and the High Court remanded the case to the Civil Court and directed that the questions as to whether intervention could be sought on the basis of the Will and as to whether the respondent was entitled to continue the suit, would have to be gone into by the Trial Court. Upon remand, the suit was numbered as 119-A/96 before the Civil Judge, Gwalior. The appellant/plaintiff moved an application for amendment of the plaint and that amendment was allowed. Against that, the present respondent filed Civil Revision No.91/97, while deciding which, the High Court directed that the question of legal representative of

5

deceased Sukhiabai had to be determined first and after determining the rights of legal representative, a proper party has to be impleaded as the legal representative and the party so impleaded as legal representative would alone have the right to amend the plaint.

5. The present appellant then filed an application to bring himself as the legal representative on record on the basis of the Will which was executed by Sukhiabai in his favour on 26.03.1990. The appellant/plaintiff examined one Prabhakar Rao as PW-2 on 01.09.1997. After due inquiry, the application of the present appellant was allowed by the Trial Court and that is how the present appellant was brought on record in place of Sukhiabai. This order was not challenged and it became final.

6. The parties thereafter led evidence and on that basis the Trial Court decreed the suit by its judgment dated 22.01.1998. That was challenged by way of an appeal before the Additional District Judge, Gwalior, who dismissed the appeal by judgment dated 15.05.1998. These concurrent findings thereafter were challenged before the High Court and the High Court has upset the concurrent findings and has proceeded to dismiss the suit. It is this judgment which has fallen for our consideration.

7. It is clear from the findings of the Trial Court and Appellate Court that the suit has been allowed on the ground of Sections 12 (1) (c) and 12 (1) (e) of the M.P. Accommodation Control Act. The High Court has accepted the arguments of the

6

respondent herein that in spite of the fact that the appellant/plaintiff was brought on record as legal representative of Sukhiabai on the basis of the Will, yet he should have led more evidence to prove the Will in order to prove that he had become owner on the basis of the testamentary succession of the concerned house. In short, the High Court came to the conclusion that since the inquiry under Order 22 Rule 5, CPC was of the summary nature and was limited only to the determination of the right of the appellant herein to be impleaded as the legal representative of Sukhiabai, any finding given in that inquiry would not be binding on the defendant (respondent herein) at the final stage of the suit and the plaintiff (appellant herein) would have to again prove the Will

in order to establish his ownership vis-à-vis the concerned premises. The High Court went on to hold that since the title of the plaintiff (present appellant) was based on the Will and it was disputed by the defendant (present respondent), therefore, the appellant/plaintiff had to independently prove his title. For that purpose the evidence led at the time of

inquiry under Order 22 Rule 5, CPC would be of no consequence.

The High Court then relied upon on the law laid down in Suraj Mani & Anr. Vs. Kishori Lal [AIR 1976 HP 74], wherein it was observed that the evidence recorded during the inquiry under Order 22 Rule 5, CPC could not be equated with the evidence recorded at the time of decision on merits.

Another judgment

relied upon was Kalyanmal Mills Ltd., Indore Vs. Voli Mohammed

7

[AIR 1965 MP 72]. The third decision relied and followed by

the High Court was Ragnath Singh Anar Singh Vs. Gangabai (D)

thr. L.R. Bhuwan Singh [AIR 1961 MPLJ 398].

The High Court

then proceeded to reject the argument on behalf of the appellant/plaintiff that this was only a suit for the ejection under the M.P. Accommodation Control Act and the respondent/defendant being an outsider could not have challenged the validity of the partition. On merits, all that

was required to be seen was as to whether the appellant herein had been properly brought on record as legal representative of Sukhiabai and if that was so, there was no question of non-suiting the appellant/plaintiff on the basis that the Will was not proved independently.

The High Court also went on to record a finding that the appellant herein was not a family member of Sukhiabai as she was not survived by any class I heir. In short, the High Court held that the Will was not

proved independently, though on its basis, the appellant/plaintiff was allowed to be brought as a legal representative of Sukhiabai, and proceeded to dismiss the suit.

8. We are unable to agree with the reasoning of the High

Court.

9. It is an admitted position that when the Civil Revision was pending before the High Court at the instance of the tenant-respondent, it was filed initially only against one Ramesh and Arun Kate, since Sukhiabai had already died after

8

the order passed in her favour. That Civil Revision was allowed by the High Court and the High Court directed to convert the matter into a suit under M.P. Accommodation Control Act. That is how the original application for conviction was transferred to the Civil Court for hearing. It was before the

Civil Court that the present appellant filed an application for being impleaded and the same was allowed without any investigation. The said impleadment was claimed on the basis of a will by Sukhiabai in favour of the appellant. In the

Revision No. 91 of 1997 against this impleadment, the High Court directed the Trial Court to decide as to who is the legal heir of Sukhiabai and to substitute such a person as legal heir. In pursuance of that, a full fledged inquiry was conducted by the Trial Court, wherein three witnesses came to be examined by the present appellant to establish the will. In

that enquiry, the Trial Court framed a question whether will was written by Sukhiabai and whether on the basis of the said will, appellant Dashrath Rao was her legal representative in this case. One Prabhakar Rao (PW-2) and Ganpat Rao were witnesses on the original will (Exhibit P-1). Ganpat Rao has

expired. Besides himself, the appellant/plaintiff examined said Prabhakar Rao (PW-2) and got the will proved. Prabhakar

Rao (PW-2) fully supported the case of the appellant in respect of the will. It is noteworthy that both, appellant and said Prabhakar Rao, were extensively cross-examined.

Not only this,

but the other person Ramesh Kate, who was joined as the legal

9

representative of Sukhiabai in the first Revision, was also got examined by the appellant, who claimed clearly that he had no

interest in the property and in fact, the suit house was bequeathed by Sukhiabai in favour of the appellant.

10. The respondent/defendant also examined himself and according to him, the signatures on the will was not that of Sukhiabai. After considering the evidence fully and in details, the Trial Court, by its order dated 9.9.1997, gave a declaration that present appellant Dashrath Rao was the legal representative of Sukhiabai in the case. The Trial Court also clarified that the order was only for the purpose of bringing legal representatives on record. Obviously it was under Order 22 Rule 5, CPC. It is noteworthy that this order is not further challenged by the tenant-respondent.

11. It was thereafter that the appellant/plaintiff made amendments and claimed himself to be the owner of the house in question. He also pointed out that the respondent/defendant was a tenant at a monthly rent of Rs.170/- of the whole house, but later on, the respondent/defendant had vacated one room of his tenancy and handed over it to Sukhiabai and retained 2 rooms and bathroom and the rent was fixed at Rs.130/- per month. He also pointed out that tenant had not paid any rent from 1.1.1994. He also reiterated his relationship with Sukhiabai and the facts regarding the will, as also his bonafide personal need of the rented premises.

10

12. In his written statement, the tenant-respondent admitted Sukhiabai to be his landlady and also accepted about the rent note dated 10.2.1980. He also again denied that the appellant/plaintiff had become owner and also denied his need. On that basis, issues came to be framed, which are as under:-

- (i) Whether there is relation of land lord and tenant between plaintiff and the defendant?
- (ii) Whether the defendant has not paid/cleared outstanding rent from 1.1.1984 to the plaintiff?
- (iii) Whether the plaintiff is in genuine need of the suit accommodation for his own residential purpose?
- (iv) Relief and Costs?

13. The evidence was again led by the appellant, wherein he asserted that the respondent/defendant was the tenant of Sukhiabai and that he had become his tenant now as per the will, since he has become owner on the basis of the will. He also reiterated the will (Exhibit P-1), regarding which Court had given decision in the enquiry under Order 22 Rule 5 CPC. He then deposed about his need. We have seen the cross-examination of this witness by the respondent/defendant, which is lengthy cross-examination and very strangely, we find not a single relevant question asked to him about the will. He was cross-examined mainly as regards his need. In para 18, a stray suggestion was given that Sukhiabai had not executed the will in his favour and that he had manipulated to prepare fraudulent will. The appellant reiterated that the will was not only

11

executed, but the Court has accepted it. Beyond this, there is nothing in the cross-examination. The respondent/defendant also examined himself and in his evidence also, in para 4, he reiterated that the will shown was forged. He was specifically asked in his cross-examination and he had to admit that he had filed no Revision against the order dated 9.9.1997, by which the Will was held proved, though he asserted that he was going to file the same. It was on this basis that the Trial Court held all the issues in favour of the appellant.

14. Before the first Appellate Court, again it was reiterated by the tenant-respondent (appellant therein) that the Trial Court had committed an error in holding the appellant/plaintiff to be the heir of the suit house. Some judgments were cited in support of this contention, they being Mahendra Dhapu & Ors. Vs. Ram Avtar & Ors. [1923 AIR Nagpur 209], Kalyanmal Mills Ltd., Indore Vs. Voli Mohammad & Ors. [1965 AIR M.P. 72], Raghunath Singh Vs. Ganga Basai [1961 M.P.L.J. 398], Surajmal & Ors. Vs. Kishori Lal [1976 AIR H.P. 74]. The Appellate Court distinguished all these decisions on the factual aspects and held that the Will (Exhibit P-1) was proved by the evidence of

the appellant/plaintiff, as also the attesting witness. It was also pointed out that the Will was not disputed by anybody else, muchless even the interested persons. On the other hand,

they had supported the Will. The Appellate Court came to the conclusion that in that view, the tenant could not be allowed

12

to raise question on the legality of the title of the appellant

herein. The Appellate Court thereafter considered the matter

on merits regarding the bonafide need of the appellant and held

it to be proved. The Appellate Court further went on to hold

that since the tenant had challenged the title of the landlord,

i.e., the appellant during the pendency of the eviction

petition, the landlord became entitled under Section 12(1)(c)

to get the decree of eviction.

It is on this basis that the

appeal came to be dismissed.

15. The High Court, however, took the view that the Will had

to be proved all over again, though it was held proved earlier

in the enquiry under Order 22 Rule 5, CPC.

We have already

earlier referred to the findings of the High Court.

In our

view, the view of the High Court that the Will had to be proved

again, is incorrect.

16. As a legal position, it cannot be disputed that normally,

an enquiry under Order 22 Rule 5, CPC is of a summary nature

and findings therein cannot amount to res judicata, however,

that legal position is true only in respect of those parties,

who set up a rival claim against the legatee.

For example,

here, there were two other persons, they being Ramesh and Arun

Kate, who were joined in the Civil Revision as the legal

representatives of Sukhiabai.

The finding on the Will in the

order dated 9.9.1997 passed by the Trial Court could not become

final as against them or for that matter, anybody else,

13

claiming a rival title to the property, vis-à-vis, the

appellant herein, and, therefore, to that extent, the

observations of the High Court are correct.

However, it could

not be expected that when the question regarding the Will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the Will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the Will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.

It was at the instance of the High Court in the revisional jurisdiction that the direction was given that the Trial Court should first decide as to whether who could be the legal representative of Sukhiabai and after complete enquiry, the Trial Court held the Will to be proved.

The Will was not only attacked by the appellant on its proof, but also on merits, inasmuch as the respondent/defendant went on to contend before the Trial Court during that enquiry that the Will was unnatural, unfair and was executed in doubtful circumstances.

The respondent/defendant had also relied on the reported decision of this Court in Girja Dutt Singh Vs. Gangotri Datt

Singh [AIR 1955 SC 346].

The Trial Court, however, rejected this contention.

On the other hand, the Trial Court found on

14

merits that the appellant was living with Sukhiabai and Sukhiabai had adopted him orally.

17. Evidence of Ramesh Kate was also referred to, who asserted

about this fact. Reference was also made to the evidence of

Sukhiabai herself in the Rent Control Case No. 14/90-91 that

she had adopted Dashrath Rao (appellant herein) and that

Dashrath Rao lived with her.

Clear cut findings were given by

the High Court in these proceedings that from the evidence of

Prabhakar Rao (PW-2), the attesting witness, it was clear that

Sukhiabai had signed in his presence and he had also signed in

present of Sukhiabai and had also seen the other attesting

witness signing the Will and attesting the same. Not only this, but the Trial Court also wrote a finding that the objection raised by the defendant (respondent herein) that Sukhiabai was not in a position to understand the Will on account of her poor physical condition, was also rejected by the Trial Court. It was also noted that the Will was executed six years prior to her death and as such, there was no question of Sukhiabai being suffered with any mental or physical disability for executing the Will. Therefore, it is on this basis that the Will was held to be proved. Once this was the position and in the same suit, the further evidence was led, there was no point on the part of the appellant/plaintiff to repeat all this evidence all over again. We have closely seen the relied upon ruling of the Himachal Pradesh High Court in

15

Suraj Mani & Anr. Vs. Kishori Lal (cited supra). The ruling undoubtedly correctly holds that the finding in an enquiry under Order 22 Rule 5 cannot operate as res judicata, provided the very question needs to be decided. The factual situation, however, differs substantially. The case before the Himachal Pradesh High Court only pertained to the correctness of the order passed in the enquiry under Order 22 Rule 5, CPC. That was not a case where the question, as in the present case, fell for consideration. In fact, the Himachal Pradesh High Court also observed and, in our view, correctly, that it was still open to the petitioner (therein) during the trial of the suit to establish that the Will was competent and conferred no right, title or interest on the respondent and, therefore, the respondent was not entitled to any relief in the suit. Unfortunately, on evidence in this case, the respondent/defendant did not do anything and did not even challenge the evidence of the appellant that he had become owner of the Will. Merely because the evidence of respondent/defendant and Prabhakar Rao (PW-2) was not repeated all over again, it cannot be held that the appellant/plaintiff

could be non-suited on this ground.

18. Dr. Kailash Chand, Learned Counsel, appearing for the respondent also relied on ruling in Vijayalakshmi Jayaram Vs.

M.R. Parasuram [AIR 1995 A.P. 351]. It is correctly held by

the Andhra Pradesh High Court that the Order 22 Rule 5 is only

16

for the purpose of bringing legal representatives on record for

conducting of proceedings in which they are to be brought on

record and it does not operate as res judicata.

However, the

High Court further correctly reiterated the legal position that

the inter se dispute between the rival legal representatives

has to be independently tried and decided in separate

proceedings. Here, there was no question of any rivalry

between the legal representatives or anybody claiming any rival

title against the appellant/plaintiff.

Therefore, there was no

question of the appellant/plaintiff proving the Will all over

again in the same suit.

The other judgment relied upon is Full

Bench Judgment of Punjab & Haryana High Court in Mohinder Kaur

& Anr. Vs. Piara Singh & Ors. [AIR 1931 Punjab & Haryana 130].

The same view was reiterated.

As we have already pointed out,

there is no question of finding fault with the view expressed.

However, in the peculiar facts and circumstances of this case,

there will be no question of non-suiting the

appellant/plaintiff, particularly because in the same suit,

there would be no question of repeating the evidence,

particularly when he had asserted that he had become owner on

the basis of the Will (Exhibit P-1).

In a case in Shaligram

Bhagoo Kunbi & Anr. Vs. Mt. Dhurpati W/o Shamrao Kunbi [AIR

1939 Nagpur 147], the Division Bench of that Court consisting

Hon'ble Stone C.J. and Hon'ble Vivian Bose, J., considered the

question. The Division Bench, firstly, quoted from Tarachand

17

Vs. Mt. Janki [AIR 1916 Nag. 89]. The quotation relied on was

as follows:-

"It is no longer open to the Court to stay the suit until the dispute as to who is the legal representative of a deceased plaintiff has been

determined in a separate suit. The question as to who was the representative of a deceased defendant could not be left open for decision in another suit, even under the old Code, but had to be decided by the Court itself. Under the present Code, all such questions have to be decided by the Court."

The Bench then proceeded to refer to Bombay High Court decision in Raoji Bhikaji Vs. Anant Laxman [1918 (5) AIR Bom 175] and Allahabad High Court decisions in Raj Bahadur Vs. Narayan Prasad [1926 (13) AIR All. 439] and Antu Rai Vs. Ram Kinkar Rai [1936 (23) AIR All. 412] and went on to record that order under Order 22 Rule 5 was not a res judicata. After referring to these rulings, the Bench held:-

"But there is an important qualification to this. It is true the order is not res judicata, but for all that, the decision is final so far as the suit in which it is made is concerned, not on the ground of res judicata but because of Section 47. No subsequent decision in a separate suit can be used to affect the rights of the parties so far as questions relating to the 'execution, discharge or satisfaction' of the decree in connection with which the order was made is concerned."

The Bench further observed:-

"Once a person is joined as a legal representative under Order 22 Rule 5, and once it is accepted that that is final so far as that litigation is concerned, then it follows to the decree, and, thereafter, all matters relating to the 'execution, discharge or satisfaction' of that decree must be decided under Section 47 and not in a separate suit." (Emphasis supplied)

18

Ultimately, the Bench came to the conclusion:-

"All that, in our opinion, is not res judicata is the question whether or not the person joined as the legal representative really occupies that character. That question is not finally concluded by a decision under Order 22 Rule 5 except in so far as it concerns the suit in which the decision is made. To that extent, we overrule the judgment in Mt. Laxmi Vs. Ganpat reported in 17 NLR 45. The appeal is dismissed with costs."

(Emphasis supplied)

Therefore, it is clear that at least insofar as the suit in the present case is concerned, the question regarding the appellant's right to represent was closed. There could be a second suit, questioning his entitlement on the basis of Will, but admittedly, there is no such challenge by anybody to his status as a legatee of Sukhiabai. Insofar as the suit in the

present case is concerned, the question was finally decided under Order 22 Rule 5, CPC and in the same suit, it could not be re-agitated. Obviously, the impugned judgment is incorrect when it holds that the appellant/plaintiff had to lead fresh evidence all over again to prove his status on the basis of the Will, which was held to be proved in the enquiry under Order 22 Rule 5, CPC.

19. All this is apart from the fact that the tenant in this case could not have challenged the Will at all.

He was an

utter outsider and had no interest in the property as owner.

Indeed, from the pleadings and evidence, it is clear that

19

tenant-respondent has not even ventured to claim any rival

interest against the appellant/plaintiff.

20. For all these reasons, we are unable to agree with the impugned judgment and we would choose to set aside the same and restore the two judgments of the Trial Court and Appellate Court. The appellant/plaintiff, therefore, succeeds with costs of Rs.25,000/-.

.....J.
(Markandey Katju)

.....J.
(V.S. Sirpurkar)

New Delhi
November 3, 2009