

(2003) 12 P&H CK 0092

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1835 of 1982

Rama and Others

APPELLANT

Vs

Hari Singh and Others

RESPONDENT

Date of Decision: Dec. 6, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 3, Order 32 Rule 7

Citation: (2004) 3 CivCC 708 : (2004) 138 PLR 481 : (2004) 3 RCR(Civil) 111

Hon'ble Judges: G.S. Singhvi, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

G.S. Singhvi, J.

1.This appeal is directed against the judg-ments and decrees dated 3.11.1980 and 3.3.1982 passed by Senior Sub Judge, Sonapat in Civil Suit No. 84 of 1978 and Additional District Judge, Sonapat in Civil Appeal No. 17/13 of 8.2.1980, respectively.

2. The plaintiffs-appellants including appellant No. 1.-Rama, who was minor and was represented through his real brother Shri Suraj Bhan, filed a suit for declaration and possession in the Court of Senior Sub Judge, Sonapat. They averred that the land detailed in para 1 of the plaint was in cultivating possession of S/Shri Hardwari, Hari Ram, Fattu and Ratia as occupancy tenants under Achhpal and others. After the deaths of Fattu, Hardwari and Hari Ram, the land continued to be in occupation of Ratia, as an occupancy tenant and he became owner by virtue of the provisions of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953. Ratia died issuess and on his death, plaintiff-appellant No. 3-Jai Kanwar and one Rattia Ram son of Shiv Ram succeeded him in equal shares. The said Rattia Ram left a registered will dated 5.2.1968 in favour of the plaintiffs-appellants No. 1 and 2. Desa son of Phula, Shanker son of Mohan Singh, Giani son of Ram Dhan, Mulghi son of Mangta and Hari Singh" son of Bansi, all residents of village Takola, Tehsil and District

Sonepat filed an application for ejectment against Rattia Ram and plaintiff-appellant No. 3 before Assistant Collector, Sonapat which was dismissed on 29.4.1967. Thereafter, they tried to take forcible possession of the land. Thereupon, Rattia Ram and plaintiff-appellant No. 3 filed an application u/s 145 of the Code of Criminal Procedure (for short, "Cr.P.C.") before Sub Divisional Magistrate, Sonapat, who passed order dated 16.12.1967 and declared them owners in possession of the suit land. This was followed by a suit for injunction filed by Desa and others which was dismissed on 23.8.1968. In 1977, the plaintiff-appellants filed an application dated 5.4.1977 before Sub Divisional Magistrate, Sonapat u/s 145 of the Cr.P.C, who attached the suit land but directed the parties to seek determination of their title by approaching the Civil Court. Thereafter, the plaintiffs-appellants filed a suit for declaration and possession.

3. Defendants-respondents No. 1, 3, 4 and 5 contested the suit. They denied that Fattu, Hardawari, Ratia etc. were the occupancy tenants and that the plaintiffs were in possession thereof for last 16/17 years. They pleaded the Fattu etc. died 13 to 15 years ago and since then they were in possession. They pleaded that plaintiff No. 3 and Rattia Ram were not related to Ratia and therefore, there was no question of their inheriting the property from him. They also challenged the validity of the will left by Rattia Ram in favour of plaintiffs No. 1 and 2. They pleaded ignorance about the cases except the last mentioned proceedings initiated by the plaintiffs u/s 145 of the Cr.P.C. In their additional objections, defendants No.1, 3, 4 and 5 pleaded that on the death of Ratia, they had taken possession of the suit land and were in possession thereof as owners. According to them, Bal Mukand etc. got false entries recorded in the Khasra Girdawaris and on coming to know of the same, they filed application before Tehsildar, Sonapat, which was still pending.

4. The plaintiffs-appellants filed replication reiterating their stand in the plaint and, at the same time controverted the averments contained in the written statement.

5. On the pleadings of the parties, the trial Court framed the following issues:-

"(i) Whether the plaintiffs are owners of the suit land? OPP

(ii) Whether the plaintiffs were in possession of the suit land within 2 months next of the passing of the attachment order by the Sub Divisional Magistrate, Sonapat dated 5.4.1977 u/s 145 Cr.P.C. and if so, to what effect? OPP

(iii) Whether the defendants were in possession of the suit land within 2 months next of the passing of the order u/s 145 Cr.P.C. dated 5.4.1977. If so, to what effect? OPD

(iv) Relief."

6. In the course of trial, Shri K.D.Bhardawaj, counsel for the plaintiffs, defendant-Hari Singh and Shri Jai Tirath, Advocate appearing for defendants No.1, 3, 4 and 5 made statements on 21.10.1980 and agreed that Ch. Rizak Ram, Advocate be

appointed as referee for deciding the dispute between the parties. Accordingly, the trial Court passed order dated 21.10.1980 appointing Ch. Rizak Ram as referee. The suit was ultimately dismissed on 2.11.1980 as per the terms and conditions disclosed in the statement of the referee.

7. The plaintiffs-appellants challenged the judgment and decree of the trial Court by filing an appeal in the Court of Additional District Judge, Sonapat on the following grounds:-

(a) There is no provision of law under which the parties or the Court could refer the dispute for decision by the referee.

(b) The trial Court did not have the jurisdiction to refer the matter for adjudication of Ch. Rizak Ram.

(c) The judgment of the trial Court was liable to be declared as nullity because the dispute could not have been referred on behalf of the minor without the leave of the Court as required by Order 32 Rule 7 of the CPC (for short, "CPC").

8. The learned Additional District Judge negatived the aforementioned grounds and held:-

(1) that the plaintiffs-appellants were bound by the statement made by their counsel, who agreed that the dispute between the parties may be referred to Ch. Rizak Ram, Advocate;

(2) that no special power was required to be given to Shri K.D.Bhardawaj, Advocate :e for making a statement agreeing to be bound by the decision of Ch. Rizak Ram, Advocate.

(3) that the judgment passed against the minor without the leave of the Court was voidable and not void and the same could be challenged only by filing a review application in the trial Court or by filing-a fresh suit and not by way of appeal.

9. I have heard learned counsel for the parties and perused the record.

10. Although, the memo of appeal is silent about the substantial questions of law arising in the appeal at the commencement of arguments, Shri U.S.Sahni submitted that the following questions of law would require consideration by the Court:-

(i) Whether the counsel for Rama, minor (now appellant No.1) had any authority under the Vakalatnama or even otherwise to agree for the reference of the dispute to Ch. Rizak Ram, who was Advocate for the opposite parties and whether this act by the counsel was not against the interests of the present appellants?

(ii) Whether the trial Court could have legally referred the matter to such a referee and whether it could have decided the controversy involved in the case simply on the statement of the referee?

(iii) Whether in a case, like the present, where the reference itself is void ab initio, being in violation of the provisions of Order 32 Rule 7 CPC, the minor is entitled to challenge and get it set aside by filing an appeal in the High Court?"

11. Shri Sahni argued that the learned Additional District Judge committed a serious illegality by holding that the appeal was not maintainable against the judgment and decree of the trial Court and the only remedy available to Rama, who was minor at the relevant time, was to file a review application or fresh suit. He referred to the provisions of Order 32 Rule 7 of the CPC and argued that the statement made by Shri K.D.Bhardawaj, Advocate agreeing to settlement of dispute through a referee without obtaining leave of the Court was not binding on the minor and he could seek nullification of the decree by filing an appeal. In support of this argument, Shri Sahni relied on the judgment of the Rajasthan High Court in [Aksingh and Another Vs. Durjansingh and Others](#). He then argued that Shri K.D.Bhardawaj had not been authorised by the plaintiffs-appellants to make a statement before the trial Court for settlement of the dispute through the intervention of the referee and therefore, the judgment and decree passed by the learned Senior Sub Judge on the basis of the statement made by the referee-Ch. Rizak Ram are liable to be declared nullity.

12. Mrs. Harsh Rekha learned counsel for the defendants-respondents supported the impugned judgment and decree and argued that no question of law, much less a substantial question of law, arises for consideration in this appeal. She then argued that the appeal filed by the appellants against the judgment of the trial Court was liable to be dismissed because the same was based on the compromise arrived at between the parties. She further argued that non-observance of the conditions laid down in Order 32 Rule 7(1) of the CPC did not affect the jurisdiction of the trial Court to decide the suit in terms of the compromise arrived at between the parties and if the minor, namely, Rama felt aggrieved by the judgment and decree dated 3.11.1980 passed by Senior Sub Judge, Sonapat then the only remedy available to him was to file a review application before the trial court or to file a fresh suit. In support of this argument, Ms. Harsh Rekha relied on the judgment of this Court in *Mst. Kaushalya Devi v. Baijnath* (1951)53 PLR 170 which was approved by the Supreme Court in [Kaushalya Devi and Others Vs. Baijnath Sayal and Others](#).

13. have thoughtfully considered the respective arguments and perused the record.

14. The question whether the judgment and decree passed by Senior Sub-Judge, Sonapat were liable to be treated as void on account of non-compliance of the provisions contained in Order 32 Rule 7(1) of the CPC has to be answered in the negative in view of the plain language of Order 32 Rule 2 of the CPC and the judgments of this Court in *Mst. Kaushalya Devi and Ors. v. Baij Nath and Ors.* (supra) and of the Supreme Court in *Kaushalya Devi and Ors. v. Baijnath Sayal (deceased) and Ors.* (supra).

15. Sub-rule (1) of Rule 7 of Order 32-CPC lays down that no next friend or guardian of the minor in the suit shall, without the leave of the Court, expressly recorded in the proceedings enter into any agreement or compromise on behalf of the minor. Sub-rule (1-A) requires the making of the application for leave along with an affidavit and passing of an appropriate order by the Court. Sub-rule (2) declares that any agreement entered into without the leave of the Court as required by sub-rule (1) shall be voidable against all the parties other than the minor.

16. In *Mst. Kaushalya Devi and Ors. v. Baijnath and Ors.* (supra), Division Bench of this Court interpreted Order 32 Rule 7 of the CPC and held that a decree passed in the absence of an express order passed by the Court granting leave to the minor to compromise under Order 32 Rule 7 can be attacked in three ways: firstly, by an application to the Court in which the compromise took place, secondly, by a regular suit to set aside the decree and thirdly, by bringing a fresh suit.

17. The above referred judgment was approved by the Supreme Court in *Kaushalya Devi and Ors. v. Baijnath Sayal (deceased) and Ors.* (supra). Their Lordships considered the effect of non-compliance of Order 31 Rule 7(1) and observed:-

"What the rule really means is that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor. It is voidable and not void. It is voidable against the parties that are major but not against a minor. If the minor avoids the said agreement it would be set aside but in no case can the infirmity in the agreement be used by other parties for the purpose of avoiding, it in their own interest. The non-observance of the condition laid down by R 1 does not make the agreement or decree void for it does not affect the jurisdiction of the court at all. The non-observance of the said condition makes the agreement or decree only voidable at the instance of the minor and not void against him."

18. Their Lordships of the Supreme Court then dealt with the issue relating to the procedure which minor can adopt for avoiding such agreement or decree and observed:-

"The question as to the procedure which the minor should adopt in avoiding such an agreement or decree has been the subject-matter of several decisions, and it has been held that a compromise decree may be avoided by the minor either by regular suit or by an application for review by the Court which passed the said decree. The decision in *Manohar Lal v. Jadu Nath Singh*, 33 Ind.App. 128 (P.C.), is an illustration of a suit filed by the minor for declaration that the impugned decree did not bind him. It is, however, not necessary for us to deal with this aspect of the matter in the present appeal any further,".

19. The appellants' plea that the minor could challenge the preliminary decree in the appeal tiled against the final decree was rejected by the Supreme Court in the following words:-

"The whole object of enacting Section 97 was to make it clear that any party feeling aggrieved by a preliminary decree must appeal against that decree; if he fails to appeal against such a decree the correctness of such a decree cannot be challenged by way of an appeal against the final decree, which means that the preliminary decree would be taken to have been correctly passed. In such a case an appeal against the final decree would inevitably be limited to the points arising from proceedings taken subsequent to the preliminary decree and the same would be dealt with on the basis that the preliminary decree was correct and beyond challenge.

Where in a partition suit a preliminary decree is passed without complying with the provisions of Order 32 Rule 7(1) the decree is not a nullity but is voidable by the minor. Where, however, no appeal is taken against the decree, and the decree is not avoided, the minor cannot avoid it by preferring an appeal against the final decree. The object of Section 97 is precisely to disallow any such dispute being raised if the preliminary decree is not challenged by appeal. The whole object which Section 97 intends to achieve would be frustrated if it is held that only the factual correctness of the decree cannot be challenged but its legal validity can be, even though an appeal against the preliminary decree has not been filed."

20. In view of the above analysis of the provisions of Order 32 Rule 7 of the CPA and the law laid down by the Division Bench of this Court and the Supreme Court in the cases noted above, I hold that judgment and decree dated 3.11.1980 passed by Senior Sub Judge, Sonapat cannot be treated as nullity and learned Additional District Judge, Sonapat did not commit any error by holding that the appeal filed against the compromise decree was not maintainable.

21. The judgment of Rajasthan High Court in A.K. Singh and Anr. v. Durjan Singh and Ors. (supra), the author of which was Wanchoo, C.J. (as his Lordship then was) does not support the argument of Shri Sahni that the appeal by the minor is maintainable against the compromise decree, but in view of the judgment of the Division Bench of this Court in Mst. Kaushalya Devi and Ors. v. Baijnath and Ors. (Supra) which, as mentioned above, has been approved by the Supreme Court in Kaushalya Devi and Ors. v. Baijnath Sayal (deceased) and Ors. (supra). I am unable to accept the argument of Shri Sahni that judgment and decree dated 3.11.1980 passed by the trial Court should be treated as nullity. Incidentally, it may be mentioned that Wanchoo C.J., who had rendered the judgment in A.K. Singh and Anr. v. Durjan Singh and Ors. (supra), was the member of the Bench of the Supreme Court which approved the view taken by the Division Bench of this court on the issue of interpretation of Order 32 Rule 7 of the CPC and maintainability of the appeal by the minor against the compromise decree.

22. Hence, question No. (iii) is answered against the appellants.

23. With respect to other two question, Shri U.S. Sahni, learned counsel for the appellants did not advance any argument and, therefore, I do not consider it necessary to record a detailed opinion on those questions. That apart, I am in agreement with the learned Lower Appellate Court that the judgment and decree of the trial Court could not be set aside on the ground that Shri K.D.Bhardwaj, Advocate had not been given special authority to make a statement agreeing to the reference of the dispute between the parties to Ch. Rizak Ram, Advocate. It has not been disputed on behalf of the appellants that Shri K.D.Bhardwaj, had been engaged by them to file civil suit and the authority given. Therefore, they cannot avoid the consequences of the statement made by Shri K.D.Bhardwaj agreeing to the disposal of the suit by making a reference to Ch. Rizak Ram, Advocate.

In the result, the appeal is dismissed. However, the parties are left to bear their own costs.