

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 626 of 2000

Reserved on: 29.9.2010

Date of decision: 29.10.2010

Smt. Koshalya

... Appellant

Versus

Smt. Rama Devi

... Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?¹ Yes.

For the appellant: Mr. D. Ghosh vice Mr. Chander Paul Sood,
Advocate.

For the respondent: Mr. Anand Sharma, Advocate, for respondent
No. 1(a).

V.K. Ahuja, J.:

This Regular Second Appeal under Section 100 C.P.C. has been filed by the appellant/plaintiff against the judgment and decree of the Court of learned District Judge, Chamba, dated 15.9.2000, vide which he accepted the appeal filed by the respondent and set aside the findings of learned Senior Sub Judge, Chamba, dated 14.1.2000, decreeing the suit for declaration and consequently, dismissed the suit of the plaintiff.

2. Briefly stated, the facts of the case are that the appellant hereinafter also referred to as the plaintiff filed a suit for possession by way of partition as against the original respondent Smt. Suto, now

¹Whether reporters of Local Papers may be allowed to see the judgment? Yes.

represented by her L.R., hereinafter referred to as the defendant. It was alleged by the plaintiff that she has filed the suit through her sister Smt. Brahmi for separate possession of her half share by way of partition of land comprised in Khasra Numbers as detailed in the plaint measuring 382-5 Square yards, situated in Chamba Town-I. It was alleged by the plaintiff that she and defendant are joint owners in possession of the suit property. The defendant is step daughter of the plaintiff. The plaintiff is deaf and dumb. The defendant being step daughter has been harassing the plaintiff. Since plaintiff is deaf and dumb and is incapable to protect her interest and as such, the suit has been instituted by her through her sister Smt. Brahmi. It was alleged that the plaintiff is in possession of less area than her share in the suit property and she wants to separate her share by way of partition. It was alleged that the other land of the parties was acquired by the Chamera Project Second Stage and the defendant had received entire compensation thereof and did not pay even a single penny to the plaintiff. The plaintiff had requested the defendant to effect partition of the suit property but she declined, hence, the suit filed by the plaintiff.

3. The defendant took up number of preliminary objections. On merits, she pleaded that the plaintiff is not joint owner of the suit property and the entries showing the plaintiff to be joint owner are wrong. It was pleaded that originally the suit property belonged to Birbal, father of defendant, who bequeathed his entire property in favour of the defendant vide Will dated 20.1.1962 and thus, the defendant became exclusive owner of the suit property. It was also pleaded that though the plaintiff is deaf and dumb, but she is

capable of protect her interest as she is able to communicate with others. It was alleged that the plaintiff received the compensation from Chamera Project authorities and she is not entitled to get the suit property partitioned

4. On the pleadings of the parties, the following issues were framed by the learned trial Court:-

1. Whether the plaintiff has $\frac{1}{2}$ share in the suit property as alleged? OPP
2. Whether Shri Birbal has executed a valid will dated 20.1.1962 in favour of the defendant, as alleged? OPD
3. Whether this court has no pecuniary jurisdiction as alleged? OPD
4. Whether the suit is bad for non joinder of necessary parties as alleged? OPD
5. Whether the suit is barred by limitation? OPD
6. Whether the entries in the revenue record showing the plaintiff to be owner of the half share in the suit property are wrong and incorrect as alleged? OPD
- 6-A Whether the plaintiff Smt. Koshalya Devi is unable to protect her interest? OPP
7. Relief.

5. Parties led their evidence and the learned trial Court vide its impugned judgment decided all the issues in favour of the plaintiff and as against the defendant and consequently decreed the suit of the plaintiff for possession by way of partition and a preliminary decree was passed accordingly in favour of the plaintiff and as against the defendant.

6. On appeal, the learned District Judge vide his impugned judgment allowed the appeal on the grounds that Smt. Brahmi was not

competent to maintain the suit on behalf of the plaintiff Koshalya Devi. On this finding only, the appeal was allowed and the suit stood dismissed accordingly.

7. I have heard the learned counsel for the parties and have gone through the record of the case.

8. The submissions made by the learned counsel for the appellant/plaintiff were that the defendant at no stage challenged competency of Smt. Brahmi, her sister, to file the suit. It was also submitted that the fact that the plaintiff was deaf and dumb was accepted in the compensation case while receiving the compensation by the respondent. It was submitted that it is for the Court to make an enquiry and the enquiry is in between the Court and the plaintiff and the defendant is not competent to challenge the same unless and until she specifically takes the plea and proves the same. It was also submitted that the enquiry was held to this extent and an issue was framed and parties led their evidence and the learned trial Court gave findings in favour of the plaintiff, which findings were wrongly set aside by the learned Appellate Court on appeal.

9. On the other hand, learned counsel for the respondent had submitted that the plaint was not properly filed. There was no medical certificate on record to prove that the plaintiff was deaf and dumb. No initial enquiry was held, which was required to be held and it was the duty of the Court to hold an enquiry and as such, the findings were wrongly recorded by the learned trial Court.

10. To substantiate his allegations that the findings recorded under Issue No.6-A that the suit was not competent since the plaintiff

was deaf and dumb, learned counsel for the appellant had placed reliance upon the following decisions:-

Reliance was placed upon the decision in **S. Chattanatha Karayalar Vs. Vaikuntarama Karayalar and another, AIR 1968 Madras 346**. The observations made in Para-5 are relevant and are being reproduced below:-

"A person who is deaf and mute and characterised as suffering from mental infirmity, cannot be taken for granted as one who should be represented by a next friend. An enquiry and indeed a proper enquiry with the assistance of medical experts is called for. Such an enquiry can be held even at the appellate stage, if such a question directly arises thereat."

The decision in **Asha Rani Vs. Amrat Lal, AIR 1977 Punjab & Haryana 28** was relied upon. The observations made therein are relevant and are being reproduced below:-

"Where the record of the case did not show that an enquiry of preliminary nature into unsoundness of mind of the party was made or the procedure contained in R. 3 of O. 32, as applicable to the States of Punjab and Haryana and R. 15 of O. 32 of the Code was complied with, the decree passed against person of unsound mind would be void."

In the above case, where in a proceeding for dissolution of marriage under Section 13 of the Hindu Marriage Act against wife, who was alleged to be of unsound mind, no list of relatives was filed by the husband as required by provisions of Order 32. The Court also did not ask for such list and did not hold an enquiry of preliminary nature into the unsoundness of mind of the appellant as required

by Rule 15 of Order 32. It did not pass any order appointing G as guardian of A. Therefore, it was held that decree for divorce was not sustainable. The facts of the case led to the inference that the wife who was alleged to be of unsound mind had a right firstly to be declared of unsound mind and incapable of defend her case and thereafter only the petition for dissolution of marriage filed as against her could have been proceeded with.

The decision in **Smt. Godawari Devi Vs. Smt. Radha Pyari Devi and others, AIR 1985 Patna 366**, was relied upon. The observations made in Para-6 are relevant and are being reproduced below:-

“Where the opposite party is not already adjudged as of unsound mind, neither the plaintiff nor the defendant has the locus standi to challenge or question the soundness of mind of the opposite side and claim an adjudication thereon at the very threshold.

The issue of unsoundness of mind of the parties is primarily betwixt the court and the party and is certainly not a lis betwixt the Parties themselves. The legislature in its wisdom has conferred a larger and paternal power on the court to see that each party has the capacity to safeguard its legal interest and is in no way handicapped by reason of any mental infirmity. It is equally significant to notice that this broad-based power extends in cases of any mental infirmity and is not necessarily governed by the extreme situation of a person being of unsound mind altogether. This beneficial and, indeed, paternal power is wholly vested in the court and it is in its discretion alone, where it finds that any one of the parties is suffering from a weakness of mind, to proceed for taking steps to safeguard the interest of such a party.”

11. On the other hand, learned counsel for the respondent had placed reliance upon the following decisions:-

The decision in **Nanak Chand and others Vs. Banarsi Das and others, AIR 1930 Lahore 425.** The observations made in Paras 1 and 2 are relevant and are being reproduced below:-

"Order 32, R. 15, is intended to cover the case of persons who are absolutely deaf and dumb and on that account are incapable of receiving any communications or of communicating their wish or thought to others. The case would be different with those who are not absolutely deaf and dumb but partially so and are able to communicate with others though with some difficulty."

Reliance was placed upon the decision **Syed Hassan Baffakki Tnangal and others Vs. Kalliath Thazha Chirutha and others, AIR 1988 Kerala 160,** wherein plaintiff was filed by next friend in the name of person of unsound mind. Defendant pleaded that the plaintiff was only a dumb person and not an idiot. It was held that the Court cannot accept plaintiff without conducting enquiry and raising an issue specifically and having it tried.

The decision in **Samalla Krishnamurthy Vs. Samala Sasila and another, AIR 1983 Andhra Pradesh 174** was relied upon. The observations made in Paras 9 and 10 are relevant and are being reproduced below:-

"A suit was filed by the plaintiff for declaration that the disputed sale deed was executed by him in the unsound state of mind. Application under O. 32, R. 15 filed by him was supported by the affidavit of the next friend wherein it was stated that the plaintiff was of unsound mind. The record disclosed that affidavits of

three other persons belonging to the same village were also filed alongwith the application. The District Munsif directed the suit to be registered. The order also showed that the counsel was heard. Apparently, the trial court was satisfied with the material before it that the plaintiff was of unsound mind. Held that in the absence of any express provision in the Rule as to the nature of the enquiry that should be conducted, it would not be possible to say that the procedure adopted by the trial court was not in conformity with the Rule."

The decision in **Somnath Vs. Tipanna Ramchandra Jannu, AIR 1973 Bombay 276** was relied upon. The observations made in Para-17 are relevant and are being reproduced below:-

"When the plaint is being examined for the purpose of admission, if it contains a statement as required by clause (d) of Rule 1 of O. 7 that the plaintiff is a person of unsound mind and that a next friend is suing on his behalf, the court must at once hold an inquiry for the purpose of recording a finding that the plaintiff is a person of unsound mind or mentally so infirm as incapable of protecting his own interest. It is the duty of the Court to do so, and it is not necessary for the next friend to make a separate application for that purpose. Apart from the total extent of the evidence that might be led in such inquiry the plaintiff who is alleged to be of unsound mind should be invariably called for being questioned. The provisions of Rule 15 of Order 32 make it possible for a next friend to sue on behalf of an adult person as a next friend only when the person is either so adjudged by a court of competent jurisdiction or if not so adjudged is found by the court on inquiry to be so. That is the foundation prima facie for a next friend to avail and proceed with the suit. Such inquiry is obviously an ex parte inquiry for the

court to give a finding and to admit the plaint and issue the process to the other side.”

12. It is clear from the above discussion of the case law cited by the learned counsel for the parties that no specific form of enquiry is specified under Order 32 Rule 15 and it is the satisfaction of the Court as to whether an enquiry should be held and to what extent the enquiry should be held. To my mind the nature of the enquiry also depends upon the fact as to whether the question was raised by the defendant in regard to the fact that the plaintiff was deaf and dumb and was able to protect her rights or not. It is also clear as has been held in *Godwari Devi's case* (supra) that neither the plaintiff nor the defendant has the locus standi to challenge or question the soundness of mind of the opposite side and claim an adjudication thereon at the very threshold. It is clear as was held in above case that the question of unsoundness of mind of the parties is primarily between the Court and party and certainly not a lis between the parties themselves. This beneficial and, indeed, paternal power is wholly vested in the Court and the Court has to proceed for taking steps to safeguard the interest of such a party.

13. Coming to the facts of the case, a perusal of the record shows that the plaintiff filed the suit and it was mentioned in the body of the plaint that Smt. Koshalya Devi widow of Birbal, deaf and dumb through Smt. Brahmi Devi. In the written statement filed by the defendant, she nowhere took any such plea that the suit was not competent since it has been filed through Smt. Brahmi Devi, who has not claimed to be the next friend of the plaintiff or that Smt. Brahmi Devi was not competent to sign the plaint as has been done in the

case. This clearly shows that at the earliest particularly the defendant did not take the plea that the suit was not maintainable having been filed by an incompetent person, who has not been declared to be the guardian or next friend of the plaintiff to file the suit. Thereafter, the Court proceeded with the suit.

14. During the trial of the case when the case was fixed for arguments, an application under Order 6 Rule 17 C.P.C. was filed by the plaintiff to amend the plaint and it was mentioned that inadvertently in the end of Para-2, the following words which had not been written be allowed to be mentioned therein. Therefore, it was alleged that since the plaintiff is deaf and dumb, the suit is being filed through Smt. Brahmi Devi who is living with the plaintiff. The word used in Hindi is 'Basaprasti' and that Smt. Brahmi Devi has got no adverse interest to that of the plaintiff. Thereafter, amended plaint was filed and the defendant also filed amended written statement and now she took up the plea that the plaintiff has no right to sue and it was pleaded that although she is deaf and dumb and it was pleaded as under:-

"..... although she is deaf and dumb but fully understand her interest. She understands and is capable of communicating her wishes and thoughts to other. She is not absolutely deaf and dumb but partially so and is able to communicate with others though with some difficulties. Smt. Brahmi as such is not competent in law to proceed with case on behalf of Smt. Kosalya."

15. It is, therefore, clear that now for the first time, the defendant has challenged the competency of Smt. Brahmi who filed

the suit, it was not denied that the plaintiff was deaf and dumb. On these pleadings, the Court framed issue No. 6-A as mentioned above.

16. Parties led their evidence and the learned trial Court gave its findings in favour of the plaintiff on Issue No. 6-A. Observations made in Paras 36 and 37 of the judgment are as under:-

"36. The defendant Smt. Suto has admitted in her counter claim cum written-statement that the plaintiff is deaf and dumb. The defendant has admitted her signature on affidavit Ex. P-3, as discussed under issues disposed of hereinabove. The defendant Smt. Suto has specifically admitted in her affidavit Ex. P-3 that the plaintiff Smt. Koshalya is deaf and dumb, therefore, she received a sum of Rs.4,48,500/- of the share of the plaintiff. So, the defendant has admitted that the plaintiff is deaf and dumb.

37. Statement of PW-1 Brahmi is that the plaintiff Koshalya is her sister, who is deaf and dumb and she cannot watch her interest. So, in view of pleadings, and evidence led by the parties, it is evident that the plaintiff is deaf and dumb and as such, she is unable to watch and protect her interest. So, the present suit has been filed by the plaintiff through her next friend Smt. Brahmi, who is her real sister. Hence, this issue is decided in favour of the plaintiff and against the defendant."

17. These findings given above clearly show that one of the factors which weighed in the mind of the learned trial Court was that the defendant had admitted in her affidavit that the plaintiff was deaf and dumb and, therefore, she received the compensation including the share of the plaintiff. In the written statement the defendant has admitted that the plaintiff is deaf and dumb. This clearly shows that when this plea suited the defendant she took

up the plea that the plaintiff was deaf and dumb and took whole compensation by filing affidavit that she was deaf and dumb and now when this plea does not suit her, she took this plea that no next friend has been appointed and that her sister was not competent to file the suit. These findings were reversed by the learned Appellate Court and the main ground taken was that there was no evidence to show that the plaintiff was unable to protect her interest and accordingly, it was held that the suit was not competent. What the learned Appellate Court had ignored is firstly the admission made by the defendant in written statement that the plaintiff was deaf and dumb, secondly, the admission made in the affidavit that the plaintiff was deaf and dumb and, therefore, she got the entire compensation and thirdly, the plea was not taken in the first written statement filed by the defendant that the suit was not competent having been filed by Smt. Brahmi without her having been declared as next friend. The Court had given an opportunity to both the parties to lead evidence to this effect and it was for the defendant to have led evidence to show that she was deaf and dumb and was unable to protect her right and the learned trial Court had accepted the evidence including the admissions made by the defendant to hold that the plaintiff was deaf and dumb and was not able to protect her interest. There is nothing on record to show that her sister had any adverse interest to that of the plaintiff. The Court has also to consider this question as to what benefit is accruing to the sister of the plaintiff. She is not getting any compensation. She is not getting any exclusive possession for herself and when the plaintiff is allegedly living with her and it has not been proved that her sister has any adverse interest. These findings

recorded under Issue No. 6-A ought not to have been reversed. The provisions do not contemplate any specific nature of the inquiry and it is the satisfaction of the Court on the basis of the material placed before it at the earliest or evidence led that the Court has to give the findings as to whether she was capable of protecting her interest or not. How can she be held to be capable of protecting her interest when the compensation money was received by her step daughter i.e. defendant. She could not agitate or dispute that she was also entitled to the compensation being a co-owner. The decision in Godawari Devi's case clearly shows that this question is in between the Court and the party and it is not specifically for the other party to challenge this question and the Court has to see as to whether the interest of such a party is protected or not. In the present case, no decree for divorce is being passed as against the person who is of unsound mind and, therefore, she herself had to be given an opportunity to defend her case. In the present case, the only claim is for partition which decree is for the benefit of the person who is allegedly deaf and dumb, which fact was not disputed and the decree will be beneficial to the plaintiff and at this stage, simply because no detailed enquiry was held. I am not inclined to remand the case to the learned trial Court for fresh decision once issue had already been framed and Court gave its findings that the plaintiff was rightly represented by her sister as her next friend.

18. In view of the above discussion, I accordingly hold that the appeal filed by the appellant is liable to be allowed and the findings recorded by the learned Appellate Court under Issue No. 6-A are liable to be set aside and consequently, the suit of the plaintiff stands

decreed as decreed by the learned trial Court. The challenge was not made to other issues since no appeal was filed by the respondent against the findings in regard to the Will under Issue No. 1 being against her, which were affirmed by the learned District Judge also.

19. In view of the above discussion, I accordingly allow the appeal filed by the appellant, set aside the judgment and decree passed by the learned Appellate Court and restore that of the learned trial Court. However, the parties are left to bear their own costs.

C.O No. 84 of 2001:

In view of the judgment passed in the main appeal, the cross objections stand disposed of.

**October 29, 2010
(BSS)**

**(V.K. Ahuja),
Judge**