IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 214 of 2007

Reserved on: 30.03.2017

Date of decision: 31.03.2017

Mohinder Paul … Appellant

Versus

Shambhu Ram and others … Respondent

Coram :

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondent No. 1.

Ms. Meera Devi, Advocate vice Mr. Deepak Gupta, Advocate, for respondent No. 3.

Ajay Mohan Goel, J.:

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 87 of 2006, dated 09.04.2007, vide which learned Appellate Court while

[1]Whether reporters of Local Papers may be allowed to see the judgment?

dismissing the appeal filed by the present appellant/plaintiff upheld the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No. III, Mandi, in Civil Suit No. 62/2001 dated 06.07.2006, whereby learned trial Court had dismissed the suit for declaration and possession filed by the present appellant/plaintiff.

2. Brief facts necessary for adjudication of the present case are that the appellant/plaintiff (hereinafter referred to as the plaintiff), filed a suit that land comprised in Khewat No. 75, Khatauni No. 83, Khasra No. 193 measuring 2-1-11 bighas situated in Muhal Nalsar/283 Illaqa Rajgarh/Balh, Tehsil Sadar, District Mandi, H.P., was earlier owned and possessed by Chinhu son of Balu, which land was obtained in exchange by Chinhu from Makku son of Todar and in lieu of the same, Chinhu had in exchange given his ancestral property comprised in Khewat Khatauni No. 169/ 209, Khasra No. 504, measuring 3-17-14 bighas, situated in Muhal Kehar/290, Tehsil Sadar, District Mandi, to Makku vide mutation No. 677. According to the plaintiff, said land measuring 2-1-11 bighas was inherited by defendant No. 2 from late Chinhu who was grandfather of the plaintiff vide mutation No. 242. Old Khasra No. 193 measuring 2-1-11

bighas was converted into Khasra No. 238 during consolidation proceeding and out of Khasra No. 238 land measuring 0-2-0 bigha was sold by defendant No. 2 to defendant No. 1 vide registered sale deed No. 677 dated 14.06.1994 which land thereafter was mortgaged by defendant No. 1 for Rupees Two Lacs, though the value of the suit land was only Rs.10,000/-. As per the plaintiff, suit land measuring 2 biswas was the Joint Hindu coparcenary property of defendant No. 2 as well as proforma defendants after the death of Chinhu and defendant No. 2 was not competent to alienate the same without the consent of the plaintiff and proforma defendants, except for legal necessity, as the suit land was Joint Hindu coparcenary property in the hands of defendant No. 2 after the death of Chinhu. It was further the case of the plaintiff that defendant No. 1 was well aware that the suit land was the Joint Hindu coparcenary property and he was also aware that there was no legal necessity with defendant No. 2 at the time of execution of sale deed to have sold the same. As per the plaintiff, his grandfather during his life time had laid foundation for the construction of a building on the suit land and defendant No. 1 despite being fully aware that defendant No. 2 was not

competent to alienate the suit land, in connivance with the bank officials had mortgaged the same with defendant No. 3 to defeat the rights of the plaintiff and proforma defendants. It was on these basis that the suit was filed praying for a decree in favour of the plaintiff and proforma defendants declaring sale deed No. 677 dated 14.06.1994 to be null and void as well as decree for possession in favour of the plaintiff and proforma defendants and further that the loan if any raised by defendant No. 1 from defendant No. 3 against the suit land, be declared as null and void.

3. Though defendant No. 2 (father of the plaintiff) by way of his written statement admitted whatever was stated in the plaint, however, defendant No. 1 contested the same. In his written statement, defendant No. 1 denied that the suit land was ancestral in nature qua defendant No. 2 and it was mentioned in the written statement that the suit land which was purchased by defendant No. 1 from defendant No. 2 was in fact self acquired property of vendor who had all the rights to sell the same. It was further the case of defendant No. 1 that value of the land was not Rs.10,000/- as alleged and in fact defendant No. 2 father of the plaintiff had received

Rs.55,000/- as sale consideration for defendant No. 1 for the sale who had compelled him to recite Rs.10,000/- as sale consideration. Defendant No. 1 also denied the allegations qua ancestral nature of property and also of exchange as alleged. Defendant No. 1 also denied that any foundation for construction over the suit land was laid by the father of the plaintiff or that there was any connivance between him and defendant No. 3. It was also mentioned in the written statement that defendant No. 2 in fact had also sold land measuring 1-9-0 bighas from Khasra No. 238 to one Rajender Kumar by way of sale deed and the said sale deed had not been challenged by the plaintiff which reflected the malafide of the plaintiff. It was also stated in the written statement that the suit was a collusive one.

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

1. Whether the suit land is joint Hindu coparcneary property of the plaintiff? … OPP
2. Whether the defendant No. 2 has sold the suit land without any legal necessity, if so its effects? … OPP

3. Whether the plaintiff and his grand father had laid down plinth over the suit land and if so its effect? … OPP
4. Whether the suit is within limitation? … OPP
5. Whether the sale No. 677 dated 14-6-94 is null and void as alleged? … OPP
6. Whether the plaintiff is entitled for the decree of declaration and possession as alleged? … OPP
7. Whether the suit land is in possession of defendant No. 1 as alleged? … OPD
8. Whether the plaintiff has no enforceable cause of action? … OPD
9. Whether the present suit is collusive one between the plaintiff and defendant No. 2 as alleged? … OPD
10. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? … OPD
11. Whether the plaintiff is estopped by his own acts and conduct to file the present suit? … OPD
12. Whether the suit is bad for misjoinder and non-joinder of necessary parties? … OPD
13. Whether the suit is not maintainable? … OPD
14. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1: No.

Issue No. 2:		No.
Issue No. 3:		No.
Issue No. 4:		Yes.
Issue No. 5:		No.
Issue No. 6:		No.
Issue No. 7:		Yes.
Issue No. 8:		No.
Issue No. 9:		No.
Issue No. 10:		No.
Issue No. 11:		No.
Issue No. 12:		No.
Issue No. 13:		No.
Relief	:	The suit of the plaintiff is dismissed as per operative part of the judgment.

6. Learned trial Court while dismissing the suit so filed by the plaintiff held that the suit land in fact was not Joint Hindu coparcenary land of the plaintiff. While arriving at the said conclusion, it was held by learned trial Court that land comprised in Khewat No. 75, Khatauni No. 83 bearing Khasra No. 193 measuring 2-1-11 bighas, situated in Muhal Nalsar/238, Illaka Rajgarh, Tehsil Sadar, District Mandi, H.P., was earlier owned and possessed by Chinhu Ram vide mutation No. 204 as was evident from Ext. PD, jamabandi for the year 1986-87. It further held that the said jamabandi

demonstrated that the suit land was owned and possessed by Makku and had been transferred in exchange to Chinhu, who was the grandfather of the plaintiff. Learned trial Court further held that Ext. PF, order of mutation No. 204, also demonstrated that the said land bearing Khasra No. 193 before exchange was owned and possessed by Makku and the same was given in exchange to Chinhu. Learned trial Court further held that the records demonstrated that in lieu of exchange Chinhu had given his property comprised in Khewat Khatauni No. 169/209 Khasra No. 504 measuring 3-17-14 bighas, situated in Muhal Kehar/290, Tehsil Sadar, District Mandi, H.P., vide mutation No. 677 Ext. PG. It was further held by learned trial Court that Ext. DW7/1 was copy of Will produced on record by defendant No. 1 which demonstrated that Chinhu Ram, grandfather of the plaintiff had bequeathed his land in favour of defendant No. 2 Charan Dass Bali and mutation No. 242 was entered on the basis of the said Will i.e. Ext. DW7/2. It was further held that when defendant No. 2 was cross-examination on this point, he deposed that he had inherited the property by way of a Will and had also stated that Will Ext. DW7/1 was the same Will which was executed by his father in his favour. Learned trial

Court held that defendant No. 2 also stated that mutation Ext. DW7/2 was attested on the basis of the said Will. It also held that defendant No. 2 also stated as DW-7 that the Will was executed by his father in his name so that the shares do not go in favour of his sisters.

7. It was held by learned trial Court that the property in issue was not inherited by defendant No. 2 in his capacity as son of Chinhu but he gained the ownership of the same by virtue of a Will which was executed by his father in his favour. It was further held by learned trial Court that the said property was inherited by defendant No. 2 on the basis of a Will, the same did not remain ancestral property in the hands of defendant No. 2 and further, it was also evident from Ext. D-14 that the property in issue was not ancestral in the hands of Chinhu also as he had been given the property as 'Gair Maursi'. On these basis, it was held by learned trial Court that the suit property was not the ancestral property and thus it was not Joint Hindu coparcenary property of the plaintiff. Thereafter, learned trial Court held that defendant No. 2 was having right to sell the property to anyone. Learned trial Court also held that DW-4 Subhash Verma, Recovery Supervisor of Land Development Bank, had also demonstrated

that defendant No. 2 took loan from the said bank which fact also stood corroborated from the copy of mutation Ext. D-5. Learned trial Court further held that it stood proved that defendant No. 2 was having legal necessity otherwise to sell the land as he was to pay the loan of the bank and it was on this account that he had sold the land to defendant No. 1. On the basis of the findings so arrived at by learned trial Court, the suit of the plaintiff was dismissed.

8. In appeal, the findings so returned by learned trial Court were upheld by learned Appellate Court. While upholding the judgment and decree passed by learned trial Court, it was held by learned Appellate Court that the moot point which survived for consideration before learned trial Court was whether the suit land which was inherited by defendant No. 2 Charan Dass on the basis of Will Ext. DW1/1 was Joint Hindu Family/coparcenary property or not. Learned Appellate Court took note of the law laid down by the Hon'ble Supreme Court of India in ***C.N. Arunachala Mudaliar Vs. C.A. Muruganatha Mudaliar and another***, ***AIR 1953 SC 495***, wherein it has been held by Hon'ble Supreme Court that in order to find out whether the property is or is not ancestral, in the hands of a particular person, not merely the

relationship between the original and present holder has to be seen but the mode or transmission has also to be looked into and the property can ordinarily be reckoned as ancestral only if the present holder had got it by virtue of his being a son or descendant of the original owner. Learned Appellate Court held that the suit land was inherited by defendant No. 2 on the basis of a registered Will and not by way of survivorship i.e. by way of intestate succession. It further held that had the property been inherited by survivorship, then the situation would have been different and the suit property could be said to be ancestral in the hands of defendant No. 2 as far as plaintiff and proforma respondents were concerned. Learned Appellate Court further held that as the suit land devolved upon defendant No. 2 by way of registered Will, then the question as to whether the sale deed executed by defendant No. 2 in favour of defendant No. 1 was without legal necessity pales into insignificance as the suit property was not ancestral or coparcenary under Hindu law. On these basis, learned Appellate Court while upholding the judgment and decree passed by learned trial Court, dismissed the appeal so filed by the present appellant.

9. Feeling aggrieved, the plaintiff has filed the present appeal.

10. This appeal was admitted on the following substantial questions of law on 11.07.2008:-

1. Whether the Courts below were right in holding that Karta of Joint Hindu Family is competent to dispose of the entire coparcenary property by Will?
2. Whether the sale of coparcenary property can be valid for legal necessity when the onus of such necessity has not been discharged?
3. Whether it is mandatory for the vendee of Joint Hindu Family/coparcenary property to show and prove that he had made a prudent inquiry regarding the existence of such necessity?

11. I will deal with first substantial question of law independently and thereafter questions No. 2 and 3 together.

1. Whether the Courts below were right in holding that Karta of Joint Hindu Family is competent to dispose of the entire coparcenary property by Will?

12. In my considered view, the substantial questions of law which has been so formulated is completely misleading as this substantial questions of law does not arise for the purpose of adjudication because no findings have been returned either of learned Courts below that the Karta of Joint Hindu Family was competent to dispose of the entire coparcenary property by Will. The findings which have been returned by learned trial Court and affirmed by learned Appellate Court are that the property which was bequeathed to defendant No. 2 by way of a Will was not coparcenary property as it stood proved from Ext. D-14. In fact, Issue No. 1 which was to the effect that as to whether the suit land was Joint Hindu coparcenary property of the plaintiff stands answered against the plaintiff by learned trial Court and the said findings have been affirmed by learned Appellate Court. Therefore, as it has not been held by learned Courts below that the suit land was coparcenary property, as such, this substantial question of law in fact does not arise for the purpose of adjudication from the facts of the case or for the adjudication of the case. Thus, this substantial question of law does not arise from judgments and decrees under challenge

and the same is completely misleading and is answered accordingly.

> ***2. Whether the sale of coparcenary property can be valid for legal necessity when the onus of such necessity has not been discharged?***
>
> ***and***
>
> ***3. Whether it is mandatory for the vendee of Joint Hindu Family/ coparcenary property to show and prove that he had made a prudent inquiry regarding the existence of such necessity?***

13. These two substantial questions of law are completely misleading as I have already held above, none of the Courts below have held that the suit land was coparcenary property. Therefore, when it is not a positive finding returned in favour of the plaintiff that the suit land was coparcenary property, there is no occasion for there being any substantial question of law to the effect that as to whether the sale of coparcenary property can be valid for legal necessity when the onus of such necessity has not been discharged, in the facts of the present case. There is a specific finding returned by learned Appellate Court that as the suit land was not ancestral in nature and as defendant No. 2 was having full right to dispose of the same, the factum of there being any

legal necessity to sell the said property as defendant No. 2 was concerned, pales into insignificance. These findings could not be demonstrated to be perverse during the course of arguments.

14. Therefore, in this view of the matter, both these substantial questions of law are also completely misleading and the same do not arise for adjudication from either of the judgments and decrees passed by both learned Courts below.

15. In view of discussion held above, there is no merit in the present appeal and the same is accordingly dismissed. No order as to costs. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands disposed of.

CMP No. 482 of 2008:

16. As this miscellaneous application was not pressed at the time of arguments, therefore, the same is dismissed as not pressed.

(Ajay Mohan Goel),
Judge

March 31, 2017
(BSS)