IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

LPA No. 19 of 2019
with OSA No. 2 of 2019
Judgment reserved on 5.12.2019.
Decided on: 16.12.2019

LPA No. 19/2019

Savita Sharma and others .....Appellants.

Versus

Master Abeer Singh and others ...Respondents.

OSA No. 2 of 2019.

Savita Sharma and others .....Appellants.

Versus

Master Abeer Singh and others ...Respondents.

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The Hon'ble Mr. Justice L. Narayana Swamy, Chief Justice.
The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge.
Whether approved for reporting?

For the appellants: Mr. Sudhir Thakur Sr. Advocate with Mr.Karun Negi, Advocate.

For the respondents: Mr. Ajay Kumar Sr. Advocate with Mr. Sumit Sood, Advocate, for respondent No.1.
Mr. Ajay Chauhan, Advocate, for respondents No. 5 to 7.
Mr. Ashok Sharma, Advocate General with M/s Ranjan Sharma Ashwani Sharma, Ritta Goswami and Nand Lal Thakur, Additional Advocates General for respondents No. 8 and 9.
Respondents No.2 and 4 *ex parte*.

L. Narayana Swamy, Chief Justice.

The plaintiff instituted a Civil Suit bearing No. 27 of 2018 before the learned Single Judge mainly with the following prayer:

> *"(a) a declaration be given in favour of the plaintiff and against the defendants to the effect that the property comprised in khata No. 11 khatauni No. 12 Khasra No. 10, 24, 28,45,75,108, 109, 116, 117 (Kitas 9) measuring 31-6 bighas situated in Mauza Bail, patwar circle Slogra Tehsil and District solan and land comprised in khata No. 14 khatauni No. 15 khasra Nos. 1,4,6,13,14, 17,22, 27, 30, 31, 33, 40, 50, 51, 60, 63, 65, 67, 69, 74, 76, 79, 87,88 91, 92, 95, 104, 106, 125, 126, 139, 142 (Kitas 33) measuring 101-09-00 bighas situated in Mauza Bail, Patwar Circle Salogra Tehsil and District solan earlier recoded in the name of Shri Khiyali Ram s/o Sh. Ram Krishan and presently recorded in the revenue records in the names of the defendants is a joint hindu family ancestral property and the plaintiff has got ¼ undivided share by birth in 82 bighas of land earlier standing in the name of Shri Khiyali Ram and Smt. Damyani Devi belonging to the HUF of Shri Khiyali Ram."*

2. In the said suit, the appellants/defendants had filed an Application under Order 7 Rule 11 read with Section 151 of the Code of Civil Procedure (for short "the CPC") with

the prayer for rejection of the plaint . The said application came to be rejected by the learned Single Judge of this Court vide its order dated 8.1.2019, against which the present Letters Patent Appeal has been filed.

3. The prayer of the appellants/defendants is to allow the application filed under Order 7 Rule 11 of the CPC and to dismiss the suit instituted by the plaintiff.

4. Facts leading to the present appeal are that earlier the parties to the proceedings instituted a Civil Suit No. 107/1 of 2010/2017 and counter claim No. 156/1 of 2007. The case of the plaintiff in the said suit was that the property in question is an ancestral property and they are co-parcerners for the purpose of inheritance of the property. During the proceedings of the suit, the parties to the suit entered into a compromise and on the basis of the said compromise deed, the suit came to be decreed as compromised with appellants/defendants No. 1 to 5 in the aforesaid suit on 11.3.2017.

5. The case of the plaintiff was that he is co-parcener and has got right over the ancestral property and the compromise entered into between the parties is contrary to the

rights accrued in his favour. Accordingly he has made a prayer to set aside the compromise and to declare that he is entitled to ¼ share in the property.

6. The case of the appellants/defendants is that the property though is Hindu Undivided Family (HUF) property and their great grandfather has gifted the property in their favour and thereby it loses the character of an ancestral property. Accordingly, the plaintiff has no right in securing the said property. The great grandfather by name Sh. Khiyali Ram died on 9.12.1987 and the wife of Shri Khiyali Ram, Smt. Damyanti great grandmother of the plaintiff had died on 20.4.2007. Hence by the death of great grandfather succession did not open as the plaintiff was not born at that time as such he is not entitled to any share in the ancestral property. It is submitted that since the plaintiff has no right or interest in the property and the suit does not disclose any cause of action and on the said count the application has been made with the prayer to reject the plaint.

7. The learned Single Judge after examining the case of the parties and going through the entire pleadings of the

parties dismissed the said application. While dismissing the application, the learned Single Judge has referred to the judgment delivered by the Hon'ble Supreme Court in case ***The Church of Christ Charitable Trust & Eduction Charitable society,*** *vs.* ***M/s Ponniamman Educational Trust 2012 (6) JT 149: 2012 AIR SCW 4136*** in which it has been held that "cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant." The learned Single Judge has also relied on the judgment rendered by the Hon'ble Supreme Court in ***Mayar (H.K.) Ltd. v. Vessel M.V. fortune Express (2006) 3 SCC 100*** referred to in case titled as ***Kuldeep Singh Pathnia versus Bikram Singh Jaryal 2017 (5) SCC 345*** wherein it has been recorded that the Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising its powers under Order 7 Rule 11 of the CPC. By referring to the judgments supra, it has been held by the learned Single Judge that while considering the

application under Order 7 Rule 11 of the CPC the Court is required to read the entire plaint as a whole to arrive at a conclusion whether it discloses a cause of action and if it does so then the plaint cannot be rejected.

8. The ground taken by the appellants/defendants is that the property loses its character of ancestral property on the gift deed executed by the great grandfather of the plaintiff therefore, the question of right over the said property by the plaintiff does not arise. For the same the learned Single Judge has referred to the affidavits filed by the appellants/defendants in the suit filed by the plaintiff where they themselves have averred that the very character and nature of the suit property is ancestral Joint Hindu Family coparcenary property, which had come into the hands of Sh. Khayali Ram, i.e., great grandfather of the plaintiff from Sh. Ram Krishan, who vide family settlement gave the same to his sons on 9.4.1953, including share of Sh. Khayali Ram and mutation dated 9.4.1953 in this regard was attested in the revenue records. As per the plaintiff, Sh. Ram Krishan was the father of Sh. Khayali Ram and he, on 9.4.1953 in a family

settlement, settled the ancestral property inherited by him from his father Sh. Bairagi Ram in favour of his six sons. It has been recorded by the learned Single Judge that when the plaintiff in the suit has averred that the suit property is an ancestral property and when such is the subject matter of the suit filed by the plaintiff, which is denied by the appellants/defendants, it is not open for them to take an altogether "U" turn by saying that the ancestral property loses its character.

9. In order to reject a plaint under Order 7 Rule 11 of the CPC, the conditions are set out in the Code itself, namely, (a) where it does not disclose a cause of action; (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so; (d) where the suit appears from the statement in the plaint to be barred

by any law; (e) where it is not filed in duplicate; and (f) where the plaintiff fails to comply with the provisions of rule 9.

10. In respect of cause of action, firstly the case of the appellants/defendants is that the plaint does not disclose any cause of action for which it has to be pleaded and proved that the property is an ancestral property of Khayali Ram great grandfather who succeeds the property by partition and the succession opened on the date of death when the amendment to Section 6 of the Succession Act had not come into force.

11. As on the prevailing date, as per the Mitakshara law great grandfather of the plaintiff had become the Karta and on his death the grandfather of the plaintiff becomes the Karta. When the father of the plaintiff is the sole Karta, the ancestral property devolves on him to the extent of ¼. Secondly, as per the Hindu Succession Act, 1956 (for short the Succession Act) and as per the Mitakshira Law by birth in the Joint Hindu Family, the male members get a right in the property and by virtue of amendment to Section 6, a female member also gets rights over the property. As on the relevant year, since the great grandfather of the plaintiff was the Karta

thereafter on his death father of the plaintiff became karta. Since the property devolves on him, naturally, he gets rights over the property to the extent of ¼ share in the property. Though as on the date of settlement entered into between the parties the plaintiff gets a right to occupy the property since he became a coparcener of the ancestral property but settlement excludes him. Accordingly, it has been recorded by the learned Single Judge that when a right is accrued in favour of the plaintiff it becomes a cause of action for the purpose of Order 7 Rule 11 of the CPC. Therefore, the first ground for rejecting the plaint is answered against the appellants/defendants.

12. The reasons have been recorded by the learned Single Judge and it is found that as on the date of death of great grandfather of the plaintiff the father of the plaintiff became Karta and accordingly, the ancestral property devolves on him. Since a right has accrued in favour of the plaintiff and his rights have not been determined or adjudicated, it is submitted by the plaintiff that the settlement is contrary to the established interest and rights of the parties. On this ground a prayer has been made by the plaintiff to

declare that he has right over the suit property thus the compromise entered into between the parties be set aside.

13. Another submission made by the learned Senior counsel for the appellants/defendants is that once the settlement is entered into between the parties under Section 21 of the Legal Services Authorities Act, 1987, it becomes a decree and it can be interfered only in limited circumstances such as suppression of material facts, fraud etc. In the instant case no such ground has been taken by the plaintiff. The settlement becomes a decree and it is binding on the parties, including the plaintiff and on this ground also, the learned Single Judge should have accepted the application.

14. The next ground taken by the appellants/defendants is with regard to amendment made to Section 6 of the Succession Act. It is submitted that a female member of the Joint Hindu Family also becomes co-parcener. Accordingly, the daughters of late Shri Khiyali Ram are also entitled to equal share as per the provisions of settlements made between the parties and all members of the family have rights over the property. When such a settlement is entered

into between the parties, it is not open for the plaintiff to reopen the same. With regard to the ground taken, the submission of the appellants/defendants is that as per the judgment of the Hon'ble Supreme Court the amendment brought to Section 6 is prospective in nature and not retrospective. In support of this contention he has relied on the judgment rendered by the Hon'ble Supreme Court in case titled ***Prakash and others versus Phulavati and others (2016) 2 SCC 36*** and it is apt to reproduce para 36 of the said judgment herein:

> *"23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."*

15. On the same principle, he has relied on the judgment of the apex Court in case titled **Danamma alias Suman Surpur and another v. Amar and others *AIR***

2018 SC 721. It is apposite to reproduce para 24 of the said judgment herein:

> *"24. Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b)."*

16. From the judgments referred to supra, and in the light of the above, we are of the considered view that by birth in the Joint Hindu Family, a male member gets right as a

coparcener prior to amendment to Section 6 of the Succession Act and after amendment every members irrespective of son and daughters get rights over the coparcenary property and any settlement made is contrary to the spirit of the Act and the law, referred to supra.

17. The great grandfather of the plaintiff Sh. Khyali Ram died in the year 1997 and his only son predeceased him in the year 1987. Thus when he is survived by a male member, it is the father of the plaintiff only who becomes the Karta and by death, the plaintiff also becomes a co-parcener and a right is accrued in his favour. When on the birth of the plaintiff a settlement has been arrived between the parties, without making him as a party, it is to be held that even settlement is not binding on him which is contrary to his rights.

18. In ***Rohit Chauhan v. Surinder Singh and others, AIR 2013 SC 3525*** in para 11, it has been held as under:

> *"11.We have bestowed our consideration to the rival submission and we find substance in the submission of Mr. Rao. In our opinion coparcenary property means the property which consists of ancestral property and a*

coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenar property and the son would acquire interest in that and become a coparcener……."

19. The ratio we have borrowed from the aforesaid judgment is that a coparcener has no definite share in the coparcenary property but he has an undivided interests in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family.

20. In **Most. Rev. P.M.A Metropolitan and others vs. Moran Mar Marthoma and another** ***AIR 1995 SC 2001*** it has been held as under:

> *"27.....One of the basic principles of law is that every right has a remedy. Ubi jus ibi remediem is the well-know maxim. Every civil suit is cognizable unless it is barred, "there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue.. ....."*

21. Here we should not forget one important thing that when a right is accrued then it is the Court of competent jurisdiction which has to deal with the matter. Section 9 of the CPC is very much clear on the subject . The legal maxim *Ubi jus ibi remediem* is that where there is a legal right there is a legal remedy. In the present case once the learned Single Judge has concluded that the plaintiff has claimed his right by virtue of his birth in the Hindu Joint Family, then his rights have to be adjudicated only by the Court of competent jurisdiction. Under these circumstances, the settlement

entered into between the parties in which the plaintiff is not a party, is not binding on him.

22. Now, with regard to Order 7 Rule 11 of the CPC, for the purpose of rejection of the plaint, it is the case of the appellants/defendants that firstly there is no cause of action, secondly, settlement is arrived at between the parties and thirdly when the succession opens, the plaintiff was not born and hence plaintiff has no interest on the property of Sh. Khayali Ram.

23. The learned Single Judge while dealing with the said application has rightly concluded that rejection of the plaint is not mechanical and while considering the application for rejection of plaint, whole pleadings of the parties and their respective cases have to be considered. In this regard he relied upon ***Bhau Ram v. Janak Singh & Ors. AIR 2012 SC 3023***, and it is apt to reproduce relevant portion of para 8 of the said judgment herein:

> *"8.The law has been settled by this Court in various decisions that while considering an application under Order VII Rule 11 CPC, the Court has to examine the averments in the plaint and the pleas*

taken by the defendants in its written statements would be irrelevant……"

24. The law has been settled by this Court and by the Hon'ble Supreme Court in various decisions that while considering an application under Order 7 Rule 11 of the CPC, the Court has to examine the averments in the plaint and the pleas taken by the defendants in its written statement would be irrelevant.

25. The judgments cited by the learned Senior Counsel for the appellants/defendants in (2008) 2 SCC 1490, (2016) 1 Apex Court Judgments 619, AIR 1986 SC 1753, (2016) 1 ACJ 263 and (2018) 3 SCC 343, in our considered opinion are not applicable to the facts and circumstances of the present case.

26. In the light of the sufficient and cogent reasons recorded by the learned Single Judge, we are of the opinion that the application made by the appellants/defendants was liable to be rejected. We make it clear that when a case of this nature comes to a Court it is not proper to allow the application only on mere asking, the Court has to examine the pleadings made in the plaint read with the conditions set out

in Order 7 Rule 11 of the CPC referred to supra, otherwise, it will result into miscarriage of justice.

27. In the light of the above, we are of the considered view that the learned Single Judge has considered the respective cases of the parties and has rightly dismissed the application filed under Order 7 Rule 11 of the CPC. We see no reason to interfere with the order passed by the learned Single Judge and hereby concur with the findings recorded by the learned Single Judge. Accordingly, the Letters Patent Appeal is dismissed.

28. In view of the dismissal of the appeal, OSA filed by the appellants/dependents challenging the order passed by the learned Single Judge on an application under Order 39 Rules 1 and 2 CPC passed in OMP No. 80/2018, is also liable to be dismissed. Ordered accordingly. The order passed by the learned Single Judge whereby he has directed not to create any third party interest and to transfer the property in favour of any person to the disadvantage of the plaintiff is confirmed.

29. A copy of this judgment be placed on the file of OSA No. 2 of 2019.

(L. Narayana Swamy)
Chief Justice

(Jyotsna Rewal Dua)
Judge

December 16, 2019.
(cm Thakur)