Hardevinder Singh vs Paramjit Singh & Ors on 7 January, 2013

Equivalent citations: 2013 AIR SCW 447, 2013 (9) SCC 261, AIR 2013 SC (SUPP) 873, (2013) 1 ALL RENTCAS 568, (2013) 1 ALLMR 946 (SC), (2013) 1 KCCR 769, (2013) 2 ANDHLD 54, (2014) 2 MAH LJ 126, (2014) 1 MPLJ 487, (2013) 122 ALLINDCAS 34 (SC), (2013) 1 ICC 101, (2013) 1 WLC(SC)CVL 246, (2013) 1 CLR 389 (SC), (2013) 119 REVDEC 735, (2013) 116 CUT LT 284, (2013) 96 ALL LR 833, (2013) 1 ALL WC 772, (2013) 1 CURCC 123, (2013) 2 JCR 136 (SC), (2013) 2 MAD LJ 226, (2013) 2 MAD LW 877, (2013) 1 RECCIVR 968, AIR 2013 SC (CIVIL) 856, 2013 (1) KLT SN 39 (SC)

Author: Dipak Misra

Bench: Dipak Misra, K. S. Radhakrishnan

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 102 OF 2013
(Arising out of S.L.P. (C) No. 35271 of 2011)

Hardevinder Singh ... Appellant

Versus

Paramjit Singh & others ...Respondents

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. One Sarabjit Singh filed Civil Suit No. 29 of 1995 for possession of the suit land to the extent of his share treating the will alleged to have been executed in favour of the defendant Nos. 1 to 4 as null and void with the consequential prayer for restraining them from alienating the suit property in any manner. It was set forth in the plaint that the suit land in the hands of his father, Shiv Singh, was ancestral coparcenary and Joint Hindu Family property and he, along with his brothers, the

defendant Nos. 5 and 6, constituted a Joint Hindu Family with the father and mother. It was alleged that the defendant Nos. 1 to 4, on the basis of a forged will, forcibly took possession of the land. It was set forth that by virtue of the will, the plaintiff and the defendant Nos. 5 and 6, the co-owners, have been deprived of the legal rights in the suit land. It was the case of the plaintiff that the will was not executed voluntarily by his father, Shiv Singh, and it was a forged one and, therefore, no right could flow in favour of the said defendants.

3. The defendant Nos. 1 to 4 entered contest and supported the execution of the will on the basis that it was voluntary and without any pressure or coercion. That apart, it was contended that the rights of defendant No. 5 had not been affected as a registered gift was executed on 31.3.1980 by late Shiv Singh. The claim of the plaintiff was strongly disputed on the ground that the will had already been worked out since the revenue records had been corrected. The defendant No. 6 resisted the stand of the plaintiff contending, inter alia, that the property was self-acquired and the execution of the will was absolutely voluntary. The defendant No. 5 filed an independent written statement admitting the claim of the plaintiff. It was set forth by him that the suit land was ancestral, a Joint Hindu Coparcenary property and his father Shiv Singh, being the Karta, had no right to bequeath the same in favour of defendant Nos. 1 to 4 to the exclusion of the other rightful owners. That apart, it was contended that the will was vitiated by fraud. A prayer was made to put him in possession of the suit land after carving out his share.

4. The learned trial Judge framed as many as four issues. The plaintiff examined himself as PW-1 and tendered number of documents in evidence which were marked as Exts. P-1 to P-17. The defendant Nos. 1 to 4 examined number of witnesses and got seven documents exhibited. The defendant No.5 supported the evidence led by the plaintiff. In rebuttal, the plaintiff examined the Record Keeper of Medical College Rohtak as PW-2 and Dr. A.K. Verma as PW-3 and brought on record four forms, Exts. P-18 to P-19A. The learned trial Judge, on appreciation of the evidence brought on record, came to hold that the suit land was a Joint Hindu Family property; that defendant Nos. 1 to 4 had failed to dispel the suspicious circumstances in the execution of the will in favour of defendant Nos. 1 to 4 and, hence, the will was null and void; that the mutation did not create any impediment on the rights of the plaintiff and other natural heirs of the testator; and that they are entitled to get joint possession of the suit land as per their shares in accordance with the law of natural succession.

5. On an appeal being preferred by the three beneficiaries of the will (as the original defendant No. 1 had died), the learned appellate Judge came to hold that the property held by Shiv Singh, the predecessor-in-interest of the parties to the suit, was not ancestral, but self-acquired and, hence, he was competent to alienate the same in any manner as he liked; that the will dated 6.7.1989, Exh. D-2, in favour of original defendant No. 1, his wife who had expired by the time the appeal was filed and the defendant Nos. 2 to 4, his grandsons, was validly executed and that the finding recorded by the learned trial Judge on that score was unsustainable. Be it noted, the learned appellate Judge took note of the fact that Sarabjit Singh had challenged the said will but, on account of settlement with the appellants before the appellate court, had practically withdrawn from the litigation. Being of this view, he set aside the judgment and decree passed by the learned trial Judge and dismissed the suit with costs.

6. The defendant No. 5 preferred R.S.A. No. 85 of 2007 before the High Court. The learned single Judge, upon hearing the learned counsel for the parties and placing reliance on Smt. Ganga Bai v. Vijay Kumar and others[1] and Banarsi and others v. Ram Phal[2], came to hold that the appeal was not maintainable at the instance of defendant No. 5 under Section 100 of the Code of Civil Procedure, 1908 (for short "the Code").

7. We have heard Mr. Vipin Gogia, learned counsel for the appellant, and Mr. K.K. Mohan, learned counsel appearing for the respondents.

8. At the very outset, we must state that the High Court has accepted the preliminary objections raised by the respondents as regards the maintainability of the appeal. While accepting the preliminary objection, the High Court has opined that the plaintiff and the defendant Nos. 1 to 4 and 6 had accepted the judgment and decree; that the defendant No. 5 cannot be regarded as an aggrieved party to assail the impugned decree invoking the jurisdiction of the High Court under Section 100 of the Code; that appeal being a creature of the statute, the right to appeal inheres in one and it stands in a distinct position than that of a suit and, hence, no appeal could lie against a mere finding for the simple reason that the Code does not provide for such an appeal; and that the suit having been dismissed by virtue of the dislodging of the decree by the first appellate court, the regular second appeal could not be filed by the defendant No. 5. Hence, the present appeal by the said defendant-appellant.

9. As indicated earlier, to arrive at such a conclusion, reliance was placed on the decision in Smt. Ganga Bai v. Vijay Kumar and others (supra) wherein a distinction was drawn between the inherent right to file a suit unless the suit is statutorily barred and the limitations in maintaining an appeal. In that case, the defendant Nos. 2 and 3 had preferred an appeal before the High Court challenging the finding recorded by the trial court. Thereafter, a challenge was made partly to the preliminary decree. This Court took note of the fact that the appeal preferred by the said defendants was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial court that the partition was not genuine. It was observed by this Court that to maintain an appeal, it requires authority of law. After referring to Sections 96(1), 100, 104(1) and 105 of the Code, the Bench observed as follows: -

> "17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court."
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> 10. Thereafter, the Court opined that the High Court mixed up two distinct issues, namely, (i) whether the defendants 2 and 3 were competent to file an appeal if they were aggrieved by the preliminary decree and

> (ii) whether the appeal as filed by them was maintainable. It was opined that if the defendants 2 and 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal, but as they had not filed an appeal against the preliminary decree, the question whether they were aggrieved by that decree and could file an appeal therefrom was irrelevant. The Bench held that the appeal was directed against the finding given by the trial court which was against them, hence, it was not maintainable. Be it noted, this Court also addressed with regard to the issue whether defendant Nos. 2 and 3 were aggrieved by the preliminary decree and opined that the appeal was against a mere finding and the preliminary decree, in fact, remained unchallenged for a long period.
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> 11. Another aspect which was addressed by the Bench was whether the finding would operate as res judicata in the subsequent proceeding.

This Court observed that the finding recorded by the trial court that the partition was a colourable transaction was unnecessary for the decision of the suit because even if the court were to find that the partition was genuine, the mortgage would only have bound the interest of the father as the debt was not of a character which, under the Hindu Law, would bind the interest of the sons. That apart, the matter relating to the partition being not directly and substantially in issue in the suit, the finding that the partition was sham could not operate as res judicata so as to preclude a party aggrieved by the finding from agitating the question covered by the finding in any other proceeding.

12. On a keen scrutiny of the facts of the aforesaid case and the dictum laid down therein, in our considered opinion, it does not really apply to the case at hand, regard being had to the obtaining factual matrix and further, the decision was rendered before the amendment was brought into the Code prior to 1976. Therefore, we have no hesitation in saying that the High Court has fallen into error in placing reliance on the said pronouncement.

13. Presently, it is apt to note that Sections 96 and 100 of the Code make provisions for preferring an appeal from any original appeal or from a decree in an appeal respectively. The aforesaid provisions do not enumerate the categories of persons who can file an appeal. If a judgment and decree prejudicially affects a person, needless to emphasize, he can prefer an appeal. In this context, a passage from Smt. Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd.[3] is worth noting: -

> "It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment."

14. In State of Punjab v. Amar Singh and another[4], Sarkaria, J., while dealing with the maintainability of an appeal by a person who is not a party to a decree or order, has stated thus: -

> "84. Firstly there is a catena of authorities which, following the doctrine of Lindley, L.J., in re Securities Insurance Co., (1894) 2 Ch 410 have laid down the rule that a person who is not a party to a decree or order may with the leave of the Court, prefer

> an appeal from such decree or order if he is either bound by the order or is aggrieved by it or is prejudicially affected by it. As a rule, leave to appeal will not be refused to a person who might have been made ex nominee a party – see Province of Bombay v. W.I. Automobile Association, AIR 1949 Bom 141; Heera Singh v. Veerka, AIR 1958 Raj 181 and Shivaraya v.

Siddamma, AIR 1963 Mys 127; Executive Officer v. Raghavan Pillai, AIR 1961 Ker 114. In re B, an Infant (1958) QB 12; Govinda Menon v. Madhavan Nair, AIR 1964 Ker 235."

15. In Baldev Singh v. Surinder Mohan Sharma and others[5], a three Judge- Bench opined that an appeal under Section 96 of the Code would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. In the said case, while dealing with the concept of 'person aggrieved', the Bench observed thus:-

> "A person aggrieved to file an appeal must be one whose right is affected by reason or the judgment and decree sought to be impugned. It is not the contention of Respondent 1 that in the event the said judgment and decree is allowed to stand, the same will cause any personal injury to him or shall affect his interest otherwise."

16. Be it noted, in the said case, the challenge in appeal was to the dissolution of marriage of the appellant therein and his first wife which, this Court held, would have no repercussion on the property in the suit and, therefore, the High Court was not justified in disposing of the civil revision with the observation that the revisionist could prefer an appeal.

17. In Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and another[6], it was observed that the right given to a respondent in an appeal is to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross appeal. In the said decision, emphasis was laid on the term 'decree'.

18. After the 1976 amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross- objection. In Banarsi and Others v. Ram Phal (supra), it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category No. 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the

pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross- objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross- objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code.

19. At this juncture, we may usefully reproduce a passage from Banarsi and others (supra) wherein it has been stated thus: -

> "Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. See Phoolchand v. Gopal Lal[7], Jatan Kumar Golcha v. Golcha Properties (P) Ltd. (supra) and Ganga Bai v. Vijay Kumar (supra).) No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment."

20. Though the High Court has referred to the said pronouncement, yet it has not applied the ratio correctly to the facts. This Court has clearly stated that if a person is prejudicially or adversely affected by the decree, he can maintain an appeal. In the present case, as we find, the plaintiff claiming to be a co-sharer filed the suit and challenged the will. The defendant No. 5, the brother of the plaintiff, supported his case. In an appeal at the instance of the defendant Nos. 1 to 4, the judgment and decree was overturned. The plaintiff entered into a settlement with the contesting defendants who had preferred the appeal. Such a decree, we are disposed to think, prejudicially affects the defendant No. 5 and, therefore, he could have preferred an appeal. It is worthy to note that the grievance pertained to the nature and character of the property and the trial court had decreed the suit. He stood benefited by such a decree. The same having been unsettled, the benefit accrued in his favour became extinct. It needs no special emphasis to state that he had suffered a legal injury by virtue of the over turning of the decree. His legal right has been affected. In this context, we may refer to a recent pronouncement in Ayaaubkhan Noorkhan Pathan v. The State of Maharashtra & ors.[8] wherein this Court has held thus: -

> "A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardized. (Vide:

Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Ors. v. Union of India & ors., AIR 1977 SC 1361)."

21. Though the said judgment was delivered in a different context, yet it is applicable to the obtaining factual matrix regard being had to the conception of legal injury. Thus, indubitably, the present appellant was a person aggrieved and was prejudicially affected by the decree and, hence, the appeal could not have been thrown overboard treating as not maintainable.

22. In view of the aforesaid premised reasons, we allow the appeal, set aside the judgment of the High Court, treat the second appeal preferred by the present appellant to be maintainable in law and remit the matter to the High Court with a request to decide the appeal within a period of six months. Needless to say, we have not expressed any opinion on any of the aspects which pertain to the merits of the case. In the facts and circumstances of the case, the parties shall bear their respective costs.

.....J. [K. S. Radhakrishnan] .....J. [Dipak Misra] New Delhi;

January 07, 2013

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[1] AIR 1974 SC 1126
[2] AIR 2003 SC 1989
[3] AIR 1971 SC 374
[4] AIR 1974 SC 994
[5] (2003) 1 SCC 34
[6] (1970) 1 SCC 685
[7] AIR 1967 SC 1470
[8] 2012 (11) SCALE 39
