Supreme Court of India
Makhan Singh (D) By Lrs vs Kulwant Singh on 30 March, 2007
Author: H S Bedi
Bench: B.P. Singh, Harjit Singh Bedi

CASE NO.:
Appeal (civil) 4446 of 2005

PETITIONER:
Makhan Singh (D) by Lrs

RESPONDENT:
Kulwant Singh

DATE OF JUDGMENT: 30/03/2007

BENCH:
B.P. SINGH & HARJIT SINGH BEDI

JUDGMENT:

J U D G M E N T WITH C.A. No. 4455/2005 HARJIT SINGH BEDI,J.

These appeals by special leave arise out of the following facts:

The plaintiff-respondent Kulwant Singh and defendant-appellant Makhan Singh (now through his LRs.) herein were two of four brothers. As per the case set up, each brother owned < share in land measuring 40.2/3 marlas and in a building housing an ice factory situated at Rayya alongwith 1/8 share in the machinery installed therein. On 3.5.1982, the defendant entered into two agreements with the plaintiff, - one for the sale of his share in the land measuring 40.2/3 marlas and the building on it for a consideration of Rs.10,000/- with earnest money of Rs.5,000/-, and a second pertaining to the sale of his share in the machinery installed in the ice factory for a consideration of Rs.16,000/- out of which Rs.5,000/- was paid as earnest money. These agreements are Ex.P-1 and Ex.P-2 on the record. As per the terms of the agreements, the sale deeds were to be executed on or before 10.8.1982. It was pleaded that the defendant defaulted on which a notice was served on him on 19.12.1983 but as no result was forthcoming, a suit for specific performance was filed on 17.1.1984.

The defendant contested the suit on several grounds, inter-alia, that the agreements as well as the receipts with respect to the earnest money had not been executed by him and that the land in question and the building raised thereupon and the ice factory were Joint Hindu Family property and he being one of four co-parceners was not competent to sell his share which made the agreement Ex.P-1 unenforceable and that no decree for specific performance could be claimed with respect to the machinery which was moveable property and at best damages or compensation could be claimed for the breach of this agreement. On the pleadings of the parties, the Trial Court framed the following issues:

1. Whether the defendant executed agreements to sell building and machinery as referred in paras No.1 and 2 of the Plaint? OPP

2. Whether the plaintiff has been and continuous to be ready and willing to perform his part of the agreement? OPP

3. Whether the defendant has committed breach of the agreement of sale ? OPP

4. Whether agreement regarding sale of building is not specifically enforceable? OPP 4A. Whether the suit property is ancestral and/or Joint Hindu Family property? If so to what effect? OPP 4B. Whether the agreement to sell is void or unenforceable for the reasons given in paras No. 3 and 4 of additional pleas raised in the amended written statement? OPP 4C. Whether the suit for specific performance is not competent so far as it relates to agreement for sale of machinery? OPP 4D. Whether the suit property has been properly described? OPP The Trial Court held that the execution of the agreements Ex.P-1 and P-2 as well as the receipt of earnest money by the defendant had been proved. It further held that the defendant had not been ready and willing to perform his part of the contract and had thereby committed a breach thereof. Contrarily, it was held that the plaintiff had always been ready and willing to perform his part of the contracts. The findings on the issue Nos. 1 to 3 were thus recorded in favour of the plaintiff. The Trial Court nevertheless dismissed the suit holding that the agreement to sell pertaining to 1/8 share in the machinery of the ice factory was not enforceable, as the remedy available to the plaintiff was to claim a refund of the earnest money with damages, if any. The Court further held that the second agreement pertaining to the sale of < share in the land and building out of 40.2/3 marlas too was unenforceable as the 11 marlas of land had been purchased by the father of the plaintiff and the defendant, Dula Singh, and the balance land measuring 29.2/3 marlas had been purchased by Dula Singh in the name of his four sons in equal shares by four different sale deeds from the income accruing from the 11 Marlas and the ice factory and as such the entire property having the character of Joint Hindu Family property in the hands of the four brothers, (the defendant being one of our co-parceners) could not have entered into an agreement to sell a share in the said property. The Court further observed that the onus to prove that there was no joint family lay on the plaintiff, and that he had been unable to discharge this onus. The Trial Court accordingly dismissed the suit on this finding. The unsuccessful plaintiff thereafter filed a first appeal which too was dismissed by the Addl. District Judge, Amritsar by judgment dated 26.5.1993. The matter was then taken up in second appeal by the plaintiff. The learned Single Judge in his judgment dated 27.11.2002 substantially reversed the findings of the Courts below and partly decreed the suit in the following terms :

"In view of the aforesaid discussion, the present appeal filed by the plaintiff is partly allowed. The suit for specific performance of the agreement Ex.P-1 regarding < share of the land measuring 29.2/3 marlas is hereby decreed on payment of the entire remaining sale consideration i.e. Rs.5,000/- by the plaintiff. However, suit of the plaintiff regarding sale of < share by the defendant in the land measuring 11 marlas and the building constructed thereon, which is Joint Hindu Family property, is dismissed. The suit regarding specific performance of agreement Ex.P-2 pertaining to the sale of 1/8 share in the machinery installed in the ice factory is also decreed on payment of the remaining sale consideration of Rs.11,000/- by the plaintiff."

These appeals have been filed against the judgment of the High Court, one at the instance of the Makhan Singh, the original defendant, (now represented by his legal representatives), and a second by Kulwant Singh plaintiff. Ms. Kamini Jaiswal, the learned counsel for the appellants in Civil Appeal No. 4446/2005 filed by the Lrs. of Makhan Singh has first and foremost argued that under the provisions of Section 100 of the Code of Civil Procedure, the High Court's jurisdiction in Second Appeal was confined only to a substantial question of law and interference in a concurrent finding of fact recorded by the trial court and confirmed by the first appellate court was not envisaged even if the High Court believed that a view contrary to the one taken by the Courts below was perhaps more appropriate on the evidence. She has, further, urged that Dula Singh had first purchased 11 marlas of land some time in the year 1954 and an ice factory had been constructed thereon and it was from the income from the ice factory which formed the nucleus which had funded the purchase of 29.2/3 marlas of land by Dula Singh in the name of his sons some time in the years 1962-1963 and the finding of the Trial Court and the First Appellate Court therefore that the entire property constituted Joint Hindu Family property was correct and could not be faulted, more particularly as the plaintiff had been unable to show any income in the hands of the family other than the income from the ice factory, leading to a clear inference about the status of the property. Mr. Gulati, the learned counsel for Kulwant Singh plaintiff-respondent has, however, supported the judgment of the High Court and pointed out that the conduct of the defendant inasmuch as he had even denied the execution of the agreements at the initial stage clearly belied his story as all the courts had found that the agreements in question had been duly executed and that he had not been willing to execute the sale deeds. He has submitted that the document Ex.P-4 which is a copy of the application submitted by the defendant before the Sub-Registrar to mark his presence on 10.8.1992 and a statement recorded by the Sub-Registrar contemporaneously clearly showed that the property belonged to him and him alone without the slightest hint that it was Joint Hindu Family property, and it was after an amendment of the written statement that the plea that the property in question was Joint Hindu Family Property had, for the first time, been taken. It has also been pleaded that there was no evidence whatsoever to show that the aforesaid property had been purchased from the income of the Joint family so as to give it the character of a Joint Hindu Family property and that the onus which lay on the defendant as the propounder of the joint family, as envisaged by the judgment of this Court in D.S. Lakshmaiah & Anr. Vs. L. Balasubramanyam & Anr. (2003) 10 SCC 310 had clearly not been discharged. It has, further, been argued that the finding of the High Court that a decree for 11 marlas of land could not be granted as this land had been purchased by Dula Singh during his life time and had passed on to his son by succession after his death in 1966 was therefore Joint Hindu Family in the hands of his sons too was wrong as observed in K.V.Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer & Ors. (1964) 7 SCR 490 as there was no presumption in law that a property purchased in the name of a member of a family had ipso-facto the character of Joint Hindu Family property unless it could be shown that the family possessed a nucleus for the purchase of the same. It has, further, been pleaded that the finding of the High Court that the 11 Marlas purchased by Dula Singh in his own name which devolved on his sons after his death in 1966 too had the character of Joint Hindu Family property was also an erroneous assumption in the light of the judgment of this Court in Commissioner of Wealth Tax, Kanpur & Ors. vs. Chander Sen & Ors. (1986) 3 SCC 567 in which it has been held that there could be no presumption that if the property purchased by a father fell to his son by inheritance it was deemed to be in his position as a Karta of a Hindu Undivided Family.

We have considered the arguments advanced by the learned counsel for the parties very carefully, and have also perused the evidence on record. There can be no doubt whatsoever with regard to the plea of Ms. Kamini Jaiswal that the interference of the High Court in second appeal should be clearly minimal and would not extend to a mere re-appraisal of the evidence. We are therefore clear that had the High Court on an appreciation of the evidence, taken a view different from that of the Trial Court and the first appellate court, the exercise would be clearly unjustified. We find, however, that the High Court differing with the courts below has proceeded on the basis and (we believe correctly) that the onus to prove that funds were available with the family with which the 29.2/3 marlas of land had been purchased by Dula Singh in the name of his sons lay on the defendant and not on the plaintiff. We find no evidence in this respect save a self serving and stray sentence in the statement of the defendant that the property had been purchased from the income of the Joint Hindu Family. It bears reiteration that the defendant had denied the execution of the two agreements Ex.P-1 and P-2 dated 3.5.1992 at the initial stage but faced with a difficult situation had later admitted that the agreements had been executed, leading to a finding by all three courts to that effect. There is also a clear recital by the defendant in Ex.P-4 that the property belonged to him and specific boundaries of the property were also given therein. The defendant's statement had also been recorded by the Sub-Registrar on Ex.P-4 wherein he stated that he was ready to execute the sale deeds but Kulwant Singh, plaintiff had not appeared to do so. Likewise, in the original written statement a case of denial of the execution of the agreements had been pleaded and it was only by way of an amendment that the plea that the property belonged to the Joint Hindu Family had been raised. In this connection the judgment in D.S. Lakshmaiah case (supra) becomes relevant. It had been observed that a property could not be presumed to be a Joint Hindu Family property merely because of the existence of a Joint Hindu Family and raised an ancillary question in the following terms:

"The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu Family property or self-

acquired property of the first appellant."

The query was answered in paragraph 18 in the following terms :

"The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

The High Court has also rightly observed that there was no presumption that the property owned by the members of the Joint Hindu Family could a fortiori be deemed to be of the same character and to prove such a status it had to be established by the propounder that a nucleus of Joint Hindu Family income was available and that the said property had been purchased from the said nucleus

and that the burden to prove such a situation lay on the party, who so asserted it. The ratio of K.V.Narayanaswami Iyer case (supra) is thus clearly applicable to the facts of the case. We are therefore in full agreement with the High Court on this aspect as well. From the above, it would be evident that the High Court has not made a simpliciter re-appraisal of the evidence to arrive at conclusions different from those of the courts below, but has corrected an error as to the onus of proof on the existence or otherwise of a Joint Hindu Family property. We now take up the appeal filed by Kulwant Singh i.e. Civil Appeal No. 4455/2005.

As already mentioned above, the reason as to why the decree for specific performance to the extent of 11 marlas regarding the sale of < share in 11 marlas of land and the building constructed thereon has been denied even by the High Court now needs to be examined. In this connection, reference must be made to Chander Sen's case (supra) wherein it has been held that a son who inherits his father's assets under Section 8 of the Hindu Succession Act does so in his individual capacity and not as a Karta of the Hindu Undivided Family. It is the admitted case before us that the 11 marlas had been purchased by Dula Singh from his income as an employee of the Railways and it was therefore his self- acquired property. Such a property falling to his sons by succession could not be said to be the property of the Joint Hindu Family. We are, therefore, of the opinion that the appeal filed by Kulwant Singh must also be allowed and we accordingly so order. The suit filed by Kulwant Singh is accordingly decreed in toto. Civil Appeal No. 4455/2005 (Kulwant Singh Vs. Makhan Singh) is allowed and the Civil Appeal No.4446/2005 (Makhan Singh (D) by LRs. vs. Kulwant Singh) is dismissed.