A SAMEER KUMAR PAL & ANOTHER

v.

SHEIKH AKBAR & OTHERS

(Civil Appeal No. 2398 of 2002)

JULY 28, 2010

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[DALVEER BHANDARI AND K.S. RADHAKRISHNAN, JJ.]

Code of Civil Procedure, 1908 – s. 100 – Second appeal C *– Suit for eviction – Tenant's case that suit property was a wakf property, thus, trial court had no jurisdiction to adjudicate the matter but no plea raised before trial court as also first appellate court that suit property is a joint family property – Suit decreed in favour of landlord holding that suit property* D *was not a wakf property – Order of trial court upheld by first appellate court – Second appeal – High Court allowing the same by setting aside the concurrent findings of fact – Justification of – Held: Not justified – High Court without any pleadings or basis held that suit property is a joint family* E *property – It was not the case of tenants either before trial court or first appellate court – Thus, order of High Court is set aside and that of trial court and first appellate court, upheld – M.P. Accommodation Control Act, 1961 – ss. 12 (1) (c) , 12 (1) (f) and 12 (1) (g).*

F **The appellant-landlord filed a suit for eviction against the respondent-tenant u/ss. 12(1)(c), 12(1)(f) and 12(1)(g) of the M.P. Accommodation Control Act, 1961. The respondents filed a written statement that the suit property was a Wakf property, thus, the trial court did not** G **have the jurisdiction to adjudicate the matter but it nowhere pleaded that the suit property is a joint family property. The trial court held that the suit property is not a Wakf property and decreed the suit in favour of the**

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appellants. Before the first appellate court also, the respondents did not raise the plea that the suit property was a joint family property. The first appellate court upheld the order of the trial court. The respondent nos. 1 and 2 then filed a second appeal and the same was allowed. The High Court set aside the concurrent findings of fact. Hence the appeal.

Allowing the appeal, the Court

HELD: The High Court without any pleadings or basis, held that the suit property is a joint family property. The High Court erroneously observed that the said property was purchased by the father of the appellants and his brothers, whereas in fact the property was purchased by the appellants by sale deed dated 31.12.1991. The assumption of wrong fact has led to total erroneous finding and conclusion. The High Court in the impugned judgment weaved out an entirely new case. Neither there was any pleading nor it was the case of the respondents either before the trial court or the first appellate court. The High Court gravely erred in arriving at the finding without any basis whatsoever. PW1 was examined by the trial court and in his testimony he categorically stated that he and his elder brother SK-appellant were owners of the property in question. The High Court was not justified in reversing the concurrent findings of fact. Thus, the impugned judgment of the High Court is set aside and that the judgment and order of the trial court, as upheld by the first appellate court, is restored. [Paras 8, 9 and 13] [99-C-D; G-H; 100-A; 101-F-G]

Mst. Rukhmabai v. Lala Laxminarayan and Ors. **AIR 1960 SC 335;** *Kuppala Obul Reddy v. Bonala Venpata Narayan Reddy (dead) by LRs.* **(1984) 3 SCC 447;** *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh* **(1969) 1 SCC 386 – relied on.**

A *Randhi Appalaswami v. Randhi Suryanarayanamurti and Ors.* **ILR 1948 Mad 440 – approved.**

Case Law Reference:

AIR 1960 SC 335	**Relied on.**	**Para 10**
(1984) 3 SCC 447	**Relied on.**	**Para 11**
(1969) 1 SCC 386	**Relied on.**	**Para 12**
ILR 1948 Mad 440	**Approved.**	**Para 12**

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2398 of 2002.

From the Judgment & Order dated 17.08.2001 of the High Court of Judicature Madhya Pradesh at Jabalpur in Second D Appeal no. 596 of 1999.

Rohit Arya, Akshat Srivastav, Nitin Gaur, P.P. Singh for the Appellants.

Abdul Karim Ansari (for Ram Swarup Sharma) for the E Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. This appeal is directed against the judgment and order of the High Court of Madhya F Pradesh at Jabalpur dated 17.8.2001 passed in Second Appeal No.596 of 1999.

2. The appellant is particularly aggrieved by the impugned judgment because the concurrent findings of fact have been set G aside by the High Court in the second appeal without any basis, justification or cogent grounds.

3. Brief facts necessary to dispose of this appeal are recapitulated as under:

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Appellants Sameer Kumar Pal and Subhash Chandra Pal, both sons of Laxminarayan Pal (who were the plaintiffs in the trial court), filed a suit in the Court of the Civil Judge, Jabalpur. In the plaint, it was clearly incorporated that the appellants were the owners in possession of Shop No.1214 (Old No.892), New Corporation Chowk, Wright Town, Jabalpur. They purchased the said shop vide sale-deed dated 31.12.1991.

4. The appellants filed a suit for eviction against the defendants (respondents herein) under section 12(1)(c) (that the tenant has created nuisance), 12(1)(f) (for *bona fide* requirement of landlord for non-residential purposes) and 12(1)(g) (*bona fide* requirements of landlord to carry out repairs) of the M.P. Accommodation Control Act, 1961. The relevant parts of section 12 of the Act are set out as under:

> "12. Restriction on eviction of tenants.—(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds, only, namely—
>
> (a) – (b) x x x
>
> (c) that the tenant or any person residing with him has created a nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or *which is likely to affect adversely and substantially the interest of the landlord therein*:
>
> (d) – (e) x x x
>
> (f) that the accommodation let for non-residential purpose is required bona fide by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters *if he is the owner thereof* or for any

A person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned;

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(g) that the accommodation has become unsafe, or unfit for human habitation and is required *bona fide* by the landlord for carrying out repairs which cannot be carried out without the accommodation being vacated."

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5. In the written statement filed in the trial court, the respondents herein raised the main objection that the appellants herein are not the owners of the suit property and the trial court had no jurisdiction to adjudicate the matter as the suit property D has been a Wakf property. It may be pertinent to mention that in the written statement the respondents nowhere took the plea that the suit property, namely 'Madras Hotel' is a joint family property. The trial court held that the appellants were in *bona fide* need of carrying on the business of sweets and for running E a restaurant. No other vacant property was in possession of the appellants in Jabalpur. It was also held that the shop in question is very old, unsafe and in dilapidated condition. There is need to repair and carry out some structural changes in the shop which cannot be carried out unless the same is made available F to the appellants. The trial court clearly held that the appellants are in *bona fide* need of the suit property. The trial court also held that the respondents have not paid rent since September, 1992 and decided the issue of default in favour of the appellants. The trial court categorically held that the suit property G is not the Wakf property and decreed the suit of the appellants.

6. The respondents preferred first appeal before the court of XIth Additional District Judge, Jabalpur. The entire evidence was re-appreciated by the appellate court independently and the court clearly held that the respondents have failed to prove

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that the appellants are in possession of any other non-residential accommodation in the entire city of Jabalpur. The first appellate court upheld the findings of the trial court. It may be pertinent to mention that before the first appellate court also, no plea was taken that the property in question, namely the 'Madras Hotel', was a joint family property. The first appellate court dismissed the appeal.

7. Respondent nos. 1 & 2, aggrieved by the judgment of the XIth Additional District Judge, Jabalpur, preferred a second appeal before the High Court of Madhya Pradesh at Jabalpur.

8. The High Court in the impugned judgment, without any pleadings or basis, held that the property namely 'Madras Hotel' is a joint family property. The High Court erroneously observed that the property namely 'Madras Hotel' was purchased by the father of the appellants and his brothers, whereas in fact the property was purchased by the appellants vide sale deed dated 31.12.1991. The assumption of wrong fact has led to total erroneous finding and conclusion. The High Court in para 8 observed as under:

> ".....It is firmly established that the building known as 'Madras Hotel' belongs to Laxminarayan Pal and his two sons who are the plaintiffs. That is their joint family property. This building was purchased by Laxminarayan when he was carrying on business with his two brothers and the partition took place long after the acquisition of that building. In that partition that building was allotted to Laxminarayan alone....."

9. The High Court in the impugned judgment weaved out an entirely new case. Neither there was any pleading nor it was the case of the respondents either before the trial court or the first appellate court. The High Court gravely erred in arriving at the finding without any basis whatsoever. Subhash Chandra Pal, PW1 was examined by the trial court and in his testimony

A he categorically stated that he and his elder brother Sameer Kumar were owners of the property in question.

10. The appellants have relied on *Mst. Rukhmabai v. Lala Laxminarayan & Others* AIR 1960 SC 335 in which this court held that there is no presumption that any property whether
B moveable or immoveable held by a member of a joint Hindu family is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact.

C 11. The appellants further relied on *Kuppala Obul Reddy v. Bonala Venpata Narayan Reddy (dead) by LRs.* (1984) 3 SCC 447 in which this court held that there were no pleadings as to the properties being joint properties and no issue as to joint family had been raised and there was no proper evidence
D to make out any case of the properties being joint family properties, was raised and no such issue could possibly have been raised in absence of the pleadings. The court further held that in absence of any pleading and any issue and further in the absence of any proper evidence, the view expressed by the
E learned judge of the High Court that the properties were joint family properties is clearly unwarranted. There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties.

F 12. The appellants further relied on *Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh* (1969) 1 SCC 386 wherein this Court held that, of course, there is no presumption that merely because the family is joint so the property is also joint. So the person alleging the property to be
G joint family property must prove it. In that case, this Court further held that the burden of proving that any particular property is joint family property is, therefore, in the first instance, upon the person who claims it to be coparcenary property. But if the possession of a nucleus of the joint family property is either
H admitted or proved, any acquisition made by a member of the

joint family is presumed to be joint family property. The Court carved out an exception and observed that, "this is, however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate." In *Mudi Gowda Gowdappa Sankh* (supra), this court heavily relied upon the ratio of Privy Council judgment in *Randhi Appalaswami v. Randhi Suryanarayanamurti & Others* ILR 1948 Mad 440 wherein the legal position of Hindu Law has been beautifully articulated by Sir John Beaumont. The relevant portion of the judgment is reproduced as under:

> "Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

13. In this view of the matter, we are constrained to set aside the impugned judgment of the High Court. The High Court was not justified in reversing the concurrent findings of fact in this case. Consequently, the appeal is allowed and the impugned judgment of the High Court is set aside and the judgment and order of the trial court, as affirmed by the first appellate court, is restored. In the facts and circumstances of the case, the parties are directed to bear their own costs.

N.J. Appeal allowed.