

RAM MEHAR,—Appellant.

versus

SURAT SINGH and others,—Respondents.

Regular Second Appeal No. 2322 of 1988

30th March, 1989.

Code of Civil Procedure (V of 1908)—O. 1 Rl. 8 Sub Rls. 2 and 4—Representative suit for partition of Abadi Deh—Trial Court appointing Local Commissioner to propose partition in accordance with preliminary decree—Some co-sharers filing objections—Such objectors making joint statement for appointment of referee for deciding objections and agreeing that decision of referee will bind all parties—Court passing final decree on the basis of report of referee—Trial Court while accepting the report of referee not issuing notice separately to all affected land-owners—Want of notice—Whether vitiates proceedings—Representative suit cannot be abandoned, withdrawn or compromised except by all interested persons in the suit after notice—Procedure to be followed in such cases—Trial Court must serve notice of suit to all persons being represented—Right of appeal—Unserved parties have right of appeal.

Held, it is incumbent on the Court to give notice in the manner provided under O. 1, Rl. 8 Sub Rl. 2 of the Code of Civil Procedure, 1908 so that they may come to know the institution of the suit and all or some of them feel interested may apply to the Court to be made a party to the suit. (Para 6).

Held, when a suit is filed in a representative capacity sub-rule (4) of Order 1 rule 8 makes an exception not to permit abandonment of part of claim in a suit, and no suit can be withdrawn, nor to record an agreement, compromise or satisfaction under the aforesaid provisions unless Court gives notice to all persons so interested in the manner specified in sub-rule (2). The reason for making this provision was obvious. One or more persons may represent a large number of persons and if cause is common for fighting out he or they may fight out on behalf of all but when question of abandoning part of claim or withdrawing the suit or entering into agreement, compromise or satisfaction arises, this can be permitted only if all agree, that is, not only the representatives who are allowed to sue or be sued but all the interested persons in the suit. (Para 7).

Held, sub-rule (4) was added so that the persons representing the whole body could go on with the suit on merits after all were served with notice of the suit under sub-rule (2) but the moment any of the things mentioned in sub-rule (4) was sought to be done, notice to all the interested persons, in this case the other co-sharers, had again to be issued, in this case the principle of natural justice

enshrined in sub-rule (4) was not followed and the Court on the day suggestion was made for appointing the referee accepted the suggestion and appointed the referee without issuing notice to all the interested persons as required by sub-rule (4). The failure to do so would vitiate the order of appointment of referee and all proceedings thereafter. (Para 9).

Held, where all parties to a suit agree to the appointment of a referee and agree to be bound by his decision, the decree passed on the basis of the decision of the referee may amount to a consent decree. Here sub-rule (4) of Order 1 rule (8) of the Code provides for issuance of notice to all interested persons in case the suit was to be decided by a referee and the parties were to be bound by his decision. This, not having been done, there was no agreed appointment of referee nor there was an agreement by all the interested persons to be bound by the decision of the referee. Hence, the appeal before the lower appellate Court and this Court is clearly maintainable. (Para 11).

Regular Second Appeal from the order of the Court of Shri Pritam Pal, Additional District Judge, Rohtak, dated the 1st September, 1988, affirming that of Shri N. C. Nahata, H.C.S., Senior Sub-Judge, Rohtak, dated the 18th November, 1986, passing the decree of partition of this suit in accordance with terms and conditions mentioned in the partition Khatoni of Abadi Land Ex. L1. field book Ex. L2 and site plan E. L3 prepared by L. C. Vijay Singh read with the amendments made therein by Shri S. S. Dahiya, Advocate, referee,—vide his report Ex. C1. The amendment suggested by the referee in his report Ex. C1. shall be deemed to have been inserted in the documents Ex. L1. Ex. L2 and Ex. L3. Shri Vijay Singh Tehsildar (Retd.) is present before this Court today and he has been agreed to incorporate the necessary amendments of Ex. C1. in the documents Ex. L1, Ex. L2 and Ex. L3. and directing to the parties Shri Vijay Singh to incorporate the necessary amendments in the above documents as suggested by the referee at the earliest, and no order as to costs.

Claim : Suit for possession for partitions of land measuring 310 Kanals 18 Marlas comprised in Khewat No. 251/242 Khatoni No. 319, plot No. Khasra No. 74 and 76 and 232 Kanals 14 marlas comprised in Khewat No. 298 min 302—314 min 309—316, Rect and Killa No. 20/21-22-23-24/21/24-25, 23/4, 5, 7, 14, 24/1, 2, 3, 4, 6 to 10, 12 to 18, 23, 24, 25, 25/16, 20, 21, 33/1, 9, 19/2, 20, 35/3, 7; 23/18; 23 situated in abadi deh of village Garhi Sampla Tehsil and District Rohtak.

Claim in Appeal : For reversal of the order of both the Courts below.

S. C. Kapoor, Advocate, for the Appellant

H. S. Hooda, Senior Advocate R. S. Chahar, Advocate, for Respondent Nos. 24, 25, 30 and 35.

JUDGMENT

Gokal Chand Mital, J.

(1) In a representative suit preliminary decree for partition of Abadi Deh of village Garhi Sampla was passed by the Sub Judge 1st Class, Rohtak, on 23rd February, 1981. The Court passing the preliminary decree appointed Shri S. S. Dahiya, Advocate, as the Local Commissioner to partition the land. However, later on that Local Commissioner was removed and Shri Vijay Singh, retired Tehsildar was appointed as the Local Commissioner to propose partition in accordance with the preliminary decree. He submitted his report suggesting partition of the Abadi land and against it some of the cosharers filed written objections.

(2) On 14th October, 1985 the objectors and/or their Advocates made joint statement before the Court to the following effect :

“We agree that Shri Sultan Singh Dahiya, Advocate, Rohtak, be appointed referee in this case for deciding objections and any other dispute in the suit ‘Surat Singh v. Kehri’ Whatever he decides will be binding on all the parties. He will be authorised to make necessary amendment in the Local Commissioner report.”

The Court passed the following order :

“In view of the above statement of the parties and counsel, Shri Sultan Singh Dahiya, Advocate, Rohtak, is appointed as referee in this case. The parties will be bound by his decision.”

(3) As already noticed, the suit was in a representative capacity and the total number of share holders involved in the partition suit were 248. Only five persons were representing them under Order 1 rule 8 of the Civil Procedure Code (hereinafter called ‘the Code’). Those landowners who were not satisfied with the proposed partition, filed objections either on the ground that they were wrongly denied allotment of their share of land, or that they should have been allotted a plot different than the one allotted to them. Referee made changes in the allotment proposed by the Local Commissioner which were of fundamental nature inasmuch as some of the allottees

were deprived of the allotment without giving alternative plot, the area of some was reduced and in some cases new plots were allotted. The persons, who were affected by the changes were not given an opportunity of hearing by the Referee. Even the trial Court before accepting the suggestion to appoint referee and to bind the parties by his decision, did not issue notice to the landowners. Even after the receipt of the report of the referee the trial Court did not issue notice to all the landowners and accepted his report as binding on the parties in view of the statement made on 14th October 1985, and on the basis of the report submitted by the referee passed a final decree.

(4) When the affected landowners came to know of the final decree passed on the basis of the report of the referee, they filed separate appeals before the District Court, which were clubbed and disposed of by the Additional District Judge on a preliminary point that by agreement dated 14th October, 1985 the referee was appointed and the parties agreed to be bound by his decision and such a decision by the referee is nothing more than to compromise a suit and the decree passed thereon would tantamount to a consent decree not being subject to appeal, and thus dismissed the appeals as incompetent. For this he relied upon *Suraj Bhan v. Jogi Ram* (1).

(5) Still feeling aggrieved, the affected landowners have filed RSA Nos. 2322, 2323, 2585, 2787 and 2857 of 1988. Since they arise out of one suit and common questions are involved, they are being disposed of by this common judgment.

(6) By virtue of Order 1 rule 8 of the Code, where there are numerous persons having the same interest, one or more of such persons may with the permission of the Court sue or be sued or may defend such suit on behalf of for the benefit of persons so interested and where permission is granted, it is incumbent on the Court to give notice of the suit to all the persons so interested in the manner so provided so that they may come to know of the institution of the suit and all or some of them feel interested may apply to the Court to be made a party to the suit.

(7) Normally a party has a right to abandon part of the claim or withdraw the suit. A party has also a right to enter into agreement or compromise the suit wholly or partially or agree to have the

(1) A.I.R. 1972 Punjab and Haryana 398.

satisfaction of the claim in the suit recorded by order of Court by virtue of the provision of Order 23 rules 1 and 3 of the Code. But when a case is filed in a representative capacity or is to be defended in a representative capacity, sub-rule (4) of Order 1 rule 8 makes an exception not to permit abandonment of part of claim in a suit, and no suit can be withdrawn, nor to record an agreement, compromise or satisfaction under the aforesaid provisions unless Court gives notice to all persons so interested in the manner specified in sub-rule (2). The reason for making this provision was obvious. One or more persons may represent a large number of persons and if cause is common for fighting out he or they may fight out on behalf of all but when question of abandoning part of claim or withdrawing the suit or entering into agreement, compromise or satisfaction arises, this can be permitted only if all agree, that is not only the representatives who are allowed to sue or be sued but all the interested persons in the suit.

(8) It is settled law that in a suit for partition all the parties are plaintiffs and defendants and without even one party the suit cannot proceed nor the matter can be settled. In partition there is chain reaction and the moment chain is broken at a place, the matter cannot be solved.

(9) In representative suits, precisely for this reason sub rule (4) was added so that the persons representing the whole body could go on with the suit on merits after all were served with notice of the suit under sub-rule (2) but the moment any of the things mentioned in sub-rule (4) was sought to be done, notice to all the interested persons, in this case the other co-sharers, had again to be issued. In this case the principle of natural justice enshrined in sub-rule (4) was not followed and the Court on the day suggestion was made for appointing the referee accepted the suggestion and appointed the referee without issuing notice to all the interested persons as required by sub-rule (4). The failure to do so would vitiate the order of appointment of referee and all proceedings thereafter.

(10) On behalf of the respondents *Dr. Iqbal Hasan Khan v. Ilir Additional District Judge, Aligarh* (2), was cited to the effect that for grant of ad-interim relief procedure laid down in sub-rule (4) need not be followed. I have gone through the facts of that case

which are clearly distinguishable from the facts of the present case. There, the election of the old boys association was sought to be challenged and by way of interim arrangement an order was passed to have fresh election as agreed under the supervision of Court. The Court accepted the agreement and ordered the fresh election. Here the rights of the parties in the joint land are involved and the appellants have been deprived of their share either wholly or partially by virtue of decision taken by the referee behind their back. Even the appointment of referee has been ordered at their back. Moreover, all the appellants were happy with the partition proposed by Vijay Singh, Local Commissioner, and if that report was to be tinkered with the affected persons had to be heard. The objectors and the persons who were allowed to represent other co-sharers agreed to be bound by the decision of the referee without getting determination from the Court. That is why, in a representative suit while a party would be bound by decision of the Court on merits subject to appeal, the persons representing a large body of persons interested in the suit have not been given the power to compromise or settle the dispute.

(11) There is no dispute with the proposition laid down in *Suraj Bhan's case* (supra), but that decision is not applicable to the facts of the case. Where all parties to a suit agree to the appointment of a referee and agree to be bound by his decision, the decree passed on the basis of the decision of the referee may amount to a consent decree. Here sub-rule (4) of Order 1 rule (8) of the Code provides for issuance of notice to all interested persons in case the suit was to be decided by a referee and the parties were to be bound by his decision. This not having been done, there was no agreed appointment of referee nor there was an agreement by all the interested persons to be bound by the decision of the referee. Hence, the appeal before the lower appellate Court and this Court is clearly maintainable.

(12) For the reasons recorded above, the appeals are allowed and the order of the trial Court dated 14th October, 1985, appointing **Shri S. S. Dahiya**, Advocate, Rohtak, as referee and all proceedings taken thereafter by him and by the trial Court are set aside and the matter is remitted to the trial Court to proceed with the case from the stage of having received the objections against the report of **Vijay Singh**, retired Tehsildar, as Local Commissioner, and to proceed further in accordance with law.

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(13) In case it become necessary to make changes in the partition proposed by Vijay Singh, Local Commissioner, before doing so, hearing would be afforded to the affected persons. However, the parties are left to bear their own costs.

(14) The parties through their counsel are directed to appear before the trial Court on 22nd May, 1989.

R.N.R.

FULL BENCH

Before M. M. Punchhi, Ujagar Singh and A. P. Chowdhri, JJ.

HARJIT SINGH SIDHU and others,—Petitioners.

versus

STATE OF PUNJAB and others,—Respondents.

Civil Writ Petition No. 6727 of 1986.

August 16, 1989.

Punjab Civil Service (Executive Branch) Rules, 1972 (as amended in 1982 and 1984)—Rules 13 and 13-A—Constitution of India, 1950—Arts. 226 and 320—Book-let of Regulations and Instructions governing the work of the Punjab Public Service Commission, Part III and III-K—Paragraph 40—Punjab Public Service Commission (Limitation of Functions) Regulation, 1955—Clauses 10, 16 and 17—Public service—Appointments—Mandamus—Commission's power to make recommendations and government's right to make appointments—Jurisdiction of High Court—High Court should not issue mandamus to Commission or the Government to make recommendation or appointment even if posts are lying vacant.

Held, that the Commission has a distinct and distinguished status under our Constitution and cannot and rather should not identify itself with the Government authorities. The powers of this Court under Article 226 of the Constitution of India, 1950 cannot be invoked to make directions to the Commission for recommending any candidate for appointment to a public service post as it would amount to interference in its working as an independent institution having a peculiar and distinct status. The Commission has been given power to recommend appointments of only those successful candidates who were thought to be capable to fulfil the intention of the framers of the Constitution.

(Para 28)..