

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER**Appeal No.6722/2001/TA/Kota :**

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| 1. | Shivraj | } | sons of Shri Mathuralal, by caste
Kumhar, residents of Village Mundla,
Tehsil Deegod, District Kota. |
| 2. | Manraj | | |
| 3. | Omprakash | | |

... Appellants.

Versus

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| 1. | Dhannalal | } | sons of Shri Kalu, by caste Kumhar, residents
of Village Mundla, Teh. Deegod, Distt. Kota. |
| 2. | Babulal | | |
| 3. | State of Rajasthan, through Tehsildar Deegod, District Kota. | | |

... Respondents.

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D.B.

Shri B.S. Garg, Member
Shri Satish Chand Kaushik, Member

Present :

Shri K.K. Purohit : counsel for the appellants.
Shri Ashok Agrawal : counsel for respondent no.1.
Shri Vijendra Chaudhary : Dy.Govt.Advocate for the State.
None present : On behalf of respondent no.2.

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Dated : 18.7.2016

J U D G M E N T

This appeal has been preferred under section 224 of the Rajasthan Tenancy Act, 1955 (hereinafter to be called "the Act") against the judgment dated 21.8.2001 passed by Revenue Appellate Authority, Kota in appeal No.1/1997.

2. In this case, a suit under section 88 and 188 of the Rajasthan Tenancy Act was filed by the appellants against defendant-respondent before the court of learned Assistant Collector and Executive Magistrate, Deegod in respect of the disputed land. During the course of hearing, the case was registered and notices were issued to the defendant-respondents.

The defendants appeared before the court of learned Assistant Collector and Executive Magistrate, Deegod and instead of filing their written statement, they moved application under Order 7 Rule 11(d) of the Code of Civil Procedure. The suit was filed on the basis of a registered will dated 01.8.1989 made by Kalya in favour of plaintiffs. Order 7 Rule 11(d) application was moved on the ground that in his lifetime, Kalya cancelled the will dated 01.8.1989 vide the deed of cancellation of the will dated 23.2.1991 and as such the validity of the said will has been finished. It was also mentioned in the application that under sections 213(2) and 227-270 of the Indian Succession Act, 1925, only the District and Sessions Judge is empowered to decide the suit regarding validity of the will and as such requested for the dismissal of the suit. The plaintiff-appellants filed the reply of the said application dated 14.6.1995 and opposed the application under Order 7 Rule 11(d) on the ground that this application has been moved to prolong the matter unnecessarily. It is an afterthought, misconceived and groundless and against the law. It was also mentioned in the reply that these facts may be decided by framing of issues after taking the written statement on record and as such it was requested that application under Order 7 Rule 11(d) to be dismissed. After hearing both the parties, the learned Assistant Collector and Executive Magistrate, Deegod vide his order dated 23.11.1996 admitted the application of the defendant-respondents and dismissed the suit of the plaintiff under Order 7 Rule 11(d) of the CPC. The learned Assistant Collector accepted the application on the ground that the so-called will dated 01.8.1989 was cancelled by Kalya in his lifetime on 23.2.1991 and no suit can be filed on the ground of that cancelled will. The plaintiff has to get his right of inheritance decided under sections 213(2) and 227-270 of the Indian Succession Act and after deciding the succession, only they will get the right of filing of the suit. The learned Assistant Collector referred the judicial pronouncements AIR 1992 Madhya Pradesh 224 Ram Shanker Vs. Balakdas and RRD 1984 page 227 Shantilal Vs. Mukna Ram. Though the learned Assistant Collector mentioned the judicial pronouncement produced by the non-applicants-appellants herein i.e. DNJ 1993 page 1, RRD 1993 page 608, RLW 1990 page 47, but the learned Assistant Collector has not discussed the legal pronouncements while he was admitting the application of the defendant-respondents. The only ground

was that deceased Kalya cancelled the will in his lifetime and on this fact, the non-applicants are silent and not in a position to reply. Being aggrieved with that order of the learned Assistant Collector dated 23.11.1996, the appellants herein filed the first appeal before the learned R.A.A., Kota which was registered as Appeal Decree No. 1/1997/Kota Shivraj etc. Vs. Dhannalal etc. After hearing the appeal, learned R.A.A., Kota vide his judgment dated 21.8.2001 confirmed the order of the learned Assistant Collector, Deegod. The learned R.A.A., Kota decided the application as under :-

“हमने पत्रावली का अवलोकन किया एवं बहस पर मनन किया। प्रस्तुत मामले में रेस्पो. द्वारा अधीनस्थ न्यायालय में प्रार्थना पत्र ऑर्डर 7 रूल 11 प्रस्तुत कर निवेदन किया कि खातेदार काल्या आत्मज सुक्खा ने वादी के पक्ष में जो वसीयत दिनांक 1.8.89 को की थी उसको काल्या ने अपने जीवनकाल में ही दिनांक 23.2.91 को निरस्त कर दिया है जिससे वादी के हक में की गई वसीयत की वैधता समाप्त हो चुकी है। जिसका खण्डन स्पष्ट रूप से वादी अपी. नहीं कर सके हैं और यह जवाब दिया है कि प्रस्तुत प्रार्थना पत्र निराधार व मनगढन्त है। आवेदन पत्र में अंकित तथ्यों को वाद में वाद बिन्दु बनाकर भी तय किया जा सकता है। अधीनस्थ न्यायालय ने प्रतिवादी रेस्पो. द्वारा प्रस्तुत प्रार्थना पत्र ऑर्डर 7 रूल 11 व वादी अपी. द्वारा प्रस्तुत जवाब का अवलोकन करते हुये उत्तराधिकारों के बारे में सक्षम न्यायालय में चाराजोही करने हेतु आदेश देते हुये वाद जो खारिज किया है वह कानून सम्मत है जिसमें किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है।”

3. Being aggrieved against that order of the learned R.A.A., Kota the second appeal was preferred before this court.

4. We have heard learned counsel for the parties and perused the record.

5. The learned counsel for the appellants argued that both the learned lower courts misconceived with the provisions of Order 7 Rule 11(d) of the Code. The same is being reproduced as under :-

"Order 7 Rule 11. Rejection of plaint - The plaint shall be rejected in the following cases :

- (a)
- (b)
- (c)
- (d) where the suit appears from the statement in the plaint to be barred by any law."

The suit was filed by the plaintiffs under sections 88 & 188 of the Tenancy Act for declaration and injunction. The suit was not barred by law. So far the suit itself is concerned, it was based on the document i.e. the registered will of the deceased Kalya which was purported to be cancelled by a so-called cancellation document which was never produced before the court even after asking of the production of the same by the appellants herein. The learned Assistant Collector as well as R.A.A. misconceived with the case on the ground that there is a will and validity of the will can be decided by the District Judge only. The validity of the will was not under challenge, the suit is of the plaintiff. Plaintiff was only required to establish the execution of the will. If the defendant is taking the ground that the will has been cancelled, then it was their duty to prove it by the evidence. The will which is registered one cannot be cancelled by a non-registered document firstly, secondly there was no evidence on the point and thirdly if the court is of the opinion that validity of the will is under consideration and it has to be decided first, then it was the duty of the court to take the written statement of the defendant first, then make the appropriate issue regarding the validity and refer it to the court of competent jurisdiction for deciding that issue. But on that ground, a suit filed for declaration and injunction under Rajasthan Tenancy Act cannot be dismissed because it is permissible under the law and only the revenue court can decide such declaration and injunction in regard to revenue land. As such, the orders passed by both the lower courts are erroneous, misconceived and liable to be quashed.

6. On the other hand, learned counsel for the respondents argued that there is no illegality in the orders of both the learned lower courts. The right to file the suit will arise only after the establishment of validity of the so-called will. When the will was cancelled by the testator in his lifetime, then there is no will at all and the suit filed on the basis of that will is barred by law. It is established legal position that the validity of a will shall be decided only by the special court empowered under the Indian Succession Act, 1925 and that is the court of learned District Judge. As such, he requested for dismissal of this appeal.

7. We have given our thoughtful consideration to the arguments advanced by learned counsel for the parties and gone through the provisions of Order 7 Rule 11(d) of the Code.

8. After considering the matter, we are of the opinion that the suit was not barred by law because the suit was filed for declaration and injunction in respect of revenue land under sections 88 and 188 of the Rajasthan Tenancy Act, 1955. Only the revenue court can hear the suit for declaration and injunction in respect of revenue land, the civil court is having no right to entertain any suit of such nature. However, it is established principle that for rejection of plaint under Order 7 Rule 11, only the averments made in plaint shall be taken into consideration and there is no averment in plaint causing legal or factual defect for rejection of plaint. It is also pertinent to mention here that the will executed in favour of the appellants herein was a registered will and so-called cancellation deed was not a registered one. In reply to Order 7 Rule 11(d) application, it was specifically mentioned that the will was never cancelled, the application is mischievous, but both the learned lower courts have not given any heed to it. They have erroneously misconceived with the matter that a suit for succession has to be filed first and only after deciding the succession, the plaintiffs were entitled for filing of the suit under sections 88 and 188 of the Rajasthan Tenancy Act. In the circumstances of the matter, the validity of the will was not challenged by the respondents in their application, they only referred that the will has been cancelled by the testator in his lifetime and that fact was denied by the appellants in their reply. They also mentioned in their reply that written statement to be taken first and issues on the point to be framed and the matter to be decided thereafter only. It does not mean that they had not denied or they were reply-less on the point of cancellation. Even otherwise also, it was the duty of the court to first see the validity of the suit, the suit was not invalid, it was permissible by law. Secondly, the parties to be given the opportunity to prove their matter, which was not given by the learned trial court. Prior to applying the application under Order 7 Rule 11(d) CPC, it was also incumbent upon the courts below that they have to consider the matter under Order 7 Rule 11 CPC that whether there is any defect in the plaint or there is defect in jurisdiction, then the suit cannot be rejected on that ground, but firstly the

order of return of the plaint to be made for filing in the court of appropriate jurisdiction.

9. As discussed above, in the facts and circumstances of the matter, this appeal deserves merit which is liable to be admitted. The orders of both the learned lower courts are erroneous and as such both are liable to be quashed. The application under Order 7 Rule 11(d) is only misnomer and abuse of process of law, which is liable to be rejected. Consequently, the appeal is admitted and orders of both the learned lower courts are hereby quashed.

Pronounced in open court.

(SATISH CHAND KAUSHIK)
Member

(B.S. GARG)
Member

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