

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.238 of 1984 (O&M)

Date of decision : 23.09.2015

Khem Singh (deceased) through LRs.

...Appellants

Versus

Pritam Singh and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Sharma, Advocate for appellant.

Mr. Gurnam Singh, Advocate for respondents.

AMIT RAWAL, J. (Oral)

The present RSA is directed against the concurrent findings of the fact rendered in impugned judgment and decree, whereby Civil Suit bearing No.251 dated 15.11.1977 for declaration that plaintiff is owner in possession of the land measuring 62 kanal 11 marla by virtue of the registered sale deed dated 10.02.1959, has been dismissed.

It would be apt to give little preface of the matter, before addressing to the rival contention of the parties to the lis. The aforementioned suit with regard to the aforementioned land comprised in Khewat No.132/133, Khatauni Nos.353 and 355, Khasra Nos.2108 (18

kanal 18 marla), 2109 (15 kanal 0 marla), 2107 (12 kanal 13 marla), 2110 (16 kanal 0 marla) and as well as challenge to the order dated 24.08.1977 passed in partition application bearing No.R-2/77 came to be filed against the respondents-defendants on the premise that appellants-plaintiffs purchased the aforementioned land from Chuhar Singh. The aforementioned suit was contested by the defendant Nos.1 to 3, 6 to 8 and 36. It was further averred that Chuhar Singh had 119/3291 share in the property, which comes to 23 kanal 6 marla and, therefore, he could not have passed on the title more than what he had hold & as well as owing to the fact that rest of the property fallen into the share of respondent-society, as on the basis of the gift deed. Chuhar Singh could not dispose of the land more than the share as reflected in the revenue record. Numerous documents have been placed on record to show that property measuring 28 kanal 13 marla from Khasra No.2107 & 2110 was mortgaged with Anokh Singh and land measuring 18 kanal 18 marla from Khasra No.2108 with Munshi Singh and the said mortgagee have been redeemed, prior to sale deed.

The defendants relied upon mutation Ex.P27 to contend that Chuhar Singh was not the owner of the entire land measuring 62 kanal 11 marla. The trial Court on the basis of the documentary evidence dismissed the suit and appeal filed against the appellants-plaintiffs also met with the same fate.

Mr. Akshay Bhan, learned Senior Counsel assisted by Mr. Santosh Sharma, learned counsel appearing on behalf of appellants-plaintiff submits, that Ex.P19, Ex.P20, Ex.P24 and Ex.P25 would reflect that Chuhar Singh prior to the sale deed dated 10.02.1959 got the property redeemed

from the aforementioned mortgagees. The gift deed relied upon by the defendants had not seen the light of the day. Both the courts below have wrongly been interpreted mutation to be a documents of title, though there is finding by the Lower Appellate Court that since there was no proof with regard to the property but yet lower Appellate Court drew an presumption that land beyond 23 kanal 6 marla had gone to the share of the society. He submits, that Courts below have committed illegality and perversity and, therefore, following substantial questions of law arises for determination by this Court:-

1. Whether the plaintiff/appellants are the exclusive owners of land measuring 62 kanals 11 marlas on the basis of sale deed dated 10.2.59 Ex.P1 whereby, the specific khasra numbers have been sold possession delivered & mutation sanctioned?
2. Whether the subsequent revenue entries in the jamabandi for the year 1956-57 Ex.P13 showing Chuhar Singh to be co-sharer could have been relied when he was shown to be the exclusive owner of suit land in the jamabandi for the year 1951-52 Ex. P18 and there is no evidence of any lawful or valid transfer etc. or the basis of such change in the revenue entries?
3. Whether the findings regarding gift or exchange of the land in question of Chuhar Singh recorded by the ld. Courts below which are beyond pleadings and evidence, can be sustained?
4. Whether partition can be ordered without notice hearing as also without the fact of co-ownership?

5. Whether the exclusive ownership of Chuhar Singh, can said to be converted into co-ownership on the basis of mutation Ex.P27 without the proof of any document of transfer etc.?

He further submits that appellants-plaintiffs did not receive the notice with regard to the alleged partition proceeding, therefore, proceeding is vitiated in law as they are having rendered miscarriage of justice, or, do not conform to the principle of natural justice.

Mr. Gurnam Singh, learned counsel appearing on behalf of contesting defendants-respondents submits, that Court should be circumspect in interfering with the concurrent findings of the fact as both the Courts below have rendered findings of the fact based upon appreciation of oral and documentary evidence and in support of his submission, he has relied upon judgment of Hon'ble Supreme Court in *Hari Singh Vs. Kanhaiya Lal*, AIR 1999 Supreme Court 3325(1) and *Bonder and another Vs. Hem Singh (dead) by LRs. and ors.* (2009) 12 Supreme Court Cases 310.

I have heard learned counsel for parties and appraised the paper book.

It is a matter of record that possession of the property is with the appellants-plaintiffs. The findings regarding execution and registration of the registered sale deed dated 10.02.1959 has not been assailed by the defendants in the appeal. It is settled law that any registered document can be challenged within three years. The respondents-defendants have not filed any counter claim challenging the sale deed, much less, sought possession.

Admittedly, the suit aforementioned was filed in the year November, 1977.

Ex.P19, Ex.P20, Ex.P24 & Ex.P25 reflects that Chuhar Singh had already mortgaged to Munshi Singh and Anokh Singh and same also redeemed. In case Chuhar Singh was not having title, interest in the property and had either parted by the same by way of gift or any other mode, the same ought to have been reflected in the revenue record.

There is no documentary evidence to that effect which shows that Chuhar Singh & no title in the property, thus, irresistible conclusion is drawn that Chuhar Singh was owner in possession of entire property measuring, 62 kanal 11 marla. The mutation Ex.P27, heavily relied by the Courts below, does not reflect any entry of gift deed or any overt act of volition on the part of Chuhar Singh having executed any gift deed or parted with the title.

The Lower Appellate Court while dealing with the appeal being the last Court of fact and law, formed an opinion that there was no direct evidence with regard to the gift deed but Court drew presumption. I would be committed fallacy in case I do not refer to the said observation, which read thus:-

“8. There appears to be no force in the contention raised by the learned counsel for the appellants. Section 123 of the Transfer of Property Act came into force in Punjab State on 15.5.1957, whereas the mutation, copy of which is Ex.P27, was sanctioned on 5.5.57 on which date oral gift could be effected in accordance with law. There is no mention of any writing in respect of the creation of any gift. Moreover, the property in dispute does not appear to have been gifted by Chuhar Singh to the Cooperative Society, but the same appears to have been put in the

common pool of the property of the Cooperative Society formed by the members, and by way of mutation the share of Chuhar Singh was duly defined, and the nature of that transaction could be only in the shape of an exchange, which again could be effected orally, and there is no indication, on the record that any document was written in respect of putting the properties of the members in the botch potch or common pool of the Cooperative Society.”

The aforementioned findings leaves no manner of doubt that Lower Appellate Court has committed illegality and perversity in not deciding the appeal by framing points of determination as required under Order 41 Rule 31 of the Code of Civil Procedure. Since, the defendant-society had not challenged the documents i.e. sale deeds and not sought possession, much less, not able to prove the due execution of gift deed by Chuhar Singh, the property cannot be said to have been partitioned and fallen to its share.

There is no dispute to the ratio decidendi culled out by the Hon'ble Supreme Court in judgment cited Supra on behalf of respondents, but the fact remains that Court is enjoined upon obligation to refer and rely upon/or interpreted the documents & any mis-interpretation which itself is a perversity and this Court while exercising the power under Section 100 can always form opinion different to one formed by Courts below, therefore, the aforementioned judgments cited by Mr. Gurnam Singh, Advocate would not be applicable to the facts and circumstances of the case.

In view of what has been observed above, questions of law as noticed above are answered in favour of appellants-plaintiffs and against the respondents-defendants.

In my view, both the Courts below have committed illegality and perversity in dismissing the suit. Accordingly, suit of the appellants-plaintiffs is decreed.

Resultantly, Regular Second Appeal is allowed.

Decree sheet be prepared accordingly.

23.09.2015

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(AMIT RAWAL)
JUDGE