

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 2947 of 1988 (O&M)

Date of decision: 21.10.2015

Mahan Singh and others

..... Appellants

Versus

Sarabjit Singh and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE RAMENDRA JAIN

1. *Whether Reporters of the local papers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not?*
3. *Whether the judgment should be reported in the digest?*

PRESENT: Mr. IS Bajwa, Advocate for the appellants.

Mr. Sarwan Singh, Senior Advocate with
Mr. NS Rapri, Advocate for respondent No. 1.

Respondents No. 2 to 5 were proceeded *ex parte*
vide order dated 24.08.1993 and
respondent No. 6 vide order dated 05.10.1993.

Respondent No. 7 is proforma respondent.

RAMENDRA JAIN, J.

Brief facts, relevant for the decision of this Regular Second Appeal are that respondent No. 1-plaintiff claiming himself to be co-sharer to the extent of ½ share in the plot (hereinafter to be called as 'the disputed plot') situated in the *abadi deh* of village Ambala Jattan,

Tehsil and District Hoshiarpur, bounded and abutted on the Eastern side by the houses of Chanan Singh, Waryam Singh and Kehar Singh, plot of Dial Singh Sheikhupura; on the Western side street; on the Northern and Southern sides plots of Jit Singh and Tara Singh, respectively as shown in red colour in the site plan attached with the plaint, filed a suit for declaration to declare him co-sharer as such by setting aside the *ex parte* judgment and decree dated 30.08.1984, obtained by appellants from the Court of Sh. K.K. Lomas, the then Sub Judge, Hoshiarpur and that the same had no effect upon his ownership rights as well as to the rights of respondents No. 2 to 9 (defendants No. 1 to 6-A before the trial Court). Initially, the disputed plot was owned by one Harditta, who had four sons, namely; Dalipa, Jiwa, Ghasita and Jawahara, out of whom Dalipa and Jawahara died unmarried and issueless. Hence, their shares on their death had devolved upon their brothers namely; Jiwa and Ghasita sons of Harditta in equal shares. Jawahara also died and resultantly, his share devolved upon his widow Radhi, who too died. Hence, after her death the share of Jawahara finally devolved upon his daughter, namely; Banti widow of Jagtu along with other properties of Harditta.

2. Banti sold her half share in the disputed plot along with other properties to respondent No. 1-plaintiff vide registered sale deed dated 29.06.1973 for a sale consideration of ₹ 38,000/-. He filed a suit for partition of the houses and plots falling within the '*Lal Dora*' of village Ambala Jattan against respondents No. 2 to 9-defendants No. 1 to 6-A. He succeeded in getting a preliminary decree dated 30.07.1980 for partition to the extent of half share in the disputed plot and other plot

from the Court of Sh. GL Chopra, the then Sub Judge, Hoshiarpur. However, his claim regarding two other properties i.e. the house and Haveli was dismissed. Respondent No. 9-defendant No. 6-A, namely; Kartar Singh, also got himself impleaded in the above suit taking the plea that he had purchased the share of respondents No. 2 and 3-defendants No. 1 and 2. However, before passing of the final decree for partition, appellants-defendants No. 7 to 10 started claiming their joint ownership along with 47 other persons in the disputed plot on the basis of some *ex parte* judgment and decree dated 30.08.1984.

3. The respondent No. 1 filed another suit for setting aside the said *ex parte* judgment and decree taking the plead that the same had no binding effect upon him, as the same were obtained by appellants-defendants No. 7 to 10 in a suit filed under Order 1 Rule 8 of the Code of Civil Procedure (CPC) in representative capacity, in which no compromise could take place without express permission of the Court. Even otherwise, the compromise on the basis of which the aforesaid decree was obtained, was invalid in view of Order 23 Rule 3-B CPC, whereby it was mandatorily required to issue Court notice(s) to all the concerned persons, before entering into any compromise. No such notice was ever served upon respondent No. 1-plaintiff before passing of the *ex parte* judgment and decree. He had requested the appellants to admit his claim of co-sharership to the extent of half share in the disputed plot, but they refused for it.

4. Upon notice, respondents No. 2 to 9 and appellants-defendants No. 7 to 10 contested the suit by filing written statement.

They took preliminary objections viz that the disputed plot was owned by Mst. Dialan wife of Khazana and not by Harditta. The site plan annexed with the plaint was incorrect; since all the interested 49 persons were not impleaded, therefore, the suit was bad for non-joinder of necessary parties and thus, was liable to be rejected.

5. On merits, while pleading the initial ownership of Dialanwala wife of Khazana over the disputed plot and after her death its devolution upon 53 persons, it was averred that Jiwa, Radhi or Banti had never held any share in the disputed plot and, thus, they could not sell any share to respondent No. 1-plaintiff. Respondent No. 1 was also one of the defendants in the representative suit. It was decreed on 30.08.1984, after due permission of the Court and notice to respondent No. 1-plaintiff. Since the rights of 49 persons were protected in the compromise entered in the said suit, on the basis of aforesaid judgment and decree dated 30.08.1984 was passed, therefore, anyone of them did not challenge the same. While denying other material contents of the plaint, dismissal of suit was prayed while pleading that respondent No. 1 was bound by the aforesaid judgment and decree dated 30.08.1984.

6. Replication was filed controverting the contentions raised in the written statement and that of reiterating the plaint. From the pleadings of the parties, the learned trial Court framed the following issues:-

- “1. Whether the plaintiff is the co-owner of the property in dispute to the extent of ½ share? OPP
2. Whether decree dated 30.08.1984 in favour of

defendant Nos. 7 to 10 has not effect on the ownership of the property of the plaintiff? OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Relief.”

7. The parties led evidence to their satisfaction. The learned trial Court while deciding issues No. 1 and 2 in favour of respondent No. 1-plaintiff and issue No. 3 against appellants-defendant No. 7 to 10, decreed the suit vide judgment and decree dated 14.11.1987 declaring respondent No. 1-plaintiff as co-sharer to the extent of half share in the disputed plot by observing that *ex parte* judgment and decree dated 30.08.1984 had no binding effect upon him as well as on respondents No. 2 to 9.

8. Aggrieved with the judgment and decree dated 14.11.1987, the appellants had preferred an appeal before the learned Appellate Court which was also dismissed by the learned Additional District Judge, Hoshiarpur, vide judgment and decree dated 12.09.1988. Still dissatisfied, the appellants (defendants No. 7 to 10) have preferred the present Regular Second Appeal.

9. I have heard the learned counsel for both the sides and gone through the case file carefully with their able assistance.

10. Learned counsel for appellants argued that the findings of both the Courts below being erroneous are liable to be reversed. Respondent No. 1-plaintiff could not prove his ownership over the disputed plot to the extent of half share by leading any cogent and

convincing evidence and, therefore, his suit was wrongly decreed by the Courts below. From the documents i.e. *Khana Shamari* Ex. D-1, *Akas Khana Shamari* Ex. D-2, pedigree table Ex. D-3, mutation of inheritance No. 402 dated 25.11.1898 etc. produced by the appellants before the trial Court, it was evident that initially Khazana S/o Chartu S/o Sabbo was owner of the disputed plot. After his death, his widow Mst. Diala inherited the same, who died issueless on 13.07.1897 and, thereafter, the disputed plot was inherited by all the collaterals of her husband Khazana vide mutation Ex. D-11. According to pedigree table Ex. D-3, Harditta was owner to the extent of 1/40th. Hence, Banti daughter of Radhi widow of Jiwa could transfer her share only to the extent of 1/40th vide sale deed dated 29.06.1973 Ex. D-10 and not the half share. Judgment and decree dated 30.08.1984, Ex. D-5/2 being legal and valid was binding upon respondent No. 1-plaintiff as he was impleaded as a party in his individual capacity. Since, he did not ever challenge the aforesaid judgment and decree, therefore, it had attained finality. The learned Courts below have erred in not appreciating the documentary evidence produced by the appellants. It was further argued that the learned trial Court has wrongly held that Mst. Diala had left India for Pakistan in the year 1947, whereas she died on 13.07.1897, much prior to the partition and mutation of her inheritance Ex. D-11 was sanctioned on 25.11.1898. Learned trial Court ought to have held her initial ownership over the disputed plot.

11. On the other hand, learned counsel for respondent No. 1-plaintiff pleading the legality and validity of the impugned judgments and

decree passed by both the Courts below prayed for dismissal of the instant appeal.

12. After giving my thoughtful consideration to the rival submissions made by learned counsel for the parties, I find the present appeal completely devoid of merits for the reasons that no substantial question of law has been raised in the instant appeal. Under Section 100 CPC, the Regular Second Appeal is only maintainable, when some substantial question of law is involved. The civil suit for partition filed by respondent No. 1-plaintiff was hotly contested by respondents No. 2 to 8 (defendants No. 1 to 6). He was held entitled for partition to the extent of half share in the disputed plot by declaring him owner as such vide judgment and decree dated 30.07.1980.

13. In the present suit, respondent No. 2-Bawa Singh as DW-1 had categorically admitted in his cross-examination that Smt. Banti had sold her half share in the agricultural land, the disputed plot and houses in *Abadi Deh* to respondent No. 1-plaintiff, Sarabjit Singh on 29.06.1973 and that he had filed a suit for partition against him and other co-sharers which was decreed in respect of half share in two properties including the disputed plot. Mohan Singh-respondent No. 3 as DW-2 as well as Bawa Singh-respondent No. 2 as DW-1 both admitted before the learned trial Court in their cross-examinations that Dalipa and Jawahra sons of Harditta had died unmarried and issueless and their inheritance had devolved upon their brothers, namely; Jiwa and Ghasita. Radhi was the widow of Jiwa, who had a daughter, namely; Banti. In the instant case, the stand of respondent No. 1-plaintiff is that he had purchased the

disputed plot from Smt. Banti to the extent of half share. Respondent No. 3-Mohan Singh as DW-4, had also specifically admitted in his cross-examination before the learned trial Court that Smt. Banti had half share in the estate of Harditta, which she had sold to respondent No. 1-plaintiff and he had got his half share partitioned. The above admissions of the respondents, estops the appellants to claim that Banti was not owner of the half share in the disputed plot which she sold to respondent No. 1/plaintiff-Sarabjit Singh.

14. It is pertinent to mention that in pursuance of the judgment and decree dated 30.07.1980 passed in the partition suit filed by respondent No. 1-plaintiff, he filed an execution petition No. 51 dated 04.11.1981 in the Court of Sub Judge, Hoshiarpur, for his separate possession to the extent of half share in the disputed plot which was delivered to him vide order dated 22.09.1982.

15. A perusal of plaint of the suit filed by the appellants in representative capacity in the year 1983 shows that the judgment and decree dated 30.07.1980 passed in the partition suit in favour of respondent No. 1 was also challenged. However, the same was not got set aside, rather the said suit was got decreed on the basis of some compromise vide judgment dated 30.08.1984. In other words, the judgment and decree dated 30.08.1984, does not speak about setting aside of the judgment and decree dated 30.07.1980 in favour of respondent No. 1-plaintiff, meaning thereby, the same still exists. Hence, the learned Courts below have not committed any illegality or irregularity in passing the impugned judgments and decrees, declaring respondent No. 1-

plaintiff as owner in possession to the extent of half share in the disputed plot being purchaser from its previous owner, namely; Banti vide sale deed dated 29.06.1973. There is also no ambiguity in the findings of both the Courts below that the compromise decree dated 30.08.1984 has no binding upon the rights of any of the respondents.

16. If this case is seen from another angle i.e. whether the appellants have been able to prove that the vendor (Smt. Banti) of respondent No. 1-plaintiff was not owner to the extent of half share in the disputed plot and, thus, she was not able to sell the same to him, then also they have miserably failed to prove so. Their stand is that initially, Mst. Dialan wife of Khazana was the owner of disputed plot and after her death, its ownership had devolved upon 53 persons as per pedigree table Ex. D-3. According to the said pedigree table, neither Jiwa nor Radhi or Banti ever held half share in the disputed plot. However, said pedigree table does not not prove anything in favour of the appellants, except that they were successors of Mst. Dialan. Even they have failed to connect the suit land by producing jamabandi Ex. D-11, *khana shamari* Ex. D-1 etc.

17. There is no force in the arguments of learned counsel for appellants that the present suit filed by respondent No. 1 was not maintainable because, admittedly, the previous suit filed by him was for partition of the disputed plot, whereas in the present suit he had sought declaration that he was co-sharer in the disputed plot to the extent of half share and that compromise decree dated 30.08.1984 obtained by the appellants had no binding effect upon him. The cause of action of both

the suits are different. There is nothing on the record in the shape of documentary evidence in support of their above assertion that there were numerous co-sharers in the disputed plot and that Banti had only 1/40th share in it. Contrary to it, respondent No. 1 is armed with final judgment and decree dated 30.07.1980 in his favour, which he had obtained after leading cogent and convincing evidence and due contest.

18. I have gone through the impugned judgments and decrees of the Courts below and found no illegality or perversity in the same.

19. No other point was urged before me.

20. In view of the above discussion, there is no merit in the instant Regular Second Appeal and accordingly the same is dismissed.

October 21, 2015

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**(RAMENDRA JAIN)
JUDGE**