

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

**RSA No.729 of 1989 (O&M)
Date of decision: 19.08.2015**

Kanwarjit Singh

... Appellant

Vs.

Gurdit Singh (deceased) through LRs & others

... 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. Kanwal Goyal, Advocate, for the appellant.

Mr. M. L. Sarin, Senior Advocate with
Mr. Nitin Sarin, Advocate and
Mr. Ritesh Aggarwal, Advocate
for the respondents.

AMIT RAWAL J. (Oral)

Challenge in the present appeal is to the impugned judgment and decree of the lower Appellate Court, as well as, to the finding rendered on issues No.2, 3 and 5 by the trial Court, whereby, it has been held that interest of the appellant-plaintiff was being protected and represented by other legal representatives of Shiv Singh.

Mr. Kanwal Goyal, learned counsel appearing on behalf of the appellant-plaintiff submits that a suit bearing No.83 of 1970 for redemption of the mortgage was filed in the year 1970 and the same was dismissed by the trial Court on 07.06.1971. In the

aforementioned suit, father of the appellant-plaintiff, namely, Sadhu Singh and appellant were arrayed in their individual capacity, though the appellant was minor at the relevant point of time. The suit was decreed. The co-defendant, i.e., LR of Shiv Singh, challenged the aforementioned decree by filing first appeal. However, the same was dismissed, vide judgment and decree dated 09.06.1971, Ex.P4. The matter did not rest here. The aforementioned judgments and decrees were challenged by filing a regular second appeal bearing No.1542 of 1975 and the same vide Ex.P7 was dismissed on 21.09.1983. The suit at the instance of appellant challenging the aforementioned judgment and decree had been filed on 08.09.1983, a few days before, the judgment rendered in the aforementioned regular second appeal, on the premise that provisions of Order 32 Rule 3 CPC were though mandatory, in nature, were not complied with, as admittedly at that point of time, the suit was filed within a period of limitation, i.e., within a period of three years of the date of attaining majority. The trial Court, though, found that the appellant-plaintiff was minor at that time but committed illegality and perversity, in holding that the estate of the minor was represented by other legal representatives.

Aggrieved against the aforementioned judgment and decree, the appellant preferred an appeal before the lower Appellate Court. He further submitted that the respondents, herein, did not file any cross-objection/appeal against the finding rendered on issue Nos.1 and 6 vis-a-vis holding the appellant to be minor, yet the lower

Appellate Court confirmed the findings on the aforementioned issues, therefore, the present appeal involves the following substantial questions of law to be adjudicated by this Court:-

- “i) Whether the respondent-defendants could obtain a decree by impleading the appellant-plaintiff in individual capacity as he was minor at that time?*
- ii) Whether the estate of the deceased Sadhu Singh could be represented by other legal representatives in the absence of the appellant-plaintiff?”*

Mr. M.L.Sarin, learned Senior counsel assisted by Mr. Nitin Sarin, Advocate submits that no question of law, much less, substantial question of law arise in the present appeal as the finding of fact has been arrived at, wherein, it has been held that the appellant-plaintiff was not minor at that point of time. Admittedly, in this regard, no evidence was led except solitary evidence, i.e., school certificate, was brought on record, whereas, other witnesses, namely, father, mother and other relatives, which were eventually required to prove the age of the appellant-plaintiff, had not been examined. He further submits that estate of Sadhu Singh or the mortgagee was being represented by the other legal representatives, as Sadhu Singh died intestate and left behind four legal heirs. He also submits that once Sadhu Singh son of Shiv Singh, had been impleaded, there was no occasion for the impleadment of appellant-plaintiff. Sadhu Singh, was proceeded against ex-parte and he did not move any

application for setting aside the ex parte judgment and decree, thus, had accepted the judgment and decree which had attained finality up to this Court.

In support of his contention, he relied upon the Division Bench judgment of this Court in **Sardara Singh and another vs. Harbhajan Singh and others 1974 AIR (Punjab) 345**, to contend that once the estate of the legal representatives is duly represented, there is no need to bring on record other LRs. In essence, he has raised the argument that even if the LRs are not impleaded, even then estate of Sadhu Singh was being represented through LRs. He further submits that the school certificate is not an authentic evidence as per provisions of Section 35 of the Indian Evidence Act and in this regard cited a judgment of the Hon'ble Supreme Court in **Brij Mohan Singh vs. Priya Brat Narain Sinha and others AIR 1965 SC 282**.

In rebuttal, Mr. Kanwal Goyal submits that in the written statement, respondent-defendants have stated that they did not have the knowledge of the appellant-plaintiff being minor and in this regard has cited the Division Bench judgment of this Court in **Gurpeet Singh vs. Chatterbhuji Goel 1991(2) R.R.R.504**, to contend that the provisions of Order 32 Rules 3, 3-A and 4(3), are mandatory in nature and therefore, the decree obtained by the respondent-defendants is null and void, in essence, is nullity.

I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below,

much less record.

The appellant-plaintiff though instituted the present suit and has not led any evidence to prove as to how his interest and right has been prejudiced by virtue of the decree dated 07.06.1971 upheld by this Court. It is now well settled law that in case the estate of the deceased is represented by few of the LRs, there is no necessity to implead all the LRs. In the instant case, Sadhu Singh was impleaded as defendant No.3. He was proceeded against ex-parte. He did not choose to move any application for setting aside the ex-parte order, much less, did not file any written statement. Estate of Sadhu Singh, that is mortgagee, was represented by other legal heirs which was assailed the judgment and decree upto this Court, though they did not succeed. The contention that since co-defendants did not lead any evidence and the suit was decreed, in view of the provisions of Order 32 Rule 3 CPC, is not sustainable, for the reason that mortgage deed dated 26.04.1943 had duly been proved and even the revenue record also reflected the execution of the mortgage. The appellant-plaintiff did not lead any evidence to show that there was no relationship between the mortgagor and mortgagee, much less, no evidence has been led to show that any prejudice has been caused, except the entire focus had been, on the ground that he was minor at that relevant point of time, when the earlier suit No.83 of 1970 was instituted. In my view, there was no need to implead appellant-plaintiff in the aforementioned suit, as

father Sadhu Singh had already been impleaded and it was he who could be said to have interest in estate of Shiv Singh.

Time and again, a question had been debated before this Court, as well as, before the Hon'ble Supreme Court, as to what would be the stage, in case few of the LRs are brought on record and others not. It has been held that in case, few of the LRs of the deceased are brought on record, it will not cause any prejudice to the estate of the deceased, who, was being represented effectively and diligently. This Court had raised a query to the learned counsel for the appellant, as to what evidence has been, led to show how prejudice has been caused to the appellant-plaintiff by virtue of decree dated 7.6.1971 but answer is in negative and the fact remains that the appellant-plaintiff failed to lead any evidence in this regard. The lower Appellate Court while exercising power under Order 41 Rule 33 CPC has set aside the finding on other issues which were not assailed by the respondent-defendants.

The interpretation of provisions of Order 41 Rule 33 CPC is no longer in *res integra*. The Appellate Court has power to vary the finding, much less, decree, if it is not assailed by the affected party. The ratio decidendi culled by this Court in Gurpreet Singh's case (*supra*), by distinguishing the judgment of this Court in **Amrik Singh vs. Karnail Singh, AIR 1974 Punjab and Haryana 315** would not be applicable to the facts and circumstances of the present case as that was the case of sole minor, herein, this case is of a mortgagee,

admittedly, Sadhu Singh, who, was being represented by four legal heirs.

The judgment and decree of the lower Appellate Court, is thus passed, on the appreciation of the fact and law, therefore, there is no illegality, much less, perversity in such findings. The substantial questions of law, noticed above, are answered against the appellant-plaintiff and in favour of respondent-defendants.

Accordingly, the regular second appeal is dismissed.

(AMIT RAWAL)
JUDGE

August 19, 2015
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