

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No. 4838 of 2009(O&M)

Date of decision : December 28th ,2015

Tarsem Singh

..... Appellant

Versus

Sadhu Ram and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. Kulwant Singh, Advocate
for the appellant.

Mr. Vikas Bahl, Senior Advocate with
Ms. Balpreet Kaur Sidhu, Advocate
for respondent Nos. 2 (i), (ii), (iii), (iv) and 5.

Mr. Kashmir Singh, Advocate
for respondent Nos. 1,3,4 & 6.

1. Whether reporters of 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?

Amit Rawal, J.

The question raised in the present appeal is whether

the suit bearing No.654 dated 25.9.1998 filed by the respondents-plaintiffs seeking declaration challenging the judgment and decree dated 10.2.1995 passed in civil suit No. 1534 of 1991 titled as Tarsem Singh Vs. Prabhi Devi and others with consequential relief of permanent injunction is maintainable or not. The following substantial questions of law would arise for determination by this Court:-

“i) Whether the present suit filed by the respondents-plaintiffs is not maintainable as the only remedy against the ex-parte decree dated 10.2.1995 is either to file an application for setting aside or an appeal?

ii) Whether the courts below ignored Exs. D-10 and D-11 which show that even Yad Ram had withdrawn his suit, filed against the appellant challenging the above decree dated 10.2.1995 in view of the family partition and thus had voluntarily given up his share in the suit land in favour of the appellant?

iii) Whether a simpliciter suit for declaration without seeking further relief of possession is maintainable in view of the law laid down by the Hon'ble Supreme Court in **Mehar Chand Dass Vs. Lal Babu Siddique and others 2007 (2) RCR (civil) 628 (SC)?**

iv) Whether the respondents-plaintiffs have been able to prove ingredients of fraud as envisaged

under Order 6 Rule 4 CPC or not.

Before adverting to the rival contentions of the parties, it would be necessary to give brief facts emanating, from the pleadings of the parties.

Ram Chander @ Ram Chand (hereinafter referred to as Ram Chander) was owner in possession of the suit land situated at Village Gadauli Tehsil Naraingarh as well as land situated at Village Machhi Kalan earlier in District Patiala, presently Tehsil Sirhind, District Fatehgarh Sahib. He allegedly executed a Will dated 23.12.1974 in favour of the respondents-plaintiffs which was registered in the office of Sub Registrar. Ram Chander was son of Karam Singh. He had two brothers Ranjit Singh and Yad Ram. The dispute arose between the appellant-Tarsem Singh s/o Ranjit Singh and respondent No.1 Sadhu Ram s/o Ranjit Singh Vidya Devi w/o Sadhu Ram, Shyam Lal and Jaspal, sons of Sadhu Ram, Shakuntala Devi w/o Shyam Lal and Usha Devi w/o Jaspal and other respondents. Rameshwar Dass died unmarried.

Ram Chander was married to Prabhi Devi. He died issueless on 13.6.1983 whereas Prabhi Devi died on 9.10.1991. There was dispute with regard to the land of Village Machhi Kalan which somewhere in the year 1929-30 was originally taken on mortgage, by Karam Singh, father of Ram Chander. The aforementioned land was not redeemed by the mortgagors at any stage yet allegedly obtained order of Redemption No.1796 dated 15.1.1995. The said order was challenged by the respondents-plaintiffs by filing suit for declaration and it was prayed that they had

become owners in possession of the land described therein by efflux of time i.e only in respect of land situated at Village Machhi Kalan, (Punjab). The said suit, was bearing No.357 of 1987. In the above said suit, the respondents-plaintiffs impleaded Prabhi Devi wd/o Ram Chander as defendant No. 12 and Tarsem Singh- appellant, as proforma defendant. The Memo of Parties reads thus:-

*"IN THE COURT OF SUB-JUDGE 1ST CLASS
RAJPURA (C)*

Suit No. 357/29.9.87

1. Shyam Lal

2. Jaspal

both sons of Sadhu son of Jit Singh

3. Vidya Devi w/o Sadhu

4. Sadhu

5. Krishan

both sons of Jit Singh

6. Akhari widow of Jit Singh

7. Daya

8. Sita

9. Krishana

10. Sikaha

all daughters of Jit Singh

*residents of Village Machhli Kalan, Tehsil Rajpura, District
Patiala.*

...Plaintiffs

Versus

1. Madan Singh

2. Raj Kumar

3. Kadam Singh

4. Bhuri Singh

sons of Soran son of Bhambool Singh

5. Maya Devi

6. Samitra Devi

7. Krishana Devi

daughters of Soran

8. Bisa Devi widow of Soran

All residents of Village Machhli Kalan, Tehsil Rajpura

...Defendants

9. Ram Murti son of Piara Lal of Village Chanalon, Tehsil Kharar.

10. Tarsem son of Jit

11. Yad Ram son of Tarsem Singh

12. Parbhi widow of Harchand

of Village Machhli Kalan, Tehsil Rajpura, District Patiala.

...Proforma respondents"

The respondents-plaintiffs in the above suit sought declaration that the land in the village Machhi Kalan, (Punjab) had come to them by virtue of registered Will dated 23.12.1974 (Ex. P-3) executed by Ram Chander therefore they are owner in possession. Prabhi Devi filed a written statement. However in the written statement filed on behalf of defendant Nos. 10 and 11 i.e. Tarsem Singh and Yad Ram s/o Tarsem Singh, the execution of the Will was seriously disputed. For the sake of brevity para 4 of the written statement reads thus:-

"That para No. 4 of the plaint is absolutely wrong and therefore denied. However, it is correct that Ram Chand son of Karam Singh died about 5 years back it is absolutely wrong that he had executed a last valid registered will dated 23.12.1974 bequeathing all his property in favour of plaintiffs No.1 and 2 their and real brother Rameshwar. It is also wrong that Rameshwar died as unmarried Rameshwar was married at Village

Aplana District Karnal. Ram Chand never executed any Will in favour of any person. The above referred will dated 23.12.74 is forged and fictitious document. It has no value in the eyes of law Rameshwar has left a widow. Plaintiff No. 3 is not only the legal heir of Rameshwar deceased. Jit Singh son of Karam Singh son of Kanhya also died and he was succeeded by plaintiffs No. 4 to 10 and defendant No. 10. The plaintiffs No. 1 to 10 and defendants No. 9 to 11 have no interest in the suit land."

In the said suit an argument was raised that the Will in dispute set up by Ram Chander in favour of Shyam Lal, Jaspal and Rameshwar had not been proved by examining the witnesses. The aforementioned plea was refuted by the trial court by holding that it was only Prabhi Devi who had right to challenge the Will. Accordingly, decreed the suit on 28.11.1991.

Prior to the decision of the suit a compromise dated 16.4.1991 (Ex. DW1/A) was entered into between the parties. Copy of which has been annexed as Annexure A-5 and as per the said terms and conditions of the compromise, it was decided that the full owner of the property of Ram Chander (deceased) situated in village Machhi Kala, Punjab and mutation of land of Village Gadauli Tehsil Naraingarh District Ambala shall be sanctioned in favour of Prabhi Devi widow of Ram Chander. The relevant portion of the compromise dated 16.4.1991 reads thus:-

That the aforesaid mutation No. 3723, which was declared as disputed vide order dated 8.6.1988 of the Assistant Collector Ist Grade Naraingarh and it was further directed

to take proceedings in the said Mutation No. 2723 of Village Gadauli, Hadbast No. 135, Tehsil Naraingarh after the decision of the Assistant Collector 1st Grade, Rajpura and the order of taking further proceedings was set-aside. Now, the Assistant Collector 1st Grade, Rajpura has decided regarding Mutation No. 1765 of Village Machhli Kalan, Tehsil Rajpura, District Patiala between the same parties regarding the succession of Shri Ram Chander @ Ram Chand (deceased) and the said decision has been given in favour of Smt. Parbhi widow of Shri Ram Chand @ Ram Chander and all the parties are satisfied with the above decision dated 30.10.1989 of the Assistant Collector Ist Grade Rajpura. The Assistant Collector 1st Grade, Rajpura vide his order has set-aside the Regd. Will No. 145, dated 23.12.74 of Ram Chand (deceased) and the mutation of succession of Shri Ram Chander (deceased) has been ordered to be sanctioned in favour of the widow of the deceased namely, Smt. Parbhi.

The parties and the beneficiaries of the Will dated 23.12.74 are satisfied with the above decision in appeal and the fact that the will has been set-aside by the Assistant Collector IInd Grade be considered to have been set-aside and the parties have also decided that they shall not fight on the basis of the Will in any court.

2. That now, the full owner of the property of Shri Ram Chander (deceased) situated in village Machhli Kalan, Tehsil Rajpura, District Patiala and Village Gadauli, H.B.No. 135, Tehsil Naraingarh, District Ambala will be Smt. Parbhi Devi widow of Smt. Ram Chander, resident of Village Gadauli, Tehsil Naraingarh, District Ambala, presently, resident of Village Machhli Kalan, Tehsil Rajpura, District Patiala and according to this the mutation of the land of Village Gadauli, Tehsil

*Naraingarh, District Ambala bearing No. 3723 of Village Gadauli, Tehsil Naraingarh shall be sanctioned in favour of Smt. Parbhi Devi widow of Shri Ram Chand @ Ram Chander (deceased) and there shall be no objection from any body regarding the same. **Hence disputed mutation No. 3723 of Village Gadauli be sanctioned in favour of Smt. Parbhi Devi widow of Shri Ram Chand in accordance with this Compromise.***

Dated 16.4.1991

Sd/- Sadhu Ram s/o Ranjit Singh

Sd/- Shyam Lal s/o Sadhu Ram S/o Ranjit Singh

Sd/- Tarsem Singh s/o Shri Ranjit Singh, r/o Village Gadauli, Tehsil Naraingarh, District Ambala.

LTI Jaspal son of Sadhu Ram, r/o Machhli Kalan, Tehsil Naraingarh, District Patiala.

LTI Krishan son of Ranjit r/o Machhli Kalan, Tehsil Rajpura, District Patiala.

RTI Parbhi widow of Ram Chander @ Ram Chand R/o Machhli Kalan, Tehsil Rajpura, District Patiala.

LTI Som Pal son of Yad ram resident of Gadauli, Tehsil Naraingar, District Ambala.

SD witness Dharam Singh s/o Raghubir Singh r/o Baragarh, Tehsil Naraingarh, District Ambala.

LTI Lajja Ram witness, r/o Gadauli, Tehsil Naraingarh,

Sd/- S.K. Gupta Advocate”

After execution of the compromise a family partition (Ex. DW-3/C) Annexure A-6 was entered into between the parties. Prabhi Devi being the First Party and Tarsem Singh, Sadhu Ram s/o Ranjit Singh, Shyam Lal, Jaspal s/o Sadhu Ram and Vidya w/o Sadhu Ram and Shakuntla Devi w/o Shyam Lal and Usha Rani w/o Jaspal being Second Party. As per the said family partition it was decided that Prabhi Devi had become full owner of land in both the

Villages i.e. Machhi Kalan, Punjab and village Gadauli, Tehsil Naraingarh District Ambala (Haryana). Prabhi Devi partitioned the same between Second Party including a house, property, house hold articles, cash, ornaments etc. in favour of Shakuntla Devi w/o Shyam Lal and Usha w/o Jaspal in equal shares. Shakunta and Usha had become the equal owners in possession of land of Smt. Prabhi Devi situated in Village Machhi Kalan, Tehsil Rajpura, District Patiala and the land situated at village Gadauli, (Haryana) by setting aside of the Will No. 145 dated 23.12.1974, shall now, by virtue of family partition along with house and household articles etc. had been given to Tarsem Singh s/o Ranjit Singh as owner in possession. It was mentioned that the possession of the same had been handed over. It was also decided to make requisite entries. The entire family partition deed is extracted hereinbelow:-

“We, Smt. Parbhi widow of Shri Ram Chander @ Ram Chand, presently, resident of Village Machhi Kalan, Tehsil Rajpura, District Patiala 1st Party and Tarsem Singh, (2) Sadhu Ram son of Shri Ranjit Singh r/o Village Gadauli, Tehsil Naraingarh, District Ambala and Village Machhi Kalan, Tehsil Rajpura, District Patiala (3) Shyam Lal (4) Jaspal son of Sadhu Ram and Smt. Vidya wife of Shri Sadhu and Shakuntla Devi wife of Shyam Lal and Usha Rani wife of Jaspal, residents of Village Machhi Kalan, Tehsil Rajpura, District Patiala ---2nd Party .

Between the above parties, a family partition deed has been executed with the intervention of the relatives and

respectables of the community and which is as under:-

That regarding the land of Shri Ram Chand @ Ram Chander (deceased) resident of Village Machhi Kalan, Tehsil Rajpura, District Patiala, regarding the property in both the villages litigation and tention Ambala, is continuing between Tarsem Singh, Shyam Lal, Jaspal sons of Sadhu and Sadhu son of Ranjit Singh and Smt. Vidya wife of Shri Sadhu. Vide order dated 30.10.1989, the court of Assistant Collector 1st Grade, Rajpura had set-aside Will No.145, dated 23.12.1974 of deceased Ram Chander in favour of Sham Lal and Jaspal and had ordered that the mutation of succession of deceased Ram Chander be sanctioned in favour of his widow Smt. Parbhi and according to which the Mutation of the land of village Machhli Kalan, Tehsil Rajpura, District Patiala has been sanctioned in favour of Smt. Parbhi, first party and now she is the full owner of the land of village Machhli Kalan. The second party has decided to get the Mutation No. 3723 sanctioned regarding the land of village Gadauli, Tehsil Naraingarh, District Ambala belonging to deceased Shri Ram Chand in favour of the first party, Smt. Parbhi and they accept Smt. Parbhi to be the full owner of the land of village Gadauli and they consider Will No. 145, dated 23.12.74 to have been set-aside.

Now, Smt. Parbhi Devi has become the full owner of the land of both the villages and having blood relation with the second party, she is related as Chachi and Dadi (grand mother) and a part from the second party, Smt. Parbhi — First Party has no other close relations. The first party has willingly and in full senses given her entire land situated in village Machhli Kalan, Tehsil Rajpura, District Patiala and of village Gadauli, Tehsil Naraingarh, District Ambala by

partitioning the same between the second party and according to the Partition decision, the entire property of village Machhli Kalan, Tehsil Rajpura, District Patiala i.e. house, property, household articles, cash, ornaments etc. shall go infavour of Smt. Shakuntla Devi wife of Shyam Lal, Second Party and Usha Rani wife of Shri Jaspal, second party in equal share by way of the family partition and they are in possession of this land as owners. From today, the aforementioned Shakuntla and Usha have become the equal owners in possession of the land of Smt. Parbhi situated in Village Machhi Kalan, Tehsil Rajpura, District Patiala.

That the entire land of village Gadauli, Tehsil Naraingarh, District Ambala has come in the name of Smt. Parbhi - First Party from her husband Shri Ram Chander @ Ram Chand son of Karam Singh on the setting aside of the Will No.145, dated 23.12.74 -and by succession in favour of first party, she has become the owner of the entire land situated in village Gadauli along with house and household articles etc. and white place and baras etc. and now this property by virtue of the family partition has been given to Tarsem Singh son of Shri Ranjit Singh @ Jit Singh i.e. to his real nephew as owner in possession and the same has been handed over to him. In the revenue record, the requisite entry be made in accordance with this partition and the

land of village Machhi Kalan be entered in the name of Smt. Shakuntla Devi and Usha and the land of Village Gadauli be entered in favour of Tarsem Singh in accordance with this family partition deed and I am bound to get the same done . Now these aforesaid persons to whom I have given the land by partitioning the same have become the full owners in possession of the property.

Hence, this family partition deed has been executed as per

my free will and wish and without any pressure and the same has been written down so that it remains as proof.

Ambala

Dated: May 4, 1991

RTI Smt. Prabhi

wd/o Ram Chander

@ Ram Chand r/o

*Machhi Kalan, Tehsil
Rajpura.*

Sd/- Tarsem Singh s/o Ranjit Singh

Sd/- Sadhu Ram son of Ranjit Singh

LTI Jaspal

Sd/- Sham Lal son of Sadhu Singh

RTI Shakuntla Devi wife of Shyam Lal

RTI Vidya wife of Sadhu

Sd/- Usha Rani wife of Jaspal

Sd/- Witness Dharam Singh s/o

*Shri Raghbir Singh R/o Baragarh,
Tehsil Naraingarh District Ambala.*

*LTI Krishan son of Ranjit r/o Machhli
Kalan, Tehsil Rajpura, District*

Patiala.

Witness:- Lajja Ram son

*LTI Satpal son of Yad Ram, r/o Machhli Kalan, Tehsil
Rajpura, District Patiala.”*

Since the appellant-Tarsem Singh had filed an appeal bearing No.158 dated 22.8.1988 against the order dated 8.6.1988 passed by the Assistant Collector, Ambala, Ist Grade, Naraingarh vide which the proceedings of mutation No.3723 of Village Gadauli Haryana were adjourned sine die. Statement of Prabhi Devi wd/o Ram Chander, Shyam Lal, Jaspal, Vidya w/o Sadhu Singh and Tarsem Singh were recorded and it was stated that the compromise had been effected between the parties which has been executed in accordance with the order passed by the Assistant Collector, Rajpura whereby it was agreed that Mutation No. 3723 of Haryana be also passed in the present case. The Collector on the basis of the statement vide order dated 6.8.1991 set aside the order passed by the Assistant Collector, Ist grade, Naraingarh and mutation No. 3723 of Village Gadauli and remanded back, with a direction that it should be decided on the basis of written compromise.

Tarsem Singh-appellant filed a Civil suit No.1534 dated 27.9.1991 against Prabhi Devi, Usha Devi, Shyam Lal, Jaspal Singh, Vidya Devi and Sadhu Ram claiming declaration to the effect that he has become absolute owner in possession of 1/3rd share of the land previously belonging to Ram Chander situated in Village Gadauli, (Haryana). In essence, he claimed declaration, only with regard to the property, which as per the compromise had fallen to him and not

with regard to the property situated in Village Machhi Kalan, (Punjab). In the aforementioned suit, the respondents-plaintiffs had appeared through one Raman Kumar Sharma, Advocate but failed to file written statement and defaulted in their appearance, thus were accordingly proceeded ex parte. In ex parte evidence, Tarsem Singh appeared as DW-1 and placed on record the documents i.e. copy of the order dated 6.3.1991, application dated 16.4.1991, Jamabandi for the year 1986-87 and partition deed/family settlement. On the basis of the aforementioned evidence, the trial court decreed the suit vide judgment and decree dated 10.2.1995.

Yad Ram s/o Karam Singh brother of Ranjit Singh and Ram Chander instituted a civil suit No.563 dated 31.7.1995 seeking setting aside of the judgment and decree dated 10.2.1995 passed in civil suit No. 1534 dated 27.9.1991 titled as Tarsem Singh Vs. Smt. Prabhi Devi and others. However, on 3.5.1996 he suffered a statement that he does not want to continue with the suit as the attorney has filed a suit without his permission and accepted the judgment and decree sheet dated 10.2.1995 to be correct. The trial court, vide order dated 3.5.1996 on the basis of his statement dismissed the suit as withdrawn. The statement of Yad Ram and order of the even date reads thus:-

Statement of Shri Yad Ram son of Shri Karam Singh, aged 65 years, resident of Village Machhli Kalan, Tehsil Rajpura, District Patiala, Agriculturist. on S.A.

It is stated that a Compromise has been arrived at between me and the respondent Tarsem Singh. The Judgment and Decree Sheet dated 10.2.1995 passed by

the Court of Smt. Rita Jhanji, Sub-Judge, Ambala is correct. I have no objection in the passing of the said decree . Prem Chand son of Arjan Ram, resident of Gadauli, Tehsil Naraingarh, District Ambala who has filed the present suit on my behalf, I do not want to continue with the suit because my Attorney has filed a suit without my permission. The power of attorney has been cancelled by me on 2.5.1996 vide Deed No. 18/4. I have sent the notice regarding the cancellation to my Attorney. The suit be dismissed. The cost be borne by the respective parties.”

Recorded at my dictation

RO & AC

Sd/- A.C.J.(Sr. Div.) 3.5.96

LTI of Yad Ram

Identified by Randeep Singh, Advocate

3.5.96”

During the interregnum respondents-plaintiffs filed a suit bearing No.654 dated 25.9.1998. Intriguingly, during the pendency of the suit, an application under Order 9 Rule 13 CPC for setting aside the ex-parte judgment and decree was also filed. However, the said application was withdrawn vide order dated 6.8.2002. In the present suit, the respondents-plaintiffs sought declaration to set aside the judgment and decree dated 10.2.1995 on the ground that they had not received the summons from the Court at Ambala regarding the civil suit No. 1534 of 1999 titled as Tarsem Singh Vs. Prabhi Devi and others, stating therein that Sadhu Singh never appeared in the court in the aforementioned case nor engaged any counsel at Ambala. Even the signatures of the plaintiffs on vakalatnama were forged one as it was never executed in favour of Raman Kumar Sharma,

Advocate. The aforementioned suit was contested by the appellant-defendant by filing a written statement wherein the factum of compromise dated 16.4.1991, family partition dated 4.5.1991 and the factum of receiving the notice, was emphatically denied.

It is pertinent to mention here that respondents-plaintiffs in the pleadings/suit did not mention about the compromise and denied the family partition dated 4.5.1991.

Since the parties were at variance, trial court gave sufficient opportunity to lead evidence, and parties to the *lis* brought on record the material in support of their rival stand.

The trial Court vide judgment and decree dated 28.1.2009 decreed the suit and appeal filed against the same by Tarsem Singh had also been dismissed. It is in these circumstances the present appeal has been filed.

Mr. Ashish Aggarwal, learned Senior counsel assisted by Mr. Kulwant Singh, Advocate submits that the suit *ex facie* was not maintainable for the reason, that the respondents-plaintiffs had availed the remedy for setting aside of the *ex-parte* judgment and decree dated 10.2.1995. As per the settled law the defendant against whom an *ex-parte* judgment and decree has been passed, has two options; either to move an application under Order 9 Rule 13 CPC or to file an appeal. Once a remedy by filing an application, has been availed and such application during the pendency of the suit, was withdrawn, the suit was liable to be dismissed on this short point alone. In support of his contentions he has relied upon the judgments **in Bhanu Kumar Jain Vs. Archana Kumar and another**

2005 (2) RCR (civil) 781 and Rabindra Singh Vs. Financial Commissioner, Cooproration, Punjab and others 2008(3)RCR (Civil) 929 to contend, that the suit for declaration ex facie is not maintainable as no relief of possession has been sought inasmuch as, as per the family partition, both the parties were given their respective portion of the land vide which the appellant-defendant was given land at Village Gadauli, Haryana and respondents-plaintiffs were given land at Village Machhi Kalan (Punjab). In support of his contentions he has also relied upon the following judgments; Ram Saran and another Vs. Smt. Ganga Devi 1972 AIR (SC) 2685, Vinay Krishna Vs. Keshav Chandra and another 1993 AIR (SC) 957, Mehar Chand Das Vs. Lal Babu Siddique and others 2007 (2) RCR (Civil) 628 to contend that ingredients of Order 6 Rule 4 CPC have not been proved and further in this regard, relied on the judgment in Ranganayakamma and another Vs. K. S. Prakash (D) by L.Rs and others 2008 (3) RCR (Civil) 601 .

He further submits that the family partition or compromise was also accepted by Yad Ram, the other brother inasmuch as, that he had filed a suit challenging the decree dated 10.2.1995 (Ex. D-4) and thereafter the same was withdrawn on 3.5.1996.

Infact, all the disputes had already been settled between the parties, who are none else but the real brothers as they have been given due share of the land, appellant-defendant was given land at Village Gadauli (Haryana) and respondents-plaintiffs

were given land at Village Machhi Kalan, (Punjab), therefore, there was no discrimination, rather the filing of the suit is an act of greed, and aggrandization, much less an arm twisting tactics. The preliminary dispute in the earlier litigation was with regard to the property at Village Machhi Kalan (Punjab) viz-a-viz mortgage rights and whereas the compromise and family settlement Ex.DW-1/D and Ex.DW-1/C is with regard to all the properties of Prabhi Devi.

He further submits that respondent No.2 when appeared as PW-2 in cross examination admitted signatures on the Power of Attorney executed in favour of Raman Kumar, Advocate and the said signatures have been proved from the report of the expert, much less even Advocate Raman Kumar Sharma has appeared as DW-3. There is no rebuttal evidence to the report of the expert.

The respondents-plaintiffs have failed to examine any expert to rebut the report of the expert. As per the report of the expert, the signatures available on the Power of Attorney and the signatures which are taken from the family settlement dated 4.5.1991 as Q-1 and Q-2 on the vakalatnama in favour of Raman Kumar Sharma, Advocate dated 21.1.1993 Q-3 on the back of the summons dated 19.9.1992 served for 1.12.1992 pertaining to case titled as Tarsem Singh Vs. Prabhi Devi and others in civil suit No. 1534 of 1991 after comparison with the admitted signatures S-1 to S-11 of Shyam Lal are of one and the same person. The said report has been proved through the testimony of expert DW-2/A. The lower appellate court has completely overlooked the aforementioned fact

and erroneously rendered a finding that the appellant-defendant had been given land in Haryana, which finding is incorrect as the compromise and partition deed specifically proved that the land situated in Punjab has been given to the respondents-plaintiffs.

In the application filed under Order 9 Rule 13 CPC, for setting aside ex-parte judgment and decree dated 10.2.1995, issues were also framed on 8.4.2002 but for the reasons best known the application was withdrawn and thus, prays that the substantial questions of law noticed above, be answered in favour of the appellant-defendant by setting aside the judgments and decrees of both the courts below.

Mr. Vikas Bahl, learned Senior Advocate assisted by Ms. Balpreet Kaur Sidhu, Advocate appearing on behalf of respondent Nos. 2 (i), (ii), (iii), (iv) and 5 and Mr. Kashmir Singh, Advocate appearing on behalf of respondent Nos. 1,3,4 & 6 submits that few lines of cross-examination of Shyam Lal-PW-3 cannot be read in isolation inasmuch as, but has to be conjunctively seen, for, on going through the entire cross-examination it is seen that PW-2 Sadhu Ram has denied his signatures on the vakalatnama, allegedly executed in favour of Raman Kumar Sharma, Advocate. The respondents-plaintiffs were never served, of pendency of civil suit bearing No. 1534 of 1991. It is the appellant-defendant who had engaged a dummy counsel and managed therefore, to get them proceeded ex-parte. The ex-parte decree was obtained by the defendant on the basis of compromise dated 16.4.1991 and family partition dated 4.5.1991 alleged to have been entered into between

the parties. Prabhi Devi was not owner of the suit land. She was not competent to partition the entire land vide family partition neither the appellant-defendant had pre-existing right in the estate left behind by Ram Chander and therefore Prabhi Devi who did not have better title could not have converted the same by entering into family partition/compromise.

Even in the suit bearing No. 1534 of 1991 on death of Prabhi Devi, Shakuntla Devi, w/o Shyam Lal, Usha Rani w/o Jaspal were arrayed as legal representatives ignoring her natural heirs. Thus, the decree had been obtained by playing fraud. The judgment and decree dated 28.11.1991 passed in Civil Suit No. 357 of 1987, the Will executed in favour of the respondents-plaintiffs has been upheld and therefore, Prabhi Devi was not owner and could not have entered into partition, as she was not owner of the suit land rather Yad Ram was recorded the owner of the suit land. He further submitted, that the compromise also required registration. In support of his contentions he has relied upon the judgments in **Kale and other Vs. Deputy Director of Consolidation and others 1976 AIR (SC) 807** to contend that parties to the family arrangement must have some antecedent title, claim or interest even a possible claim or interest in the property which is acknowledged by the parties to the settlement even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld, but since there was no pre-existing

rights, therefore it required compulsory registration and to the similar lines judgment in **Mukhtiar Singh Vs. Balwinder Singh 2009 (2) RCR (Civil) 113** rendered by this Court. He further submits, that if the vital document is withheld in order to gain advantage on the other side it tantamounts of playing fraud on court as well as on the opposite party. In support of his contentions he has relied upon the judgment in **Smt. Badami (deceased) by her L.R.Vs. Bhall 2012 (11) SCC 574**. The family partition was not denied for the reason that as per the Will, entire property belonging to Ram Chander of both the villages situated in Punjab and Haryana namely Village Machhi Kalan and Village Gadauli had been bequeathed in favour of the respondents-plaintiffs, therefore, the family partition does not remotely appear to be bona fide. He further submits that the appellant-defendant did not disclose about the judgment and decree dated 28.11.1991, while filing the suit bearing No.1534 of 1991 and thus, case of the appellant-defendant in the aforementioned suit was based on falsehood, therefore it should be thrown out. In support of his contentions he has relied upon the judgment in **Santosh Vs. Jagat Ram and another 2010 (3) SCC 251**.

He further submitted that, in case at all the respondents-plaintiffs had engaged services of Raman Kumar Sharma and he pleaded no instructions, as per settled law rendered by this Court in **Baljit Singh Vs. Maya Ram and others 2006 (4) RCR (Civil) 415** the court was required to issue notice to the parties and having not done so the ex-parte judgment and decree was not sustainable in the eyes of law. He further submitted that facts of the

previous suit i.e.judgment and decree dated 28.11.1991 had a direct bearing on the adjudication of *lis* as, in the aforementioned judgment and decree the Will executed by Ram Chander had been proved and the said judgment and decree, has been brought on record in the present suit which is admissible in evidence as per provisions of Section 13 of the Indian Evidence Act,1872. In support of his contentions he has relied upon the judgment of this Court in **Sohan Singh Vs. Murti Rani and others 2008 (3) RCR 448.** He further submits that concurrent finding of fact cannot be challenged by invoking the provisions of Section 100 CPC until and unless a very strong and prima facie substantial questions of law arise for determination.

I have heard learned counsel for the parties, appraised the paper book and as well as case law cited at bar and of the view that the appeal is liable to be allowed, for the following reasons:-

i) No explanation, much less any case law has been cited on behalf of the respondents-plaintiffs that how the present suit was maintainable, particularly when they had moved an application for setting aside of the ex-parte judgment and decree. Even the issues in the aforementioned application were framed and during the pendency of the application the present suit was filed and thereafter withdrew the filed under Order 9 Rule 13 CPC on 6.8.2002. The ratio decidendi culled out in the judgment of Hon'ble Supreme Court in **Bhanu Kumar Jain's case (supra)** is squarely applicable to the facts and circumstances of the case, wherein, it has been held that

for a defendant who has been proceeded ex-parte, he has two remedies, either to file an application under Order 9 Rule 13 CPC or to file an appeal. Assuming for an argument sake that the suit instituted was based upon the actuation of fraud at the behest of the appellant-defendant. It is essential and necessary, for the respondents-plaintiffs, in such an eventuality, to prove provisions of Order 6 Rule 4 CPC .

On going through the averments, I am of the view that respondents-plaintiffs have intentionally not pleaded about the compromise dated 16.4.1991 though there is passing reference to the family partition dated 4.5.1991. Both the courts below have grossly ignored that all the facts have arisen during the pendency of the suit bearing No.357 dated 29.9.1987 pertains an entry made in the revenue record viz-a-viz redemption of property situated in Village Machhi Kalal (Punjab) and not with regard to the village Gadauli (Haryana). Any observations given by the trial court with regard to the execution of the Will which has not been proved without complying with the provisions of Section 68 of Indian Evidence Act, 1872. Such finding would be obiter. There is no adjudication of Will in the judgment and decree dated 28.11.1991 viz-a-viz property situated at Village Gadauli (Haryana) which as per the compromise on the family partition has been given to appellant-defendant.

In my view, Prabhi Devi relaying that there would be a dispute amongst her nephew settled the dispute for all times to come by giving the property situated in Village Punjab to the respondents-plaintiffs and in Gadauli (in Haryana) to the appellant-

defendant rather balanced the equities and therefore there cannot be an act in the favouritism or partiality. Since Ram Chander and Prabhi Devi died issue less the property would have devolved upon his brothers and the parties to the *lis* are none else but sons of Ranjit Singh brother of Ram Chander being class-II heirs, therefore they had pre-existing rights, thus the compromise/family partition did not require registration and I am supported by the ratio decidendi culled out in **Amteshwar Anand Vs. Virender Mohan Singh and others 2005 (4) RCR (Civil) 485** and **Narinder Kaur and another Vs. Amar Jeet Singh Sethi and another 2000 (3) RCR (Civil) 508.**

There is no dispute to the ratio decidendi culled out in **Smt. Badami (deceased) by her L.Rs's case (supra)** and **Kale and other's case (supra)**. The facts and circumstances of each and every case has to be seen. Both the parties to the *lis* are real brothers, sons of Ranjit Singh. The family arrangement has to be seen from an angle as to whether of any family member has seriously been prejudiced or not. The transaction entered into by way of family partition is for the benefit of the legacy of the family and its preservation, much less peace and honour, rather an attempt to avoid any further litigation. In the present case, the family partition cannot be said to be an advantage, as the compromise has been effected between both the brothers. It should not have been re-opened except whether the property was ancestral or co-parcenary property as per the facts culled out in **Smt. Badami (deceased) by her L.Rs's case (supra)**, the family settlement ignoring the family members entire property had been given to a distant relation.

However, in the instant case both the brothers have been given property equally, in essence, the property situated in Punjab to respondents-plaintiffs and of Haryana to the appellant-defendant.

I am of the further view that family settlement was not contrary to any statutory provisions nor was opposite to the public policy as envisaged under Section 23 of the Indian Contract Act, 1872. There cannot be act of fraud played upon the respondents-plaintiffs. For the sake of repetition judgment dated 28.11.1991, pertains to property situated in Punjab which as per the family partition has been given to the respondents-plaintiffs. In my view, Prabhi Devi had executed a family settlement for harmony and peace of the family as she had love and affection for her nephews, being issueless. The aforementioned facts have not been noticed by both the courts below.

There is another aspect of the matter. It is a simpliciter suit for declaration, as the possession has not been sought. Even documents referred above shows that the possession of property in (Punjab) is with the respondents-plaintiffs whereas of Haryana with appellant Tarsem Singh. but the fact remains that the terms and conditions of the compromise and family settlement leaves no manner of doubt that the respective parties were given possession and ownership of the property situated in Punjab and Haryana and even addresses in the suit have also been given in the same manner, thus, both the parties were put into their possession of the property situated in Punjab and Haryana respectively. In the absence of relief of possession, simpliciter suit for declaration in view of **Ram Saran**

and another's case (supra) is not maintainable and the ratio decidendi culled out squarely applicable to the facts and circumstances of the case.

Shyam Lal to a specific question in the cross examination admitted his signatures on the Power of Attorney executed in favour of Raman Kumar Sharma, Advocate and subsequently disputed one on the vakalatnama, as noticed above, in comparison with his standard signatures and as per the report of the expert it is of one and the same person. The respondents-plaintiffs have not cared to examine any expert, much less sought indulgence of the trial court to send it to any Forensic Science Laboratory for comparison. The judgments referred by Mr. Vikas Bahl, learned Senior counsel are applicable keeping in view the facts and circumstances of each and every case, however present case do not fall within the ratio, owing to reasons, given above.

The respondents-plaintiffs have not been able to prove the ingredients of Order 6 Rule 4 CPC as they have also not been fair enough to the Court in not disclosing the factum of compromise dated 16.4.1991 and had an audacity to challenge the family partition.

I cannot remain oblivious of the fact that in the present suit also the respondents-plaintiffs have failed to examine the witnesses to the Will executed by Ram Chander to lay claim on the entire property on the basis of Will. Thus, the Will dated 23.12.1974 allegedly executed by Ram Chander has not been proved.

Keeping in view the aforementioned facts, the

questions of law noticed above are answered in favour of the appellant-defendant and against the respondents-plaintiffs.

Accordingly, the impugned judgments and decrees of both the courts are set aside. In essence the suit filed by the respondents-plaintiffs is dismissed.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

December 28th , 2015

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