

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.2100 of 2010 (O&M)
Date of Decision: 19.05.2015

Miss Kailash and others

... Appellants

Versus

Satnam Singh and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. K.S. Rekhi, Advocate,
for the appellants.

Mr. Gurmeet Singh, Advocate,
for R-1, 2, 4 & 5.

None for R-6, 11, 12 & 13.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes**

RAJIV NARAIN RAINA, J.

1. The substantial questions of law which arise in this appeal are:
2. (1) Whether the learned court of first appeal was justified for any of the four reasons assigned by it in dismissing the applications filed under Order 41 Rule 27 and Order 6 Rule 17 of the Code of Civil Procedure, 1908 praying for adducing additional evidence by way of a sale deed to establish the title of the plaintiffs to the suit property coming from the father of the plaintiffs late Sunder Singh who had purchased the property on February 15, 1961 but there was failure to produce it in the trial court in terms of

Order 13 Rule 1 of the Code, the father, vendor, having died long before the institution of the suit when sale deed was said to be not to the knowledge of the plaintiffs and only the Jamabandies were relied upon?

(2) Whether the prayer for additional evidence by was of a sale deed after making necessary changes in the plaint deserved to have be allowed when ownership was claimed in the plaint based on Jamabandies for the years 1990-91 and 2000-01 where the names of the plaintiffs were entered, even when the sale deed is primary and best evidence of proof of ownership of suit property and is available for production and reception?

3. The facts: This is plaintiffs' second appeal against the decree of the lower appellate court dated August 18, 2009 affirming the findings and decree of the learned trial court dismissing the suit for separate possession of and permanent injunction on the suit property described in the head note to the plaint as per Jamabandi for the year 1995-96 of Amritsar (Urban), Tehsil and District Amritsar. A permanent injunction was sought against building activity by any one thereby restraining the defendants from raising construction or changing the nature of the suit property till partition is effected between the parties by metes and bounds. The parties are members of the family and also those who have bought part of suit land from the original owners/co-sharers-sellers.

4. The plaintiffs claimed 1/12 share in the suit property through their predecessor-in-interest Sunder Singh. However, plaintiffs could not produce title deed in favour of Sunder Singh or in their own favour with respect to the suit property. All that they were able to produce were certified copies of the Jamabandies for the years 1990-91 and 2000-01 mentioning their names

in the ownership column and the mutation entries.

5. Heard the learned counsel for the parties at length on the two points framed for the opinion of the Court in second appeal.

6. The trial Judge was correct in reasoning that a Jamabandi alone was not a document of title and in the absence of proof of ownership vesting in Sunder Singh, the case of his successors-in-interest had no legs to stand on. The further complication was that the suit property was not vacant or land under cultivation but was constructed property which had fallen by passage of time in the urban area of Amritsar. The court also found the Nirmal Sadhana Trust to be owner to the extent of 2/3 share in the suit property which forms constructed buildings housing the offices of the Trust etc. Nirmal Sadhana Trust was created by Swami Nirmala Ji who executed a Will in favour of the Trust on March 11, 1971 and appointed seven trustees as executors of the Will. This share was not disputed by the palintiffs. The trustees had obtained a probate under the Indian Succession Act, 1925 from the court of the learned District Judge, Amritsar vide order dated February 14, 1973 and mutation bearing No.7473 was sanctioned in favour of the Trust at Amritsar. In absence of proof of ownership, the suit for joint possession failed. So also the prayer for permanent injunction and in the circumstances claim for partition was a far cry. On this short ground, the learned Civil Judge (Junior Division) Amritsar dismissed the suit on October 22, 2008 which has been upheld in first appeal for the same reasons as assigned in the judgment of the trial court in appeal. The applications under Order 41 Rule 27 and Order 6 Rule 17 of the Code of Civil Procedure filed by the plaintiffs to amend pleadings and lead additional

evidence of the sale deed discovered after decree, which the aforesaid Jamabandies are stated to support, has been dismissed by the impugned order of even date.

7. Though the plaintiffs relied on the Jamabandies for the year 1990-91 and 2000-01 and a mutation entry in favour of Sunder Singh after his death sanctioned by the revenue authorities in favour of the plaintiffs vide mutation entry No.16447, it was urged that a presumption of truth attaches to the Jamabandies by virtue of section 44 of the Punjab Land Revenue Act, 1887 and they are presumed to be correct unless they are rebutted by clear evidence.

8. While the appeal was pending under section 96 of the CPC the plaintiffs were able to trace out the sale deed dated February 15, 1961 which made their father Sunder Singh title-holder of suit property under registered sale deed to the extent sold and purchased. A certified copy of the same was obtained from the office of the Registrar and thence an application under Order 41 Rule 27 CPC was filed before the lower appellate court for grant of leave to the plaintiffs to lead the sale deed as additional evidence and proof by certified copy from where they now trace their legitimate title. A separate application was filed under Order 6 Rule 17 of the CPC read with section 151 of the CPC for consequential amendment of pleadings since the sale deed had been found prime facie establishing Sunder Singh as owner of the suit property to the extent purchased. Notwithstanding this revelation, the learned Additional District Judge, Amritsar dismissed the appeal and both the applications by separate judgment and decree and order of even date.

9. Mr. K.S. Rekhi, learned counsel appearing for the appellants submits that the fate of the suit depended entirely on the fate of the two applications, otherwise he would have had nothing to say on the merits of the case on 'as is where is' basis obtaining before the trial court. It was pleaded in the application that the plaintiffs came to know of the sale deed dated February 15, 1961 from a close friend of their father, namely, Sohan Lal and before that they were not fully aware of this fact and, therefore, depended on the Jamabandies and mutations to cite their title to the suit property.

10. Mr. Rekhi has read the order dismissing both the applications in extenso and points out several flaws in the reasoning. And on the quality of the order I have heard Mr. Gurmeet Singh, learned counsel appearing for R #1, 2, 4 & 5 as to elicit his views, if any, to sustain the findings. My view on the order is as follows:-

11. Noticeably, the first flaw in the impugned order is that the lower appellate court read the written statement filed by defendants #1, 2, 4, 5 & 6 wherein [on page 3 in para.4] there is a specific mention of the sale deed dated February 16, 1961. But it is borne out that this is not the canvassed sale deed dated February 15, 1961 since there is a difference of one day in the registration date and appear not to be one and the same thing. What the court meant to say with reference to the sale deed dated February 16, 1961 is not clear from the face of the order. Neither have the similarity, identity or dissimilarity been explained by the appeal court *a quo*. If they are different then the reasoning is not sound and open to serious justiciable doubt.

12. The second flaw is that the lower appellate court misread the judgment of the Supreme Court in **Vidhyabai & Ors. v. Padmalatha** reported in AIR 2009 SC 1433: 2009 (1) RCR (Civil) 763 (SC) that court has no jurisdiction to allow amendment of pleadings after commencement of the trial. There is no such absolute bar placed by any court yet and the issue will depend from case to case, if request should be entertained or not depending on whether it is necessary to decide the real dispute between the parties and things like that. The Supreme Court in *Vidhyabai* case ruled in as follows :

"14. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed.

However, proviso appended to Order VI, Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."

13. The object of the amendment in Rule 17 of Order 6 of the C.P.C by limiting the power to amend was explained earlier by the Supreme Court in the authority **Chander Kanta Bansal v. Rajinder Singh Anand**, AIR 2008 SC 2234 as follows:-

"10. The entire object of the said amendment is to stall filing of applications for amending a pleading subsequent to the commencement of trial, to avoid surprises and the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of

due diligence, he could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. As stated earlier, the reason for adding proviso is to curtail delay and expedite hearing of cases."

14. Therefore, a far too narrow and constricted view has been taken by the court *a quo* which tends to result in manifest injustice. A court of law ought not to have rejected the application off hand in the presence of likely evidence in proof of ownership and an opportunity should have been given to the plaintiffs to lead the sale deed as evidence or additional evidence especially when it was the best primary evidence of ownership subject to rebuttal, if any.

15. The third flaw is that the appeal Judge has found the application vague in nature because there is no specific date mentioned therein regarding when the applicants came to know about the sale deed dated February 15, 1961. The reasoning is too farfetched and pedantic to be legally accepted as an ouster of right to prove the document and thus the view taken is from the wrong angle. Pray, what has date of knowledge of sale deed or its truthfulness got to do in the face of doing justice when court is confronted by the sale deed itself and what that would mean is no one's guess if allowed to be produced as additional evidence and its correctness ascertained which could tend to change the complexion of the case itself. By dismissing the application, the rights, if any, of the plaintiffs based on the alleged sale deed shall stand foreclosed forever causing grievous and irreparable loss to them without further recourse to law. Justice has to be dispensed and not dispensed with. The plaintiffs pleaded that they learnt of the sale deed from a close friend of their father. They named the man as

Sohan Lal. They pleaded that they were not aware of the sale deed earlier. The father had passed away. The story I should think is not an unbelievable one spun to waste time and prolong the litigation while on the other hand it would put a wholesome end to the litigation. Such things can happen in ordinary human affairs and the judicial reflex ought to have been to accommodate the request instead of turning it down summarily.

16. The fourth flaw in the order is that the court of first appeal has upheld the observation of the trial court that parties should not be permitted to fill up lacuna at this stage. The plaintiffs should not be viewed in the application as persons trying to fill up a lacuna left in the trial. The reasoning is so entirely perverse that Mr. Gurmeet Singh, learned counsel appearing for R #1, 2, 4 & 5 is at loss to explain the logic or to put it more bluntly, the lack of application of mind by the learned lower appellate court that appears to have carried it away by fallacious currents of injudicious thought processes in the wrong direction. And now the dark path has to be ordered to be lit again in order to accomplish even-handed justice and save the *lis* from complete ruin and a consummate end where valuable rights and the true controversy left in limbo.

17. I find myself entirely in agreement with Mr. Rekhi's contention that the order dated August 18, 2009 passed in the applications is entirely perverse, irrational and unreasonable. The order tends to stifle justice and scuttle precious rights of the plaintiffs to a prayed for declaration in immovable property and both the applications, therefore, deserved to have been accepted and leave granted to the plaintiffs to carry out suitable amendments in the plaint and party be permitted to produce the sale deed as

evidence of title of the successors-in-interest of the estate of late Sunder Singh, by way of additional evidence, for justice not only to be done but seen to be done.

18. This awkward situation gives rise indeed to a substantial questions of law as above framed, and to repeat, as to whether the orders passed in the applications are legally correct and whether the applications bearing such wide ramifications involving the valuable rights of the plaintiffs could have been so carelessly and casually decided by not giving a whit of a chance to the plaintiffs to demonstrate their case based on a document found in Sub Registrar's office and on which their entire fate depended and there were pleadings in support suggesting ownership. Depending for solution on the real controversy and the dispute between the parties on merits. The answer to which question lies in the four flaws noticed in the impugned order and pointed out above which appear to make the order unsustainable in the eyes of law. Those flaws in reasoning, to the mind of this Court, are fatal. Refusal to admit evidence was not proper and the impugned order should not be left unattended in second appeal lest it culminates in a grave miscarriage of justice. The order deserves to be nullified to prevent further grievous and irreparable loss to the plaintiffs by a half baked decree. If they floundered in the trial court and were unable to produce their best evidence and retrieve themselves they committed no cardinal sin. The lacuna appears to be curable only by a remand of the case to the learned first appellate Judge for reconsideration of the case on merits only with respect to admittance to test the authenticity of the sale deed.

Order 41 Rule 27 and Order 13 Rule 1 of the Code of Civil Procedure lay

down the prescriptions as follows:-

"27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted.
or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission." (underlined for emphasis)

Order 13 Rule 1 of the CPC:-

"1. Original documents to be produced at or before the settlement of issues.-

(1) The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with the plaint or written statement.

(2) The court shall receive the documents so produced:

Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(3) Nothing in sub-rule (1) shall apply to documents—

(a) produced for the cross-examination of the witnesses of the other party; or (b) handed over to a witness merely to refresh his memory."

19. It may be appropriate to mention that ordinarily an appellate Court should not allow new evidence to be adduced in order to enable a losing party to raise a new point in appeal. The appellate court would apply strictly the provisions of Order 41 Rule 27 of the Code where there was failure to act under Order 13 Rule 1 of the CPC. But some exceptions have been carved out. In **Parsotim Thakur v. Lal Mohar Thakur**, AIR 1931 Privy Council 143 it was held:

"... The provisions of Section 107, Civil Procedure Code, as elucidated by Order 41 Rule 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower court to patch up the weak parts of his case and fill up omissions in the court of appeal.

... Under Rule 27, clause (1)(b), it is only where the appellate court 'requires' it (i.e. finds it needful)... The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent'.

... It may well be that the defect may be pointed out by a party, or that a party may move the court to supply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the court adopts this procedure it is bound by Rule 27(2) to record its reasons for so doing and under Rule 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. ... the power so conferred upon the court by the Code ought to be very sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case."

(emphasis added)

20. The legal position insofar as reception of additional evidence is

concerned during trial of a lawsuit in a civil court after the 1st July 2002, when the Civil Procedure Code was amended inter alia in Order 18 Rule 17, the legal position consequent to amendments of 1999 and 2000 to the CPC was explained in **Salem Advocate Bar Association, Tamil Nadu v. Union of India (II)**, AIR 2005 SC 3353: (2005) 6 SCC 344 in the following words:-

"Additional Evidence in Salem Advocates Bar Association's case, [cf.(2003) 1 SCC 49 (1)] it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just."
(emphasized)

21. In **Union of India v. Ibrahim Uddin**, (2012) 8 SCC 148 the Supreme Court dealt extensively with the scope and ambit of Order 41 Rule 27 of the Civil Procedure Code and the inherent limitations and restrictions placed by the provisions on court and have carved a few exceptions only in cases where the court "requires" reception of additional evidence "for any other substantial cause": The Supreme Court held in quintessence by following its earlier dicta in **K. Venkataramiah v. A. Seetharama Reddy**,

AIR 1963 Supreme Court 1526; **Municipal Corpn. of Greater Bombay v. Lala Pancham**, AIR 1965 Supreme Court 1008; **Soonda Ram v. Rameshwarlal**, AIR 1975 Supreme Court 479 and **Syed Abdul Khader v. Rami Reddy**, AIR 1979 Supreme Court 553 in paragraphs 36 and 47 of the report of the last case; as under:-

“36. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.”

"47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed."

(emphasis added)

22. It is not that the plaintiffs failed to plead ownership over the suit property in the plaint. They did. An issue was framed to settle the controversy. They depended at least on the Jamabandies for the years 1995-96 and 2000-2001 of Amritsar (Urban), Tehsil and District Amritsar reflecting their names through their father in the ownership column including the consequential mutation entries in the revenue record. A presumption of truth is attached to entries in the revenue record though it is a rebuttable one. If they found the sale deed albeit too late and in first appeal they do not deserve to be precluded forever from claiming title to suit property which was the serious lacuna left in the trial proceedings. The law does not abhor inherent lacunas or defects left and to be plugged in by the best evidence which later becomes tangible and available. Nevertheless,

it also cannot be said that judgment could not be pronounced by the courts below on the evidence on the file but then it would not be a "satisfactory judgment" as observed in para. 36 in *Ibrahim Uddin case* supra. Besides, the sale deed, if found, is what the mutation entry and the Jamabandi must have been based on. Of course, subject to proof if the application for additional evidence were allowed. It then becomes primary proof of title and only establishes and supplements the revenue record already on record by way of support. The discretion of the court deserves to go in favour of the plaintiffs to permit the evidence to be brought on record and to be appreciated by the court *a quo* to weigh in the scales of justice and to assess the value to be attached to the matter. But I do not think that the request should be dismissed out of hand without even reception of the document to consider its evidentiary worth. If the sale deed exists in fact it is a notice to the public at large being a private document registered in public office and can easily be produced in one hearing when summoned through the official witness with opportunity to the other side to bring evidence, if any, to the contrary, if such material exists. This would not prolong the litigation beyond tolerable limits and for this reason the first appeal court would itself examine the issue with respect to the sale deed and return its findings thereon instead of remanding the matter to the learned trial court which might entail delay in the proceedings.

23. Resultantly, the appeal is partly allowed for the four reasons aforesaid and the substantial questions of law are answered accordingly in favour of the appellants and against the defendants. The common order dated August 18, 2009 passed in the applications under Order 41 Rule 27 of

the CPC and Order 6 Rule 17 of the Code read with section 151 of the CPC is consequently set aside. Both the applications are allowed. Consequently, the judgment and decree of the lower appellate court is set aside. Further steps be taken by the parties before the court of first appeal where the case stands remitted for production and recording of evidence relating only to the reception of the sale deed dated February 15, 1961 which is neither "new" nor strictly speaking "additional evidence" but broadly yes and an important matter which cannot be brushed aside lightly.

24. Therefore, the case is remanded to the learned first appeal court to the extent indicated above and confined to the production of the moot sale deed and summoning of witness[es] so also the contemplated amendments as may be necessary in the original plaint which will also suffer restrictions accordingly, in order to meet the demands, the introduction of the additional document might entail. In this the appellant-plaintiffs are put to costs of Rs 10,000/- to be paid to the respondents on remand as compensation towards litigation expenses incurred in this appeal.

25. However, nothing observed in this order will be taken as an expression of opinion on the merits of the case or as to the legality, validity and probative value of the sale deed sought to be produced by way of additional evidence. This order is not meant to obviate mode of proof of the said document in accordance with law which procedure shall be adhered to. The learned appeal court will come to its own conclusions independently at the rekindled proceedings without being influenced by anything said in this order.

26. The first appellate court would endeavour to try and conclude the

case within 6 months or so, as not much remains to be done.

(RAJIV NARAIN RAINA)
JUDGE

19.05.2015
manju