

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

**RSA No.2195 of 2013 (O&M)
Date of Decision: 12.10.2015**

Karnail Singh (dead) through LRs

....Appellant

Vs

Gurdev Kaur and others

....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Kanwal Goyal, Advocate
for the appellant.

Mr. Rakesh Chopra, Advocate
for respondent No.1.

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?*

RAJ MOHAN SINGH, J.

[1]. Defendant Karnail Singh is in second appeal against judgment of reversal passed by the lower appellate Court by setting aside judgment and decree dated 31.10.1998 passed by Civil Judge (Jr. Divn.) Fatehgarh Sahib and accepting the appeal of the plaintiffs vide order dated 17.08.2012 in a suit for separate possession and permanent injunction thereby decreeing the suit of the plaintiffs in appeal.

[2]. Plaintiffs filed suit for separate possession and permanent injunction on the ground that the suit property was owned by the father of the plaintiffs and after the death of their father plaintiffs and

defendant were joint owners in possession of the suit property i.e. the house in question being legal heirs of deceased father. The suit property has not been partitioned and is still in joint possession of the parties. Deceased-plaintiff had half share in the suit property and the remaining half share is of defendant. With this background suit was filed.

[3]. Defendant contested the suit firstly on the ground that full particulars of the disputed property have not been given which is property No.7/2347. The said property was claimed to be in exclusive possession of the defendant who had spent huge amount on construction. Previously plaintiff tried to interfere in the possession of defendant and he filed suit in which order of *status quo* was passed against the then plaintiff Ram Sarup (husband of Gurdev Kaur and father of remaining plaintiffs). In the said suit Local Commissioner was appointed who submitted its report to the effect that defendant Karnail Singh was residing in the suit property along with his family. Dismissal of the suit with costs has been prayed.

[4] After filing of replication, trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled for the separate are possession by way of partition of the suit property? OPP
2. Whether the plaintiff is entitled for the injunction as prayed for?OPP
3. Whether the suit is not maintainable? OPD
4. Relief.”

[5]. The defendant was proceeded against *ex parte*. Plaintiff led *ex parte* evidence. PW-1 Gurdev Kaur appeared as plaintiff-witness and has deposed on the factum of Ram Sarup and Karnail Singh being two sons of Sham Singh, who were entitled to share the property in question. She has placed on record Ex.P-1 the General Power of Attorney and except the aforesaid deposition of the witness, plaintiffs did not produce any evidence either oral or documentary to show that Sham Singh was the owner of the property in question. Plaintiffs did not explain as to whether suit property was ancestral or self-acquired property of Sham Singh.

[6]. No document of title in favour of ownership of Sham Singh has been produced on record, nor any evidence has come vis-a-vis the property situated within *lal lakir* or was described by any particular *khasra* number. Mere assertion of the PW-1 to the effect that Sham Singh was owner of the property in question and plaintiffs being heirs of said Ram Sarup and defendant are equally entitled to inherit the same was not held sufficient by the trial Court. The suit of the plaintiffs was dismissed even though testimony of PW-1 went unrebutted. Plaintiffs were to stand on the strength of their own case. Consequently, the suit was dismissed vide judgment and decree dated 31.10.1998.

[7]. Aggrieved by the judgment and decree of the trial Court, the plaintiffs filed appeal which was earlier allowed *ex parte* by the appellate Court vide judgment and decree dated 03.12.2012. Subsequently the defendant filed an application seeking setting

aside the *ex parte* judgment and decree of the appellate Court. The said application was allowed vide order dated 08.01.2011 whereby *ex parte* judgment and decree dated 03.12.2002 was set aside and appeal was ordered to be heard on merits.

[8]. During pendency of appeal an application under Order 41 Rule 27 CPC was filed by the applicant-plaintiffs to produce additional evidence of a certified copy of plaint of civil suit no.120 of 12.03.1995/01.03.1995 deciddd on 18.11.1997, written statement dated 09.01.1996 filed by Ram Sarup and Gurdev Kaur, in the said suit a copy of decree sheet dated 08.11.1997 and copy of zimni order dated 29.03.1995 passed by Additional Civil Judge (Sr. Divn.) Fatehgarh Sahib.

[9]. The aforesaid documents were claimed to be per se admissible and the production of those documents was claimed to be necessary for effecting decision of *lis* between the parties. The aforesaid documents were claimed to be sufficient to show the admission made by the respondent in respect of ownership of property in question. The said application was opposed by the respondent on the ground of delay and the additional evidence being beyond pleadings of the parties. The said application under Order 41 Rule 27 CPC at that belated stage of the case was held not necessary for effecting decision of the case and consequently prayer was rejected.

[10]. Even in the earlier litigation the stand of Karnail Singh was pleaded that he was the exclusive owner of property in question.

Same stand has been taken by him in the present case. Karnail Singh has been taking the stand of being in exclusive possession of the house in question since the year 1995. In the written statement he had admitted the factum of filing of earlier suit by him against Ram Sarup and Gurdev Kaur in respect of this very property. The said suit was civil suit no.120 dated 21.03.1995 titled as Karnail Singh v. Ram Sarup filed for permanent injunction which was dismissed for want of evidence on 18.11.1997. This very document was sought to be produced by the plaintiffs as additional evidence in terms of Order 41 Rule 27 CPC which was dismissed by the lower appellate Court. The property in question was stated to be situated within *lal lakir* of the village.

[11]. Defendant had no source of title distinct from the plaintiffs and, therefore, property was presumed to be the joint property of the parties i.e. ancestral property of the parties in which plaintiffs being legal heir of Ram Sarup had co-sharership to the extent of half share. The Appellate Court accepted the appeal by relying upon such a stand of the defendant in the written statement which was sought to be translated by the plaintiffs by way of moving application under Order 41 Rule 27 CPC which was rejected by the lower appellate Court in earlier proceedings of the appeal.

[12]. While filing the appeal, the appellant formulated substantial questions of law in para No.6 of grounds of appeal in the following manner:-

“A) *Whether the finding of the learned Lower*

Appellate Court is based on mis-appreciation and overlooking of the evidence on record and thus has led to perverse finding?

- B) *Whether in view of the facts and circumstances of the case in hand, the Ld. Lower appellate court committed grave illegality by decreeing the suit, although plaintiff failed to bring on record any document of title in favour of his father?*
- C) *Whether the Ld. Lower Appellate Court was justified in decreeing the suit of plaintiff merely on the ground that defendant was proceeded exparte and thus, oral evidence of plaintiff had gone unrebutted, although the plaintiff had miserably failed to discharge his initial onus?*
- D) *Whether the Ld. Lower Appellate Court was justified in decreeing the suit of plaintiff by assuming the property to be ancestral, without there being any proof regarding the same?"*

[13]. I have heard arguments of both the sides and have perused the material on record with the assistance of both the learned counsel for the parties.

[14]. Learned counsel for the appellant has argued that no document of title has been produced on record by the plaintiffs. Only plaintiff No.1-Gurdev Kaur appeared as PW-1 and no evidence of title was adduced by her. Trial Court dismissed the suit for want of evidence of the nature of title i.e. whether the property was ancestral or self-acquired property of Sham Singh. Since the preponderance of evidence could not be translated into any probability by the plaintiffs,

therefore, suit was dismissed for want of cogent evidence. Even if defendant was *ex parte* before the trial Court, but the plaintiffs were supposed to stand on their own legs, therefore, suit was found to be lacking on evidence and was dismissed accordingly.

[15]. In appeal firstly, the defendant was proceeded against *ex parte*, but thereafter he was allowed to join the proceedings. On joining the proceedings the plaintiff filed an application under Order 41 Rule 27 CPC for adducing additional evidence of certified copy of plaint of previous litigation i.e. civil suit No.120 dated 21.03.1995 filed by defendant Karnail Singh against Ram Sarup for permanent injunction which was rejected by LAC. The said civil suit was dismissed for want of evidence on 18.11.1997. The stand of Karnail Singh in the said suit was that he was having exclusive possession over the house in question since the year 1995.

[16]. The Appellate Court relied upon the admission of Karnail Singh in the written statement in respect of earlier suit despite the same prayer having been rejected at the instance of the plaintiffs in the form of additional evidence under Order 41 Rule 27 CPC and the lower appellate Court presumed the fact that the property was situated within *lal lakir* and, therefore, there was no document of title in favour of defendant distinct from the plaintiffs, therefore, property was presumed to be joint properties of the parties and even ancestral in nature.

[17]. Since both the parties could not produce document of title

on record and the house in question is situated within *lal lakir*, but according to the defendants the same is agricultural in nature bearing property No.7/1/2347 defendant was proceeded against *ex parte* after filing of the written statement.

[18]. Learned counsel for the appellant relied upon **C.N. Ramappa Gowda vs. C.C. Chandregowda (Dead) by LRs and another, 2012(3) RCR (Civil) 331** on the point that in the absence of document of title in favour of either of the parties, it was not safe for the lower appellate Court to decide the issue on the basis of presumption. Plaintiffs were required to prove their case. Learned counsel further relied upon **Balraj Taneja vs. Sunil Madan, 1994(4) RCR (Civil) 438** to contend that in the event of non-filing of written statement it is the discretion of the Court to pronounce judgment. Perusal of the aforesaid judgment shows that it has no exact application on the facts of this case. In the present case, written statement was filed by the defendant and thereafter he was proceeded against *ex parte*. Plaintiffs led no evidence to show title in their favour. The facts involved in the present case are somehow different than the one recorded in the aforesaid judgment.

[19]. Learned counsel for the appellant also relied upon **Hawa Singh vs. Daya Nand and others, 2010(2) PLR 567** on the ground that presumption is always in favour of land being not ancestral in nature unless and until it is proved otherwise by way of evidence. He also relied upon **Harash Vardhan vs. Union of India, 2006(2) RCR (Civil) 447** to contend that merely because defendant remain *ex*

parte and did not file any written statement, the claim of the plaintiffs could not be decreed straightaway because plaintiffs have to stand on their own legs.

[20]. On the other hand, learned counsel for the respondents relied upon **2001(2) Apex Court Journal 463 SC** on the point that absence of cross-examination of a witness on a point entails not to be taken true. Learned counsel further relied upon **2014(3) CCC 332 (Delhi High Court)** on the ground that party not appearing in the witness box as his own witness and did not offer himself to be cross-examined by the other side, then presumption arises against the case set by him.

[21]. Learned counsel further relied upon **Sulochana Amma vs. Narayana Nair, 1993(3) RRR 682** on the ground of jurisdiction. Since as per the written statement, factum of filing earlier suit by the defendant has been admitted, but the same was decided for want of evidence, therefore, the same cannot be allowed to be taken a decision on merits, rather the stand taken by the present defendant in said suit was also of exclusive possession over the land in question. Apparently, the precedents cited at the bar on behalf of respondents do not advance their case in view of controversy involved in the present case.

[22]. In the instant case, the plaintiffs could not adduce any document of title on record. Defendant was proceeded against *ex parte* after filing of written statement. Trial Court dismissed the suit on the ground that no cogent evidence has been brought on record

showing that the parties were co-sharers to the extent of half share in the house in question warranting separation of shares by means of partition. Plaintiffs were to stand on their own legs, despite the fact that defendant was proceeded against *ex parte*.

[23]. The lower appellate Court solely on the basis of the property being situated within *lal lakir* presumed that in the absence of question of title of ownership in favour of either of the parties, status of the parties is to be treated as joint owners. The lower appellate Court even went ahead to presume the property to be ancestral in nature without there being any evidence on record. If the questions formulated in the appeal are to be tested on the touchstone of evidence on record, then it will be found that there is no evidence of the plaintiffs on record except self-serving statement of PW-1 Gurdev Kaur. Since there was no evidence of title there, therefore, lower appellate Court was not within its jurisdiction to presume evidence in favour of the plaintiff by decreeing the suit at appellate stage. Questions No.A and B have to be answered in affirmative that since there was no evidence of title on record, therefore, lower appellate Court was not justified in presuming any preponderance of probability merely because the land in question was stated to be within *lal lakir* of the village. There was no document of title in favour of either of the parties.

[24]. Questions No.C and D are also to be answered in affirmative on the ground that since there was no evidence of the land being ancestral in nature simply because defendant was

proceeded against *ex parte* after filing of the written statement, no amount of presumption can be tilted in favour of the plaintiffs, who also remained barren in terms of availability of cogent evidence to prove title over the suit land. Since the plaintiffs have failed to adduce cogent evidence on record, therefore, merely because defendant was proceeded against *ex parte*, no tilt could have been observed in favour of the plaintiff by treating the property to be joint within *lal lakir* and even presumed to be ancestral in nature without any evidence on record on that count.

[25]. In view of aforesaid, the questions as formulated by the appellant do exist. The appeal involves substantial questions which have been considered and are accordingly answered in favour of the appellant, thereby accepting the appeal.

[26]. Various interlocutory orders on record reveal that notice of condonation of delay in CM No.5974-C of 2013 was issued on 21.05.2013, thereafter respondents appeared on number of occasions, but did not file any reply to the said application. Even vide order dated 05.08.2013 executing Court was directed to adjourn the case beyond the date fixed in the present case, however application for condonation of delay remained undecided.

[27]. There is delay of 152 days in filing the appeal on the ground that appellant is rustic villager and was suffering from paralysis for quite sometime. The prescription slip has been on record as Annexure A-1.

There is no rebuttal to the application on record. It is a

settled principle of law that merits of the case cannot be sacrificed on the threshold of technicality. Since the appeal is found to have merits, therefore the delay is condoned.

[28]. In the light of observations as made above, this appeal is allowed. Impugned judgment and decree passed by the lower appellate Court is set aside. Suit of the plaintiffs is dismissed without any order as to costs.

October 12, 2015
Atik

(RAJ MOHAN SINGH)
JUDGE