

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

**RSA No.2049 of 2014 (O&M)
Date of decision : May 21, 2015**

Narain Singh and others

..... Appellants

Versus

Amarjeet Kaur

..... Respondent

CORAM : HON'BLE MR.JUSTICE GURMIT RAM

1. To be referred to the Reporters or not? No / Yes
2. Whether the judgment should be reported in the Digest? No / Yes

Present : Mr. Sanjay Jain, Advocate
for the appellants.

Mr. Pritam Saini, Advocate
for the respondent.

GURMIT RAM, J.

1. This regular second appeal has been preferred by the appellants/defendants Narain Singh and others against the judgment and decree dated 19.10.2011 passed by the Court of ld. Civil Judge (Junior Division) Ambala vide which the suit of the plaintiff filed for permanent injunction was decreed with costs and judgement and decree dated 13.12.2013 of the Court of ld. District Judge, Ambala vide which the appeal preferred against the aforesaid judgment and decree dated 19.10.2011 was dismissed, whereby affirming the findings of the learned trial Court.

2. The case of the respondent herein (plaintiff) before the learned trial Court in brief was that originally one Gurcharan Singh s/o Tirth Singh was owner in possession of the half share of the total land measuring 45 kanals and 13 marlas bearing *Khewat/Khatauni* No.5/15 as detailed in the plaint. After his death, mutation No.189 regarding his inheritance was sanctioned in favour of Smt. Tej Kaur daughter of Tirth Singh. Said Tej Kaur sold her share to the respondent-plaintiff/Amarjit Kaur vide sale deed No.714/1 dated 10.10.2011 and mutation was sanctioned in her favour vide No.189. Since appellants No.1 and 2 herein (defendants) had started false litigation against her, so, as such, she filed an application for partition of the total land against the defendant No.1, which was partitioned on 20.07.2005. *Sanad-Taqseem* i.e. Instrument of partition was prepared which was further implemented in the relevant revenue record of the land vide mutation No.200 duly sanctioned on 31.08.2005. The land was demarcated and possession of the land partitioned was delivered to the plaintiff and defendant No.1 by the revenue officials. Suit land fell to the share of plaintiff being half share of total land measuring 45 kanals and 13 marlas as detailed in the head note of the plaint. Khasra No.19//5/2/1 was kept reserved as the common passage for the use of both the parties to the suit. Earlier plaintiff and defendant No.1 were in joint possession of the aforesaid entire land measuring 45 kanals 13 marlas to the extent of $\frac{1}{2}$ share each and they were using tubewell situated in the land. One tubewell installed in khasra No.24 fell to her share. After the partition of the land, she is in cultivating as well as in physical possession of the suit land being its owner. Besides this, she was also using the aforesaid common passage for the

purpose of ingress and egress to reach her said land. Defendants who were having no right, title or interest in the land in dispute were interfering into her cultivating possession over the land in dispute as well as with regard to the use of common passage abovesaid and hence was the instant suit.

3. On notice, defendants No.1 and 3 (appellants No.1 and 3 herein) appeared and filed written statement. Defendant No.2 and 4 were proceeded against ex-parte.

4. It was the plea of answering defendants that plaintiff who is resident of village Macchounda, Tehsil and District Ambala along with some other persons had tried to dispossess them forcibly in which she did not succeed. A criminal case was also got registered against them. Then it is admitted that Gurcharan Singh was the owner of the half share in the total land measuring 45 kanals 13 marlas. In this connection it is their plea that Smt. Tej Kaur was never competent to inherit land in dispute since Gurcharan Singh (now deceased) had already handed over the physical possession of this land to them vide an agreement dated 20.03.1970 after receiving the entire sale consideration of this land. On the basis of this agreement, defendants No.1 and 2 had already filed a civil suit No.68 of 2002 much prior to the sale deed as alleged by the plaintiff in her favour in which she was already a party as defendant No.2. The partition proceedings as alleged in the plaint were stated to be illegal, hence not binding upon defendants since the question of title is yet to be decided by the Court qua the land in dispute. It was also their plea that defendant No.1 had challenged the alleged partition proceedings in the higher Court. Rest of the averments were also denied.

5. The learned trial Court after hearing learned counsel for both the parties and going through the record as well, decreed the suit of the plaintiff with costs vide the impugned judgment and decree dated 19.10.2011. Appeal preferred against this judgment and decree was dismissed by the learned District Judge, Ambala vide the impugned judgment and decree dated 13.12.2013.

6. The appellants/defendants being not satisfied with the findings recorded by both the learned Courts below have come up with the instant appeal before this Court, notice of which was given to the respondent.

7. I have heard the learned counsel for the both the parties and have also perused the record as available on file with their able assistance.

8. The learned counsel for the appellants has firstly submitted that the instant suit is barred by the principle of res judicata, which fact is not appreciated by both the Courts below and consequently the findings recorded by both the Courts below are liable to be set aside. He has submitted that earlier also, a similar suit was filed by the respondent-plaintiff for permanent injunction, which was dismissed in default under Order 9 Rule 8, CPC. The instant suit on the same very cause of action is not tenable. In support of his contention he has relied upon authority of this Court delivered in ***Karam Singh (deceased) through his LRs vs. Jaswant Singh and Others 2008(2) RCR (Civil) 477***. In this case law it has been laid down in nut shell that if the earlier suit is wholly or partly dismissed in default under Order 9 Rule 8 of the CPC, the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. The only remedy available with the aggrieved party is to file an application for setting

aside the dismissal order and for restoration of the suit dismissed earlier.

9. On the other hand, the learned counsel for the respondent has contended that this suit is maintainable because the earlier suit was filed for permanent injunction which was allegedly dismissed in default. Then he has also contended that if an earlier suit for permanent injunction is dismissed due to non-prosecution, then second suit for permanent injunction cannot be held to be barred by the principle of res judicata, as the relief of injunction is of continuous nature. In support of his contention he has also cited an authority of this Court titled as ***Ranjit Singh vs. Gurnam Singh 1998 (4) RCR (Civil) 528***, wherein it has been held that seeking of an injunction, in-deed, is a continuous cause. If similar threat comes subsequently, then in that event subsequent suit for permanent injunction will not be barred, even if the earlier suit for injunction was dismissed in default. But if the earlier suit was for declaration and the same was dismissed in default, then the second suit for declaration on the same very cause of action is not tenable. Then the learned counsel for the respondent has also referred to an other authority of this Court as laid down in ***Khiali Ram vs. Kanshi Ram 2011(3) CCC 731 (P&H)***. In this case law, it has been held in nut shell that if an earlier suit is dismissed under Order 9 Rule 8, CPC, then it does not bar the second suit when the cause of action in two suits is different.

10. Then in the case in hand, the appellants-defendants did not take any plea in their written statement with regard to the earlier suit of the plaintiff, which was allegedly dismissed in default. Since this plea is not taken by the appellants/defendants in their written statement, then on this

ground also they cannot be permitted to raise such like plea at this stage in the arguments. In order to properly adjudicate the above contention of the learned counsel for the appellants if at all it is needed, then the copies of pleadings of the earlier suit i.e. plaint, written statement, replication, the issues framed and the copy of judgment are required to be brought on record. In the case in hand, no such pleadings of the earlier suit in the shape of copies thereof were brought on record during trial of the suit. On this ground also, the above plea of the learned counsel for the appellants is not tenable and same is declined. Herein the principle as laid down in the case law titled as ***Salwant Singh and Others vs. Surinder Singh and Others 1997 (Suppl.) CCC 363 (P&H)*** is followed.

11. So far as the filing of civil suit by defendant No.1 and 2 (herein appellant Nos.1 and 2) is concerned, that suit has no bearing on the facts of this case for the reason that suit has been filed for the possession by way of specific performance of an agreement to sell dated 20.03.1970 stated to be executed by said Gurbachan Singh in their favour. The case in hand as abovesaid is simple suit for injunction and in this suit, Court is only to see as to which party is in lawful possession of the land in dispute at the spot.

12. Then it is admitted by the learned counsel for the appellants, that appeal preferred against the partition proceedings has been dismissed by the higher authority. Then during the pendency of this appeal, the appellants have filed an application under Order 41 Rule 27 CPC for placing on record copy of the plaint Annexure A-1 and copy of an order Annexure A-2 dated 18.02.2008 in additional evidence. In this regard learned counsel for the respondent has contended that such like application

was also filed before the learned Appellate Authority which was declined. The present appellant preferred a civil revision No.6929 of 2013 against this order of the learned Appellate Authority which was declined vide order dated 14.11.2013 by this Court. Then he has also placed on record copy of this order passed in this civil revision. Counsel for the appellants has not denied this fact.

13. Then as per the revenue record produced by the respondent/plaintiff before the learned trial Court she was found to be in possession of the property in dispute at the spot. Even at the time of the arguments on this appeal the learned counsel for the respondent has placed on record copy of jamabandi for the year 2005-06 alongwith copy of khasra girdawari for the year *Khariif*-2011 to *Rabi*-2014 which also show that the respondent/plaintiff is still in possession of the property in dispute as its owner at the spot.

In the light of the above discussion, this appeal as well as the application under Order 41 Rule 27 of CPC filed by the appellants are held to be merit less. There is nothing on the record to warrant any kind of interference in the impugned judgments and decrees passed by both the Courts below. So this appeal as well as the said application under Order 41 Rule 27 of CPC stand dismissed and disposed of accordingly.

May 21, 2015

Gaurav Sorot

**(GURMIT RAM)
JUDGE**