

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

Regular Second Appeal No.803 of 2014 (O&M)

Date of decision: 21.7.2015

Davinder Singh and another

... Appellants

Versus

Joginder Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Achin Gupta, Advocate,
for the appellants.

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

RAJIV NARAIN RAINA, J.(Oral)

Two of the defendants [# 1 & 2] amongst the six arrayed by the plaintiffs as defendants in a simple suit for injunction against illegal dispossession from 27 kanals 17 marlas of land per *jamabandi* for the year 2002-03 without due course of law are in second appeal when the suit was decreed ex parte defendants after their respective written statements were presented in two separate sets. In defence the defendants # 1 & 2 disputed ownership and possession of the plaintiffs over the suit land admeasuring 13 kanals 14 marlas of agricultural land which they claimed to have purchased from the co-sharers of the khata. Defendants, who are purchasers of shares from one of the co-owners, admitted that they were co-sharers with the plaintiffs. Earlier five persons had interfered in the possession of the present

plaintiffs' father Balbir Singh over suit property. In order to protect their property the plaintiffs had to file a suit for permanent injunction in 'Balbir Singh v. Dhan Kaur etc.' which was decreed on September 9, 1992 and the defendants were restrained from interfering in possession of the plaintiff. The present plaintiffs are successors in interest of late Balbir Singh and their names are recorded in the mutation of inheritance coming to the share of the father. The present defendants pleaded that land had been redistributed among the co-sharers by a compromise deed dated November 2, 2011 [recorded in Police Station Sadar, Faridkot in connection with FIR # 51 dated 10.5.2010 u/Ss. 307, 427, 148, 149 IPC and Ss. 25/27/54/59 of the Arms Act] and other co-owners mentioned in the written statement had handed over possession of 6 kanals 5 marlas to them. In the said compromise, the plaintiffs have admitted that they are in possession of only 9 kanals, out of the total land admeasuring 28 kanals 13 marlas and defendants # 1 & 2 are in possession of land to the extent of 13 marlas 14 kanals, which is the disputed area and in addition thereto of the aforesaid 6 kanals 5 marlas of land. Defendants # 3 to 6, the proforma parties in first appeal and the present appeal disclaimed any connection with the dispute since their names are not recorded in the *jamabandi* nor were they witnesses to the deed.

2. After filing the written statement defendants # 1 & 2 failed to pursue the case diligently and were proceeded ex parte which is blamed on their counsel who failed to appear citing illness of his mother but the appeal court has noticed that the objection was taken in the grounds of appeal but nothing was established on the file with respect to the non-appearance of the

defendants.

3. On hearing Mr. Gupta for the appellants I find no cogent ground for setting aside the judgments and decrees of the learned courts below. If the appellants' interests were not adequately protected by the counsel, then a complaint cannot be made in second appeal against *ex parte* judgment and decree of the court of first instance. I find no reason to disagree with the order of the court of first appeal dismissing the case. The learned District Judge, Faridkot in her judgment dated November 11, 2013 has gone by the available *jamabandi* placed on record as an exhibit P1 where plaintiffs' fathers name is recorded as joint owner to the extent of 91 shares whereas the plaintiffs are recorded as joint owners to the extent of 96 shares, equally, out of the total 573 shares. The appeal court has noticed that even in the column of cultivation the name of the father Balbir Singh is depicted. Mutation # 6537 stands sanctioned in favour of plaintiffs as property inherited from father. The *khasra girdawari* on record reveals exclusive possession of Balbir Singh. Column 9 of the *jamabandi* plaintiffs are shown in exclusive possession of suit landholding from *Hari* 2009. The appeal court has found continuity of possession since the year 1989 in the hands of the plaintiffs. Injunction can issue to protect long settled possession among joint owners till property is partitioned. The judgment in appeal is well reasoned and is not liable to be interfered with from any angle.

4. To be fair to counsel his submission on “subsequent *jamabandi*” of the year 2007-2008 and *khasra girdawari* for the year 2010-2011 and affidavit of plaintiff # 1 Mohinder Singh in which there is an

alleged admission of possession of 9 kanals is noticed and rejected.

5. A few words on the issue of non-appearance of counsel are in order. If the grounds of appeal were drafted by the counsel, as suggested and argued, and in those grounds counsel pleaded facts of the illness of his mother as sufficient cause for non appearance, then those facts were not verified on affidavit and neither was a modicum of evidence produced and shown to substantiate the plea in explanation of default of appearance. Parties have to remain vigilant in doing *pairvi* of their cases. If the suit was ex parte defendants then timely and appropriate steps should have been taken to restore their presence. This was not done. No application was preferred before the same court for setting aside the order proceeding ex parte on 9.4.2013 especially in view of the latent imputations against judicial proceedings contained in paras 6 and 7 of the grounds of first appeal [see page 24 of the second appeal paper-book] which could only be controverted by affidavit filed before the same Judge [even though an appeal was maintainable in concurrent jurisdiction against the decree]. But in any case, if the defendants assert title and possession then it is always open to them to litigate their rights in a separate suit de hors the findings of the civil court in a suit simpliciter for permanent injunction against forcible acts of commission and threat of dispossession.

6. Learned counsel for the appellants submits that the counsel in the Court of first appeal has signed the grounds of appeal and that amounts to attestation and due verification of the contents of the paragraphs which are personal to his knowledge and could not have been verified by his clients. Today at the hearing, learned counsel has passed on a loose affidavit

of the counsel prepared recently in support of his contention and asks the court to act on it. I am afraid; it is not possible to do so. It is not on the record of the case and therefore should not be read in second appeal for the first time without being seen to do an outlandish thing, not found in the rule book.

7. No substantial question of law arises in this case. There is no merit in this appeal. The Courts are well within their jurisdiction to pass *ex parte* judgments and decrees which when passed for good and sufficient cause are binding. Ex parte decrees are decrees and are executable in law. If the defendants have been unable to prosecute their case properly in defence of the suit by their own fault or the fault of the counsel representing them, then there is hardly any scope left for showing misplaced sympathy by any court, including this Court in its second appeal side albeit restricted within the confines of the jurisdiction conferred by Section 100 of the CPC to review original decrees, which are otherwise are found sound in reasoning on facts and law reflecting sensibly the probabilities on the entire evidence leaning heavily in favour of the plaintiffs to merely protect their peaceful possession of the suit property in accordance with law.

8. Accordingly, the appeal is dismissed at the threshold as not warranting admission for regular hearing after requisitioning lower court record as there is nothing special to be consulted in case papers. The file be consigned to the record room.

(RAJIV NARAIN RAINA)
JUDGE

July 21, 2015