

SAO No.30 of 2014 (O&M)

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

**SAO No.30 of 2014 (O&M)
Date of decision:10.02.2015**

Sher Singh and others

...Appellants

Versus

Mahender Singh and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

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

Mr. Sudhir Mittal, Advocate,
for the respondents.

Rakesh Kumar Jain, J.

The appellants are the sons of Deegh Ram, arrayed as defendant no.2 in the suit filed by respondents no.1 to 7 against him and the Gram Panchayat-respondent no.8, for declaration and permanent injunction alleging that the suit land falls in khewat no.68, khatauni no.69min, mustatil no.31, killa no.23/2(2-2) and khatauni no.70, mustatil no.31, killa no.18/2 (2-9), measuring 4 kanal and 11 marlas, situated at village Kalaka, Tehsil and District Rewari. The plaintiffs are the proprietors of Patti Bodhar, filed the suit in the representative capacity while referring to the other proprietors mentioned in the list attached as Annexure-A. It was urged that the Gram Panchayat-defendant no.1 had no right, title or interest in the suit property

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and neither it had any right to give it on lease nor it has been used for common purposes of the village. It is also urged that defendant no.2 Deegh Ram is recorded as Gair Marausi in the column of cultivation qua land bearing mustatil no.31, killa no.18/2 (2-9) and that the Gram Panchayat is bent upon to lease out the suit land, therefore, declaration was sought that they, being the proprietors, are the owners of the suit property and the defendants had no right, title or interest in the suit land.

Defendant no.1 filed the written statement admitting the claim of the plaintiffs-respondent no.1 to 7 in toto but defendant no.2 filed a separate written statement and contested the suit. It was urged that Anoop Singh, Lambardar, who had a share in Patti Bodhar, had given the land comprised in killa nos.23/2 and 18/2 to defendant no.2 for cultivation on payment of rent of Rs.9/- per annum and after the death of Deegh Ram, the appellants are cultivating the said land on payment of rent.

On the pleadings of the parties, as many as 8 issues were framed by the trial Court and recorded a finding that though the suit has been filed in the representative capacity but no application under Order 1 Rule 8 of the Code of Civil Procedure, 1908 (here-in-after referred to as the "CPC") has been filed, therefore, the suit cannot be considered in the representative capacity of the plaintiffs. Ultimately, the suit was dismissed on 09.08.2012. The plaintiffs filed the statutory appeal. It was noticed by the lower Appellate Court that one of the reasons for non-suiting the plaintiffs by the trial Court was that the suit has not been filed in the representative capacity as no application has been filed under Order 1 Rule

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8 of the CPC. However, the lower Appellate Court had found that when the plaint was filed, it was accompanied with the application filed under Order 1 Rule 8 of the CPC. There was also Annexure-A filed with the suit having list of the proprietors of Patti Bodhar but no order was passed by the trial Court on the application rather it has been wrongly observed that no such application under Order 1 Rule 8 of the CPC has been filed and the suit was not treated in the representative capacity. Thus, the lower Appellate Court set aside the judgment and decree of the trial Court and remanded the case back to decide the application under Order 1 Rule 8 of the CPC and then proceed with the suit.

Counsel for the appellants has vehemently argued that if the suit was filed by the plaintiffs in their representative capacity and the trial Court had not noticed this fact that they had also filed an application under Order 1 Rule 8 of the CPC, the entire judgment of the trial Court should not have been set aside and the suit filed by the plaintiffs should have been treated in their individual capacity. In this regard, he has relied upon a decision of this Court in the case of **Suhlar etc. v. Ram Singh**, 1987 RRR 366.

On the other hand, counsel for the respondents has argued that the trial Court has made an erroneous observation contrary to the record that the plaintiffs had not filed any application under Order 1 Rule 8 of the CPC though the application had actually been filed but it appears that it escaped the notice of the trial Court, therefore, the lower Appellate Court has remanded the case back to the trial Court to first decide the application filed

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under Order 1 Rule 8 of the CPC and then decide the controversy between the parties on merits. In support of his submissions, he has relied upon a decision of this Court in the case of **Kundan Singh and others v. Gurnam Singh and others**, AIR 1986 Punjab & Haryana 51.

I have heard learned counsel for the parties and examined the record with their able assistance.

In this case, the issues were framed on 14.05.2010 to the effect as to whether the plaintiffs are entitled to for declaration and also for permanent injunction. The plaintiffs examined as many as 5 witnesses and tendered various documents. Similarly, the defendants also examined 5 witnesses and tendered many documents. A finding was recorded on issue no.1, on the appreciation of documentary evidence, that the defendants are in possession as tenants on payment of rent @ Rs.9/- per annum and were found to be in possession in view of khasra girdawari Ex.D16 to Ex.D25 and held that the plaintiffs have failed to prove their possession over the suit land. While deciding issue no.2, it was held that since the plaintiffs are not found to be in possession, therefore, they are not entitled to injunction. It was also held that the plaintiffs have no cause of action to file the suit which is also time barred. Hence, all the issues no.2, 3, 5 and 6 were decided against the plaintiffs. In the appeal, the lower Appellate Court has decided the issue only with regard to maintainability of the suit on behalf of the plaintiffs in the representative capacity and observed that since their application filed under Order 1 Rule 8 of the CPC was not decided by the trial Court, therefore, there is a patent error and thus the judgment and

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decree of the trial Court was set aside and the case was remanded back with a direction to comply with the mandatory requirement of Order 1 Rule 8 of the CPC.

Insofar as the judgment relied upon by learned counsel for the respondents in **Kundan Singh and others' case (supra)** is concerned, in that case the trial Court did not issue notice for institution of suit to all residents either by way of personal service or by public advertisement as required by Order 1 Rule 8 of the CPC, while dismissing the suit. In appeal, the judgment and decree of the trial Court was set aside and the matter was remanded back for a fresh decision after compliance of Order 1 Rule 8 of the CPC.

To my mind, this judgment is not applicable rather the judgment relied upon by learned counsel for the appellants in **Suhlar etc.'s case (supra)** is applicable to the facts and circumstances of the present case because in this case also, there was an application filed under Order 1 Rule 8 of the CPC in which no order was passed by the trial Court. This Court has held that if the application under Order 1 Rule 8 of the CPC is not decided at all, the suit filed by the plaintiffs should be taken to have been filed by them in their individual capacity.

Moreover, learned counsel for the appellants has also relied upon a judgment of this Court passed in SAO No.42 of 2014 titled as "**Kulwant Singh v. Jagtar Singh and others**" on 03.09.2014 in which it has been held that while remanding the case, the lower Appellate Court is required to set aside the finding on every issue on merits, whereas in the

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present case, though all the issues have been decided by the trial Court against the plaintiffs, whether on merits or on technicality, but none of the findings has been reversed except for the maintainability of the suit on the ground that the application filed under Order 1 Rule 8 remained undecided.

Thus, in view of the aforesaid, I am of the considered opinion that the impugned order is patently illegal and thus hereby set aside. The suit filed by the plaintiffs is ordered to be considered to have been filed in their individual capacity. The result of the suit would not bind the other proprietors in respect of their rights who might be having the similar interest and can always file a separate suit as the finding recorded here-in-above would not operate as *res judicata*. The lower Appellate Court shall decide the appeal on merits in accordance with law. The parties are directed to appear before the lower Appellate Court on 20.03.2015.

February 10, 2015
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(**Rakesh Kumar Jain**)
Judge