

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

RSA No.1174 of 1990

Date of Decision-26.02.2016

Telu Ram and others

... Appellants

Versus

Dera Baba Guru Brahma Nand and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. C.B. Goel, Advocate for the appellants.

Mr. Dinesh Sharma, Advocate for the respondents.

RAJ MOHAN SINGH, J.

[1]. Plaintiffs are in second appeal against the concurrent judgments and decrees passed by the Courts below.

[2]. Plaintiffs filed a suit for declaration and possession in respect of suit land measuring 149 kanals 14 marlas situated in Pundri, Tehsil and District Kaithal. Plaintiffs alleged that the suit land was owned by *Shamlat Thula Nathia Hasab Rasad Khewat*.

[3]. The suit land was reserved for resting place for cattle and collection of water etc. No part of suit land was ever donated by the proprietors of Thula to defendant No.1. Defendants No.2 to 4 colluded with Shri Baleshawara Nand and filed a Civil Suit No.351 of 1979 on 29.05.1979 titled as Dera Baba Guru Brahma

Nand Vs. Lal Singh etc in the Court of Sub Judge, IInd Class, Kaithal in which defendant No.1 had claimed the land on the basis of the donation by the owners of Thula.

[4]. As a result of collusion, defendants No.2 to 4 filed the written statement admitting the claim of defendant No.1 in the said suit. On the basis of admission, suit was decreed on 18.08.1979 declaring defendant No.1 to be owner in possession of the suit land. Plaintiff alleged that the decree dated 18.08.1979 passed in Civil Suit No.351 of 1979 was the result of collusion and fraud. The suit land was never donated by the proprietors of Thula to defendant No.1.

[5]. In the consolidation, the proprietors of Thula Nathia were associated with the Advisory Committee constituted out of the proprietors of village. It was never brought to the notice of consolidation authority by the said committee. The scheme was prepared during consolidation as a lawful document, containing the rights of proprietors in respect of piece of land.

[6]. Plaintiff further alleged that there was total non-compliance of Order 1 Rule 8 CPC in the previous suit. No permission was granted by the Court to institute the suit under representative capacity. No munadi was effected in compliance to Order 1 Rule 8 CPC in the village.

[7]. The Chowkidar namely Phulla who was shown as munadi kuninda never did any such munadi in the village. In fact,

there was no chowkidar in the village known by the name of Phulla. The attesting witnesses of the munadi i.e Neki Ram Numberdar who was the brother of Lal Singh defendant No.2 and Pt. Ganesh Datt was follower of Guru Brahma Nand.

[8]. The whole process of munadi was done to circumvent the provisions in terms of Order 1 Rule 8 CPC and with a view to deprive the other proprietors of Thula Nathia to represent their case before the Court. Neither any notice was ever served to the proprietors of Thula, nor the same was issued.

[9]. The admission made by selected proprietors was not binding upon Thula as a whole for want of compliance in terms of Order 1 Rule 8 CPC. The judgment and decree dated 18.08.1979 was claimed to be null and void and not binding upon the rights of the plaintiffs. Defendant No.4 was never a proprietor in Shamlat Thula Nathia and as such he was not competent to admit the claim of defendant No.1 in the earlier suit.

[10]. The judgment and decree dated 18.08.1979 besides being null and void did not create any title in favour of defendant No.1. Defendant No.1 had taken possession of about 60 kanals of land and had started cultivation thereon whereas rest of the land was used by proprietors as a Johar and sitting place for their cattle. Defendant No.1 also threatened to change the user of the land. With this background, suit came to be filed.

[11]. Defendant No.1 contested the suit by taking all pleas and stated that the property in question was dedicated for the religious and charitable purposes wherein Mandir, Madi Guga Pir, Smadh with a status of Swami Brahma Nand and Smadh of Trodeshi Nath and a Pathshala were located. The place was used for worship. The other land situated around was utilized by the Saints and Sadhus by spending huge amount towards maintenance for religious and charitable purposes like Yag and Hawan. There was small cottage where Baba Brahma Nand resided. He was held in high esteem by the villagers. There was no Johar in the suit land and the property was dedicated by the villagers for religious and charitable purposes. Defendants No.2 to 4 never had any collusion with Shri Baleshwara Nand.

[12]. The entries in the revenue record did not give correct position and therefore, suit was filed against defendants No.2 to 4 in representative capacity under Order 1 Rule 8 CPC. Defendant alleged that due compliance was made in terms of Order 1 Rule 8 CPC and none of the proprietors came forward to contest the suit. Resultantly, lawful decree was passed.

[13]. Defendant No.1 further alleged that before filing of the suit, Notified Area Committee, Pundir claimed this property under the Haryana Municipal Common Land (Regulations) Act, 1973. The case was contested by defendant No.1 and some other persons also contested the ownership of the property. The

amendment in the Act as a whole was set aside and declared ultra vires in the year 1979 on the ground that the same was not directed towards upliftment of rural economy and also did not fulfill ancillary purpose of rural growth. Defendant relied upon the said judgment to plead res-judicata in terms of Section 11 CPC.

[14]. Defendant further alleged that there was no misrepresentation by the defendant in the earlier Civil Suit No.351 of 1979. The property had come within the municipal limit and the judgment and decree was binding on everyone. Baba Guru Brahma Nand was in possession of the suit property and earlier to him there were Udasi Faqir and Nath who were in possession of the suit property. The manager of Sadhus or Mahant kept on changing from time to time, but the property remained in possession of Dera. The existence of Johar in the suit land was denied. Plaintiffs have no right title or interest in the property. The cultivation over the land was carried out for the purposes of securing funds for preservations of religious and charitable institution. Defendant No.1 claimed to be in continuous possession of the suit land for the last more than 12 years before filing of the suit and therefore, the suit was claimed to be not maintainable.

[15]. On the pleadings of the parties, following issues were framed:-

“1. Whether the suit land is in the ownership of Shamlat Thula Nathia Hasab Rasad Khewat? OPP

2. Whether the judgment and decree passed in suit No.351 of 1979 is a result of collusion, misrepresentation of facts and fraud committed by the defendants upon the proprietors as alleged in para No.8 of the plaint and is null and void as alleged in para No.9 of the plaint? OPP

3. Whether some land is being used by the proprietors as a johar as alleged in para No.10 of the plaint?

4. Whether defendant No.1 has ever threatened to obstruct the proprietors of thula Nathia from using a part of the disputed land as Johar and the rest of place for their cattle and threatened to change the use of the same by bringing it under cultivation as alleged? OPP

5. Whether any donation of any part of the suit land was made as alleged by the defendants? OPD

6. Whether the compliance of Order 1 Rule 8 CPC has not been made, if so, its effect? OPD

6(a). Whether the suit is maintainable? OPD

6(b) Whether the plaintiffs are estopped from filing the present suit? OPD

6(c) Whether the suit for actual possession is not maintainable? OPD

6 (d) Whether the suit land is reserved is meant as a resting place for village cattle and was meant for grazing of them and for collection of water for their drinking purposes? OPD

7. Relief.”

[16]. Parties led their respective evidence to prove their case. Trial Court dismissed the suit vide judgment and decree

dated 26.11.1986 which was upheld by the Lower Appellate Court vide judgment and decree dated 21.02.1990. That is how the present appeal came to be filed in this Court.

[17]. I have learned counsel for the parties and perused the record.

[18]. Learned counsel for the appellants has vehemently argued that Civil Suit No.351 of 1979 was instituted on 28.05.1979 in which written statement was filed by three persons namely Lal Singh, Surta and Prithi on 06.06.1979. All the three persons were close to the defendants. An application under Order 1 Rule 8 CPC and admitted written statement were filed, but there was no compliance of Order 1 Rule 8 CPC. By referring to order dated 26.07.1979, learned counsel submitted that written statement had already been filed by defendants No.1 to 3 and none had appeared for other proprietors of the village in reply to notice proclaimed under Order 1 rule 8 CPC. There was no proof of munadi established on record. The order dated 26.07.1979 is reproduced here as under:

“Written statement has already been filed by defendants No.1 to 3. None has appeared for the other proprietors of the village in reply to the notice proclaimed under Section 1 Rule 8 CPC. The defendants No.1 to 3 have admitted the claim of the plaintiff in their written statement. Their statements be recorded.”

[19]. Learned counsel further contended that in the application for restoration of file Ex.P-16, only three persons wanted to get the same restored whose signatures were appended in the said application. There was no proof of munadi.

[20]. Evidently as per Ex.P1, plaint of Civil Suit No.351 of 1979 was instituted on 31.05.1979. The Civil Judge, Second Class, Kaithal vide order dated 04.06.1979 passed an order in purported compliance of the application under Order 1 Rule 8 CPC which was filed by the plaintiff. Ex.P-2 i.e order dated 04.06.1979 was passed by the Sub Judge, Second Class, Kaithal in which factum of the suit filed by Dera Guru Brahma Nand was mentioned along with list of proprietors of the village and impleadment of Lal Singh etc.

[21]. The suit for declaration was in respect of 149 kanals, 14 marlas of land situated in Pundri to which munadi was got effected by beat of drum, calling upon members of the *Jumla Malkan* to file objection upto 26.07.1979. A report Ex.P2/A was made by Phula Chowkidar, munadi kuninda, Pundri which was attested by Prithi son of Munshi defendant No.3 in the said suit and Neki Ram Namberdar as first witness, Ganesh Dutt Sharma as second witness besides attestation made by Lal Singh defendant No.1 and Surta defendant No.2. After the aforesaid signatures of the witnesses, recital of verification was made by way of affidavit of Daya Nand (PS) who had stated on oath that the aforesaid report was true and correct.

[22]. The report submitted by Daya Nand (PS) was to the effect that by going to village Pundri as per order of the Court, munadi was done by beat of drum to the effect that Dera Baba Guru Brahma Nand had filed application in the suit under Order 1 Rule 8 CPC in which Lal Singh, Prithi Singh and Surta and other villagers were informed about their right to file objection upto 26.07.1979 in the Court. A copy of list of defendants was affixed at appropriate place in the village and statements of the witnesses were recorded at the spot.

[23]. On the basis of consented written statement Ex.P6, the suit was decreed vide judgment and decree dated 18.08.1979. After institution of said suit the Sub Judge, IInd Class, Kaithal passed an order dated 31.05.1979 that notice of the application under Order 1 Rule 8 CPC be given for 26.07.1979 on payment of process fee. The proprietors of Thula Nathia, Pundri were given notices in the town of Pundri through munadi. In compliance of order dated 31.05.1979, the munadi was allegedly done on 06.06.1979 along with affixation. The statements of Lal Singh vide Ex.P14 was recorded who admitted the contents of the plaint and prayed for decretal of the suit.

[24]. As per list of proprietors Thula Nathia as many as 785 proprietors were shown in the Thula Nathia as per Ex.P17. The revenue record of the land in terms of *jamabandi* for the year 1965-66 depicted that Shamlat Thula Nathia Hasab Rasad

Khewat was the owner of the land and in the column of cultivation '*Khud Kast wa Makbuja Malkan*' was recorded. The nature of land was shown to be *gair mumkin bani* which was shown to be *gair mazurua* (not cultivable). The same entries were continued in subsequent *jamabandi* for the year 1970-71. In view of nature of land being *gair mumkin bani* and ownership of Shamlat Thula Nathia Hasab Rasad Khewat, question of vesting of such land in Panchayat as shamlat deh was a necessary consideration which was required to be deliberated. In such a situation, Gram Panchayat, Pundri was a necessary party. The subsequent revenue record even if contained some other entries was also required to be co-related vis-à-vis vesting or otherwise of the land in Panchayat as shamlat deh.

[25]. The plaint of the earlier suit contained the recital that donation was made in respect of Thula land by the proprietors about 60 years ago. The gift pleaded by way of donation should be specific in nature as to on what date donation was made, what type of ceremonies were conducted at the spot and who attended the proceedings.

[26]. Para 3 of the Civil Suit No.351 of 1979 had the following recital "that Shri Brahma Nand founder of the said Dharmshala was in possession of aforesaid land since over 60 years and the same was donated by the proprietors of Shamlat Thula Nathia, Pundri for the said purpose." The particulars of

donation/gift were conspicuously missing. Whether those three persons who were served in the suit were present at the time of alleged donation/gift? Whether they had acquired specific knowledge about the alleged gift made in favour of Dera?

[27]. Apparently Madi, Guga Pir and temple were not existed in the entire land. As per nature of the property, it was *gair mumkin bani* which in common parlance was the subject matter of resting place for cattle and for arrangement of drinking water for cattle in the form of johar. Land belonging to thola patti or insar if used for common purposes has the background of vesting in Panchayat shamlat deh as per Section 2(g) of Punjab Village Common Land (Regulations) Act, 1961.

[28]. In any case Panchayat should have been impleaded as party in the earlier suit. Learned counsel for the appellants further contended that a fraud was committed in the year 1979 and that had vitiated all solemn acts. On detection of fraud, the beneficiaries and author of such fraud can be thrown at any stage of litigation.

[29]. Both the Courts have not appreciated this aspect of the matter and proceeded to decide the suit on the premise that in the suit, challenging the amended provision of Municipal Act has virtually created a bar to challenge the title of defendant No.1. The Court relied upon the record of Case No.3 of 1978 titled as Notified Area Committee Vs. Bleshwara Nand decided on

16.04.1979 which shows that whole of the land was vested in the Notified Area Committee. Mutation No.5342 was sanctioned in the name of Dera Baba Guru Brahma Nand and said mutation was never challenged.

[30]. Secondly in a book published by the Tourism Department in the year 1968 photograph of Guru Brahma Nand has appeared and that fact was not challenged by the plaintiff in their application. Thirdly the number of witnesses produced by the plaintiff in the context of dedication on the land by the proprietors have proved the charitable nature of the suit land.

[31]. The statements of DW 2 Baleshwara Nand, DW 4 Lakhi Ram, DW 5 Ginna, DW 6 Ganesh Dutt, DW 7 Man Singh, DW 8 Prithi Singh, DW 8 Surta were held admissible on the strength of their corroboration by each other. Credibility of witnesses could not be shattered in the cross examination, therefore, Court held that nature of property was charitable in nature and dedication on behalf of proprietor body of the village was proved. The admission on the part of Raghubir Singh PW 2 that he had not visited the site for the last 6-7 years was also taken to be a fallacy in the plaintiffs' case. The number of proprietors out of total strength of about 800 who came forward to depose in favour of plaintiffs was also an instance of negativity for consideration of plaintiff's claim.

[32]. The Courts below have taken the factum of dedication over the suit land to be of paramount consideration, while considering the donation to be a possible truth. On the strength of evidence on issues No.1 and 5, the Courts below concluded that the land was once under the ownership of Shalmlat Thula Nathia Hasab Rasad Khewat and was donated to defendant No.1. The aforesaid donation was presumed on the strength of dedication of the site towards religious and charitable purposes.

[33]. The utilization of land for public purpose has to be in terms of revenue record. Dedication of land for charitable and religious purposes may or may not be treated to be utilized for common purposes. The common purposes of the village have defined connotation which must emanate from the revenue record. It is a settled position that instinct of fraud vitiates all solemn acts and the transaction based on such a fraud is a nullity. Reference can be made to **S.P. Changalvaraya Naidu (dead) by LRs. Vs. Jagannath (dead) by LRs., 1994 AIR (SC) 853, Hamza Haji Vs. State of Kerala and another, 2006(7) SCC 416, A.V. Papayya Sastry and ors. Vs. Government of A.P. and ors, 2007(2) RCR (Civil) 431 and Balwant Rai Tayal Vs. M/s Subhash Oil Company, Hisar through Shri Raghunath Sahi, 2003(2) RCR (Rent) 148.**

[34]. The perusal of lis as found by the Courts vis-a-vis the issues framed, only restricted the parties to the scope of litigation

emerging from the issues. The decisions have been rendered by the Courts on restrictive mechanism without considering the nature of land and its prospects of vesting in Panchayat as shamlat deh. None of the parties was alive to the situation as to whether the suit land was capable of vesting in Panchayat as shamlat deh as per entries in the revenue record of the relevant period. The entry of *gair mumkin bani* in the nature of land and Shamlat Thula Nathia in column of ownership definitely should have been taken cognizance of and should have been crystallized and tested, whether donation even if presumed (not established by way of documentary evidence of the beneficiaries) could have been made by the proprietors in the absence of Gram Panchayat being party to the suit. The issues framed and decided in the suit have not given any such answer to the preposition.

[35]. Question arises for consideration is whether the nomenclature of Thula being '*Shamlat Thula Nathia Hasad Rasad Khewat*' requires to be tested on the touchstone of vesting phenomenon of such land in Panchayat as shamlat deh under Section 2(g) of the Punjab Village Common Lands (Regulations), Act 1961. Section 2(g) reads as follows:-

“2. Definitions.--

(g) “Shamlat deh” includes--

(1) Lands described in the revenue records as

Shamlat deh or Charand excluding abadi deh”

(2) shamilat tikkas;

(3) lands described in the revenue records as

shamilat, Tarafs, Pattis, Pannas and Tholas

and used according to revenue records for the benefit of the village community or a part

thereof or for common purposes of the village;

(4) xx xxxxx xxxx xxxx xxx xx

(4a) xx xxxxx xxxx xxxx xxx xx

(5) lands in any village described as banjar qadim

and used for common purposes of the village,

according to revenue records;

[.....]

but does not include land which-

(i) becomes or has become shamilat deh due to river action or has been reserved as shamilat in villages subject to river action except shamilat deh entered as pasture, pond or playground in the revenue records;

(ii) has been allotted on quasi-permanent basis to a displaced person;

(ii-a) was shamilat deh, but , has been allotted to any person by the Rehabilitation Department of the State Government, after the commencement of this Act, but on or before the 9th day of July, 1985;]

(iii) has been partitioned and brought under cultivation by individual landholders before the 26th January, 1950.”

(iv) having been acquired before the 26th January, 1950, by a person by purchase or in

exchange for proprietary land from a cosharer

in the shamilat deh and is so recorded

in the jamabandi or is supported by a valid deed;

(v) is described in the revenue records as

Shamilat, Taraf, Pattis, Pannas, and Thola

and not used; according to revenue records

for the benefit of the village community or a

part thereof or for common purposes of the village.

xx xxxxx xxxx xxxx xxx xx.”

[36]. The category of land being Shamlat Thula Nathia, falls under Section 2(g) (3). The act postulates that the land of Shamlat Patti, Thola, Taraf and Panna etc. would falls under the category of shamlat deh, if it is used for benefit of village community or a part thereof or for common purposes of the village as per revenue record.

[37]. Revenue record produced in this case indicated that according to *jamabandis* for the year 1965-66 and 1970-71, the land was shown to be *gair mumkin bani*. Whether such type of land was capable of vesting in Gram Panchayat as shamlat deh or not, was a core question. It should have been deliberated after impleading Gram Panchayat as necessary party.

[38]. It is a settled position by now in view of law laid down in **Tal Ram and others Vs. Gram Sabha Manakpur and others, 1976 PLJ 628, Division Bench** and **Shri Shiv Charan Singh and others Vs. Gram Panchayat Narike and others, 1978 PLR 32** that all the clauses of Section 2(g) (1) to (5) of the Punjab Village Common Lands (Regulations) Act, 1961 are independent of each other. Recourse can be made to any of the clauses to the exclusion of other. If the case fall under any of the clauses, then it would be sufficient to bring the case within the ambit of said clause to hold the land to be shamilat deh. All the sub clauses of Section 2(g) (1) to Section 2(g) (5) of the Act are independent and do not circumscribe the scope of each other in any manner.

[39]. In the light of aforesaid facts, in considered opinion of this Court, onerous duty ought to have been cast upon the trial Court to deduce and frame basic issue with regard to vesting or non-vesting of land in Panchayat as shamilat deh in view of status of the land in the revenue record. According to this Court, the persons who have done munadi in the village have not come forward to make any report. A report was made by Daya Nand (Process Server) who had done the alleged affixation. The allegation of the plaintiffs that no chowkidar in the name of Phulla ever lived in the village, was not adverted to by the defendants.

[40] Admittedly, property was recorded to be under the ownership of Shamlat Thula Nathia Hasab Rasad Khewat, whether munadi was done in the vicinity of Shamlat Thula or not,

was also required to be established on record. The report to the effect that munadi was done in Mauja Pundri was vague enough to presume such a munadi in the vicinity of Thula Nathia, particularly when the Chowkidar who did the munadi was not examined. The primary issue which has to be debated is whether the property by its nature and user, vested in Panchayat as shamlat deh or not?

[41]. In the light of aforesaid facts, I am of the view that the Courts below have missed a vital clue in the litigation. The entire case is dependent upon the true import of revenue entries for which an issue with regard to vesting or non-vesting of land in Panchayat as shamlat deh was required to be framed. Therefore, following issues arise for determination at the hands of the trial Court:-

“1. Whether the suit land was capable of vesting in panchayat as shamlat deh in view of ownership of shamlat thula nathia hasad rasad khewat which was shown to be gair mumkin bani as per revenue record?OPP

2. Whether shamlat thula nathia hasad rasad khewat was being used for common purposes of the village as per revenue record?OPP

3. If issues No.1 and 2 are proved, whether the suit land could have been donated to defendant No.1 by some of the proprietors of the village without consent of the Gram Panchayat?OPP

[42]. Having deliberated upon the issues, I am of the view that Gram Panchayat/Notified Area Committee, Pundri is required to be impleaded as party-defendant to the suit and thereafter, trial Court can be obligated to dispose of the suit by returning the findings under the aforesaid added issues. This Court is sanguine of the fact that remand should not be made in routine in terms of Order 41 Rule 23 CPC which deals with the situation where the Court from whose decree an appeal is preferred, has disposed of the suit upon a primary point and the decree is reversed by the Appellate Court. The Appellate Court if thinks fit by order of remand may further direct the trial Court to try the issues and remand the case to the Court from whose decree the appeal is preferred with a direction to re-admit the suit at its original number and proceed to determine the suit on the basis of material so brought before it.

[43]. Order 41 Rule 23-A CPC deals with the remand in other case, where the Court from whose decree an appeal is preferred has decided the case otherwise than on a primary point and the decree is reversed in appeal and re-trial is considered necessary. The Appellate Court has the same powers as under Order 41 Rule 23 CPC.

[44]. In third category under Order 41 Rule 25 CPC, the situation arises whether the Appellate Court framed issues and referred them to the trial Court whose decree is appealed and in

such case, Appellate Court may direct the trial Court to take additional evidence and return the evidence to the Appellate Court together with findings thereon within such time as may be prescribed by the Appellate Court.

[45]. The situation arises in the present case is the cumulative effect of all the three categories as mentioned above. This Court has proposed to frame the additional issues. The framing of such issues and decision thereof would definitely have binding effect on other issues as well, therefore, calling for a report of the trial Court on these additional issues would not be sufficient to decide the controversy in one go. The findings recorded under all the issues are required to be set aside as the additional issues would be having paramount consideration before the Court and the findings recorded under these issues would be having definite bearing on the fate of other issues. Therefore, while remanding this case back to the trial Court, this Court does not wish to comment upon validity of evidence collected during course of the suit and would refrain from commenting anything except to obligate the trial Court to take fresh decision on the basis of material likely to be produced before it by the parties.

[46]. With the aforesaid observations, the appeal is allowed. Impugned judgments and decrees are set aside. Case is remanded back to the trial Court. Trial Court is directed to decide

all the issues afresh after giving due consideration to the evidence of the parties. All the necessary issues be framed without being influenced by any observation made by this Court hereinabove. Trial Court would be at liberty to re-construct or re-cast the issues in an appropriate manner so as to streamline the respective onus of the parties. Appeal is accordingly disposed of. Parties through their counsel are directed to appear before trial Court on 28.03.2016.

(RAJ MOHAN SINGH)

JUDGE

26.02.2016

Prince