

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

**RSA No.2367-1990 (O&M)
Date of decision : 18.11.2016**

Major Singh and ors.

..... Appellants

Versus

Ajmer Singh through LRs and Others

..... Respondents

CORAM : HON'BLE MR.JUSTICE GURMIT RAM

Argued by : Mr. Arun Jain, Senior Advocate with
Mr. Amit Jain, Advocate
for the appellants.

Mr. Sanjay Majithia, Senior Advocate with
Mr. Inderjeet Singh, Advocate
for the respondents.

GURMIT RAM, J.

The aforesaid appellants who were defendants before the trial Court have filed the instant appeal against the judgment and decree dated 08.12.1990 passed by the Court of learned Additional District Judge, Hisar vide which the appeal of respondents-herein (plaintiffs) was accepted, judgment and decree dated 30.07.1987 passed by the Court of Sub-Judge Second Class, Fatehabad was set aside and the suit of plaintiffs for possession of suit land measuring 179 kanals 10 marlas was decreed in favour of the plaintiffs and proforma defendant No.4.

2. The case of the respondents-herein (plaintiffs) before the learned trial Court in brief was that one Baggu s/o of Kalu was having four sons namely Jang Singh, Gurbax Singh @ Chhotu, Mastan Singh and Ajmer Singh and three daughters namely Smt. Dhano, Smt. Rajji and Smt. Kishno. Said Jang Singh and Mastan Singh pre-deceased Gurbax Singh @ Chhotu whereas he (Gurbax Singh @ Chhotu) expired about 20 days back. Said Smt. Kishno was also stated to be expired.

Parties to this suit are Jat Sikhs by caste and earning their livelihood by doing farming. In the matter of succession and mutation of the inheritance, they are governed by the *Zimidari* custom as prevailing in Punjab and Haryana. As per this custom no person is competent to transfer his ancestral property without legal necessity and consideration. Plaintiff No.1-Ajmer Singh is the real brother, whereas plaintiff No.2 and proforma defendant No.4 are the real sisters of said Gurbax Singh @ Chhotu. Defendant Nos.1 to 3 are stated to be the sons of deceased Jang Singh, brother of Gurbax Singh @ Chhotu. Defendant Nos.1 to 3 are stated to be very clever persons and had been keeping said Gurbax Singh @ Chhotu under their thumb. He was an illiterate and simpleton person and was unable to understand his wrong and right. The said defendants filed civil suit No.101 of 1984 titled as *Major Singh etc. vs. Gurbax Singh @ Chhotu* and got a decree in their favour in said suit on 07.05.1984 from the Court of learned Additional Civil Judge (Senior Division) Fatehabad by way of misrepresentation and exercising their undue influence and coercion upon Gurbax Singh @ Chhotu in respect of the land in dispute measuring 179 kanals 10 marlas situated in village Kamana, Tehsil Ratia, District Hisar. The suit land was stated to be ancestral property in the hands of said Gurbax

Singh @ Chhotu. Further defendants No.1 to 3 got the mutation sanctioned in their favour on the basis of decree dated 7.05.1984 which was stated to be illegal, null and void being against the facts and result of misrepresentation, undue influence and coercion. Plaintiffs were claiming 2/3rd share in the land in dispute whereas proforma defendant No.4 was having 1/3rd share in this property. It was also pleaded that the value of the property in dispute was more than Rs.5 lacs and as such abovesaid decree dated 07.05.1984 was required to be registered compulsorily under the provisions of the Transfer of Properties Act being its value more than Rs.100. Since this decree was not got registered with the Registering Authority concerned as was legally required, so suit land could not be transferred in favour of defendants No.1 to 3 on the basis of this decree. The plaintiffs requested defendant Nos. 1 to 3 to admit their claim in the land in dispute and further to deliver its possession to them to which they refused, which necessitated to file the instant suit of possession by way of declaration.

3. Notice of suit was given to the defendants. Defendant No.4 in her written statement admitted the claim of the plaintiffs with a prayer that she has no objection if the suit of the plaintiffs be decreed.

4. Defendants No.1 to 3 in their written statement took preliminary objections that this suit is liable to be dismissed being against the facts and law; that plaintiffs have no locus standi to file this suit; that suit is not maintainable in the present form; that property in dispute was the self-acquired property of Gurbax Singh @ Chhotu (since deceased) and as such he was authorized to transfer the same in favour of anybody he liked; that alleged thumb impression of plaintiff No.2 on the plaint as well as power of attorney was stated to be forged one and that this suit is liable to be

dismissed with special costs. It was further case of these defendants that said Gurbax Singh @ Chhotu was unmarried and died issueless. He used to reside with these defendants, who used to serve him.

On merits, it was pleaded that Baggu was having only three children namely Jang Singh, Gurbax Singh @ Chhotu and Mastan Singh and that he was not having any other children. But it was admitted that said Jang Singh and Mastan Singh pre-deceased to Gurbax Singh @ Chhotu. Then it was also admitted that parties to the suit were Jat Sikhs by caste and primarily doing agricultural work. Then it was also admitted that defendant Nos. 1 to 3 were the sons of Jang Singh (since deceased), the pre-deceased brother of Gurbax Singh @ Chhotu. But it was denied that plaintiffs and proforma defendant No.4 are the brother and sisters of Gurbax Singh @ Chhotu. Since Gurbax Singh @ Chhotu was fully satisfied with the services rendered by answering defendants towards him, so he transferred the land in dispute in their favour vide decree dated 07.05.1984 suffered on the basis of family settlement. It was anyhow denied that this judgment and decree was result of any fraud, undue influence and coercion. Plaintiffs and proforma defendant No.4 are not entitled to get possession of any share out of the land in dispute. The abovesaid decree dated 07.05.1984 was stated to be legal and valid and mutation on its basis was also correctly entered. Rest of the averments were also denied by the answering defendants.

5. From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether Gurbax Singh @ Chhottu was brother of plaintiffs and proforma defendant No.4, as alleged? OPP

2. Whether the suit land was ancestral in the hands of Gurbax Singh @ Chhottu qua the plaintiffs, if so, to what effect? OPP

3. Whether the judgment and decree dated 07.05.1984 and the mutation sanctioned on its basis in civil suit No.101 of 1984 titled as Major Singh vs. Gurbax Singh is liable to be set aside on the ground mentioned in the plaint? OPP

4. If issue No.3 is proved, whether the plaintiffs were consenting party in passing the decree dated 07.05.1984? OPD

5. Whether the plaintiffs have got no locus standi to file the present suit? OPD

6. Whether the suit is not maintainable in the present form? OPD

7. Whether the plaint has not been thumb marked by plaintiff No.2 as alleged? OPD

8. Whether the plaintiffs are estopped by their own act and conduct to file the present suit? OPD

9. Whether the defendants are entitled to special cost under Sections 35-A of C.P.C? OPD

10. Relief.

6. The learned trial Court after hearing the learned counsel for the parties and going through the record as well recorded its findings on issue Nos. 1 and 4 to 9 in favour of the plaintiffs, on issue Nos.2 and 3 in favour of defendants and dismissed the suit of the plaintiffs with no order as to costs vide judgment and decree dated 30.07.1987.

7. The plaintiffs being not satisfied with this judgment and decree preferred an appeal which was dealt with by the learned Court of Additional District Judge, Hisar. Said learned Appellate Court set aside the findings of

the learned trial Court recorded on issue No.3 and accepted the appeal. Resultantly, the suit of the plaintiffs for possession in respect of the land in dispute was decreed in favour of the plaintiffs and proforma defendant No.4.

8. The appellants-herein (defendants) being not satisfied with the judgment and decree dated 08.12.1990 passed by the Court of learned Additional District Judge, Hisar have come up before this Court vide instant appeal, notice of which was given to the respondents-herein (plaintiffs). Record of both the Courts below was also requisitioned.

9. I have heard learned counsel for both the parties at length and also perused the record in detail with their able assistance.

10. Learned counsel for the appellants has contended that the decree in question Ex.P-4 dated 7.5.1984 was a consent decree as being passed on the basis of admission of Gurbax Singh @ Chhotu, who was defendant in Civil Suit No.101 of 1984 as well as also on account of some family settlement made between the parties to that suit. Herein, he has contended that in a case of consent decree, as per the provisions of Order 23 Rule 3 of the Code of Civil Procedure (for short – CPC), no separate suit is tenable and the remedy available with the person feeling aggrieved from such type of decree, is to move application before the Court which has passed the decree to get the same set aside. In this regard, it is further his contention that the Court while dealing with such like application cannot go into the fact that the compromise, on the basis of which decree was passed, was unlawful one or the facts mentioned in the plaint were incorrect. For the proper disposal of this appeal, the learned counsel for the appellants has proposed the following questions of law dated 31.5.2016:

1. Whether in the facts and circumstances of the instant

case, the decree dated 7.5.1984 can be declared to be null and void and not binding on the rights of the plaintiffs/respondents without there being any material brought on record by the respondents/plaintiffs?

2. Whether in the facts and circumstances of the instant case, the respondents/plaintiffs having failed to discharge the onus to prove that the decree was fraudulent or invalid, the approach of the first appellate court in accepting the appeal and decreeing the suit filed by the respondents/plaintiffs can be sustainable in the eyes of law?

3. Whether in the facts and circumstances of the instant case, the dispute being qua the share of Gurbax Singh, decree for possession could be granted?

4. Whether a separate suit to challenge a decree is maintainable?

POINT Nos.1 and 2 :

11. Being interconnected, these points are taken up together for their discussion and determination. Learned counsel for the appellants has contended that there is not even an iota of evidence on record to suggest that decree in question was the result of any fraud, misrepresentation, undue influence etc. having been played upon Gurbax Singh above mentioned and hence the findings recorded by learned Appellate Court vide the impugned judgment that this decree was obtained by the appellants – herein (defendants No.1 to 3) by playing fraud etc. upon said Gurbax Singh under issue No.3 are absolutely wrong being against the law and for lack of

evidence on this point on the record and hence the same are liable to be set aside. He also further argued that in Civil Suit No.101 of 1984 in which decree in question was passed, Gurbax Singh himself as per the proceedings of this suit appeared before the Court, filed his written statement admitting the claim of the plaintiffs in that suit (now appellants) and further suffered a statement voluntarily in the Court which followed that decree. Statement made in the Court is sacrosanct and carries great sanctity. Herein he has also referred to the case law as laid down by this Court in **Lichhami Devi and others Versus Smt.Bharpai and others, The Punjab Law Reporter Vol.CLXIII-(2011-3) 376.**

12. But on the other hand, learned counsel for the respondents – herein(plaintiffs No.1 and 2 and proforma defendant No.4) has contended that there is sufficient circumstantial evidence on record to hold that the decree in question was the result of fraud etc. played upon Gurbax Singh aforementioned and hence the findings recorded by the learned Appellate Court under issue No.3 that it was the outcome of fraud etc. are justifiable as well as tenable. It is a fact that existence of the element of any fraud, misrepresentation etc. can be inferred from the circumstances, if any, surrounding the matter/document in issue. Nature of fraud, misrepresentation etc., is such, it is always done in a secret manner in order to maintain its secrecy so that cat may not come out of the bag to the knowledge of other concerned persons.

13. Now I deem it ineluctable to see as to whether there is sufficient credible circumstances/material on the record in order to uphold the findings of the Appellate Court that decree in question Ex.P4 was the result of fraud etc. or not. For this purpose, the conduct of the parties and the proceedings

as conducted in Civil Suit No.101 above mentioned in which this decree was suffered are to be analyzed.

14. As per record, that suit No.101 was instituted before learned trial Court on 20.2.1984 and the defendant was ordered to be summoned for 7.4.1984 on filing of PF, RC. For this date, notice to defendant was not issued as the RC was not filed and defendant was ordered to be served for 23.5.1984 on filing of RC within three days. Then as per the record, Sh.Nirmal Kumar Chaudhary and Sh.M.R. Mehta, Advocates were engaged for defendant – Gurbax Singh of that suit and power of attorney in their favour was given by defendant – Gurbax Singh on 7.4.1984 which was filed in the Court on 7.5.1984. It means that Gurbax Singh – defendant had either attended the Court Complex, Fatehabad on 7.5.1984 or the said power of attorney in favour of his aforementioned Advocates was got thumb marked from him in the village or somewhere else. Then as abovesaid, the case was adjourned for 23.5.1984 for the service of defendant. It was preponed for 7.5.1984 on which date defendant – Gurbax Singh allegedly appeared before the trial Court, filed written statement and suffered a statement admitting the claim of appellants – herein (defendants No.1 to 3) and resultantly, the suit was disposed of on the same date whereby ensuing the decree in question. No valid reason was assigned by the Court for preponing this suit from 23.5.1984 to 7.5.1984. Preponment of any proceeding without any valid and justifiable reason generally smells a rat about its sanctity. Then the written statement filed in abovesaid suit on behalf of defendant – Gurbax Singh also evinces very clearly that his thumb impressions were obtained on a blank paper and thereafter this written statement was prepared in the manner suitable to the plaintiffs of that suit for the reason that these thumb

impressions are not found to be at the proper places where these ought to be in a genuine case. Then below the alleged statement of defendant – Gurbax Singh made in the Court on 7.5.1984, there is no endorsement of any responsible person like Lambardar, Sarpanch etc. to the effect that he knew Gurbax Singh – defendant personally, in order to establish the fact that the person who had made statement before the Court on the said date in that suit was Gurbax Singh – defendant and none-else. Even none of the two lawyers aforementioned who were engaged for defendant-Gurbax Singh in Civil Suit No.101 of 1984 was examined by the defendants to say that they had filed the written statement in that suit on behalf of defendant-Gurbax Singh correctly and the person who had suffered the statement in that suit before the Court on dated 07.05.1984 was defendant-Gurbax Singh himself and nobody else.

15. Admittedly, in abovesaid Civil Suit No.101, no summons were ever issued to defendant – Gurbax Singh for his service. The matter was adjourned twice for his service, but no RC was filed for his service. The decree in question could have been covered under the provisions of Ist proviso annexed to Order V Rule 1, CPC, if defendant – Gurbax Singh had appeared before the Court at the time when the plaint was presented in Civil Suit No.101 and admitted the claim of the plaintiffs of that suit, but it did not so happen in that suit, since defendant Gurbax Singh did not appear before the Court concerned on the date when the plaint was presented before the Court in said civil suit.

16. Then another fact to be noted in this case is that the appellants – herein (defendants No.1 to 3) even denied the relationship of respondents – herein (plaintiffs and proforma defendant No.4) with that of said Gurbax

Singh (since deceased). It was the specific plea of the respondents – herein (plaintiffs No.1 and 2 and proforma-defendant No.4) that plaintiff No.1 was real brother whereas plaintiff No.2 and proforma-defendant No.4 were the real sisters of said Gurbax Singh. During trial of the case, there had come on record sufficient and convincing evidence to establish the plea that they were real brother and sisters of said Gurbax Singh. Even this fact was also not denied by the learned counsel for the appellants at the time of arguments of this appeal.

17. Then it was the case of the respondents – herein (plaintiffs) that Gurbax Singh @ Chhotu expired about 20 days prior to the filing of instant suit. This suit as per the record was initially instituted on 14.9.1984. The decree in dispute Ex.P4 is dated 7.5.1984. In the light of the above plea of the respondents, said Gurbax Singh @ Chhotu might have expired in the last week of August, 1984. There is no dispute regarding his death. So he had died within a period of less than four months after the passing of the decree Ex.P4. Then it is also found recorded in the statement of PW1 – Ajmer Singh plaintiff that the land of Chhota Singh which is transferred in favour of defendant Nos.1 to 3, the same has been wrongly transferred. So as such the learned Appellate Court is held to be justified in declaring the decree in question Ex.P4 as null & void being the result of fraud etc.

POINT No.4

18. Learned counsel for the appellants has contended that in view of the provisions of Rule 3A of Order XXIII of CPC in case of any consent/compromise decree, no separate suit to challenge the same is maintainable. In this connection, he also submitted that in case of any consent/compromise decree, the remedy available to the parties to this

decree, if aggrieved from the decree, is to file an application before the Court by which decree in question has been passed in order to seek redressal of his/her grievance qua this decree. In support of his contention, he has also referred to following case laws:

- 1. *Pushpa Devi Bhagat (D) Th. LR. Smt. Sadhna Rai Versus Rajinder Singh and ors., 2006(3) R.C.R.(Civil) 479.***
- 2. *Smt. Shanti Devi (dead) represented by L.R. Versus Gian Chand, 2008(1) R.C.R.(Civil) 658.***
- 3. *Daljit Kaur and another Versus Muktar Steels Pvt. Ltd. and another, 2014(1)R.C.R.(Civil) 625***

19. In order to appreciate the above contention of learned counsel for the appellants, I deem it expedient to see the relevant part of provisions of Order XXIII of CPC and its Rule 3A is not to be read in isolation. Relevant part of provisions of Order XXIII, CPC, reads as under:

ORDER XXIII- WITHDRAWAL AND ADJUSTMENT OF SUITS

(1) Withdrawal of suit or abandonment of part of claim— (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

1A . When transposition of defendants as plaintiffs may be permitted.

XXXX

2. Limitation law not affected by first suit.

XXXX

3. Compromise of suit— Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation—An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule;

3A . Bar to suit— No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

3B . No agreement or compromise to be entered in a representative suit without leave of Court.

XXXX

(2) *Explanation.*

XXXX.

If the above provisions of Order 23, CPC, are to be read as a whole, then what does it imply is that the provisions of this order talk about the persons who were parties to the litigation in which the alleged consent/compromise decree had been passed. Provisions of Rule 3A of this order are to be read/considered in the light of wholesome provision of this order and not to treat the same in isolation.

Perusal of the above cited case laws as mentioned in Para No.18 of this judgment also indicates beyond any doubt that parties in these case laws were also the parties to the earlier litigation/suits in which the alleged consent/compromise decree had been passed.

But in the case in hand, respondents – herein (plaintiffs) were not the parties to the suit No.101 of 1984 in which alleged decree Ex.P4 had been passed. So as such they certainly had their own independent rights to challenge this decree on the grounds whichever were available to them other than the remedy as provided under the abovementioned provisions of Order 23, CPC. Resultantly, the principles laid down in ***Pushpa Devi's, Smt.Shanti Devi's and Daljit Kaur's*** cases (supra) cited in para No. 18 of this judgment cannot be thrust upon the case in hand.

Hence the above contention of learned counsel for the

appellants is declined. Respondents – herein (plaintiffs) and proforma-defendant No.4-Smt. Rajji who were Class II heirs of Gurbax Singh (since deceased) had a right to inherit his estate as per their respective share being his brother and sisters since it had come on the file that there was no Class I heir to inherit his estate after his death. Since an infringement had been caused to their said right on account of decree Ex.P4, so certainly they were vested with a right to challenge it and this point is accordingly decided in favour of the respondents.

20. The objections raised by learned counsel for the respondents that decree Ex.P4 was required to be compulsorily registered as per the provisions of Section 17 of the Indian Registration Act is held to be not tenable for the reason that beneficiary of this decree i.e. appellants – herein even otherwise were to inherit the land in dispute being the sons of Jung Singh, who was also a Class II heir, being the real brother of Gurbax Singh. Moreover there is no need to discuss this issue in any further detail since the decree in question Ex.P4 has been set aside being found outcome of fraud etc.

POINT No.3

21. From the above discussion, the picture which has emerged is that on the death of Gurbax Singh aforementioned, plaintiffs and proforma-defendant No.4 were entitled to inherit his estate to the extent of $\frac{3}{4}$ th share i.e. $\frac{1}{4}$ th share each being his real brother and sisters and remaining $\frac{1}{4}$ th was to go to the share of the appellants – herein (defendants No.1 to 3) being the sons of Jung Singh, who was also pre-deceased brother of said Gurbax Singh. So in this background, the learned Appellate Court was not justified to decree the suit for possession qua the entire suit land measuring 179

Kanals 10 Marlas in favour of respondents – herein (plaintiffs No.1 and 2 and proforma-defendant No.4). So the suit of the plaintiffs and proforma-defendant No.4 for joint possession by way of declaration to the extent of 3/4th share qua suit land is partly decreed. The impugned judgment and decree under appeal are also ordered to be modified accordingly as above held in this appeal. So this appeal stands partly accepted to the extent indicated above. Parties are left to bear their own costs.

Since the main appeal has been disposed of, the miscellaneous application, if any, also stands automatically disposed of as having been rendered infructuous.

(GURMIT RAM)
JUDGE

Dated:18.11.2016
Gaurav Sorot/Brij

1. Whether reportable? No / Yes
2. Whether speaking / reasoned? No / Yes