

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.1635 of 2009 (O&M)
Date of decision:02.12.2016

Surjit Kaur ... Appellant
Vs.

Harpal Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Inderjit Sharma, Advocate
for the appellant.

Mr. Arun Bansal, Advocate and
Mr. Kanhiya Soni, Advocate
for the respondents.

AMIT RAWAL J. (Oral)

Appellant-defendant No.1 is aggrieved of the judgments and decrees rendered by both the Courts below, whereby, the suit for permanent injunction at the instance of the respondent-plaintiffs, vide which she has been restrained from alienating any specific portion of the joint holding more than her share only and also from raising construction over the suit property and from changing its nature, has been partly decreed.

Mr. Inderjeet Sharma, learned counsel for appellant-defendant No.1 submits that as per the jamabandi Ex.P4, the property is in joint ownership, therefore, the injunction, as per the ratio decidendi culled out by the Hon'ble Full Bench of this Court in **Bhartu vs. Ram Sarup 1981 PLJ 204** reiterated by the Division Bench judgment of this Court in **Bachan Singh vs. Swaran Singh 2000(3) RCR (Civil) 70**, could not have been

granted. Remedy, if any, was to seek partition of the suit property. All these facts have not been taken into consideration by the Courts below. It is not a case of the respondent-plaintiffs that the injunction qua forcible interference and dispossession being in exclusive possession was sought. Had it been so, perhaps the suit would have been maintainable.

Per contra, Mr. Arun Bansal and Mr. Kanhiya Soni, learned counsels for the respondent-plaintiffs submits that the injunction has been continuous since 2008 and therefore, should not be disturbed. The party would seek the partition of the property and till then the arrangement as made by the Courts below be maintained and therefore, the suit was perfectly maintainable as by raising the construction, respondent No.1 would diminish the value of the property and thus, urges this Court for affirming the findings under challenge.

I have heard learned counsel for the parties and appraised the judgments and decrees of the Courts below as well as record and of the view that as per the jamabandi for the year 2000-01 (Ex.P4) under Column No.5, all the parties to the lis, particularly plaintiffs and defendant No.1 had been shown to be in joint possession. It is not the case of the respondent-plaintiffs that injunction was sought qua forcible interference and dispossession being in exclusive possession. The injunction sought is against the appellant/defendant which could not be granted, in view of the ratio decidendi culled out by this Court in the aforementioned judgments. Mere raising of construction would not also tantamount to ouster. The remedy, if any, is to seek partition of the suit property in the competent

Court of law. This aspect has not been taken care of by the Courts below.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is

thus overruled." [at paras 27 - 29]"

"27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil

Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

The judgments and decrees of the Courts below are set aside. Accordingly, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

December 02, 2016
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No