

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.1311 of 2010 (O&M)

Date of Decision: November 18, 2016

Balkar Singh & others

...Appellants

Versus

Ram Kumar & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Ms.Savita Rana, Advocate,
for the appellants.

Mr.Pritam Saini, Advocate,
for the respondents.

AMIT RAWAL, J.

The appellants, who are the legal heirs of defendant Sarwan Kumar, are aggrieved of the judgment and decree rendered by the Lower Appellate Court, whereby the suit of the respondent-plaintiffs has been decreed by granting following declaration, in essence the judgment and decree of the trial Court has been set-aside:-

“(i) Land measuring 71 kanals 7 marlas comprised in Khewat no.192, khatoni no.506, rect.No.11, killa no.22 (8-0), rect.no.19, Killa No.18 (7-12), 2 (8-0), 8(8-0), 13 (8-0), Rect.No.28 Killa No.11 (6-7), 16 (8-0), 17 (8-0), 18/1 (1-8), (Kittas 9), measuring 63 kls. 7 mls and land measuring 8 kanals comprised in Khewat no.39 khatoni no.98 to 135, Rect.No.17 killa 9 min (4-0), 12 min (4-0), which was purchased from Bishnu, 160/12594 share situated at Village Sirsala, Tehsil Thanesar, District Kurukshetra And

(ii) Land measuring 9 kanals 9 Mls.comprised in Khewat no.86, khatoni no.117, Rect.No.17, Killa no.8/2 (6-12) and 13

min (2-17), situated at Village Sakhraon, Tehsil Ambala, Distt.Ambala, total land in both the village measuring 80 Kls. 16 marlas along with all the houses and rights in abadi deh, Shamlat deh, and share in Shamlat deh, along with all other rights appurtenant thereto, of village Kaserla, Tehsil Thanesar.

Ms.Savita Rana, learned counsel for the appellant submits that Gainda Ram was the owner in possession of land measuring 80 kanals 16 marlas in village Sirsala, District Kurukshetra and 96 kanals 16 marlas in Village Sakhron, District Ambala. The respondent-plaintiffs instituted the suit on 11.6.2002 seeking declaration of the alleged writing dated 25.5.2001 on the ground that both the parties, who are litigating, are real brothers and co-sharers in the Village and, therefore, the parties had agreed that the land situated in village Sakhraon (Ambala) would fall to the share of the defendants and that of Village Sirsala (Kurukshetra) would go with the respondent-plaintiffs. In fact, the appellants never intended to partition the property in the manner and mode indicated in the agreement as the land at Kurukshetra is more valuable than the one at Ambala. The respondent-plaintiffs have failed to prove on record the documents/revenue record to show that the arrangement was continuing since long. The alleged admission of execution of the document would not result into consent of the parties. The alleged agreement cannot be said to be partition in view of the fact that a valuable land has fallen to the share of Amar Nath and having less value to the appellants. The trial Court dismissed the suit, but the Lower Appellate Court erroneously decreed the suit and, thus, urges this Court for setting-aside the judgment and decree of the Lower Appellate Court.

Mr.Pritam Saini, learned counsel for the respondent-plaintiffs,

while heavily relying upon the findings rendered by the Lower Appellate Court, submits that even if the khewat is joint, the oral partition reduced into writing can always be looked into for the purpose of relief sought in the plaint. After having appended his signatures on the agreement, the partition was done in the manner and mode indicated in the agreement. When the defendants did not agree for incorporation of the same in the revenue record, necessity arose to file the suit, aforementioned. The arrangement between the parties itself is a clincher/ pointer for effectively partition and, thus, urges this Court for affirming the findings.

I have heard the learned counsel for the parties, appraised the paper book and of the view that every co-owner even not in possession of the land unless and until other co-owners set up the proof of ouster, shall be owner of every inch of land. Once the khewat is joint in respect of both the villages, aforementioned, there was no occasion for the Lower Appellate Court to have granted the declaration on the basis of the agreement. The prayer in the suit is for declaration and not seeking for specific performance. The aforementioned view of mine is fortified from the judgment rendered by the Full Bench of this Court in **Ram Chander Versus Bhim Singh & others, 2008 (3) R.C.R. (Civil) 685**, wherein it has been held that the revenue record reflected on the existing date has to be seen. The body of the owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate.

The parentage of both the parties is not in dispute and on demise of Gainda Ram, they would be branded as co-sharers/owners. The suit would have been succeeded had the alternative relief of partition had

been sought, but the respondent-plaintiffs took the risk of seeking declaration by relying upon the writing, aforementioned.

I am of the view that the Lower Appellate Court has committed illegality and perversity in not appreciating the legal position, much less revenue record. The writing cannot be fastened upon the appellants once they were not agreed to the same. No sane person would give his share of a valuable land in the manner and mode noticed above.

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.

For the foregoing reasons, the judgment and decree of the Lower Appellate Court is set-aside and that of the trial Court is restored. The suit is dismissed.

Appeal stands allowed.

November 18, 2016
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No