

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

RSA No.3205 of 2010 (O&M)

Date of Decision.29.08.2016

Jasbir Singh and others

.....Appellants

Vs.

Mewa Singh and others

.....Respondents

Present: Mr. Arun Jain, Senior Advocate with
Mr. Arnav Sood, Advocate
for the appellants.

Mr. J.S. Cooner, Advocate
for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

-:-

AMIT RAWAL J.

The appellants-defendants are aggrieved of the dismissal of the suit claiming possession on the premise that Sher Kaur (since deceased) now represented by the Lrs-appellants, sought possession of 1/3rd share i.e. 99 kanals 3 marlas of the suit property situated within revenue estate of Village Mohra, Tehsil and District Ambala and as well as for setting aside the judgment and decree dated 06.02.1996, Ex.P-10 and judgment and decree dated 22.01.1996, Ex.P12 passed in Civil Suit No.86 of 1996 and Civil Suit No.1064 of 1995 respectively, unregistered Will dated 01.03.1999 and mutation effected thereupon, much less, the subsequent entries in the revenue record on the ground that Sher Kaur was 1/3rd shareholder in the property of his brother, Sher Singh, by virtue of family settlement because Sher Singh and Sher Kaur inherited the property from

their common ancestor, Ujjagar Singh. Sher Singh had no son but was having only two daughters namely Nasib Kaur and Chint Kaur. He gave 1/3rd share to the plaintiff-Sher Kaur and 1/3rd share each to his daughters vide judgment and decree dated 25.05.1991, Ex.P5, passed in Civil No.167 of 1991 titled as “Sher Kaur Vs. Sher Singh.”

Mr. Arun Jain, learned Senior Advocate assisted by Mr. Arnav Sood, Advocate appearing for the appellants submitted that in the aforementioned suit, Mr. Randhir Singh, Advocate appeared for the plaintiff-Sher Kaur and Mr. Om Parkash, Advocate appeared for Sher Singh-defendant. The entire case revolves around the documentary evidence. Sher Singh at the back of Sher Kaur instituted a suit bearing No.1064 on 21.12.1995 and somebody else impersonated as Sher Kaur and the aforementioned suit was decreed vide judgment and decree dated 22.01.1996 whereby the judgment and decree dated 25.05.1991 was set aside, in essence, 1/3rd share, which Sher Singh had given to Sher Kaur, reverted back to him. In the aforementioned suit i.e. Suit No.1064 of 1995, Om Parkash, Advocate, who had earlier appeared for Sher Singh in Civil Suit No.167 of 1991, appeared for Sher Kaur and one Rameshwar Dass, Advocate for Sher Singh. Without wastage of any further time, another suit filed against him by Mewa Singh son of Bachan Singh, husband of Nasib Kaur daughter of Sher Singh and by virtue of the same, aforementioned 1/3rd share was decreed in favour of Mewa Singh and intriguingly, Randhir Singh Advocate, who had appeared for Sher Kaur in the suit resulting into judgment and decree dated 25.05.1991, appeared for Mewa Singh and Rameshwar Dass, Advocate who had appeared for Sher Singh in Civil Suit No.1064 of 1995 that resulted into judgment and decree dated 22.01.1996,

appeared for him again. All these facts and evidence has been brought on record. Even the document expert, Devendra Prasad had been examined as PW2. Sher Kaur also appeared in the witness box as PW1 and stated that she never appeared or made statement in the court admitting the claim of Sher Singh and for proving this fact, the thumb impression on the statement dated 12.01.1996 given before the Court in Civil Suit No.1064 of 1995 was examined by the expert, who submitted his report dated 29.03.2009 stating that thumb impression Mark X-1 on the statement dated 12.01.1996 is doubly affixed and not clear to determine the identity or otherwise with respect to the standard thumb impressions marked S-1 to S-4. On the contrary, the defendants did not produce any evidence to suggest that Sher Kaur appeared in the Court and suffered a statement on 12.01.996. The factum of appearance of Advocates by Sher Singh itself results into a fraud having been played upon Sher Kaur. The defendants had summoned Om Parkash, Advocate but the report came that he had left the practice but again summons were sent and the report came that he was not well. In fact, he refrained himself from appearing in the Court or was escaping to be examined and cross-examined by not appearing before the Court. The defendants could not produce any evidence which could suggest that the plaintiff-Sher Kaur actually appeared in the Court to make the statement on 12.01.1996. In these circumstances, the Courts below ought to have drawn adverse inference against the defendants, thus, urges this Court for setting aside the judgments and decrees passed by the Courts below by determining the following substantial questions of law:-

- “(i) Whether the impugned judgments and decrees passed by the Courts below are perverse to evidence available on file?

(ii) Whether the presumption of the presence of the plaintiff Sher Kaur in Court without any evidence for the side of the defendants can be raised when the plaintiff has produced the affirmative evidence of non-appearance in the court?

(iii) Whether the onus of proving that the plaintiff appeared in the Court and made statement dated 12.01.1996 was upon the defendants when the plaintiff categorically stated and proved by document expert that she never appeared in the Court?

On the contrary, Mr. J.S. Cooner, learned counsel appearing for the respondents-defendants submitted that the judgment and decree dated 25.05.1995 was fraudulently obtained by Sher Kaur against Sher Singh. It is a matter of co-incidence that the advocate who appeared for Sher Singh in judgment and decree dated 25.05.1991, had appeared for Sher Kaur in judgment and decree dated 22.01.1996. The respondents-defendants have intentionally not got the vakalatnama and other documents bearing the thumb impression of Sher kaur examined as they actually bore her thumb impression. The defendants have brought on record documents Ex.D1 to D19 and examined various witnesses to prove their case, in essence, the appellants-plaintiffs filed to discharge the onus and rightly so, the Courts below have drawn the presumption against the appellants-plaintiffs. The plaintiffs have failed to prove the nature of the property being ancestral one. The ingredients of fraud or impersonation are absent. The mutation had been based on judgment and decree dated 06.02.1996 and Will dated 01.03.1999, Ex.D1, thus, urges this Court for confirming the findings rendered by the Courts below.

In rebuttal, Mr. Jain, learned senior counsel appearing for the

appellants relied upon the judgment of Hon'ble Supreme Court in **Smt. Badami (deceased) by her LR Vs. Bhali 2013(1) RCR (Civil) 821** to contend that there is no limitation where the decree is obtained by fraud and has also relied upon the judgment of the Hon'ble Supreme Court in **Santosh Vs. Jagat Ram and another 2010(2) RCR (Civil) 207** to contend that where common lawyers appear for plaintiff and for adverse party, the element of fraud cannot be ruled out.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Jain, learned Senior Counsel appearing for the appellants and judgments and decrees passed by both the Courts below are liable to be set aside.

As noticed above, Om Parkash, Advocate appeared for Sher Singh in judgment and decree dated 25.05.1991 passed in Civil Suit No.167 of 1991 and the same very lawyer appeared for Sher Kaur in judgment and decree dated 22.01.1996 passed in Civil Suit No.1064 of 1995 which has been challenged and interestingly, Rameshwar Dass, Advocate who had appeared for Sher Singh in the aforementioned suit i.e. Civil Suit No.1064 of 1995 for Sher Kaur, had appeared for Sher Singh in the judgment and decree dated 06.02.1996 passed in Civil Suit No.86 of 1996 and Randhir Singh, Advocate who had appeared for Sher Kaur in judgment and decree dated 25.05.1991 by which she got the property, had appeared for Mewa Singh, husband of Nasib Kaur daughter of Sher Singh, in judgment and decree dated 06.02.1996 passed in Civil Suit No.86 of 1996. This itself is a striking fraud played upon Sher Kaur by Sher Singh. Once Sher Kaur had already got executed a decree dated 25.05.1991 and decree remained valid almost for five years, no person has come forward for challenging the same

till the suit filed bearing No.1064 of 1996 and Sher Kaur, if at all, had given a share, she would not have conceded the claim as has been projected by the defendants. In fact, Sher Kaur had not been served and she in her statement given in the earlier round of litigation stated that Sher Singh had got certain papers signed from her and perhaps those documents have been used in Civil Suit No.1064 of 1995. There is another aspect of the matter. Though it was a duty cast upon the plaintiffs to summon Om Parkash and cross-examine him to ascertain the truth but such exercise could have also been done by the defendants. The report with regard to his service that he was not well and had left practice shows that he does not come forward for suffering a statement perhaps he was afraid of the wrath of cross-examination. In my view, the Courts below ought to have drawn the adverse inference in view of the provisions of Section 114 of the Indian Evidence Act. This fact has totally escaped the notice of the Courts below, thus, in my view, committed perversity and falsity.

No doubt, the suit had been filed on 25.10.1999 but the fact remains that the Limitation Act would not apply when the decree under challenge has been obtained by fraud, in view of the ratio decidendi culled out in the judgment of Supreme Court in Smt. Badami's case (supra). Similar was the position regarding engaging common lawyers as held in Santosh's case (supra). Sher Singh and Sher Kaur being brother and sister had common ancestor, Ujjagar Singh and he was owner of land measuring 297 kanals 9 marlas. Sher Singh did not have any son and survived by two daughters. So, 1/3rd share, Sher Singh gave to Sher Kaur, which she was entitled in law as Ujjagar Singh had died intestate. She could not have given back that share to Sher Singh in the manner and mode as indicated

above and the act of Sher Singh in passing of the title to Mewa Singh in undue haste is also a pointer of fraud and cannot go unnoticed.

All these facts, in my view, were required to be pondered upon by the Courts below. For the foregoing reasons, I am of the view that judgments and decrees passed by the Courts below are not sustainable in the eye of law and the substantial questions of law as determined above are answered in favour of the appellants-plaintiffs and against the respondents-defendants. The suit of the plaintiffs is accordingly decreed and the second appeal is allowed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

August 29, 2016
Pankaj*

Whether speaking/reasoned Yes

Whether reportable No