

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

RSA No.4901 of 2010 (O&M)
Date of decision : 25.02.2016

Manohar Lal and ors.

(deceased through LRs)

...Appellants

Versus

Ram Dai and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

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

Present: Mr. M.K. Mittal, Advocate for the appellants.

Mr. Jai Vir Yadav, Advocate for respondent Nos.2 and 3.

Mr. Akshay Kumar Goel, Advocate
for respondent Nos.13, 14, 17, 18, 27, 38, 39, 41 to 44, 54, 57,
58, 64 to 68, 79 to 81, 84, 85, 88, 91 to 95, 100, 102, 105, 106,
112 to 115, 117, 119, 120, 122 and 123.

Mr. Ashwani Gaur, Advocate for respondent Nos.23 to 26.

AMIT RAWAL, J. (Oral)

CM No.14539-C of 2010

For the reasons stated in the application, which is duly supported by an affidavit, delay of 168 days in filing the present appeal is condoned.

Application is allowed.

Main case

The appellant-defendants Nos.11, 12, 13, 14, 81, 101, 102, 121 who were ex parte before the trial Court and the lower Appellate Court have challenged the judgment and decree rendered by the lower Appellate Court, whereby suit for separate possession by way of partition, has been decreed in favour of respondent-plaintiff.

Mr. M.K. Mittal, learned counsel appearing on behalf of appellants submits, that no doubt that defendants were ex parte, but for proving the case by leading direct and cogent evidence', much less, discharging the onus as per Section 101 of Indian Evidence Act, the plaintiff has to stand on his own legs. Lalji was the owner of the land measuring 69 kanals 2 marlas which was inherited by two sons Mitter Sain and Hira Singh. Mitter Sain had one wife namely Ram Dai-plaintiff and two sons Randhir and Satpal-defendant Nos.1 and 2, whereas Hira Singh had another wife Satri-defendant No.6 and defendant Nos.3 to 10 are the children from the loins of Hira Singh and Sarti. During the pendency of the suit, the application under Order 1 Rule 8 of the Code of Civil procedure was filed to treat the suit in representative capacity but there is no order on the said application and the trial Court declined the suit on two grounds, that property as per the site plan and jamabandi was agricultural in nature and, therefore, in view of provision of Section 158 of Punjab Land Revenue Act, Civil Court did not have jurisdiction and no evidence had been led on behalf of plaintiff to show their possession. Ram Dai during the pendency of the suit died. Judgment and decree of the trial Court was assailed by Satpal-

defendant No.2 being the LR's of Ram Dai. The lower Appellate erroneously dispensed with the service of all the defendants, whereas notice should have been sent and had the opportunity be given, the appellant could have defended the appeal as they were not aggrieved of the judgment and decree of the trial Court. He further submits that decree does not specify the share of each and every co-owners and, therefore, there is inherent defect in it and also not sustainable in the eyes of law and urges to this Court to formulate substantial question of law.

Mr. Jai Vir Yadav, learned counsel appearing on behalf of respondent Nos.1 and 2 submits that as per the documentary evidence brought on record by way of additional evidence, nature of the land was gair mumkin and while taking into consideration the aforementioned evidence and as well as case law on this point, lower Appellate Court set aside the finding of the trial Court holding that Civil Court had jurisdiction vis-a-vis the claim of the partition and separate possession. The original co-owners i.e. defendant Nos.3 to 10 admitted the share of Ram Dai to the extent of 1/6th share. In view of such position, there was no occasion for the trial Court to dismiss the suit and rightly so, the lower Appellate Court has decreed the suit. He further submits that Munadi was effected upon the present appellants but despite same, nobody had put in appearance.

Mr. Akshay Kumar Goel, & Mr. Ashwani Gaur, learned counsels appearing on behalf of proforma defendants supports the arguments raised by Mr. Mittal and urges to this Court that judgment and decree of the lower Appellate Court be set aside.

I have heard learned counsel for the parties and appraised the

paper book.

Vis-a-vis the dispensation of service upon the appellants before the lower Appellate Court, it is settled law that as per the judgment rendered by Full Bench in 1988(2) PLR 138 Mohan Masih Vs. Bashiro and ors. and as well as provision of Order 41 Rule 14, Sub-Rule 4, even lower Appellate Court has a power to dispense with the service in case defendants are proceeded ex parte. Once, contesting defendants had admitted the claim of the plaintiff-Ram Dai as 1/6th share, there was no occasion for Courts below to embark upon a path to ascertain and determine the share of other co-owners. The additional evidence brought on record particularly, Ex.P70, Khasra Girdawri, for September 2003 and March 2004, show the nature of the land as Gair Mumkin i.e. non-agricultural. It is settled law that where construction has been raised on the agricultural land, then the Civil Court would have jurisdiction to grant the decree vis-a-vis partition of the property, much less, separate possession. Khasra Girdwari also showed the possession of the property in favour of respondent-plaintiff, defendant No.2. By noticing the aforementioned fact, lower Appellate Court granted injunction restraining the adverse parties not to interfere into the possession. On going through the operative part of the judgment rendered by the lower Appellate Court, I am of the view that it cannot be construed to be composite decree and shall be construed as preliminary decree.

Keeping in view the aforementioned facts and circumstances, I am of the view that there is no illegality and perversity in the judgment rendered by the lower Appellate Court. Judgment shall be construed as preliminary decree. Liberty is given to the parties to apply for final decree,

in accordance with law.

With the aforementioned observations, judgment and decree of the lower Appellate Court is upheld.

Accordingly, appeal stands dismissed.

25.02.2016

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**(AMIT RAWAL)
JUDGE**