

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

RSA No.2632 of 2011 (O&M)

Date of Decision.22.11.2016

Ami Lal and others

.....Appellants

Vs

Ram Kumar and others

.....Respondents

Present: Mr. Akshay Kumar Goel, Advocate
for the appellants.

Mr. Jatin Hans, Advocate
for the respondent Nos.1 to 9.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

The appellants-defendants are in regular second appeal against the judgment and decree rendered by both the Courts below whereby the suit for declaration to the effect that the land comprised in Khewat No.375, Khatoni No.523 and 524 Kitte 29 total measuring 123 kanals 10 marlas as per the jamabandi for the year 1998-99 situated at village Devrala Tehsil Tosham District Bhiwani in which plaintiff Nos.1 to 9 are owners in possession to the extent of 315/630 share, plaintiffs No.10 to 15 are owners in possession to the extent of 57/630 share in equal share, plaintiffs No.16 to 22 are owners in possession to the extent of 57/630 share in equal share, plaintiff No.23 is owner in possession to the extent of 57/630 share, plaintiffs No.24 to 29 and pro forma defendant No.21 Balbir are owners in possession to the extent of 57/630 share in equal share and plaintiffs No.30 to 35 are owners in possession to the extent of 15/630 share in equal share pro forma defendants No.12 to 14 are owners in possession to the extent of 171/3150 share in equal share, pro forma defendant Nos.15 to 20 are owners

in possession of 57/3150 share in equal share and real defendant No.11 is owner in possession of 57/3150 share, pro forma defendant Nos.22 to 24 are owners in possession to the extent of 9/630 share in equal share, pro forma defendants no.25 to 28 are owners in possession to the extent of 3/630 share in equal share and pro forma defendants No.29 to 30 are owners in possession to the extent of 3/630 share in equal share and defendants No.1 to 10 and legal representatives of defendant No.1- Heera son of Roopla son of Nanka resident of Devrala has no concern whatsoever with the above said land and challenge to the mutation No.2175 dated 10.03.1995 and sale deed dated 14.2.1995 regarding the total land measuring 123 kanals 10 marlas to the extent of 1/3rd share i.e. 41 kanals 3 marlas being illegal, null and void and not binding upon the rights to the plaintiff and also seeking prohibitory injunction against the defendants, has been decreed.

Mr. Akshay Goel, learned counsel appearing for the appellants submits that the declaration aforementioned was sought by the plaintiffs on the ground that they have common ancestors namely Nanga and the appellants Nos.1 to 3 and pro forma defendants No.2, 3, 4, 6 to 10 had no concern with the deceased Heera son of Rupla son of Nanga and therefore, not entitled to succeed, much less, concern with the plaintiffs as the defendant no.11 was totally stranger because Heera son of Rupla son of Nanga died issueless.

He further submits that the Courts below have committed illegality and perversity in decreeing the suit filed by the respondents whereby essentially the sale deed dated 14.02.1995 challenged by filing suit in 2001 was barred by limitation, for, Balbir Singh pro forma defendant No.21 in the present suit earlier instituted a suit in the year 1995. In that

suit, defendant Nos.12 to 17 are arrayed as plaintiffs No.24 to 29 in the present suit and similarly defendant Nos.18 to 23 are plaintiff Nos.10 to 15, defendant Nos.24 to 26 are proforma defendant Nos.12 to 14, defendant Nos.28 to 34 are plaintiff Nos.16 to 22, defendant No.35 is plaintiff No.23 i.e. legal representatives of Gora, defendant Nos.36 is plaintiff Nos.30 to 35 being legal representatives of Manhi, defendant No.37 is pro forma defendant Nos.25 to 28 i.e. sons and daughter of Ant Ram, defendant Nos.38 and 39 are pro forma defendant Nos.22 and 23 and defendant Nos.40 is pro forma defendant Nos.29 and 30 i.e. legal representatives of Kundan and defendant No. 41 is plaintiff Nos.1 to 9 i.e. legal representatives of Ganpat.

The aforementioned suit was compromised and the dismissed as withdrawn on 26.03.2001 and following order was passed, which has been proved as Ex.D3:-

“Present: Plaintiff Balbir in person with Shri D.D. Aggarwal, Advocate.

Shri R.P. Jain, Advocate for defendant Nos.1 to 11, 24 and 25.

Shri G.D. Sharma, Advocate for defendant Nos.12, 14, 15, 29, 17 to 23, 30, 31, 33 and 34.

Defendant Nos.13, 16, 26 to 28, 36 to 41 ex parte.

Plaintiff had made a statement to the effect that he does not want to proceed with the case any further and withdraws the same. His statement recorded separately. In view of the statement, the present suit is hereby dismissed as withdrawn. File be consigned to record room after due compliance.

Announced in the open court.

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Dated:26.3.2001

*Civil Judge (Junior Division)
Bhiwani/26.3.2001”*

The present suit has been filed in the year 2001 and therefore, the suit was ex facie barred by limitation as the factum of the sale deed was in the knowledge of the plaintiffs who were party in the earlier instituted

suit. The plaintiffs cannot take the benefit of provisions of Article 58 or 59 of the Limitation Act.

He further submits that the plaintiffs have failed to prove on record the fact that Heera was having 1/3rd share in the property died issueless about 65-70 years ago. The onus was heavily upon the plaintiffs which they failed to discharge. The Courts below have ignored the admission of fact made by Balir Singh, pro forma defendant No.21 in para 7 of the earlier suit bearing No.767 of 1995 wherein it was alleged that Rupla had son Heera who did not marry and he died many years ago. The defendant Nos.1 to 11 filed the written statement, as has been filed in the instant suit, that Heera married to Gora and had two sons and four daughters. Heera died on 20.04.1965 and his wife died on 7.5.1986. Even his sons Megh Raj and Ram Dutt died on 5.3.1996 and in the year 1992 respectively. The mutation of inheritance was got sanctioned on 01.11.1995 at village Jodhpuria, Tehsil Ratia, District Sirsa, prior to the filing of the suit. Balbir and other pro forma defendants knowing about their admission made about Rupla and Heera in para 7 of the earlier suit got dismissed as withdrawn that suit and filed the fresh instant suit concocting a new story against defendant Nos.1 to 11.

The Courts below have further erred in deciding the issue No.3 regarding the suit being barred by limitation as suit was filed after expiry of six years, thus, urges this Court for setting aside the judgments and decrees under challenge.

Per contra, Mr. Jatin Hans learned counsel appearing for respondent Nos.1 to 9 submits that there is categorical admission in the written statement that Heera died issueless. He submits that Heera son of

Rupla son of Nanga was real person and the defendants are basing their claim on the premise that Heera son of Rupla son of Rudha and some unknown person in whose name the mutation had been entered. In fact, the mutation had been sanctioned in collusion with one Chander Bhan. 1/3rd share of the Heera was sold to Chander Bhan by the defendants who got the mutation bearing No.2175 sanctioned in his favour and therefore, the subsequent mutation was incorrect and void in law. Both the courts below have concurrently decreed the suit which cannot be interfered unless and until there is gross illegality and perversity.

It has been proved on record that Heera died issueless rather the sale deed was challenged. The factum of Ganpat who had died and earlier Balbir Singh filed the suit has been admitted by the defendants. This Court, during the course of the hearing called upon the counsel to refer to record of the trial court as to whether death of Ganpat in the present suit had been proved, the answer was in affirmative, for, in the Courts below showed the death certificate to contend that it carried presumption of truth being a public document, thus, urges this Court for confirming the judgments and decrees under challenge.

I have heard learned counsel for the parties and appraised the paper book. The pith and substance/foundation of the suit had been that Ganpat had died at the time when Rameshwar, Satbir, Chatter Singh, Karanwati and Saru were impleaded, as Bhura son of Dedha had died. Even Ganpat, father of plaintiff Nos.1 to 5 had also died. In the absence of evidence of Ganpat, it can not be believed that he was dead on that day and the earlier suit No.767 of 1995 had been disposed of as noticed above on the basis of compromise. There was a categoric admission of Balbir Singh

in the previous suit that Rupla was having one son Heera though it was pleaded that Heera never married and expired many years ago but when the appellants i.e. defendant Nos.1 to 11 had filed written statement contending marriage of Heera with Gora and his children, being afraid that the truth would not surface got the suit dismissed as withdrawn. The factum of sale deed was in the knowledge of the plaintiffs, being legal representatives of Ganpat arrayed as defendant No.41 in the previous suit and various other plaintiffs, as indicated above. Despite that fact, plaintiffs did not continue with the earlier suit but chose to challenge the sale deed in the present suit.

In my view, sale deed regarding the total land measuring 123 kanals 10 marlas to the extent of 1/3rd share i.e. 41 kanals 3 marlas is dated 14.02.1995 and the suit filed in the year 2001 challenging the same was hopelessly barred by Article 59 of the Limitation Act as the plaintiffs have miserably failed to prove ingredient of the same. For the sake of brevity, Article 59 reads as under:-

59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
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All these facts have not been taken care, much less, noticed by the Courts below, thus, there is gross illegality and perversity.

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 findings rendered by both the Courts below are perverse and fallacious, much less, not based upon the correct appreciation of fact and law. The judgments and decrees under challenge are set aside. The second appeal is allowed and the suit of the plaintiffs is consequently dismissed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

November 22, 2016
Pankaj*

Whether speaking/reasoned Yes

Whether reportable No