

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

RSA No.2564 of 2013

Date of Decision.30.09.2016

Tara Singh son of Banta Singh

.....Appellant

Vs.

Bhajan Singh

.....Respondent

Present: Mr. R.S. Bajaj, Advocate
for the appellant.

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?

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AMIT RAWAL J. (ORAL)

The appellant-plaintiff is aggrieved of the dismissal of the suit seeking decree for possession of land measuring 2 kanals 6 marlas comprises in K/K No.203/235 and Khasra No.227/24/2(2-4), 152(0-2), chahi and gair mumkin in ruri on the premise that he is owner of the property and in the year 1997, defendant started interfering in his peaceful possession. Accordingly, the plaintiff filed the civil suit bearing No.146 of 1997 in the court of Additional Civil Judge (SD) Nakodar against the defendant on 23.05.1997 and the Court was pleased to issue temporary injunction but during the pendency of the suit, defendant was successful in taking forcible possession of the suit property on 16.6.1997. The aforementioned suit was decreed in favour of the plaintiff on 23.12.2000. It is in this backdrop of the matter, the suit for possession was filed but the Courts below have dismissed the suit on the ground that it was hit by doctrine akin to res judicata and nothing prevented the appellant-plaintiff to

convert the suit for possession.

Mr. R.S. Bajaj, learned counsel appearing for the appellant-plaintiff submits that for deciding the controversy with regard to the provisions of Section 11 of the Civil Procedure Code or Order 2 Rule 2 CPC, the pleadings of the previous suit has to be placed on record. The judgment and decree would not suffice to the purpose. In the earlier suit, there was no adjudication on merits regarding the relief of possession nor there was any legal bar to the subsequent suit. While deciding the suit, the Court below returned the finding that the appellant-plaintiff was real owner of the suit property and the defendant was restrained from interfering in the peaceful and lawful possession over the suit land but the Courts below have not looked into the aforementioned finding and dismissed the suit on the ground of res judicata. Both the Courts below have not looked into the fact that the aforementioned decree was never assailed by the other side, thus, urges this Court for setting aside the judgments and decrees under challenge by formulating the substantial questions of law as drawn in the memorandum of appeal.

Notice of motion was issued on 19.02.2015 and as per the office report on 05.08.2015, notice issued to the respondent has been received back duly served. No one had put in appearance and the matter was listed for 11.01.2016. After that the matter was adjourned 17.05.2016 and then 30.09.2016. Today also there is no representation on behalf of the respondent. Accordingly, I proceed to decide the appeal.

I have heard the counsel for the appellant and appraised the paper book. I am in full agreement with the submission of Mr. Bajaj, learned counsel appearing for the appellant-plaintiff, as the Courts below

failed to examine the judgments and decrees, Ex.P2 and P3. Judgment and decree dated 23.12.2000, clearly reveals that the injunction was granted whereby the respondent was restrained from interfering into the peaceful and lawful possession of the suit property. Once he had taken the forcible possession, the remedy for the appellant was to file the suit for possession as there was admitted violation of the ad interim order, much less, of the decree. Even the defence taken by the defendant in the previous suit had not seen the light of the day. In my view, there was no discussion with regard to possession. As per record, it is found that the appellant-plaintiff was in possession and in this backdrop of the matter, the Court below passed the injunction decree but once it has been specifically averred that the respondent had dispossessed the plaintiff on 16.06.1997, he cannot be precluded to take possession being owner of the property. In case the impugned judgments and decrees are not set aside, the respondent would continue to be in illegal possession of the property in dispute. This fact could not have been ignored by the Courts below, much less, by this Court.

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.

I am of the view that the factum of the illegal possession has been proved upto the hilt and therefore, there was no occasion for the Courts below to decline the relief, sought for, in the plaint. Accordingly, the judgments and decrees passed by the Courts below are set aside and the suit of the appellant-plaintiff is decreed. Resultantly, the second appeal is allowed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

September 30, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No