

In the High Court of Punjab and Haryana at Chandigarh

**R.S.A. No. 5305 of 2015 (O&M)
Date of Decision: January 29, 2016**

Bihari Lal (deceased) through his LRs and others

... Appellants

Versus

Bachan Singh (deceased) through his LRs and others

... Respondents

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

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

Present: Mr. Parminder Singh, Advocate,
for the appellants.

Paramjeet Singh Dhaliwal, J. (Oral)

CM-12643-C-2015

Having heard learned counsel for the appellants and for the reasons recorded in the civil misc. application, same is allowed. Delay of 54 days in filing the appeal is condoned.

RSA No. 5305 of 2015

This regular second appeal has been preferred by the appellants-plaintiffs against the judgment and decree dated 24.08.2011 passed by learned Civil Judge (Senior Division), Kapurthala, whereby suit filed by the appellants/plaintiffs for declaration, possession and permanent injunction has been dismissed, as well as, against the judgment and decree

dated 24.12.2014 passed by learned District Judge, Kapurthala, whereby appeal preferred by the appellants/plaintiffs has also been dismissed.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, brief facts relevant for disposal of this second appeal are that plaintiffs filed a suit for declaration, possession and permanent injunction on the grounds that plaintiffs are residents of Ambala Cantt. and are sons of late Munshi Ram. Said Munshi Ram used to reside in H.No. 1288, Dina Ki Mandi, Ambala. Munshi Ram and his brother namely Chuni Lal, Ayodhya Parshad and Kundan Lal were owners of land about 66 Kanals, which was allotted to them by the Government. Said Chuni Lal never resided at Nainital, Ayodhya Parshad never resided at Ambala Cantt or Yamuna Nagar, Kundan Lal never resided at Nainital or Yamuna Nagar and similarly Munshi Ram never resided at Yamuna Nagar or Nainital, at any stage. Most of sons and daughters of Munshi Ram were born at House No.1288, Dina Ki Mandi, Ambala Cantt. One of the brothers of the plaintiffs, namely Subhash Chander had expired. Plaintiff-Bihari who remained student of C.B School at Ambala Cantt and later on S.D.High School at Ambala Cantt has been working at Ambala Cantt. It was further alleged that about 40K-17M land remained with the above said persons, but due to the circumstances prevalent in Punjab, they visited Punjab oftenly and never resided in the village nor they ever agreed to sell any portion of the said land to Bachan Singh and other defendants. About two months ago (before

filing of the suit) the plaintiffs came to know that land of their father and their uncles etc. had been got transferred in their names by Bachan Singh etc. The plaintiffs visited the court and after proper inquiry, they came to know that Bachan Singh and others had filed a suit for 11K-17M of land and got it decreed, showing the address of Munshi Ram at Yamuna Nagar, Chuni Lal at Nainital, though they never resided there. Even publication was effected against Munshi Ram on wrong address. The matter was reported to Sub Registrar, Kapurthala, Lambardar as well as Sarpanch of the village. It was further alleged that said judgment and decree being based upon fraud and misrepresentation, is not binding on the right, title or interest of the plaintiffs or against their father and uncles etc. It was further alleged that as the defendants are in unlawful possession of the property in dispute and are using the same without any right, title or interest, so now they are also liable to pay mense profits at market price. The defendants were asked to admit the claim of the plaintiffs, but to no effect. Hence suit was filed.

Upon notice, legal heirs of defendants appeared and filed written statement, took legal objections that the plaintiffs have no cause of action; locus standi; maintainability, jurisdiction etc. It was alleged that no allotment order of the property in dispute has been placed on record to show that Munshi Ram etc. were allotted the land. Even no Khasra number or Khewat number has been mentioned in the pleadings by the plaintiffs. Legal representatives of the defendants are the absolute owners of the property in dispute, on the basis of court decree dated 31.12.1964 and sale deed, and the plaintiffs are having no concern with the suit land.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- “1. *Whether the judgment and decree dated 31.12.1964 passed by the court of Sh. Kuljeet Singh, the then Sub Judge 1st Class, Kapurthala in case titled as “Bachan etc. Vs. Chuni Lal etc.” is illegal and not binding on the rights of plaintiffs?OPP.*
2. *Whether the plaintiffs are entitled for declaration as prayed for?OPP.*
3. *Whether the plaintiffs are entitled to mense profits, if so at what rate?OPP.*
4. *Whether plaintiffs are entitled to permanent injunction as prayed for?OPP.*
5. *Whether the suit is within limitation?OPP.*
6. *Whether the suit is not maintainable?OPD.*
7. *Whether this court has jurisdiction to entertain and try the present suit?OPP.*
8. *Whether plaintiffs have no locus standi and cause of action to file the present suit?OPD.*
9. *Whether suit is properly valued for the purposes of court fee and jurisdiction?OPP.*
10. *Relief.”*

The Court of first instance, after perusal of the evidence led by the parties, dismissed the suit vide judgment and decree dated 24.08.211. Against that, plaintiffs preferred an appeal, which has also been dismissed by the lower appellate Court vide judgment and decree dated 24.12.2014. Hence, this second appeal.

I have heard learned counsel for the appellants.

Learned counsel for the appellants has submitted that the following substantial questions of law formulated in para no. 11 of grounds

of appeal, arise for consideration in this second appeal:-

- “i) *Whether the finding of both the courts blow in perversity of the oral as well as documentary evidence is ever sustainable in the eyes of law?*
- ii) *Whether part of evidence beyond pleading of the defendant, can set a ground to non-suited the plaintiff/appellant and finding to this aspect is ever sustainable in the eyes of law?*
- iii) *Whether by virtue of section 90/91 of the Evidence Act, the documentary evidence may be prevail and the finding of both the courts below is ever sustainable in the eyes of law?*
- iv) *Whether without any pre-existing right, the collusive decree for want of registration is ever sustainable in the eyes of law?*
- v) *Whether the alleged execution of sale deed without the authority and right of the vendor has ever pass out the better right and title in favour of the defendant and in this manner whether the alleged sale deed is liable to be ignored, in the eyes of law?”*

Learned counsel for the appellants contended that the impugned judgments and decrees passed by both the Courts below are the result of misreading of evidence on record. The judgments and decrees of both the Courts below are based on conjectures and surmises. Therefore, the impugned judgments and decrees are liable to be set aside.

I have considered the contentions raised by learned counsel for the appellants and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded findings of fact with regard to the existence of passage. The Court of first instance recorded the following findings:-

“10. I have given thoughtful consideration to the respective submissions of both the sides and gone through the documents

on the file. In this case the decree dated 31.12.1964 having been passed in case titled as Bachan Singh etc Vs Munshi Ram etc is under challenge and the basic plea of the plaintiff is that the said decree was obtained by the said Bachan Singh etc by playing fraud with the court at that time. For this purpose the plaintiffs were bound to lead sufficient and substantive evidence to prove the factum of alleged fraud. The plaintiffs examined seven witnesses in this regard. PW3 Smt. Krishna Devi in her examination in chief has claimed that Munshi Ram was her tenant at Ambala Cantt but she subsequently did not appear for her cross examination. It is settled law that when a person examined in chief and did not make subsequently available for her cross examination then the testimony led by her in examination in chief is of no relevance and the same is liable to be thrown aside. PW7 Bal Krishan one of the plaintiffs was bound to lead substantive evidence to prove the factum of fraud with the Court as alleged at the time of passing of decree dated 31.12.1964 but in his testimony mere recital regarding the fraud played upon them is not proved until and unless the same is supported by sufficient and substantive evidence on record and since Smt.Krishna Devi failed to appear in the witness box for her cross examination so her testimony is of no relevance. For want of corroborative evidence on behalf of the plaintiff, they have failed to prove that Munshi Ram was continuously residing at Ambala Cantt and in this way they have failed to dispel the plea of the learned counsel for the defendants who claimed that the power of attorney dated 14.11.1958 having been executed by Munshi Ram, Kundan Lal and Ayodhya Parshad in favour of Chuni Lal and sale deed dated 9.6.1960 regarding the land measuring 40K-17M executed in favour of Bachan Singh etc also shows the addresses of said Munshi Ram etc as Chota Model Town, Yamuna Nagar and there is nothing contrary on

record in this regard so as to dislodge the claim of the learned counsel for the defendants submitting that during the course of proceedings in the suit titled as Bachan Singh etc Vs Chuni Lal etc the service by way of publication was effected on the address of Yamuna Nagar and said Munshi Ram was proceeded against exparte at that time. Even more, when defendants Munshi Ram etc in the said civil suit titled as Bachan Singh Vs Chuni Lal etc were proceeded against exparte, then the plaintiffs being the legal representatives of said Chuni Lal, Munshi Ram etc were having the remedy under Order 9 Rule 13 CPC for setting aside the exparte decree dated 31.12.1964 having been passed in the above mentioned suit but the plaintiffs did not make any endeavour to have recourse to the said proceedings. They have never appeared on behalf of the plaintiffs. The repeated averments of the learned counsel for the plaintiffs is that the fraud was played at that time of obtaining the decree dated 31.12.1964 in the suit titled as Bachan Singh etc Vs Chuni Lal etc but due to paucity of evidence on behalf of plaintiffs, the plea as alleged by the plaintiffs in this case is not sustainable as the plaintiffs were bound to discard the proved version of the defendants in a substantive and cogent manner but failure to do so by the plaintiffs itself leads towards the infirmities in their case. The plaintiffs were bound to prove their own case by leading sufficient evidence and cannot rely upon the weakness of the defendants so as to weaken the case of the defendants. The plaintiffs are seeking declaration claiming themselves to be the owners with the plea that the decree dated 31.12.1964 is illegal null and void but the predecessors of the plaintiffs against whom the said decree was passed had never come forward to challenge the said decree. More so, the plaintiff have never challenged the sale deed regarding the land measuring 40K-17M which was executed by Chuni Lal on

behalf of himself as well as on the basis of power of attorney dated 14.11.1958 issued by Munshi Ram, Ayodhya Prashad and Kundal Lal. If the plaintiffs are not challenging the said sale deed, it means that they are admitting the addresses of Chuni Lal etc given in the said power of attorney dated 14.11.1958 to be correct one and the address has been described as Chota Model Town Yamuna Nagar, Jagadhri. The said land measuring 40K-17M was alienated by way of above said sale deed out of total land measuring 11K-18M and that was transferred in favour of Bachan Singh, Mohinder Singh and Atma Singh on the basis of decree dated 31.12.1964. The plaintiffs cannot be allowed to approbate and reprobate. The plaintiffs have never discarded the power of attorney dated 14.11.1998 on the basis of which the learned counsel for the defendants is claiming that the sale deed was executed regarding land measuring 40K-17M on 9.6.1960 out of total land measuring 52K-15M. If such is the situation, then no party can accept or reject the same instrument. A person cannot at one time accept that transaction is valid and thereby obtain some advantage to which he could be only entitled on the footing that it is valid and then turn round and say that it is void for the purpose of securing some other advantage. If the sale deed has never been challenged by the plaintiff and the power of attorney bearing the addresses of Chuni Lal and Munshi Ram etc as residents of Chhota Model Town Yamuna Nagar, has never been discarded, then the plaintiffs subsequently cannot challenge the decree dated 31.12.1964 on the ground that the predecessors of the plaintiffs against whom the said decree was passed were not residing at Yamuna Nagar, but at some other addresses. The learned counsel for the plaintiffs has placed reliance upon Swami Pragya Nand Vs Ram Swaroop Kapur, 1994(3) RRR 551, but this ruling is not applicable to the facts of the present case as the plaintiffs have

challenged the judgment and decree dated 31.12.1964 in this case on the basis of alleged fraud and misrepresentation and the case of the plaintiffs is not for setting aside the ex parte proceedings against them. The learned counsel for the plaintiffs have further placed reliance upon Bank of India and Anr Vs Avinash D. Mandivikar & Ors, 2006 (1) Apex Court Judgments, 499 (S.C.), but these rulings is not applicable to the facts of the present case as in the present casem the plaintiffs have challenged the passing of the judgment and decree dated 31.12.1964 on the ground that the said decree was obtained by Furnishing the wrong addresses of the defendants in a suit titled as Bachan Singh Vs Chuni Lal etc. The learned counsel for the plaintiffs has further placed reliance upon 2010 (3) Civil Court Cases 305. It was incumbent upon the plaintiffs to prove as to what has been led into evidence of the defendants in the absence of the pleadings, but no specific and cogent instance has been mentioned by the plaintiffs in this regard. So this ruling is not applicable to the facts of the present case. So, the analytical inference that the plaintiffs have failed to establish their case and in this way, after weighing entire material and evidence on record in the scale of judicial scrutiny, I find that it is not a fit case where the plaintiffs are entitled to declaration and permanent injunction as prayed for and they are not entitled to the mesne profits. Thus all these issues are held against the plaintiffs.”

Learned counsel for the appellant has failed to show that the findings of fact recorded by both the Courts below are perverse or illegal or based on misreading, non-reading or mis-appreciation of the material evidence on record.

In view of concurrent findings of fact recorded by both the Courts below, I do not find any illegality or perversity in the impugned

judgments and decrees passed by both the Courts below. No question of law, much-less substantial question of law, as alleged, arises for adjudication in this second appeal.

No other point has been urged.

Dismissed in limine.

January 29, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge