

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.6274 of 2015 (O&M)

Date of decision: 23.05.2016

Ram Kishan and another

.....Appellants

Vs.

Bijender Singh and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE AMOL RATTAN SINGH

Present:- Mr. Suvineet Sharma, Advocate, for the appellants.

- (1) To be referred to the Reporters or not?
- (2) Whether the judgment should be reported in the Digest?

.....

AMOL RATTAN SINGH, J.

This is the second appeal by the plaintiffs in a suit, filed by them, seeking a declaration that they are owners in possession of land measuring 31 kanals 11 marlas, as detailed in the head note of the plaint. They further sought a declaration that the judgment and decree dated 03.01.1989 and the consequent mutation entered in the revenue record, as also the judgment and decree dated 22.09.1994, and the consequent mutations thereafter entered into the revenue record, be declared to be null and void, along with subsequent transfers and revenue entries, in favour of the defendants. Alternatively, they prayed for joint possession of the suit land, if they were not found in possession thereof and a further relief for permanent injunction, restraining defendants No.1 to 4 from alienating the suit land in any manner.

2. Briefly, the facts, taken from the judgment of the learned Civil Judge (Sr.Divn.), Panipat, are that the plaintiffs had pleaded that they are *biswedars* of village Khukhrana and have a right in the *Jumla Mushtarka*

Malkan, Shamlat Deh and Gora Deh of the village. It was pleaded that the suit land was owned and possessed by the proprietors of the village and defendant No.5 Ram Dia (presently represented by his legal representatives in this appeal), in collusion with the father of defendants No.8 to 10, i.e. one Sumer Singh, as also defendant No.6 Dharambir, had obtained a judgment and decree dated 03.01.1989 by misrepresentation and fraud and had thereafter, transferred the suit land vide sale deeds dated 22.03.1990, in favour of Duli Chand, father of respondent No.6 and the aforesaid Sumer Singh.

They further pleaded that Duli Chand had thereafter transferred his share to defendant No.1-Bijender Singh, vide a judgment and decree suffered by him on 22.09.1994 and had after that, even got a mutation sanctioned in that regard.

Similarly, Sumer Singh had transferred his share to defendants No.2 to 4, vide sale deeds dated 24.01.1992 and 03.02.1992 and had got mutations sanctioned accordingly.

It was, thus, pleaded that the aforesaid transfers, the judgments and decrees, and the mutations, were all illegal, null and void, being based upon a fraud and actually Sumer Singh and Dharambir had colluded to usurp the land of the proprietors, without permission of the Court to file the suit in a representative capacity. It was further alleged that no *munadi* was effected in the village in respect of the suit decided on 03.01.1989 and further, that Sumer Singh and Dharambir were not in possession of the land.

Consequently, the defendants having refused to rectify the alleged mistake, the suit was filed.

3. Upon notice issued, the defendants appeared and filed their respective written statements, with defendants No.2 to 4 filing a joint written statement and defendants No.6 to 12 also filing a separate joint written statement. Defendants No.1 and 5 filed their own separate written statements.

In effect, the different written statements of the defendants stated that the Jumla Mustarka Malkan land, belonging to the proprietors of the village, had been duly partitioned in the year 1980 but the suit land was intentionally not included in the said partition as a gesture of gratitude towards Ram Dia, respondent-defendant No.5, in lieu of his services rendered, in getting the land partitioned. Hence, Ram Dia was allowed, by consent of the proprietors, to become owner in possession of the suit land measuring 31 kanals and 11 marlas.

4. Upon the aforesaid pleadings, the learned Civil Judge framed the following issues:-

1. Whether the plaintiff is owner in possession of the suit property as alleged in the plaint if so to what effect? OPP.
2. Whether the judgment and decree in case titled Ram Dia Vs. Sumer Singh etc. and sale deed dated 22.03.1990, 24.01.1992, 03.02.1992 and judgment and decree in case titled Dharambir etc Vs. Duli Chand and subsequent mutations and revenue entries are illegal, null and void as alleged in the plaint if so to what effect?OPP.
3. Whether the plaintiff is entitled for possession of the suit property as an alternative relief as alleged in the plaint if so to what effect? OPP.
4. Whether the suit is not maintainable? OPD.
5. Relief.

5. By way of evidence, plaintiff No.1, Ram Kishan, examined himself, one Karam Chand and Maha Singh, who tendered their affidavits by way of examination-in-chief. However, the other two witnesses did not appear for cross-examination and hence, their affidavits were treated to have been discarded.

The defendants examined defendant No.1, Bijender Singh, as DW-1, one Net Ram as DW-2, defendant No.3-Balbir Singh as DW-3, a record keeper, Devki Nandan, as DW-4 and Ram Kumar-Clerk as DW-5.

6. Upon considering the evidence, the learned Civil Judge found that an earlier oral partition of the jumla mustarka land was sanctioned subsequently on 20.07.1980 and entries were accordingly made in favour of all the proprietors, as per the actual partition, with such entries also having been entered in favour of Munshi S/o Heera, who was the father of plaintiff No.1, as also in favour of Mai Dhand, father of plaintiff No.2.

Those partition proceedings and mutations were never challenged by the plaintiffs, even though they obviously had knowledge of the land which was mutated in favour of their respective fathers. Further, neither the mutations, nor the partition, nor the judgment and decree dated 03.01.1989, were challenged by their respective fathers either.

It was also found that the judgment and decree dated 03.01.1989 (Ex.P-3 and Ex.P4), showed that the suit was filed by Ram Dia against Sumer Singh and Dharambir (respondent-defendants No.6), with the suit decreed in Ram Dia's favour, after which mutations were duly sanctioned and reflected in the subsequent jamabandis for the years 1981-82 and 1986-87.

It was further found that plaintiff- PW1 Ram Kishan had

admitted that even at the time of partition, defendant-Ram Dia had been cultivating the suit land. He further admitted that he and his brother had knowledge that the suit land was not included in the partition but they had never raised any objection earlier, about it.

Further, even as per the proved list, of proprietors, led in evidence by the plaintiff (Ex.P19), defendant-Ram Dia was also recorded as one of the proprietors.

Yet further, a finding was also recorded by the learned Civil Judge that though the plaintiffs had pleaded that an application under Order 1 Rule 8 CPC had not been decided by the Court in Civil Suit No.1368 of 1988 (concluding in the decree of 03.01.1989) Ex.P3, the defendants had taken a stand that, in fact, an order was passed on the said application, and the plaintiffs had not been able to show from the records that no such order was actually passed.

7. It was also held by the learned Court that the decree dated 03.01.1989 having been challenged in the suit only on 05.10.2007, the suit was actually filed beyond limitation.

In view of all the above findings, including obviously the fact that the respective fathers of the plaintiffs were also beneficiaries of the partition and that the plaintiffs had knowledge of the partition proceedings as also the subsequent decrees in favour of Ram Dia, the suit of the plaintiffs was dismissed.

8. Along with the first appeal filed by the plaintiffs before the learned District Judge, Panipat, they also filed an application for leading additional evidence to examine three witnesses. However, the said

application was dismissed on the ground that no reason was given as to why the said witness had not been examined before the learned Civil Judge and it was further held that the non-appearance of two witnesses, to subject themselves to cross-examination, obviously led to an inference that no person was willing to support the plaintiffs' case, because of the fact that the suit land was deliberately kept for the use of Ram Dia, by the proprietors, in lieu of the services rendered by him.

9. As regards the merits of the contentions in the main case, the learned first appellate Court held that though undoubtedly the suit leading to the decree dated 03.01.1989 was filed impleading only two proprietors, namely Sumer Singh and Dharambir, but in a representative capacity, the burden was upon the plaintiffs to prove that the Court had decreed the suit without effecting service on the proprietors, in the manner set out in Order 1 Rule 8 CPC. Thus, unless the contrary was shown, that the said procedure had not been followed by the Court, the presumption would be that the procedure was followed before the Court allowed the aforesaid two persons to be impleaded in a representative capacity on behalf of all other proprietors of the village. No such evidence having been led by the plaintiffs, that contention was also rejected and the suit in any case was held to have been filed beyond limitation.

Consequently, the first appeal filed by the plaintiffs was dismissed.

10. Before this Court, though learned counsel for the appellants has made strenuous efforts to submit that the judgment and decree dated 03.01.1989 was a collusive decree obtained by fraud and hence not binding

on any of the proprietors of the land, including the appellants-plaintiffs, however, a perusal of the judgment of the learned Civil Judge shows that admittedly, Ram Dia, defendant-respondent No.5, was in cultivating possession of the suit land at the time when an oral partition is stated to have been effected, of the remaining land falling to the proprietors, i.e. land of the 'Jumla Mushtarka Malkan'. After the said partition, mutations reflecting the said partition of other 'Jumla' land, i.e. other than the present suit land, comprising of 31 kanals and 11 marlas, were entered in the names of the respective proprietors as per their shares effected by the aforesaid partition. Even at that time respondent No.5 is stated to have been in possession of the suit land and continued to be in possession thereof and filed a civil suit bearing No.1368 of 1998, impleading therein only two persons, Sumer Singh and Dharambir Singh, as defendants in a representative capacity, which suit was decreed, allegedly collusively, in favour of defendant-respondent No.5 (Ram Dia) on 03.01.1989. Pursuant to the said decree, admittedly mutation No.676 was also entered in the name of Ram Dia, after which, vide sale deeds dated 23.02.1990, the said land was alienated by respondent No.5, which sale was also duly reflected in the revenue record by way of mutation Nos.694 and 695. The transfer of the said land vide various sale-deeds of the years 1992 and 1994, were also duly reflected in the revenue record.

11. Thus, with the possession of the suit land admittedly having been with respondent No.5 and thereafter mutations having been duly entered in the revenue record, pertaining to various transfers of the suit land, the appellants-plaintiffs obviously cannot take a plea of ignorance of such transfer and possession of the suit land, they themselves also being resident

of the village in which the land is situated.

They eventually filed the suit on 05.10.2007 (out of which this second appeal arises) seeking a declaration that this aforesaid decree dated 03.01.1989 be declared to be null and void.

12. In view of the fact that the effect of the judgment and decree was duly reflected in the revenue record by way of a mutation soon after the decree, and subsequent transfers of the suit land were also well reflected in the revenue record, the appellants-plaintiffs cannot take a plea of ignorance and revert to a plea of the original decree having been obtained by fraud or collusion, at such a belated stage.

The limitation for challenging a judgment and decree of a Court is 3 years as per Article 59 of the Schedule to the Limitation Act, 1963.

In fact, even the plea of the decree being vitiated by fraud cannot be resorted to by the appellants-plaintiffs when, if such fraud indeed had been perpetuated, such fraud was obviously within their knowledge for at least 17-18 years prior to the filing of the suit.

13. In any case, other than the issue of limitation, even on merits, I do not see how the appellants can take the plea of a fraud having been perpetuated at the time of partition of the '*jumla*' land, i.e. the common land of the proprietors in the year 1980. The oral partition of that land was duly sanctioned on 20.07.1980 and entries accordingly made in favour of all the parties, including the respective fathers of the two plaintiffs (present appellants).

The suit land measuring 31 kanalas and 11 marlas was even at the time of such partition left to Ram Dia, respondent No.5, by common

consent as found by the Courts below, despite the fact that it was part of the larger common land property.

The reasoning given by the different defendants in their respective replies was in favour of the land remaining with Ram Dia and his successor-in-interest on the ground that Ram Dia had helped all the properties of the village to get the common land partitioned.

That partition, as duly reflected by mutation entries in the revenue record, never having been challenged by even the respective father of the appellants-plaintiffs, they also obviously accepted their shares in the partition, leaving the suit land of 31 kanals and 11 marlas to Ram Dia.

Thereafter, Ram Dia having instituted a suit seeking that he be declared to be the owner of the suit land, with two proprietors impleaded in a representative capacity and that suit having been decreed in his favour on 03.01.1989, with the effect of that decree again duly reflected by mutation entries and in subsequent revenue record, I do not see how at this stage, i.e. in the year 2007, when the suit was filed, the appellants-plaintiffs could have taken a stand that the entire proceedings of partition in the year 1980, leaving out 31 kanals and 11 marlas of the '*jumla*' land to Ram Dia, and a subsequent decree and revenue entries in favour of Ram Dia, be all declared to be null and void, with none of either proprietors, including the respective fathers of the two plaintiffs-appellants, having ever objected to such partition and decree in favour of respondent No.5 (Ram Dia).

14. In the opinion of this Court, the learned Courts below have further, correctly held that in the absence of any evidence led to the contrary, the defendants in the civil suit filed by Ram Dia (resulting in the judgment

and decree dated 03.01.1989), i.e. Sumer Singh and Dharambir, were presumed to have been validly allowed to be declared as defendants in a representative capacity, on behalf of all the proprietors of the village, in that suit.

Thus, the Courts below have correctly held that a presumption would be in favour of the decree and the orders allowing the aforesaid Sumer Singh and Dharambir (of whom Dharambir is presently the respondent No.6), to be impleaded in a representative capacity, unless it could be shown that the procedure followed was not as per the provisions of Order 1 Rule 8, CPC.

That presumption not having been rebutted by any evidence, I see no error in the Courts below upholding the validity of the judgment and decree dated 03.01.1989.

15. Consequently, in view of all that has been discussed above, finding no infirmity in the judgments and decrees of the Courts below, the appeal is dismissed in limine, but with no orders as to costs.

23.05.2016
anil

(Amol Rattan Singh)
Judge