

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

RSA No.1944 of 2010 (O&M)

Date of decision: 04.07.2017

Bashir Ahamed

..Appellant

Versus

Smt. Farzana and others

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. Pawan K. Mutneja, Advocate
for the appellant.

Mr. Anil Ghangas, Advocate
for respondents No.1 to 6.

Daya Chaudhary, J.

Appellant-plaintiff-Bashir Ahamed filed a civil suit for possession of some part of the suit land and permanent injunction regarding remaining land before the Additional Civil Judge (Senior Division), Panipat, which was dismissed vide judgment and decree dated 19.02.2009. Aggrieved by said judgment and decree dated 19.02.2009, he filed appeal before the Additional District Judge, Panipat and it was also dismissed vide judgment and decree dated 05.03.2010.

After losing the battle before two Courts below, the appellant-plaintiff filed regular second appeal before this Court, which was allowed vide judgment dated 16.11.2012.

Said judgment and decree dated 16.11.2012 passed by this Court was challenged before Hon'ble the Apex Court and the same was allowed. The matter was remanded on the ground that Section 100 CPC

casts a duty on the High Court to frame substantial question of law first and then decide the appeal on merits. It was also observed that learned Single Judge has framed the substantial question of law not strictly in consonance with the mandate of Section 100 CPC and has decided the appeal ignoring the mandate of Section 100 CPC as first merits of the case have been discussed and then the question of law has been framed. The order passed by Hon'ble the Apex Court is reproduced as under: -

“ *Leave granted.*

This appeal is directed against judgment dated 16.11.2012 of the learned Single Judge of the Punjab and Haryana High Court, whereby he allowed the second appeal filed by respondent No.1, reversed the judgments and decrees passed by the trial Court and the lower appellate Court and partly decreed the suit filed by respondent No.1 for possession and granted permanent injunction in respect of the remaining portion of the suit land.

While issuing notice of the special leave petition on 12.4.2013, this Court passed the following order:

“Issue notice on the special leave petition as also on the petitioner's prayer for interim relief, returnable on 12.07.2013, to the respondents to show cause as to why leave may not be granted, the judgment under challenge may not be set aside only on the ground that the learned Single Judge decided the second appeal without framing a question of law in terms of Section 100(1), CPC and giving opportunity of hearing to the parties with reference to such substantial question of law. Dasti, in addition, is permitted.

In the meanwhile, status quo regarding possession of the property in question, as it is obtaining today, shall be maintained by both

the parties.

It shall be the duty of the petitioner to serve the respondents before the next date of hearing failing which the interim order passed today shall stand automatically vacated.”

Shri Aldanish Rein, learned counsel for the respondents defended the impugned judgment by pointing out that after analyzing the pleadings and evidence produced by the parties, learned Single Judge framed substantial question of law and partly decreed the suit. According to him, even though the methodology adopted by the learned Judge of the High Court may not strictly in consonance with the mandate of Section 100, CPC, this Court should not interfere with the judgment under challenge.

In our view, the submission of the learned counsel is wholly meritless and deserves to be rejected.

Section 100 CPC casts a duty on the High Court to frame substantial question of law, hear the parties with reference to the question of law so framed and decide the second appeal. It does not give an option to the High Court to first consider the merits of the case and then frame substantial question of law and pass the final judgment. The learned Single Judge has decided the appeal ignoring the mandate of Section 100 CPC. Therefore, the impugned judgment is legally unsustainable.

The appeal is accordingly allowed, the impugned judgment is set aside and the matter is remitted to the High Court for fresh disposal of the second appeal filed by respondent no.1.”

In view of mandate of Hon'ble the Apex Court, the case has been heard at length and both the counsel for the parties have raised their arguments.

As per averments made in the suit, the plaintiff was claiming himself to be owner of land in dispute. He was having two sons, namely, Afzal and Adhnan. His son Afzal was murdered by some person in the year 2006 and FIR in this regard was registered. Defendant No.1-Smt. Farzana was widow of Afzal and defendant No.2 was father of defendant No.1 and defendants No.3 to 6. Out of the wedlock of his son Afzal and defendant No.1-Smt. Farzana, no child was born. During the lifetime of his son Afzal, the plaintiff along with his other son Adhnan was in cultivating possession of the land in dispute. Defendants No.1 to 6 were not having any right, title or interest over the land in dispute. The Khasra Girdawari of the suit land was still in the name of plaintiff. As per scheme of consolidation of village Rana Majra in the year 1978, the plaintiff was in cultivating possession of the land in dispute as owner. Defendants No.2 to 6 in collusion with defendant No.7 moved an application for correction of Khasra Girdawari in the name of defendant No.1 on 23.02.2007 and by getting the Khasra Girdawari changed in the name of defendant No.1 as they intended to take the possession of the land mentioned in the headnote of the plaint. The proceedings were initiated before the Assistant Collector IInd Grade for correction of Khasra Girdawari and the same were alleged to be illegal, null and void. The plaintiff has got installed a tubewell for irrigation purpose, which was in his name. The defendants along with some antisocial elements forcibly occupied the property. As per claim of the plaintiff, defendant No.1

was having no right of maintenance as she did not follow the process of IDDAT as per Muslim right. Defendants No.1 to 6 were alleged to have given threats to dispossess the plaintiff from the second set of the land.

The suit was contested by defendants No.1 to 6 and following issues were framed by the trial Court: -

1. Whether the plaintiff is entitled for possession of the suit property as alleged in the plaint, if so to what effect?OPP
2. Whether the plaintiff is in peaceful possession over the residential house and the agricultural land detailed in the plaint, as alleged if so to what effect?OPP
3. Whether the suit is not maintainable?OPD
4. Relief.

Learned counsel for the appellant submits that the plaintiff-appellant has been recorded as partly owner/co-sharer and partly as tenant over the land in dispute. As per revenue record, the plaintiff-appellant is in possession of the total land but he has been dispossessed from part of the land by defendants No.1 to 6 and the plaintiff is entitled for injunction regarding possession thereof.

Learned counsel for respondents No.1 to 6 submits that there was a family settlement between the parties and a part of the total land was in the share of husband of defendant No.1. After the death of her husband, defendant No.1 came into possession and as such, her possession was legal and rightful. Learned counsel also submits that the possession of defendant No.1 has been proved on record by the statements of the witnesses.

After hearing arguments of learned counsel for the parties and on perusal of evidence available on record, the issue for consideration

before this Court is as to whether the plaintiff-appellant can be non-suited on the ground of alleged family settlement or the findings recorded are perverse and illegal and based on misinterpretation and misappropriation of evidence.

Accordingly, the following substantial questions of law are framed:-

- “(i) Whether the plaintiff can be non-suited by both the Courts below on the ground of alleged family settlement?
- (ii) Whether the findings recorded by both the Courts below are illegal and based on misinterpretation and misappropriation of evidence?”

The findings recorded by the trial Court are reproduced as under:-

“12. Now coming to the first set of the disputed property over which possession has been prayed for by the plaintiff and the claim of the defendant is that 11 years ago partition took place and Afzal late husband of defendant no.1 was given this set of property over which they had continuous ownership and possession since then and application for change of Khasra Girdawari in regard to this property is already pending. Learned counsel for defendant has taken help of the cross-examination of PW1 where he admits that both the sons had separated out during the life-time of his son Afzal, when they had there separated kitchen. This is read to show that there was a family settlement of this

family 11 years time earlier. Then it was admitted by PW1 Bashir Ahmad that against the order of change of Khasra Girdawari, no appeal was preferred by him. Meaning thereby, the same has become final between them. Necessary is also to read the cross-examination of PW2, who also admits that Afzal and Adnan had separated out some 10 years ago with separate kitchen and he at one point of time admits that as defendant no.1 did not have any child for this reason, the plaintiff her father-in-law wanted to throw her out of the house.

13. In the entire sequence of pleadings and arguments, it has been found that plaintiff and his two sons of separated out by way of a family settlement some 11 years ago and the first set of disputed property was given to Afzal and as such coming to defendant no.1 after the death of Afzal. There is no serious cross-examination on these pleadings of earlier family settlement between the parties and for no one such cross-examination. Defendant has filed the reported judgment of “Mehnga Singh versus Gurdial Singh, RCR 2004(1) 338” and “Bhag Kaur versus Piara Singh, LJR 1999 (1) 650” to state that if there is no serious cross-examination on any single point then that fact is to be taken as an admitted fact. I admit these reported judgments and ones there is the no strong denial of the plaintiff on the plea of the defendants of earlier family settlement during the life time of the husband of defendant no.1, the same is to be admitted. Secondly, the application for change of Khasra Girdawari filed by defendant no.1 has not been challenged by way of appeal by the plaintiff making

the conclusive status of rights among the parties. Meaning thereby, plaintiff is not found to have any right in this regard to the first set of the suit property.

14. Coming to the second set of the property, the revenue entries again stands in the name of co-sharers and without any family settlement, no injunction against the other co-sharers can lie. Admittedly, defendant no.1 is widow of the son of the plaintiff, for which no injunction can stand against a co-sharer. Hence, issues no.1 and 2 are decided against the plaintiff and in favour of the defendants.”

Similarly the findings recorded by the Lower Appellate Court are reproduced as under: -

“14. Plaintiff Bashir Ahamed, during his cross-examination, had admitted this fact that against the order dated 17.12.2007 Ex.D1, vide which the entries regarding the first set of the disputed land were entered in the name of defendant no.1 he has not filed any appeal and thus the same has become final.

15. Not only this, as is explicit from the perusal of the contents of the certified copy Ex.D3 of judgment dated 15.12.2008 handed down by Smt. Raju Yadav, the then learned Additional Civil Judge (Senior Division), Panipat in civil suit No.151 of 2005 titled 'Bashir Ahmed Vs. Sahida & another' regarding the disputed land, the plaintiff-appellant claiming himself to be in possession of the disputed land had instituted the suit for permanent injunction against his sister defendant no.1-Sahida and one Ravinder Kumar and even that suit was dismissed, which

shows that the plaintiff was not in possession of the disputed land.

16. Regarding the second set of the disputed land, as mentioned in the head note of the plaint, admittedly the case of the plaintiff-appellant has been that he alongwith his deceased son Afzal and Adhnan had been in possession of the same and they have been cultivating the same jointly. After the death of his son Afzal defendant no.1 Smt. Farzana, being his widow has also become co-sharer in the disputed land and the law is well settled that no injunction can be granted against the co-sharer.”

On perusal of findings recorded by both the Courts below, it has been proved on record that there was a family settlement between the parties and as per said family settlement, the husband of defendant No.1 was given one set of property and the defendants were in possession of that property. The application filed for correction of Khasra Girdawari was subsequently decided and no appeal against said order was filed.

It has also been admitted by the plaintiff-PW1 in his cross-examination that both the sons were separated during the lifetime of his son-Afzal and both of them were having separate kitchen also. It has also been admitted by the plaintiff-appellant-Bashir Ahamed himself that against order of change of Khasra Girdawari, no appeal was filed by him, which shows that change of Khasra Girdawari had become final. Similarly, in cross-examination of PW2-Aalamdeen, it has been admitted that Afzal and Adhnan were separated ten years back and both of them were having separate kitchen. It has also been admitted by PW2 that defendant No.1 was not having any child and due to that reason, the plaintiff, father-in-law of

defendant No.1 ousted her from her matrimonial home.

As far as second set of property is concerned, the revenue entries were in the name of co-sharers and no injunction can be granted against other co-sharers. Defendant No.1 is widow of son of plaintiff and no injunction can be issued against her being co-sharer.

From the findings recorded by both the Courts below, it can be concluded that the plaintiff-appellant is claiming himself to be in possession of the land in dispute and he filed suit for permanent injunction. Regarding the disputed land, the plaintiff filed a suit against his sister Sahida and one Ravinder Kumar and that suit was dismissed, which shows that the plaintiff-appellant was not in possession of the land in dispute.

Admittedly, the plaintiff-appellant along with his deceased son Afzal and other son Adhnan was in possession of the land and they were cultivating the same jointly. After death of Afzal, defendant No.1 Smt. Farzana became co-sharer in the disputed land and no injunction can be granted against co-sharer.

Accordingly, the appeal is partly allowed and the appellant is held entitled for possession of land as per family settlement i.e. other than the share of defendant No.1 but no injunction can be issued against co-sharer.

04.07.2017
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

√
Yes/No

Whether Reportable

√
Yes/No