

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RSA No.1534 of 2017 (O&M)
Date of Decision: 12.10.2017**

Fattu and others

... Appellants

Versus

Ayyub now deceased through his L.R.
and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Dr. Anmol Rattan Sidhu, Senior Advocate,
with Mr. Mahir Sood, Advocate,
for the appellants.

RAJIV NARAIN RAINA, J.(Oral)

1. The defendant in the present suit instituted civil proceedings in 1990 in which the predecessors-in-interest of the present plaintiff were the defendants. The suit was decreed ex parte defendants on March 22, 1993.

2. Dr. Sidhu, learned Senior counsel submits that the plaintiff in that suit had based his claim over the suit property as a mortgagee in possession and claimed rights of adverse possession over the defendant. The plaintiff and the defendants in both the suits are admittedly co-sharers of the suit property. The present suit is one for partition of joint property brought by the plaintiffs against the defendants. The moot issue which arose for consideration revolved on the plea that the earlier decree was not binding on the rights of the defendants therein when they had no notice of the suit and were wrongly proceeded against ex parte and deceit was practiced behind

the back of the defendants, the present plaintiffs. A dispute arose as to service of summons. Munadi was effected in the village of the defendant at Hussainpur.

3. Dr. Sidhu informs that village Hussainpur was not the place where the defendants actually resided which was in the adjoining village not more than about 2 kms distant but under the same Gram Panchayat. It was also the defence in the present suit that the proceedings were barred by limitation, the decree having been passed on 16-17 years ago at the time of.

4. On a query put by Court whether defendants address in the memo of parties in the suit was the correct address being the revenue estate wherein the land fell, the answer is in the affirmative. Much is made of the deposition of PW-4 Hasan Khan who in his cross-examination deposed that the decree was passed in favour of Sarjeet about 16-17 years ago (on the date of recording of testimony). The witness was obviously speaking from record. He did not say that he knew of the decree personally and, therefore, limitation had begun to run against him. To speak to the contrary would be a plain misreading of the evidence. The trial Court and the Appellate Court both decreed the suit against the defendants and held that the plaintiffs were entitled to decree of dispossession of the defendants which was beyond share and accordingly the rights of the co-sharers in the partition suit were determined according to their respective land holding by inheritance. The trial Court noticed the contention of the present appellants to the effect that the suit was not maintainable as the father of the plaintiffs was party to the impugned judgment and decree of 1993 and, therefore, the plaintiffs should have filed an application under Order 9 Rule 13 CPC for setting aside the ex

parte decree. The Court applied the law in Mahesh Yadav v. Rajeshwar Singh, 2009 (1) RCR (Civil) 422 indicating that there are different remedies available against the ex parte judgment and decree. None of these pursuits would matter when the finding of fact recorded in the judgment in appeal is that the defendants were never served of the summons in the suit. The decree was liable to be ignored. The contention is rejected.

5. In any case, the earlier suit being based on adverse possession could not have been decreed in law as plaintiffs could not set up plea of adverse possession against the defendants which could only be pleaded in defence of the suit, even if the plaintiff was a mortgagee in possession and the defendant was not the mortgagor. Then another issue might arise as to whether the mortgage was redeemed but I can say nothing on the point when not raised and would leave that matter in passing.

6. As a result, the appeal fails and is dismissed. No question of law arises for consideration. Rights *inter se* of the parties shall remain what they were prior to the filing of the previous suit and as though it was never filed.

(RAJIV NARAIN RAINA)
JUDGE

12.10.2017

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Whether speaking/reasoned Yes

Whether reportable No