

RSA-2535-1988 (O&M)

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

**RSA-2535-1988 (O&M)
Date of decision : 14.12.2018**

Paramjit Singh and others

... Appellants

Versus

Roor Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Amit Jain, Advocate for the appellants.

None for the respondents.

AMIT RAWAL, J.

The appellants-plaintiffs are in regular second appeal against the judgment and decree of the lower Appellate Court, whereby the suit for mandatory injunction and in alternative for possession of the suit property decreed by the trial Court, has been dismissed.

The plaintiffs instituted the suit claiming mandatory injunction directing the defendants to remove the manure heap from the land measuring 61'x28' as per the site plan as it was ancestral and had half share.

The defendants objected to the suit, by taking plea of locus standi and cause of action, much less, limitation and on merits, claimed to be owner of some portion of the land being ancestral and other half to be allotted by Rehabilitation Department. In the alternative, plea of adverse possession was also taken.

The trial Court on the basis of the pleadings framed the following issues including the additional:-

"1. *Whether the plaintiff have got no locus standi to file the*

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present suit? OPP

2. Whether the plaintiffs are entitled to the injunction as prayed for? OPP

3. Relief.

2A: Whether the plaintiff is entitled to the possession of the suit land as alternative relief? OPP

2B: Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP

2C: Whether the suit is within time? OPP"

The plaintiffs in support of their case examined seven witnesses, whereas the defendants six.

The trial Court on the basis of the evidence decreed the suit by holding the plaintiffs to be owner in possession, particularly the fact that the defendants had taken the plea of adverse possession. The lower Appellate Court, as indicated above, reversed the findings, simply on the ground that the boundaries mentioned in the sale deeds (Ex.P2 and Ex.P3) were not in consonance with the boundaries mentioned in the plaint.

Learned counsel appearing on behalf of the appellants-plaintiffs submitted that the lower Appellate Court being the last court of fact and law has failed to advert to the entire piece of evidence, but heavily laid reliance upon the descriptions given in the sale deeds (Ex.P2 and Ex.P3). The sale deeds were of 1945 and not 1973. Over passage of time, there was some deviation at the spot, but miserably ignored the fact that the defendants had taken the plea of adverse possession, which tantamounts to admitting the title of the plaintiffs. No evidence in respect of the certificate of sale alleging the allotment from Rehabilitation Department or the ancestral in nature, has been led or brought on record, thus, there is abdication.

This Court, vide order dated 02.11.2018, had issued the notice to the respondents as there was no representation on their behalf and the

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counsel had also died.

As per office report, respondent Nos.1, 2, 6, 9 & 10 have died. Respondent Nos.3 and 8 remain un-served as gone for yatra. Respondent Nos.4, 5 and 7 refused to accept notice and affixation made. Respondent No.11 remains un-served as not residing at given address.

The appeal is of the year 1988, accordingly, I decide the appeal on merits.

I have heard the learned counsel for the appellants-plaintiffs, appraised the paper book as well as the records of the Courts below and of the view that there is force and merit in the submissions of Mr. Jain, for, the plaintiffs in support of the aforementioned pleadings brought on record the sale deeds referred to above as Ex.P2 & Ex.P3. The witnesses of the sale deeds have also been examined as Roor Singh, defendant No.2, was also the witness, who could not explain how he did not witness the sale deed. All these witnesses in fact proved the sale of the property, much less, ownership of the plaintiffs. Once the defendants had taken the plea of adverse possession, for all intents and purposes the possession, which was sought, had admitted the title of the plaintiffs. In the absence of the documentary evidence or the date of adverse possession or proof of any ingredients of adverse possession like *animus possidendi*, knowledge to the whole world, the finding of fact arrived at by the trial Court is correct view. The lower Appellate Court has remained oblivious of all the evidence, both oral and documentary and laid focus on the identity of the property, which was not in dispute in view of the plea of adverse possession.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the

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ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. 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 and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. 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

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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.

Keeping in view the aforementioned facts, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and the same is hereby set aside and that of the trial Court is restored. The present regular second appeal is allowed.

14.12.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**