

325

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 19.03.2018

1.

RSA-1651-1989 (O&M)

Amit Kumar

... Appellant(s)

Versus

Matu Ram @ Madhusudan and others

... Respondent(s)

2.

RSA-3709-1987 (O&M)

Chhattar Singh

... Appellant(s)

Versus

Amit Kumar and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Umesh Aggarwal, Advocate
for the appellant in RSA-3709-1987.

Mr. Ajay Jain, Advocate
for the appellant in RSA-1651-1989 and
for the respondent(s) in RSA-3709-1987.

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two regular second appeals bearing **RSA No.1651 of 1989** titled as **“Amit Kumar V/s Matu Ram @ Madhusudan and others”**, filed at the instance of the appellant-plaintiff against the concurrent findings of fact, whereby the suit bearing No.392 of 1985 titled as “Amit Kumar V/s Matu Ram @ Madhusudan and others” (in

short 'the first suit') seeking declaration with consequential relief of possession in respect of registered lease deed dated 11.07.1977, has been dismissed by both the Courts below and **RSA No.3709 of 1987** titled as **“Chhattar Singh V/s Amit Kumar and others”** filed at the instance of the appellant-defendant No.4 against the judgment and decree dated 04.11.1987, whereby the suit bearing No.393 of 1985 titled as “Amit Kumar V/s Matu Ram @ Madhusdan and others” (in short 'the second suit') seeking declaration and consequential relief of possession in respect of registered lease dated 12.07.1977, though dismissed by the trial Court vide judgment and decree dated 14.05.1987, but has been decreed by the lower Appellate Court.

For the sake of brevity, the facts are being taken from **RSA No.1651 of 1989**.

The appellant-plaintiff instituted the "First Suit" claiming declaration and consequential relief of possession on the premise that defendant Nos.1 to 3 were the members of the joint Hindu undivided family as per the *sajra nasab*. The land detailed and described in para No.1 of the plaint continued to be joint coparcenary properties, therefore, defendant Nos.1 to 3, who were the persons of extravagant habits, could not alienate the property vide registered lease deed dated 12.07.1977 (wrongly typed in the judgment and decree as sale deed) for a consideration of ₹13,000/-, being illegal, null and void as the land at the hand of Dohlidar was ancestral.

The aforementioned suit was contested by defendant No.4/appellant in RSA No.3709-1987 challenging the *locus standi* of the

plaintiff and maintainability of the suit and on merits, it was stated that lacs of rupees had been spent to improve the quality of the land and it is only after that the land had been developed, the suit was filed in the year 1984. The land was self-acquired property of defendant Nos.1 to 3, in essence, the status of the property being coparcenary ancestral was emphatically denied. Replication was filed rebutting the averments made in the written statement.

The trial Court on the basis of the pleadings of the parties framed the following issues in both the suits:-

“Issues in First Suit

1. *Whether the land in dispute is co-parcenary property of the plaintiff and defendant Nos.1 to 3? OPP*
2. *Whether the impugned sale is for consideration and legal necessity? OPD.*
3. *Whether the plaintiff has no locus standi to file the present suit? OPD*
4. *Whether the suit is not maintainable in the present form? OPD*
5. *Whether the plaintiff is estopped to file the present suit by his own act and conduct? OPD*
6. *Whether the plaintiff has no cause of action to file the present suit? OPD.*
7. *Whether the defendant has made any improvements over the suit land to what amount? OPD.*
8. *Relief.*

Issues in Second Suit

1. *Whether the land in dispute is coparcenary property qua plaintiff and defendant Nos.1 to 3? OPP*
2. *Whether the impugned lease for 99 years is sale in fact if so its effect? OPD*
3. *Whether the impugned lease is for legal necessity and for*

consideration? OPD.

4. *Whether the plaintiff has no locus standi to file the present suit? OPD*
5. *Whether the suit is not maintainable in the present form? OPD*
6. *Whether the plaintiff is estopped to file the present suit by his own act and conduct? OPD*
7. *Whether the plaintiff has no cause of action to file the present suit? OPD.*
8. *Whether the defendant No.4 has made any improvement to what amount? OPD*
9. *Relief.*

The trial Court on the basis of preponderance of evidence dismissed the "First Suit" and the appeal taken before the lower Appellate Court also met with the same fate, whereas the "Second Suit" though dismissed by the trial Court vide judgment and decree dated 14.05.1987, but has been decreed by the lower Appellate Court vide judgment and decree dated 04.11.1987. Hence two regular second appeals, aforementioned.

Mr. Umesh Aggarwal, learned counsel appearing on behalf of appellant-defendant No.4 in RSA-3709-1987 submitted that the respondent(s)-plaintiff(s) failed to prove the nature and character of the property being ancestral as *sajra report* (Ex.P7) had not been proved on record, for, in some other proceedings, the Kanungo had tendered the same as Ex.P1 and the trial Court had sent request to the concerned Court at Gurgaon for recording the statement. It is such statement, which had been taken into a piece of evidence as Ex.P7. The defendants were not given any opportunity to cross-examine the aforementioned witness, much less, regarding its preparation or existence. It is, in that manner, the trial Court

dismissed the suit, but the lower Appellate Court has committed illegality and perversity.

On the contrary, Mr. Ajay Jain, learned counsel appearing on behalf of the appellant-plaintiff in RSA-1651-1989 and for the respondent No.1 in RSA-3709-1987 submitted that the judgment and decree of the lower Appellate Court is perfectly legal and justified. Dohildar property cannot be alienated, for, giving land for 99 years tantamounts to transfer. However, both the Courts below dismissed the first suit on the ground that the plaintiff miserably failed to prove the nature and character of the property being ancestral, but the fact of the matter is that Excerpt, which is the essential requirement of law to prove on record, has been exhibited without any objection to the same, thus, urges this Court for decreeing the first suit and dismissal of the appeal bearing RSA No.3709 of 1987.

I have heard the learned counsel for the parties, appraised the paper book and also seen the records of the Courts below with their able assistance and of the view that there is force and merit in **RSA No.3709 of 1987** and but no force in **RSA No.1651 of 1989**.

Admittedly in *sajra* report (Ex.P7), it surfaced that the Court at Rewari had sent a request to the Court at Gurgaon to record the statement of Kanungo, who had proved the *sajra* (Ex.PW1/1) in some other proceedings to be taken in evidence as Ex.P7 and in the column of cross-examination, it was stated 'Nil'. Such a practice and procedure adopted by the Court below was not correct one. The defendants were required to be given a chance to cross-examine the aforesaid witness, much less, put the document to

ascertain its veracity and genuinity. Even otherwise, the onus to prove the pleaded case was emphatically laid upon the plaintiff, which has not been discharged. It has not been established whether the property at the hands of Dohlidar would be ancestral or not, for, the status of Dohlidar is as would as that of a tenant and therefore, tenant cannot claim the right in the property being ancestral. The findings of the lower Appellate Court in the second suit, in my view, is bereft of the aforementioned appreciation of law as well as based upon the misdirection of the documentary evidence, therefore, there is an abdication and perversity.

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

For the foregoing reasons, the judgment and decree of the lower Appellate Court passed in RSA No.3709 of 1987 is not sustainable in the eyes of law and the same is hereby set aside, in essence, the suit bearing No.393 of 1985 is dismissed.

As regards the appeal bearing RSA No.1651 of 1989, the appellant-plaintiff has miserably failed to discharge the onus viz-a-viz proving the nature and character of the property as ancestral. In my view, the judgments and decrees passed by both the Courts below in Civil Suit No.392 of 1985 are based upon the appreciation of oral and documentary evidence, much, no substantial question of law arises for determination.

Resultantly, the appeal bearing RSA No.1651 of 1989 is dismissed and the appeal bearing RSA No.3709 of 1987 is allowed.

19.03.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned Yes/ No

✓

Whether Reportable Yes/ No