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

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Date of decision : 20.07.2018

Attar Singh (since deceased) through LRs

... Appellant(s)

Versus

Fateh Singh (since deceased) through LRs

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. IPS Doabia, Advocate
for the appellant.

Ms. Kamalpreet, Advocate
for the respondent.

AMIT RAWAL, J.

The appellant being successor-in-interest of the plaintiff has preferred the present regular second appeal against the concurrent findings of fact and law, whereby the suit seeking declaration for setting aside the judgment and decree dated 17.12.1980 declared null and void, has been dismissed by both the Courts below.

Succinctly, the facts which emanate from the pleadings of the parties, are that the plaintiff instituted the suit challenging the *ex parte* judgment and decree dated 17.12.1980 to be declared null and void on the premise that Fateh Singh, brother of the plaintiff, had filed a civil suit for declaration at Sirsa on 24.11.1978 alleging that on the basis of the family settlement, he had become owner of the suit land, detailed in para No.1 of the plaint. In fact, there was no family settlement/partition of the land nor the land had fallen to the share of his brother-Fateh Singh, for, cultivation of

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the suit land situated at Village Kariwali, was joint with the defendant and plaintiff. Fateh Singh had instituted a previous suit at the address of the plaintiff of Village Deepanwali, therefore, by playing fraud obtained *ex parte* judgment and decree dated 17.12.1980. In fact the interest of the plaintiff in the suit land was watched by grandsons Sucha Singh and Harmeet Singh residing at Village Kariwali, Tehsil and District Sirsa. The plaintiff intended to seek the land partitioned and when in the month of July 1981 contacted Halqa Patwari for securing a report from him acquired the knowledge of *ex parte* judgment and decree, thus, filed the present suit on 23.07.1981.

The respondent-defendant admitted the filing of the previous suit, however, denied that no family settlement was effected between the parties. It was asserted that the suit land had fallen to the share of the defendant in the family settlement and he had been in exclusive owner in possession of the land. Sucha Singh and Harmeet Singh were residing at Village Deepanwali, District Ferozepur (Punjab), whereas the plaintiff was also residing at Village Deepanwali, but not at Village Kariwali. The plaintiff was permanent resident of Village Deepanwali, so his correct address was given in the previous suit and despite service through registered post, plaintiff did not appear and accordingly, was proceeded *ex parte*. During the pendency of the suit, the plaintiff-Banta Singh died and his son Attar Singh submitted an application for bringing on record his LRs, which was allowed.

Since the parties were at variance, the trial Court framed the following issues:-

1. Whether the *ex parte* judgment and decree dated 17.12.1980

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passed by Sh. J.K. Sood, in civil suit No.753 of 1978 is null and void and liable to be set aside on the grounds mentioned in plaint? OPD

2. *Whether the suit of the plaintiff is barred by law of limitation? OPD.*
3. *Whether the suit of the plaintiff is barred by the Res-judict? OPD*
4. *Whether the suit of the plaintiff is liable to be stayed under Section 10 of C.P.C.*
5. *Whether the suit is not maintainable in the present form? OPD*
6. *Whether civil court has got no jurisdiction to try the suit? OPD*
7. *Whether the plaintiff is estopped by his act and conduct from filing of the present suit? OPD.*
8. *Relief.*

The appellant being successor-in-interest of the plaintiff in support of the aforementioned pleadings examined as many as five witnesses and tendered in evidence the documents (Ex.P1 to Ex.P-3). On the other hand, the defendant examined as many as three witnesses.

The trial Court on the basis of the evidence and the case law referred to, dismissed the suit by holding that Banta Singh-plaintiff on the basis of the family settlement had left the entire share in the property situated at Village Kariwali and Fateh Singh/defendant in respect of property situated at Village Deepanwali and found that the judgment and decree dated 17.12.1980 was not obtained by playing fraud. The appeal preferred thereto before the lower Appellate Court also met with the same fate.

Mr. IPS Doabia, learned counsel appearing on behalf of the appellant submitted that judgments and decrees of the Courts below are not

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sustainable in the eyes of law, for, the respondent/defendant-Fateh Singh had played fraud upon the plaintiff-Banta Singh regarding the previous instituted suit, resulting into, *ex parte* judgment and decree dated 17.12.1980. The provisions of Order 9 Rule 13 of the Code of Civil Procedure would not be applicable as for challenging the decree obtained by fraud, the remedy was to file suit under Section 9 of the Code of Civil Procedure. The previous suit was filed in the month of November 1978 and the decree was passed in 1980. The defendant did not file the correct address, yet the trial Court in the previous suit proceeded Banta Singh as *ex parte*. There was no family settlement between Fateh Singh and Banta Singh, real brothers. Gurmej Singh son of Fateh Singh appeared as DW-1 and stated that his father Fateh Singh and uncle Banta Singh had separate allotment because, their father had died in Pakistan before partition. In fact, the family settlement was not implemented for 35 years, therefore, there was no such family settlement in the eyes of law. The suit of the plaintiff was required to be decreed. The publication in the previous suit was effected by giving incorrect address of Village Deepanwali, whereas Banta Singh was resident of Village Kariwali. Banta Singh in examination-in-chief stated that he was resident of Village Kariwali. The finding of fact arrived at by the Courts below that Fateh Singh had not played fraud upon the plaintiff-Banta Singh is not sustainable in the eyes of law as no satisfaction was recorded by the Court below that the plaintiff-Banta Singh was avoiding service and necessity arose for effecting the service through publication. The provisions of Order 5 Rule 20 of the Code of Civil Procedure were not complied with, thus, urges this Court for setting aside the concurrent findings of fact.

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Per contra, Ms. Kamalpreet, learned counsel appearing on behalf of the respondent submitted that Banta Singh in cross-examination admitted that he owned a considerable chunk of land in Village Deepanwali and had also a vote in the aforementioned village. It was admitted that he and his brother was jointly allotted the land in Village Deepanwali and brother, Fateh Singh, was owner to the extent of 1/3rd share in the land. It was also admitted that Fateh Singh had left all his interest in the property situated in village Deepanwali and Banta Singh in village Kariwali in favour of Fateh Singh. Filing of the suit was nothing, but an act of greed. The concurrent findings of fact and law cannot be interfered until and unless there is gross illegality and perversity, thus, urges this Court for dismissal of the present regular second appeal.

I have heard learned counsel for the parties, appraised the paper book as well as the records of the Courts below and of the view that there is no merit and force in the submissions of Mr. Doabia, for, Banta Singh in examination-in-chief was emphatic and in tandem with the pleadings in the plaint, but in cross-examination spilled the beans, when unequivocally admitted that he owned 30 killas of land in village Deepanwali and also voter of village Deepanwali. PW2-Sucha Singh, grand son of the plaintiff, stated that his mother was residing in village Deepanwali and was voter of the same village. Jagdev Singh resident of village Deepanwali appeared as PW-3 and admitted that Banta Singh was residing in Village Deepanwali, therefore, the unclinching evidence brought on record established that Banta Singh was in fact resident of village Deepanwali. The report on summons and registered cover showed that Banta Singh was residing at Village Deepanwali and on some occasions, it was reported to be out of station or

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refused to accept the service. It is, in this aspect of the matter, the trial Court ordered for service through publication. If at all, Banta Singh was not resident of Village Deepanwali, but of village Kariwali, it was obligatory to prove certain pieces of evidence like ration card or some other connected evidence and in the absence of the same, the Courts below had no occasion, but to dismiss the suit by declining the plea of fraud, therefore, it is unbelievable that Banta Singh was not aware of the institution of the suit. The statement of defendant viz-a-viz leaving the land at different villages in favour of brother had not been rebutted by the plaintiff. It is not a uncommon thing amongst the brothers to arrive at a settlement on their own and possess land at a particular place/area. All these factors weighed in the mind of the Courts below in dismissing the suit. The argument of Mr. Doabia has not been able to point out any different evidence both oral and documentary, enabling this Court to form a different opinion than the one arrived at by the Courts below, much less, no substantial question of law arises for determination.

Resultantly, the present regular second appeal is dismissed.

20.07.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**