

372

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1690-1991 (O&M)
Date of decision : 25.04.2018

Gugan (deceased through LRs)

... Appellant(s)

Versus

Amar Chand and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. P.C. Chaudhary, Advocate
for the appellant.

Ms. Navdeep Kaur, Advocate for
Mr. Keshav Pratap Singh, Advocate
for the respondents.

AMIT RAWAL, J. (ORAL)

The appellant-defendant No.3 is aggrieved of the judgment and decree dated 06.02.1991 of the lower Appellate Court, whereby the judgment and decree of the trial Court dated 21.10.1988 dismissing the suit for injunction filed by the respondents-plaintiffs, has been set aside, in essence, the suit of the plaintiff has been decreed.

Succinctly, the facts as enumerated from the pleadings of the parties to the *lis* are that the respondents-plaintiffs instituted the suit for permanent injunction on the premise that the plaintiff was co-sharer and in joint possession of the agricultural land measuring 47 kanals 10 marals bearing Khewat No.151/634 and Khatoni No.382 Khasra No.159//10/2(5-7), 11(6-0), 26(2-0), 160//3/3 (0-16), 4/2 (0-19), 6/2 (5-9), 7/2 (6-5), 8/1 (2-8)

13/2 (2-8) 14 (8-0) 15 (8-0) as per jamabandi for the year 1980-81 situated in Village Behl Tehsil Siwani, District Bhiwani along with other co-shaers. Defendant No.3 Gugan had alienated more than his share in the land by way of different sale deeds and was left with no right and title in the property. Gugan/defendant No.3 was co-sharer in the land measuring 116B 8B, whereas the plaintiff and other co-sharer had further purchased 24B 80B out of 29B 1B land, comprised in khatoni No.85 min. Mutation bearing No.307, in this regard, was sanctioned on 12.05.1982. This portion of the land comprised in khatoni No.85 min was sold by Digla and Bishna sons of Sanwal. Defendant No.3/appellant along with other defendants wanted to interfere in the peaceful possession of the plaintiff and therefore, a cause of action accrued for the plaintiff to file the suit.

Defendant Nos.6, 17, 18 and 19 were proceeded *ex parte*. Written statement was filed on behalf of the defendant Nos.1 to 5 and 7 to 16 resisting the suit of the plaintiff by raising the plea that the suit was bad for non-joinder and mis-joinder of the parties, besides other customary objections and on merits, it was denied that the land as mentioned in the title of the plaint was allotted in lieu of the land comprised in old khatoni No.629 to 632, in fact the land was allotted in lieu of land comprised in khatoni No.634. It was pleaded that defendant No.3/Gugan or the plaintiff did not file any previous suit regarding the land comprised in khatoni No.382 and the plaintiff had no right and title in the property, whereas the land comprised in khewat No.151 khatoni No.379 and 380 measuring 60 kanals 1 maral was allotted in lieu of the land comprised in khewat No.141 Khatoni No.629 to 632.

Since the parties are at variance, the trial Court framed the

following issues:-

1. *Whether the plaintiff is co-owner in possession along with other co-sharer's in the land in dispute and the defendants have no right and title in the property in dispute? OPP*
2. *Whether the suit is not maintainable in the present form? OPP*
3. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPP*
4. *Whether the suit is bad for non-joinder of necessary parties? OPD*
5. *Whether the defendants are entitled to special compensatory costs under Section 35-A CPC ?OPD*
6. *Relief.*

The plaintiff examined as many as two witnesses and tendered in evidence certain documents (Ex.P-1 to P-23), whereas the defendants examined as many as five witnesses and tendered in evidence certain documents (Ex.D-1 to D-29).

The trial Court on the basis of the preponderance of evidence by holding that none of the co-sharers were in exclusive possession, declined to grant injunction in view of the law laid down by this Court in **“Bharthu V/s Ram Sarup” PLJ 1981 page 204** and the appeal preferred thereto before the lower Appellate Court by the plaintiff, has been allowed by taking into consideration the judgment and decree dated 30.09.1987 (Ex.P14 and Ex.P-15). According to the lower Appellate Court, the share in the land in dispute did not arise in favour of the appellant/defendant No.3 on the ground that defendant No.3 predecessor-in-interest had sold the entire land in the suit and therefore, there was no such plea taken by the defendant No.3.

Learned counsel for the appellant-defendant No.3 submitted

that the suit for injunction against a co-sharer in the absence of exclusive possession is not maintainable. He submitted that vide order dated 28.02.2018 substantial questions of law submitted by the appellant-defendant No.3 were taken on record, which are extracted hereinbelow:-

- i. Whether impugned judgment and decree of Lower Appellate are wrong, illegal, arbitrary, perverse, erroneous, unjust, untenable, unsustainable, unwarranted, violative of statutory provisions, without jurisdiction and against law laid down?*
- ii. Whether impugned judgment and decree of Lower Appellate Court are in conformity of statutory mandate of Order 41 Rule 31 of Code of Civil Procedure?*
- iii. Whether failure of Lower Appellate Court to consider evidence on record has resulted in perversity of its findings, decision and further miscarriage of justice?*
- iv. Whether appeal filed before Lower Appellate Court against a dead person namely Om Pal son of Kirpal Ram defendant No.2, who died pending suit is maintainable and if not then impugned judgment and decree of Lower Appellate Court is nullity being against dead person?*
- v. Whether an instant suit for permanent injunction is maintainable against appellant/co-sharer?*
- vi. Whether judgment and decree of Lower Appellate Court can decree suit without reversing and setting aside decision of trial Court on Issue No.2 under which trial Court has held the suit is not maintainable?*
- vii. Whether plaintiff/respondent has any locus standi and cause of action to file the present suit?*
- viii. Whether finding and decision of trial Court legally and validly arrived at and based on revenue record adduced on record can be nullity by Lower Appellate Court solely on the basis of judgment and decree dated 30.09.1987 (Ex.P-14 and Ex.P-15) relating to different land and wherein suit was*

not the subject matter?

ix. Whether mutation confers any title without any legal document in its support?

The land in dispute in the judgment and decree (Ex.P-14 and Ex.P-15) is different to the one in the suit.

Learned counsel for the appellant-defendant No.3 by drawing the attention of this Court regarding the comparative chart given in ground No.5 of the memorandum of appeal, submitted that lower Appellate Court has abdicated in relying upon the judgment and decree (Ex.P14 and Ex.P15). On the other hand, the appellant/defendant No.3 had established on record that he was owner in possession and co-sharer in the land in dispute, including the jamabandi and khasra girdawaries, but the lower Appellate Court did not advert to the aforementioned documents. The appellant-defendant No.3 discharged the onus to establish that he was exclusive owner in possession of the land in dispute and remedy was for partition of the property. The plaintiff failed to establish on record the alleged sale purported to have been made to the appellant/defendant No.3, therefore, there is a gross illegality and perversity, thus, urges this Court for setting aside the judgment and decree, under challenge.

Learned counsel for the respondents-plaintiff submitted that judgment and decree of the lower Appellate Court is perfectly legal and justified. No ground is made out for interference as judgment and decree dated 30.09.1987 (Ex.P-14 and Ex.P-15) has been point of consideration by the lower Appellate Court being the last Court of fact and law, thus, there is no illegality and perversity and 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 force and merit in the submissions of Mr. Chaudhary. The questions of law bearing No.1, 4 and 8, extracted above, arises for adjudication. The law with regard to the maintainability of the suit of a co-sharer against co-sharer is no longer *res integra* in view of the decision taken by the Full Bench of this Court in **“Bhartu's case** (supra).

The principles culled out in the aforementioned judgment reveal no manner of doubt that a person for the purpose of seeking injunction against a co-sharer requires to be in exclusive possession. The respondents-plaintiff has not been able to place on record any documentary evidence to show that he had been in exclusive possession, therefore, the lower Appellate Court, in my view, has abdicated.

Coming to other point with regard to ceasing of right of a co-sharer in the land in dispute, the reliance had been laid to the judgment and decree dated 30.09.1987 (Ex.P14 and P-15). For the sake of brevity, the disputed land in the suit and in the judgment and decree, chart of which has been mentioned in ground No.5 of the appeal, reads as under:-

Land-in-dispute in present suit (As per Jamabandi 1980-81			Land which was the subject matter in earlier suit of Ex.P-14 and P-15 judgment and decree sheet (as per jamabandi 1980-81)		
Khewat No.	Khatoni No.	Khasra No.	Khewat No.	Khatoni No.	Khasra No.

151/634	382	159//10/2 (5-7), 11(6-0), 26(2-0), 160//5/3 (0-16), 4/2 (0-19), 6/2 (5-9), 7/2 (6-5), 8/1 (2-8) 13/2 (2-8) 14 (8-0) 15 (8-0)	151 min/141	378, 379, 380	159//20 (8-0), 16 (8-0), 17/1 (3-0), 159//1/2, 9 (4-18), 10/1 (2-13), 12 (8-0), 13/1 (2-14), 19/1 (0-13), 160//4/3 (1-15) 5/2 (2-13) 6/1 (2-13) 7/1 (1-15) 159//2 (7-16) 3 (8-0) 8 (9-16) 13/1 min (1-0) 13/2 (3-12)
Total Land		47 K 10 M			79 K 1 M

From the perusal of the aforementioned chart, it is evident that numbers of the land were different than that of the suit land and therefore, the lower Appellate Court could not form an opinion that defendant No.3/appellant ceased to exist a co-sharer and should have relegated the parties to avail the remedy of partition under Section 111 of the Punjab Land Revenue Act. All these factors have not been noticed by the lower Appellate Court, therefore, there is a gross illegality 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 appeal, aforementioned.

For the foregoing reasons, 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 substantial questions of law bearing No.1, 4 and 8, extracted above, are answered in favour of the appellant-defendant No.3 and against the respondents-plaintiff.

Resultantly, the present regular second appeal is allowed.

25.04.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**