

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

**RSA No.370 of 1991 (O&M)
Date of Decision.30.11.2018**

Sant Ram and othersAppellants

Vs

Ram Rakha and others ...Respondents

2. COCP No.1138 of 2003

Sant RamPetitioner

Vs

Harbhajan Singh and others ...Respondents

3. COCP No.898 of 2005

Mehar Chand and anotherPetitioners

Vs

Gurbax Singh and others ...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Som Nath Saini, Advocate
for the appellants.

Mr. S.S. Swaich, Advocate
for the respondents.

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AMIT RAWAL J. (ORAL)

This order of mine shall dispose of one regular second appeal bearing No.370 of 1991 and two contempt petitions bearing Nos.1138 of 2003 and 898 of 2005.

The aforementioned regular second appeal, at the instance of the appellants-plaintiffs, is directed against the judgment and decree of the lower Appellate Court, which reversed the judgment and decree of the trial Court granting injunction in favour

of the plaintiffs on the ground of non-impleadment of all proprietors.

While admitting the aforementioned appeal on 13.05.1991, following order was passed:-

“Admitted.

Stay to continue. Appeal to be heard on 1st November, 1991.”

During the pendency of the appeal, in misc. application No.9663-C of 2002, respondents were directed not to alienate the property.

Two contempt petitions bearing Nos.1138 of 2003 and 898 of 2005 have been filed alleging violation of both the interim orders i.e. qua alienation and as well as interference in the right of grazing of the cattle and collection of twigs/light wood.

The plaintiffs claimed aforementioned injunction on the premise that by virtue of a decree dated 23.03.1901 rendered in Civil Suit No.262 of 1900 by the Court of Munsif 1st Class, Hoshiarpur, Ex.P1, plaintiffs were permitted to graze the land, cut the grass and wood as nature and character of the property in the revenue record was *charand*. Over 61 (sixty one) proprietors were arrayed as defendants.

The defendants opposed the suit by explaining that compromise consequent to decree was passed, which was never acted upon and therefore, could not have been enforced in the manner and mode.

The trial Court on the basis of the pleadings framed following issues including the issue No.11-A for non-joining of the

necessary parties.

- “1. Whether there had been a compromise decree dated 23.3.1901 between the parties? If so, its effect on the rights of the parties? OPP*
- 2. Whether the compromise and the compromise decree ever acted upon and it is against the public policy unjust, unequitable and is hit by uncertainty? OPD*
- 3. Whether the rights of the plaintiffs if any in the suit land have been extinguished by adverse possession of the defendant and due to non user? OPD.*
- 4. Whether suit is barred by time? OPD*
- 5. What is the effect of the judgment and decree dated 17.2.1930, 30.5.1930, 26.3.1930 and 13.11.1929 on the rights of the parties? OPP*
- 6. Whether the defendants are estopped by their act and conduct and acquiescence from denying the rights of the plaintiffs? OPP*
- 7. Whether the suit land and the land in lieu of which it had been allotted during consolidation was being and had been used as a grazing ground by the plaintiffs and the others? OPP*
- 8. Whether the plaintiffs are entitled to the permanent injunction as prayed for? OPP*
- 9. Whether the jurisdiction of this Court is barred by the principle of res judicata in view of decision dated 7.1.1971 of the Punjab and Haryana High Court in civil*

writ petition No.600 of 1965? OPD

10. Whether the said judgment dated 7.1.1971 operates as estoppels? OPD

11. Whether the suit does not lie in view of Section 44 of the East Punjab Consolidation of Holdings Act? OPD

11-A. Whether the persons named in the preliminary objection are the necessary parties to the suit. If so, its effect? OPD

12. Whether the suit under Order 1 Rule 8 CPC is not maintainable? OPD

13. Relief.”

On preponderance of evidence by examining the revenue record noticing the khasra numbers referred to in the decree Ex.P1, the trial Court restrained defendants from causing obstruction/interference in grazing the cattle, collecting grass and wood etc. In appeal laid before the lower Appellate Court, finding of the trial Court has been reversed on the ground of non-impleadment.

Mr. Som Nath Saini, learned counsel appearing on behalf of the appellants submitted that relief of injunction cannot be denied on account of non-impleadment of all the proprietors. It can be sought by arraying person from whom the threat perception was evident. In the revenue record brought on record though the property belonged to the proprietors but reserved as *charand*. The compromise Ex.P1 is between the proprietors and non-proprietors and not between the landlord and tenants. It reflected the land measuring 5682 kanals 18 marlas situated on the river bed in the village and the

residents of the village had grazing rights over such pieces of land. Khatauni Pamaish and Naksha Haqdrawar Ex.P-7, P-8 and P-9 to P-15 and P-16 also reflected the nature of the land as *charand*. The lower Appellate Court in such manner noticing the fact that nature of the land was *charand* could not have non-suited and set aside the injunction on account of non-impleadment.

In view of the alienation by the proprietors, the respondents-defendants had been restrained from grazing the land and therefore, pressed for passing an appropriate order by convicting the contemners.

Mr. S.S. Swaich, learned counsel appearing on behalf of the respondents-defendants supported the judgment and decree of the lower Appellate Court, which returned the finding against the plaintiffs on issue No.1, 7 and 11-A. The entries in *Sharat Wajab-Ul-Arz*, Ex.P26 were actually not as per the revenue record but as per the compromise. No reasons and explanation have come forward in not impleading all proprietors, particularly, when the alleged compromise was relied. The compromise relied did not reflect agreement by all the proprietors, therefore, compliance of Order 1 Rule 9 CPC was conspicuously absent, thus, urges this Court for dismissal of the appeal. He further submitted that application for seeking restraint qua alienation could not have been entertained in the absence of any relief in the impugned suit. It is settled law that relief cannot be substituted in the absence of primary relief unless and until grave injustice is being reflected and relied upon judgment passed by this Court in CWP No.600 of 1965 dated 07.01.1971, Ex.D3.

I have heard learned counsel for the parties, appraised the paper book, record of the Courts below and of the view that there is force and merit in the submission of Mr. Saini. It would be apt to reproduce Order 1 Rule 9 CPC, which reads as under:-

“9. Misjoinder and non-joinder.

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it:

Provided that nothing in this rule shall apply to non-joinder of a necessary party.”

On plain and simple perusal of the same, it is clear that no suit can be defeated on the ground of non-joinder and mis-joinder of the parties. The Court can deal with the controversy with regard to the rights and interest of the parties but of course the rule would not apply to the non-joinder of necessary parties. Concededly, defendant Nos.1 to 61 were also proprietors. They were espousing the cause of other proprietors and mere simplicitor injunction would not have affected the other proprietors when the revenue record reflected the nature of the property as *charand*. The lower Appellate Court should have also struck the equities in realizing that it would help not only the non-proprietors to sustain themselves and as well as animals but also provide basic needs to the residents of the village like milk etc. The natural process of grazing rather helps the villagers and proprietors and save money to raise unregulated crop of grass. It is law of nature which maintains the ecological balance. In such

circumstances the suit could not have been dismissed on this technical ground.

The decree Ex.P1 is not disputed. It is not only the non-proprietors who had right to graze animals but even the proprietors who had, could also graze. Such an innocuous relief should not have been discarded by the lower Appellate Court.

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 Vs. 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 the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. 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.

In view of the aforementioned circumstances, judgment and decree of the lower Appellate Court is set aside and that of the trial Court is restored. The respondents are restrained from causing interference in the appellants/plaintiff's right of grazing their cattle and taking grass and wood etc.

Resultantly, the second appeal is allowed.

In view of the restoration of the judgment and decree of the trial Court, no useful purpose would be served in continuing with the contempt petition. Both the contempt petitions are dismissed.

(AMIT RAWAL)
JUDGE

November 30, 2018

Pankaj*

Whether Reasoned/Speaking Yes

Whether Reportable Yes