

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

RSA No.558 of 1991

Baksha Singh
(Deceased) through LRs

....Appellant

Versus

Kabul Singh (dead) through LRs etc
(Deceased) through LRs

....Respondents

And

RSA No.559 of 1991

Baksha Singh
(Deceased through LRs)

....Appellant

Versus

Kabul Singh (dead) through LRs and Ors.

....Respondents

Date of Order: 02.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

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

Mr. G.S Nagra, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

This common order of mine shall dispose of aforesaid two appeals arising out of two suits since common questions of law and facts are involved in the same.

The plaintiff-appellant Baksha Singh has preferred appeal bearing RSA No.558 of 1991 against the judgment and decree dated 31.1.1991 passed by learned Addl. District Judge, Jalandhar whereby the appeal filed by Kabul Singh-defendant against the judgment and decree dated 03.11.1987 passed by Sub Judge, Ist Class, Jalandhar, decreeing the suit, has been partly accepted.

In another appeal bearing RSA No.559 of 1991, plaintiff-appellant Baksha Singh has challenged the judgment and decree dated 31.1.1991 passed by learned Addl. District Judge, Jalandhar whereby the appeal filed by Kabul Singh-plaintiff against the judgment and decree dated 03.11.1987 passed by Sub Judge, Ist Class, Jalandhar, dismissing the suit, has been accepted with the modification to the extent that the plaintiff is owner of the suit land to the extent of half share and is entitled to protect his share being invaded from the defendants besides being entitled to the injunction prayed for. The facts of both the cases are being reproduced hereunder:

The plaintiff-Kabul Singh instituted the suit bearing No.201 of 1986 titled S Kabul Singh Vs. Gurbachan Kaur and Ors (for short “second suit”) on the premise that the land comprising in Khata No.6/6, Khasra No.9/9 (5-10) was joint ownership of plaintiff and his brother Nasib Singh sons of Basant Singh. The suit property on the death of Nasib Singh was succeeded by defendant No.1 & 3 i.e Gurbachan Kaur and Manjit Kaur i.e widow and his daughter being legal heirs. Land measuring 2 kanal 15 marlas continued in possession of plaintiff and remaining land measuring 2 kanal 15 marlas out of said Khasra number continued in cultivating possession of defendant No.1. But defendant No.1 in connivance with Patwari Halqa got the khasra girdawari changed in her name in respect of entire land measuring 5 kanal 10 marlas & vide sale deed dated 24.3.1976 sold the land measuring 5 kanal 10 marlas in favour of defendant No.2 Baksha Singh son of Nirmal Singh, therefore the said sale deed dated 24.3.1976 was null and void because it was exceeding her share as her share was half out of 5 kanal 10 marlas which comes to 2 kanal and 15 marlas

only.

The suit was contested by the defendants. Defendant Nos.1 & 3 by filing joint written statements took the pleas of maintainability, locus standi besides stating that the suit was not properly valued for the purpose of court fee and jurisdiction as cancellation of sale deed was prayed for. It was emphatically stated that the plaintiff was never in possession of suit land and it was actually in exclusive possession of defendant Nos.1 & 3, which was surrendered in favour defendant No.2 at the time of execution of sale deed. Though the parties had already been having separate possession but in the revenue record, joint ownership continued.

Defendant No.2 filed separate written statement stating that he had become owner by virtue of registered document and had been in possession of the property.

From the pleadings of the parties, trial Court framed the following issues:

- “1. Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD*
- 2. Whether suit is not maintainable in the present form?OPD*
- 3. Whether plaintiff is entitled to declaration, prayed for?OPP*
- 4. Whether plaintiff is entitled to injunction, prayed for?OPP*
- 5 Relief.”*

In order to support their case, plaintiff examined Sucha Singh as PW1, Ujagar Singh as PW2, Surjit Singh as PW3 besides bring on record certain documents i.e jamabandi for the year 1970-71 Ex.P.1, copy of jamaandi for the year 1960-61 as Ex.P.2, copy of jamabandi for the year

1975-76 as Ex.P.3, copies of khasra Girdawaries as Ex.P4 and P.5 and copy of mutation as Ex.P.6.

On the other hand, defendants examined Gurbachan Kaur as DW1, Baksha Singh as DW2, Naranjan Singh as DW3 and Joginder Singh as DW4. He also tendered in evidence copy of sale deed as Ex.D1 and copy of khasra girdawaris Ex.D.2 and D.3.

Another suit bearing Civil Suit No.234 of 1986 titled Baksha Singh Vs. Gurbachan Kaur and Ors (for short “first suit”) was filed by plaintiff-Baksha Singh for permanent injunction restraining the defendants from interfering in the peaceful possession of plaintiff over the property by virtue of aforesaid sale deed as he was in exclusive possession being vendor and a co-sharer, thus the property had devolved upon him though it was disputed by the defendants in the written statement.

Plaintiffs in order to prove his case, examined himself as PW1, Naranjan Singh as PW2, Joginder Singh as PW3 and placed on record copy of sale deed as Ex.P1 and copies of khasra girdawaris as Ex.P2 and P.3.

Defendants in support of their case examined DW1 Sucha Singh, Ujagar Singh as DW2 and placed on record copies of jamabandi as Ex.D1 and D2, copies of khasra girdawaris as Ex.D3 and D4, another copies of jamabandi as Ex.D5 and Ex.D6.

On the basis of preponderance of evidence, the trial Court dismissed the “Second Suit whereas the appeal filed by plaintiff-Kabul was accepted by lower Appellate Court holding him entitled to the injunction. Judgment and decree of trial Court was modified to the extent that the plaintiff was owner of the land in suit to the extent of half share and thus entitled to protect his share being invaded from the defendants.

The “first suit” was decreed by the trial Court while restraining the defendant Nos.2 to 4 from dispossessing the plaintiff from the land comprising in Khasra No.9/9. Feeling dissatisfied, defendant-Kabul Singh filed appeal, which was partly accepted by lower Appellate Court holding the defendant to be owner to the extent of half share of the suit land.

Both the present appeal were listed together before this Court and at the time of admitting the appeal, dispossession of Baksha Singh-appellant was stayed. Said interim stay was made absolute by this Court vide order dated 27.5.1992.

Learned counsel for the appellants in both the appeals particularly while challenging the judgment of lower Appellate Court in “Second Suit” submitted that the same is not sustainable being illegal and perverse. There has been misreading of documentary evidence as the lower Appellate Court had abdicated in construing the contents of the sale deed as well as jamabandi Ex.P.6 in correct perspective, for, it was not only the property in dispute, which was joint ownership of Kabul Singh and Nasib Singh being inherited by Gurbachan Kaur and her daughter as she had another 1/4th share in other land measuring 18 kanals. Even khasra girdawari Ex.P.4 and P5 proved that Gurbachan Kaur was in exclusive possession of land measuring 5 kanal 10 marlas in Khasra No.9/9 and by virtue of sale deed, she handed over said possession to the appellant-Baksha Singh. He submitted that the trial Court while misreading the documents decreed the first suit by granting injunction. The law with regard to the injunction vis-a-vis co-sharers being exclusive owners is no longer *res integra* in view of judgment reported as **Bhartu Vs. Ram Sarup 1981 PLJ 204**. It was next submitted that the lower Appellate Court instead of setting

aside the sale deed to the extent of half share should have directed the parties to seek partition of the entire property of Kabul Singh and Nasib Singh/Gurbachan Kaur by keeping the sale deed intact with the caveat that in case there was any shortfall, only then the sale deed would be effected. The appellant-plaintiff is in continuous possession of the suit property since the year 1991 and preceding to the year 2002. No harm and injury would be caused if the parties were/are relegated to avail the remedy of seeking partition of land.

Per contra, learned counsel for the respondents submitted that the appellant-Baksha Singh failed to prove on record any evidence that there was certain other joint holding between Kabul Singh and Nasib Singh than the disputed property and in such circumstances, the argument raised on behalf of the appellant would not be sustainable. Once the revenue record shows that Khasra No.9/9 was joint ownership of Kabul Singh and Nasib Singh, the share of which devolved upon Gurbachan Kaur and her daughter, it could not have alienated the land more than her half share i.e 2 kanal and 15 marlas, thus the findings of lower Appellate Court with regard to injunction is correct appreciation of law, thus prayed for dismissal of the appeals.

After hearing learned counsel for the parties and appraising the paper book with their able assistance, I find merit in the submissions made by learned counsel for the appellant, for, on examination of Ex.P.6 mutation of half share in favour of Baksha Singh in respect of Khasra No.9/9 of land measuring 5 kanal 10 marlas whereas other khasra Nos.1/26/3, 9/1/1, 69/1, 1/14, 15/1, 16/2, 25/2, 10/5/1, 5/2, 5/3 shows that land measuring 18 kanal was joint ownership of Gurbachan Kaur with Kabul Singh.

Both the courts below have not referred to the aforesaid documents. In my view, the lower Appellate Court at least being the last court of law and facts instead of setting aside the judgment and decree of trial Court to the extent of half share, should have kept the sale deed intact till the partition took place by metes and bounds. The sale deed could have been touched after culmination of the partition proceedings and that too if there was some shortfall. Suffice to say that the finding recorded by the lower Appellate Court has been wholly fallacious, if not, perverse.

The sale deed (Ex.D1) also shows the joint ownership and such kind of documents carries presumption of truth being registered documents especially when no contrary evidence has been led in rebuttal. Even the Ex.P.5 Khasra girdawari from the year 1981 to 1985 in respect of Khasra No.9/9 measuring 5 kanal 10 marlas proved that Gurbachan Kaur was in exclusive possession but the same was also not referred to. Law for the purpose of granting injunction against a co-sharer is also no longer *res integra*. Said Gurbachan Kaur was in exclusive possession, which fact had not been denied. The lower Appellate Court while setting aside the judgment of trial Court observed that no injunction could be granted qua half share of the property whereas the injunction still remained qua the land measuring 2 kanal and 15 marlas. Thus such finding is sustainable in law and in my view, could have been given only subject to the culmination of the partition proceedings initiated at the instance of either of the co-owners. Status of appellant-Baksha Singh by virtue of sale deed in respect of Khasra No.9/9 would be of a co-sharer with Kabul Singh and their shares would be determined only when a preliminary decree is drawn. All these facts have not been dealt with. It is true that in a second appeal a finding of fact even

if erroneous, will generally not be disturbed but where it is found that it is vitiated on wrong test and on the basis of assumptions and conjectures an element of perversity involved is there, this Court would obviously have to deal with the issue. The incorrect and vague finding, in my view have stemmed out on a complete misreading of evidence.

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 LR's 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 LR's 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.

Keeping in view the aforementioned, I have no hesitation to allow the appeal and set aside the impugned judgment of the appellate Court which is modified to the extent that the sale deed cannot be said to be null and void in respect of half share. It would be subject to ratification if any after the culmination of the partition proceedings to be initiated at the instance of either of the parties. Similarly, the judgment and decree of lower Appellate Court qua injunction is also set aside and the judgment and decree passed of the trial Court is restored. However, it is made clear that in

case parties have already compromised the matter then nothing survives for execution. If otherwise, the natural consequences of the judgment and decree passed by the trial Court, confirmed by this Court, shall follow. The second appeal is allowed in the above terms.

May 02, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No