

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

**RSA No.1858 of 1996
Date of decision:20.02.2018**

Model Education Society Safidon

... Appellant

Vs.

Jeet Singh and others

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. S.K.Jain, Advocate
for the appellant.

AMIT RAWAL J.

Appellant-defendant no.2 is in Regular Second Appeal against the judgment and decree dated 08.05.1996 passed by the Lower Appellate Court, whereby, the judgment and decree dated 31.10.1992 has been set aside.

The plaintiffs alongwith proprietors claiming to be owners of the agricultural land measuring 57 kanals 19 marlas comprised in khewat no.1239 khatoni no.1445 situated in the revenue estate of Safidon, having proportionate share in the respective holdings instituted a suit seeking declaration of land with consequential relief of permanent injunction that they are in possession of a part of this land measuring 25 kanals 15 marlas (hereinafter called "suit land"). Whereas, Ram Avtar, Gopi Ram, Pirthi Singh, Ram Gopal, Ravinder Parkash and Thambu Ram, defendants no.3 to 8 gifted the entire land of 57 kanals 17marlas to Akhil Bhartiya Charatic Auam Sanskrittic Punarshthapan Samaj Central School Safido, District Jind, vide registered gift deed no.650 dated 2.8.1985. Defendant no.1

subsequently gifted the land measuring 25 kanals 15 marls to appellant-defendant No.2, Model Education Society, Safidon, vide registered gift deed no.931 dated 07.12.1987. The aforementioned gift deed was challenged alongwith consequential relief with perpetual injunction by the plaintiffs by filing a civil suit No.32 of 1988 instituted on 18.01.1988.

Defendants no.1 and 2 contested the suit by filing a joint written statement stating therein that foundation stone of the school was laid and construction had already been started by spending a sum of ₹30,000/-. Defendant no.1 could not manage and collect more funds for the construction of the school building, abandoned the plan and gifted the suit land measuring 25 kanals 15 marlas to defendant no.2. Defendant no.2 paid the loan raised for laying foundation of the school. It was also stated that the suit was not maintainable and gift deeds were valid and binding. Despite having been served, defendants No.4, 5, 7, 8 and defendants No. 3 and 6 were proceeded against ex parte.

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

1. *Whether the plaintiffs are owners in possession of the suit land as alleged? OPP*
2. *Whether the gift deed no.650 dated 2.8.85 and no.231 dated 7.12.87 are null and void as alleged and the same are liable to be set aside?OPP*
3. *Whether the plaintiffs have no cause of action?OPD*
4. *Whether the plaintiffs have no locus-standi to file the present suit?OPD*

5. *Whether the suit is not maintainable in the present form?OPD*
6. *Whether the plaintiffs are estopped from filing the present suit by their act and conduct?OPD*
7. *Whether the suit is bad for non-joinder of necessary parties?OPD*
8. *Relief.”*

Plaintiffs in support of evidence examined Ajit Singh, PW1 and Richhpal Singh PW2. All in unison stated that the plaintiffs were in possession of the suit land for the last 25 years being “Biswedar” (proprietors) and relied upon mutation no.5434(Ex.P2), jamabandi for the year 1979-80 (Ex.P1) and khasra girdawari (Ex.P3) to prove their ownership and possession.

The trial Court on the basis of aforementioned evidence dismissed the suit. However, in appeal, the suit has been allowed by holding that the trial Court had not appreciated the evidence in correct perspective. It is under these circumstances, present Regular Second Appeal was filed.

Mr. S.K.Jain, learned counsel for the appellant/defendant no.2 submitted that the suit was not maintainable as the respondent-plaintiffs did not have any locus-standi to institute a suit, much less did not prove on record being “Biswedar” of suit land and no list of proprietors had been brought on record to claim the relief as indicated above. The Lower Appellate Court erred in reversing the findings of the trial Court by holding that gift deed was not coupled with delivery of possession. In fact, the possession was surrendered and construction of the school building was

also started. The Court below found that the construction had been done upto the foundation level. Lower Appellate Court only referred to Ex.D14 the pamphlet whereby the general public was informed regarding the installation of the foundation stone but did not refer to the statement made by DW3 to DW5, who categorically stated that the foundation stone was laid on the spot, much less possession of the land was delivered by the respondents at the time of execution of the gift deed, therefore, there was abdication and mis-direction. If at all, the respondent-plaintiffs had a claim of proprietors, the remedy was to seek partition of proprietary body. The foundation of the school had not been disputed. If the Court was to grant injunction, it could not have granted with regard to entire land of '*Jumla Mustarka Malkan*' and thus, urged this Court for setting aside the findings under challenge.

This Court, while admitting the appeal, vide order dated 25.07.1996 stayed the operation of the decree under appeal till further orders. The order reads thus:-

“Present: S.K. Jain, Advocate for the appellant.

Admitted.

Operation of the decree under appeal shall remain stayed till further orders.

25.7.1996

(N.K.SODHI)

JUDGE”

The contesting respondents in the present appeal are respondents No.1 to 3, out of which, respondents No.1 and 2 have refused to accept notices and respondent No.3, despite service has not put in appearance. Rest of the respondents are proforma respondents, who were

proceeded against ex parte before the trial Court.

The aforementioned fact has been noticed by this Court in the order dated 01.06.2017 which reads as under:-

“Present: None for the appellant.

As per office report, respondents No.1, 2, 7 and 10 have refused to accept notice whereas respondents no.3, 4, 6 and 9 have been served but no one has put in appearance on their behalf despite service. Respondents No.5 and 8 have died.

Needful be done before the next date of hearing.

Adjourned to 30.10.2017.

*June 01, 2017
Poonam*

*(DAYA CHAUDHGARY)
JUDGE”*

Since there is no representation on behalf of the respondents, I proceed to decide the appeal on merits.

I have heard the learned counsel for the appellant/defendant no.2, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is force and merit in the submissions of Mr. S.K. Jain.

The plaintiffs miserably failed to prove on record the factum of their ownership. The entire jamabandi and mutation brought on record, i.e. Ex.P1 to Ex.P3 reflected their possession as that of *Chakotedar*. The claim in the suit was that they were proprietors but did not bring on record the list of proprietors and other corroborated evidence and therefore, could not lay challenge to the gift deeds dated 02.08.1985 and 07.12.1987. The evidence brought on record did not prove that gift deed dated 02.08.1985 was bad on

account of delivery of possession. The registered document carried a presumption of truth which has not been rebutted either by direct or corroborated evidence. Rather on the other hand, it has come on record that possession of the land was delivered to Akhil Bhartiya Charatic Auam Sanskrittic Punarshthapan Samaj Central School Safido, District Jind and the foundation was laid. However, they could not carry on but it was gifted to defendant no.2. However, the factum of laying of the foundation stone and construction was not emphatically denied in the replication. The foundation of the school was laid down by the then Minister of Union of India and this fact has been admitted by one of the plaintiffs but in other breath, stated that it was set up for poultry farm.

During the pendency of the suit, Local Commissioner was appointed, who submitted his report regarding the construction, thus, for all intents and purposes, it leaves no manner of doubt that if at all the plaintiffs have not surrendered the possession, the foundation could not have been laid, in other words, plaintiffs allowed the foundation of the school to be laid, much less the construction. The lower Appellate Court, in my view, has completely abdicated in not noticing the aforementioned facts. It failed to advert to the report of the Local Commissioner regarding construction of the foundation as well as of the school. The gift deed Ex.D13 revealed that it was gifted only for establishing the school which was not disputed by the plaintiffs. The Lower Appellate Court also remained oblivious of the fact of locus-standi of plaintiffs. No evidence has been led to the total holdings of the land or list of proprietors. The plaintiffs miserably failed to prove averments made in the plaint.

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 what has been observed above, judgment and decree of the Lower Appellate Court is hereby set aside and that of trial Court is restored.

Resultantly, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

February 20, 2018

savita

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No