

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

RSA No.1968 of 1998(O&M)

Date of decision: 5.10.2018

Jangir Singh through LRs

....Appellant

VERSUS

Baldev Singh and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Vikas Bahl, Senior Advocate with
Mr. Rakesh Gupta, Advocate,
Mr. Akshay Rawal, Advocate and
Ms. Priyanka Kansal, Advocate for the appellant.

Mr. Avnish Mittal, Advocate for respondent No.1.

REKHA MITTAL, J.

Challenge in the present appeal has been directed against the judgment and decree dated 26.02.1998 passed by the Additional District Judge, Sangrur whereby appeal filed by the respondent/plaintiff against the judgment and decree dated 13.08.1993 passed by Sub Judge 2nd Class, Sangrur (hereinafter to be referred as the trial Court) was allowed, judgment and decree dated 13.08.1993 were set aside and suit filed by the respondent/plaintiff for declaration that he is owner in possession of land measuring 67 kanal 14 marlas, fully described in head-note of the plaint, was decreed with costs throughout.

Baldev Singh son of Natha Singh, respondent/plaintiff staked his claim to the suit land on the basis of sale deed dated 22.11.1978 executed by Mehar Singh @ Mehru. It is pleaded that Mehar Singh @

Mehru and Mst. Sham Kaur widow of Gajjan Singh were co-owners to the

extent of half share each in agricultural land measuring 313 kanal 8 marlas situated in the revenue estate of village Rogla, as mentioned in the copy of Jamabandi for the year 1982-83. Balbir Singh son of Mehar Singh was the collateral of Mst. Sham Kaur as per the pedigree table reproduced in para 2 of the plaint. Sham Kaur was not heard of for more than 32 years. The Collector, Sunam vide order dated 15.05.1984 directed deletion of name of Sham Kaur treating her as dead and mutation No.4438 of village Rogla was entered and sanctioned vide order dated 16.07.1984 in favour of Jagir Singh (appellant herein) and the same is illegal as Jagir Singh never succeeded to the estate of Sham Kaur being distant collateral.

Balbir Singh son of Mehar Singh was alive at that time and succeeded to the estate of Sham Kaur – deceased. Balbir Singh died on 27.01.1985 and he was succeeded by Smt. Surjit Kaur and others, defendants No.2 to 7, who are owners of half share in the land being the heirs and successors of Sham Kaur and Balbir Singh. The disputed land measuring 67 kanal 14 marlas is a part of the entire suit land and the plaintiff was competent to purchase it from the estate of Balbir Singh who succeeded to the share of Sham Kaur. If defendant No.1 is in possession of any portion of the suit land, its possession be got delivered to defendants No.2 to 7.

Defendants No.2 to 7 filed civil suit for joint possession on 30.01.1986 against Jagir Singh in which Baldev Singh was also impleaded as defendant No.2. Defendant No.6 who was acting as guardian of defendants No.2 to 5 colluded with defendant No.1 and got the suit dismissed. The Sub Divisional Magistrate, Sunam vide order dated 07.01.1986 got attached the suit land under Section 145/146 of the Code of

Criminal Procedure, 1973 and an official Receiver has been appointed to manage the suit land.

The appellant/defendant No.1 filed the written statement and in turn raised preliminary objections inter alia locus standi of the plaintiff to file the suit; the suit being without any cause of action; plaintiff being not competent to file suit for possession for benefit of defendants No.2 to 7; simple suit for declaration being not competent; suit being bad for non-joinder of necessary parties and mis-joinder of parties and the plaintiff being estopped by his act and conduct from filing the suit. On merits, para No.1 of the plaint has been admitted but it has been denied that defendants No.2 to 7 are entitled to succeed to the estate of Smt. Sham Kaur. He has controverted the allegations challenging mutation No.4438 sanctioned in favour of the answering defendant with the averments that mutation qua succession to Mst. Sham Kaur was rightly sanctioned.

Mehar Singh had half share in land measuring 313 kanal and the land of his share comes to 156 kanal 10 marlas. Out of this land, he executed registered gift deed dated 08.11.1958 in favour of Jang Singh and Norang Singh sons of Mohan Singh in respect of land measuring 70 kanal 8 marlas, sold 68 kanal 17 marlas to Mukhtiar Singh and others and 12 kanals in favour of Bachan Kaur and others. Prior to the alleged sale by Mehar Singh in favour of the plaintiff in the year 1978, Mehar Singh had already transferred 151 kanal 13 marlas of land, thus, was left with only 4 kanal 17 marlas of land. Mehar Singh could not transfer land measuring 67 kanal 14 marlas in favour of the plaintiff. Transfer of 62 kanal 3 marlas of land in excess of share of Mehar Singh is without any right and no title passes to the plaintiff with respect to said land. All other material

averments of the plaint have been denied with a prayer for dismissal of the suit.

The controversy between the parties led to framing of following issues:-

1. Whether Mehru son of Jaimal was competent to sell the whole land measuring 67 kanal 14 marlas on 22.11.1978 in favour of the plaintiff as alleged? OPP
2. Whether the plaintiff is in possession of the whole of the suit land as alleged? If not, to what effect? OPP
3. Whether the suit is bad for non-joinder of necessary parties as alleged? OPP
4. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
5. Relief.

The parties were permitted to adduce evidence in support of their respective contentions. Initially the suit was decided vide judgment and decree dated 15.09.1987 whereby suit of the plaintiff with regard to land measuring 4 kanal 17 marlas was decreed and in respect of land measuring 62 kanal 17 marlas was dismissed. In appeal preferred by Baldev Singh, judgment and decree passed by the trial Court were set aside and the matter was remitted to the trial Court for decision afresh after allowing the plaintiff/appellant an opportunity to produce evidence vide judgment dated 29.01.1991 passed by the Additional District Judge, Sangrur. After remand, suit of the plaintiff was dismissed by the trial Court on 13.08.1993 but the same was decreed by the Appellate Court whereby judgment and decree passed by the trial Court were set aside.

Counsel for the appellant would argue that Sh. Mehar Singh was co-owner to the extent of one half share out of land measuring 313 kanal 8 marlas i.e. 156 kanal 14 marlas. The appellant/defendant No.1 in para 7 of the written statement has given details of transfer of land measuring 151 kanal 13 marlas by said Mehar Singh by way of gift and sales before the sale deed was executed in favour of the plaintiff/respondent. The plaintiff filed replication to the written statement and in reply to para 7, there is no challenge to the averments with regard to land gifted and sold by Mehar Singh and the same amounts to admission on the part of respondent/plaintiff. It is vehemently argued that as Mehar Singh had already transferred land measuring 151 kanal 13 marlas out of land measuring 156 kanal 14 marlas, Mehar Singh was left with land measuring 5 kanal 1 marla of his ownership and sale in favour of the respondent/plaintiff to that extent can hold good and in respect of remaining land does not confer any title in favour of the respondent/plaintiff.

The second submission made by counsel is that the Court in appeal absolutely misdirected itself by upholding the entire sale by Mehru by extending the benefit of Section 43 of the Transfer of Property Act, 1882 (in short 'the T.P. Act'). It is vehemently argued that it is none of the plea of respondent/plaintiff that Mehru ever succeeded to the estate of Mst. Sham Kaur, therefore, there was no occasion for the Appellate Court to make out a new case for the respondent/plaintiff. He would point out that in para 3 of the plaint, it is averred that Balbir Singh son of Mehar Singh who was alive at the time of sanction of mutation No.4438 in July 1984 was entitle to succeed to the estate of Sham Kaur – deceased. In addition, it is argued that as per plea of the respondent/plaintiff, Mst. Sham Kaur had

not been heard of for the past about 32 years before institution of the suit in 1986. Till date, there is no declaration by a competent Court qua death of Mst. Sham Kaur as she had not been heard of at least 7 years prior to institution of such suit. It is further argued that even in the suit instituted by Baldev Singh – plaintiff, no such declaration has been sought that Mst. Sham Kaur is to be declared as dead. According to counsel, there is no clear evidence on record with regard to exact date of death of Sh. Mehar Singh @ Mehru. However, it has been brought on record in evidence that Mehar Singh died 2 years after execution of sale deed in November 1978. It is further argued that as Mehar Singh died sometime in the year 1980-81 and till date Mst. Sham Kaur has not been declared to be dead, Sh. Mehar Singh @ Mehru never succeeded to the estate of Mst. Sham Kaur, therefore, respondent/plaintiff possibly cannot claim benefit of the provisions of Section 43 of the Transfer of Property Act, 1882. In the alternative, it is argued that assuming that Mst. Sham Kaur is declared to be dead on the basis of suit instituted by Baldev Singh in August 1986, she would be deemed to be dead with effect from date of the suit and not prior thereto. For this purpose reliance has been placed upon judgment of Hon'ble the Supreme Court **LIC of India Vs. Anuradha, 2004 (3) RCR (Civil) 21.**

Another submission made by counsel for the appellant is that successors in interest of Sh. Balbir Singh son of Mehar Singh filed a suit for joint possession in January 1986 qua land left behind by Mst. Sham Kaur and the same was withdrawn vide order dated 26.05.1986 Ex.P12 without permission to file a fresh suit on the same cause of action. It is argued that as successors in interest of Balbir Singh withdrew the suit, respondent/plaintiff cannot claim any relief of possession for defendants

No.2 to 7 in the present suit when otherwise the same is barred under Order 23 Rule 1 of the Code of Civil Procedure, 1908 (in short 'the Code').

Counsel has further submitted that prior to filing of the instant suit for declaration, the respondent/plaintiff filed a suit for permanent injunction that came to be dismissed in the year 1987 vide judgment and decree dated 11.05.1987, sought to be produced on record by way of additional evidence. The respondent/plaintiff is guilty of concealing the factum of filing of the suit for injunction, therefore, suit filed by the respondent is liable to be dismissed for want of compliance with the provisions of Order 7 Rule 1 (j) of the Code. In this context, reference has been made to judgment of Delhi High Court **Holy Health and Educational Society (Regd.) Vs. Delhi Development Authority, 1993(3) RCR (Civil) 531.**

Counsel for the appellant has also challenged maintainability of the suit in view of provisions of Section 34 of the Specific Relief Act, 1963. It is argued that the appellant raised preliminary objection No.5 that the respondent is not in possession of the suit land and has not sought any consequential relief, therefore, suit for mere declaration is not competent. It is argued that the judgment and decree dated 11.05.1987 dismissing suit for injunction filed by the respondent against dispossession from the suit land negates his plea that he is in possession of suit land, therefore, simplicitor suit for declaration without consequential relief of possession is hit by proviso to Section 34 of the Specific Relief Act, 1963.

Counsel representing the respondent/plaintiff has supported the judgment passed by the Appellate Court. He would point out the averments raised in para 3 of the plaint wherein there is reference to the order dated 15.05.1984 passed by the Collector, Sunam, deleting name of

Mst. Sham Kaur by treating her as dead and mutation No.4438 was entered in the name of appellant – Jangir Singh. It is argued that indisputably Mehru or Balbir Singh, his son, stood at a nearest degree of collaterals viz-a-viz Jagir Singh – appellant, therefore, estate left behind by Mst. Sham Kaur would be inherited by Balbir Singh son of Mehar Singh and later by successors in interest of Sh. Balbir Singh. It is further argued that Balbir Singh is the son of Mehar Singh @ Mehru. Sale by Mehar Singh in excess of land of his share to the extent of half share out of land measuring 313 kanal 8 marlas has rightly been protected by extending the benefit of Section 43 of the T.P. Act.

To refute contention of the appellant that simplicitor suit for declaration is not maintainable, counsel would urge that no sooner the respondent/plaintiff is declared to be co-owner in the land to the extent of 67 kanal 14 marlas on the basis of sale deed executed by Sh. Mehru, he would be entitle to joint possession of land with his co-sharers and he cannot seek a decree of possession without partition of the joint land. It has further been submitted that as soon as the respondent becomes co-owner in the joint land and every co-owner is deemed to be in possession of every inch of joint land, suit filed by the respondent cannot fail for want of seeking consequential relief of possession.

With regard to the provisions of Order 7 Rule 1 (j) of the Code, it is argued that as the previous suit was a simplicitor suit for injunction and the present suit is only a suit for declaration without any relief for injunction, the instant suit cannot fail for non-compliance of the provisions of Order 7 Rule 1 (j) of the Code.

I have heard counsel for the parties, perused the paper-book and original records.

Indisputably, Mehru was owner of land measuring 156 kanal 14 marlas being co-owner to the extent of half share out of total land measuring 313 kanal 8 marlas. The remaining half share was co-owned by Mst. Sham Kaur widow of Gajjan Singh. Mehar Singh @ Mehru executed sale deed dated 22.11.1978 in favour of the respondent/plaintiff qua land measuring 67 kanal 14 marlas. As per plea of the appellant/defendant raised in para 7 of the written statement, Mehru had already transferred land measuring 151 kanal 13 marlas prior to the sale in question. In para 7, there is reference to gift deed dated 08.11.1958 in favour of Jang Singh and Norang Singh sons of Mohan Singh qua land measuring 70 kanal 8 marlas. Sale of 68 kanal 17 marlas to Mukhtiar Singh etc. and 12 kanals in favour of Bachan Kaur and others. No doubt, in the replication to para 7 of the written statement, there is no counter to the allegations qua transfer of land by Sh. Mehar Singh by way of gift and sales etc. However, there is no evidence on record with regard to gift deed dated 08.11.1958 in respect of land measuring 70 kanal 8 marlas in favour of Jang Singh and Norang Singh. On the contrary, the appellant/defendant produced Jamabandi for the year 1977-78. The said jamabandi in column No.5 records sale of land measuring 68 kanal 17 marlas by Mehru in favour of Mukhtiar Singh and others, land measuring 12 kanal 8 marlas in favour of Bachan Kaur and others and gift of land measuring 27 kanal 19 marlas in favour of Jang Singh and Norang Singh sons of Mohan Singh. The jamabandi Ex.D2 relied upon by the appellant falsifies and belies his plea that Mehru gifted land measuring 70 kanal 8 marlas in favour of Jang Singh and Norang Singh sons of Mohan Singh. Had it been true that Mehru had gifted land measuring 70 kanal 8 marlas in favour of Jang Singh and Norang Singh, Jamabandi for the year 1977-78 would have recorded the factum of gift to

that extent. Taking into consideration the land sold and gifted by Sh. Mehru recorded in the Jamabandi for the year 1977-78 and in absence of the appellant having proved the gift deed dated 08.11.1958, it can safely be held that Mehru transferred land measuring 109 kanal 4 marlas out of land measuring 156 kanal 14 marlas owned by him prior to execution of sale deed dated 22.11.1978 in favour of the respondent/plaintiff, thus, he was left with ownership of land measuring 47 kanal 10 marlas of his share out of land measuring 156 kanal 14 marlas. The Courts have failed to correctly appreciate the entries in the revenue records, therefore, could not correctly calculate land owned by Mehru at the time of sale in favour of respondent/plaintiff. In this view of the matter, sale deed dated 22.11.1978 executed by Mehru in favour of the respondent would hold good to the extent of land measuring 47 kanal 10 marlas. In this view of the matter, respondent/plaintiff is entitle to declaration that he is owner of land measuring 47 kanal 10 marlas on the basis of sale deed dated 22.11.1978.

This brings the Court to applicability of Section 43 of the T.P. Act. Section 43 of T.P. Act deals with transfer by unauthorized person who subsequently acquires interest in property transferred. A relevant extract therefrom, reads as follows:-

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person 1[fraudulently or] erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said

option. Illustration A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorised to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him."

In the case at hand, it is not plea of the respondent/plaintiff that Mehar Singh @ Mehru ever acquired any right of ownership in respect of land owned by Mst. Sham Kaur. If Mehru did not acquire any right in the land of Mst. Sham Kaur, provisions of Section 43 of T.P. Act, by no stretch of imagination, can be attracted in order to extend benefit thereof to the respondent/plaintiff qua land sold in excess of share of Sh. Mehru to the extent of 47 kanal 10 marlas.

As per plea of the respondent/plaintiff, Mst. Sham Kaur has not been heard of for the past about 32 years. As has been rightly argued by counsel for the appellant that till date, there is no declaration by a competent Court of law with regard to death of Mst. Sham Kaur. Even in the suit filed by respondent/plaintiff, he has not sought any such declaration with regard to death of Mst. Sham Kaur. Assuming that any such declaration is sought or can be granted in the present suit, the same would be effective from the date of filing of the suit in August 1986.

Counsel for respondent No.1 has not disputed that in view of evidence on record, Sh. Mehru passed away 2 years after sale deed dated 22.11.1978 was executed. As Sh. Mehru died sometime in the year 1980-81 and succession to the estate of Mst. Sham Kaur had not opened before his death, there is no question of Mehru having inherited to the estate of Mst. Sham Kaur or extending benefit of Section 43 of T.P. Act to the

respondent/plaintiff. In this view of the matter, I find merit in contention of the appellant that the judgment passed by the Court in appeal upholding validity of sale qua entire land measuring 67 kanal 14 marlas on the basis of sale deed dated 22.11.1978 by invoking Section 43 of T.P. Act cannot stand the test of judicial scrutiny and liable to be set aside.

So far as plea of the appellant that suit filed by the respondent/plaintiff is hit by the provisions of Section 34 of the Specific Relief Act, 1963 for want of seeking consequential relief of possession, the same is not tenable and liable to be rejected. The respondent/plaintiff, in view of discussion made hereinbefore, became the co-owner in joint land to the extent of 47 kanal 10 marlas. There is no denial about settled position in law that every co-owner is deemed to be in possession of every inch of joint land. Under the circumstances, failure of the respondent to seek a decree of joint possession is inconsequential when otherwise he cannot seek possession till the joint land is partitioned.

Contention of the appellant with regard to the suit being liable to be dismissed for want of necessary compliance with the provisions of Order 7 Rule 1 (j) of the Code is also devoid of merit. Order 7 Rule 1 (j) of the Code was inserted in the Code by way of amendment, applicable to Punjab, Haryana and Chandigarh w.e.f. March 1991. As the present case was instituted by the respondent/plaintiff in 1986, the appellant cannot derive any advantage to his contention from a provision in the Code which came into existence subsequent in point of time.

To be fair, counsel for the appellant has also raised an issue that the respondent is not entitle to raise a plea that he (appellant) should deliver possession of any part of suit land in his possession to defendants

No.2 to 7 as suit filed by defendants No.2 to 7 for the said relief has been

dismissed as withdrawn. The said plea raised by the respondent/plaintiff is not relevant and material in the context of claim made by the plaintiff with regard to his entitlement to 67 kanal 14 marlas of land on the basis of sale deed dated 22.11.1978. That being so, this Court need not to dilate on this issue which seems to be raised by the respondent/plaintiff without any justification much less its relevance in the context of present controversy. This issue may be open to be raised by the appellant in case defendants No.2 to 7 file a suit claiming any right qua inheritance to the estate of Mst. Sham Kaur, in appropriate proceedings.

No other point has been raised.

For the foregoing reasons, the appeal is partly allowed. The judgment and decree passed by the Appellate Court are set aside to the extent of declaring the respondent owner of land beyond 47 kanal 10 marlas, on the basis of sale deed dated 22.11.1978. It is clarified that the judgment and decree passed by the Court in appeal declaring the respondent/plaintiff to be owner of suit land to the extent of 47 kanal 10 marlas are affirmed. In the peculiar circumstances of the case, the parties are left to bear their own costs. All miscellaneous applications including application for additional evidence shall be deemed to be disposed of.

OCTOBER 5th, 2018

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned :

yes/no

Whether reportable :

yes/no