

RSA No.4240 of 2003 (O&M)

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

RSA No.4240 of 2003 (O&M)

Date of decision:20.08.2018

Dhan Singh

... Appellant

Vs.

Mamo Devi and others

... Respondents

RSA No.569 of 2008 (O&M)

Sher Singh and others

... Appellants

Vs.

Dhan Singh

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Vijay S. Kajla, Advocate
for the appellant (in RSA No.4240 of 2003) and
for the respondent (in RSA No.569 of 2008).

Mr. Jagdish Manchanda, Advocate
for the appellant (in RSA No.569 of 2008) and
for the respondents (in RSA No.4240 of 2003).

AMIT RAWAL J. (Oral)

This order of mine shall dispose of two Regular Second Appeals bearing Nos.4240 of 2003 and 569 of 2008.

RSA No.4240 of 2003 has arisen out of decision of civil suit bearing No.255 of 1997 titled as “Dhan Singh Vs. Nagina (since deceased) through LRs and others”, seeking recovery of ₹21,10,305.25 paise (hereinafter referred to as “first suit”) for the period kharif 1994 to rabi 1997 which was decreed by the trial Court but reversed by the Lower Appellate

Court.

RSA No.569 of 2008 has arisen out of decision of civil suit bearing No.386 of 2002 titled as “Dhan Singh Vs. Sher Singh and others” seeking recovery of ₹2,23,330/- (hereinafter referred to as “second suit”) for the period from kharif 1998 to kharif 2000 which was dismissed by the trial Court but decreed by the Lower Appellate Court.

The facts involved in the present appeals are common, therefore, both are decided together.

Succinctly, the facts which emanate from the pleadings of the parties are that plaintiff had succeeded in a suit for possession in respect of suit land by virtue of the judgment dated 16.02.1994 rendered by Hon'ble the Supreme Court. Concededly, the possession of the suit land has been given. The suit was filed for claiming mesne profit in respect of the aforementioned period by the plaintiff.

The whole basis for the Court below to set aside the decree of the trial Court and as well as to accept the appeal of the defendants was that plaintiffs have not been able to prove illegal possession of defendants.

Mr. Vijay S. Kajla, learned counsel appearing on behalf of the appellant(s) submitted that reasoning given by the Lower Appellate Court for non-suiting the plaintiff was that Hon'ble the Supreme Court in the judgment did not hold the possession of the defendants to be un-authorized and illegal, therefore, are not entitled to claim mesne profit, much less there was no observation giving right to the plaintiff to claim mesne profit, thus, the said findings are totally erroneous, for, once the plea of ownership in the

suit land had been declined by Hon'ble the Supreme Court, the natural consequences to claim use and occupation charges in the shape of mesne profits are inevitable and therefore, the judgment and decree of the Lower Appellate Court is liable to be set aside and that of the trial Court is liable to be maintained.

Mr. Jagdish Manchanda, learned counsel appearing on behalf of the respondents submitted that judgment and decree of the Court below in decreeing the suit are not sustainable in the eyes of law, for, judgment aforementioned of Hon'ble the Supreme Court did not brand the defendants to be unauthorized occupants or giving any right to claim the mesne profit, thus, the suit was *ex facie* barred by law of limitation.

I have heard the learned counsel for the parties, 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. Vijay S. Kajla, therefore, the appeal of the appellant-plaintiff bearing No.4240 of 2003 is liable to be allowed and RSA No.569 of 2008 filed on behalf of the defendants is liable to be dismissed.

Concededly, possession of the suit land has been taken by the plaintiff in pursuance to the decretal of the suit claiming possession of the suit land since 1994 to 2000.

I am not able to believe the submission of Mr. Manchanda *vis-a-vis* the fact that while decreeing the suit, there was no observation by Hon'ble the Supreme Court of illegal possession. A person being owner of the property, who has not been able to prove to be owner cannot be

prevented to claim the use and occupation charges by claiming the mesne profit. It is not necessary for the Court below to hold the possession to be unauthorized, for, plea of the defendants in the earlier round of litigation by throttling the case of the plaintiff *vis-a-vis* possession had not been successful. The plaintiff had no other choice but to claim the mesne profit by filing the suit. The mesne profit had been determined as per the prevalent prices of the crops in respect of the year claimed. Thus, the defendants cannot be permitted to get away in parting with the possession by depriving the plaintiff, much less occupation charges.

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 bearing No.4240 of 2003.

Resultantly, RSA No.4240 of 2003 preferred by the plaintiff is allowed and RSA No.569 of 2008 filed by the defendants is dismissed.

Liberty is granted to respondent No.8-Sher Singh to agitate the issue with regard to determination of his share qua liability *vis-a-vis* mesne profit in case any amount has been deposited.

(AMIT RAWAL)
JUDGE

August 20, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No