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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-384-2001 (O&M)

Date of decision : 25.04.2018

Bhagwana (deceased) through LRs and others

... Appellant(s)

Versus

Gram Panchayat Village Joshi, Tehsil and District
Sonapat

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. B.R. Vohra, Advocate
for the appellants.

Mr. Sisodhia, Advocate for
Mr. Anil Rathee, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The appellants-plaintiffs are in regular second appeal against the judgment and decree dated 22.12.2000 of the lower Appellate Court, whereby the judgment and decree dated 27.05.1999 of the trial Court granting declaration against the defendants of ownership of the suit land except the share of Dulia, has been set aside, in other words, the lower Appellate Court in an appeal preferred by the appellants-plaintiffs against non-granting of declaration qua share of Dulia, reversed the findings of the trial Court.

Succinctly, the facts as enumerated from the pleadings of the parties are that the appellants-plaintiffs instituted the suit for declaration against Gram Panchayat/respondent that they had been in cultivating possession of the land measuring 32 kanals comprised in khewat No.258

min Khata No.339, 340, 401 rect. and killa No.29/16-17-25-24 situated at Village Joshi Chauhan Tehsil and District Sonapat, for the last 100 years through their predecessors-in-interest as Basharesh Parta Malkan Billa Malkana. During the consolidation proceedings, the aforementioned land was allocated khasra numbers and the same allotted to the plaintiffs as tenants. The plaintiffs and predecessors-in-interest had been cultivating the land after consolidation, but the rate of rent was never raised during all this period. There was an agreement between the parties and the predecessors-in-interest at the inception of tenancy with a understanding that the plaintiffs or their predecessors-in-interest would never be ejected. As per local customs and the provisions of Section 8 of the Punjab Tenancy Act, 1887, the plaintiffs had acquired the right of ownership and occupancy tenants in view of the provisions of Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 (in short 'the 1953 Act'). Hence, the suit.

The aforementioned suit was contested by the defendant with regard to the maintainability of the suit, much less, jurisdiction of the Civil Court and on merits, it was averred that the plaintiffs had been in unauthorized occupation of the land which possessed few months before filing of the suit, in other words, long and settled possession of the plaintiffs and their predecessors-in-interest had emphatically been denied. Even the alleged agreement between the plaintiffs and the Gram Panchayat was also denied. The entries of revenue record in favour of the plaintiffs were said to be wrong and in collusion with the revenue Department.

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

1. *Whether plaintiffs have become owners in possession on the ground taken in the plaint? OPP*
2. *Whether the Civil Court has no jurisdiction to try and decide the present suit? OPD*
3. *Whether the plaintiffs have no locus standi nor have any cause of action? OPD*
4. *Whether the suit is bad for want of notice under Section 205 of the Haryana Panchayati Raj Act, 1994? OPD*
5. *Relief.*

The plaintiffs in support of their case examined Nage Ram one of the plaintiffs as PW1 and tendered in evidence certain documents (Ex.P-1 to Ex.P-17), on the other hand, the defendant examined Ombir as DW-1 and tendered in evidence documents (Ex.D1 and Ex.D-2)

The trial Court on the basis of the preponderance of the evidence brought on record as well as by noticing the provisions of 1953 Act found that the plaintiffs had been in long and settled possession, therefore, they had acquired the occupancy rights in the suit property to the extent of the share of Tulsi, Shera and Nathu, but declined to grant relief qua the share of Dulia. The objection of maintainability of the suit taken by the Gram Panchayat/respondent was also rejected. The appellants-plaintiffs filed the appeal bearing No.103 of 1999 against declining of the occupancy rights qua share of Dulia and the lower Appellate Court while taking into consideration the provisions of Order 41 Rule 22 of the Code of Civil Procedure, set aside the judgment and decree of the trial Court partly decreeing the suit.

Learned counsel appearing on behalf of the appellants-plaintiffs submitted that the judgment and decree of the lower Appellate Court in the

absence of challenge laid by the respondent to the findings *suo motu* cognizance under Order 41 Rule 22 CPC was not sustainable as the provisions of Order 41 Rule 22 CPC only pertains to the cross-objections. The evidence produced on record i.e. jamabandi for the year 1943-44 to 1993-94 showed the possession of plaintiffs and their predecessors-in-interest on the suit property. It too established that the plaintiffs and their predecessors-in-interest had been in long and settled possession nor any attempt was made by the Gram Panchayat/respondent-defendant to seek the ejectment. By taking the provisions of Vesting of Proprietary Rights to the tenants as per 1953 Act, declaration was granted qua the share of persons referred to in the judgment and decree by declining the share of Dulia. Though the Gram Panchayat/respondent had filed the appeal against the aforementioned averments, but the same was dismissed under Order 41 Rule 11(2) CPC, in essence, there was no appeal on behalf of the Gram Panchayat/respondent, therefore, the lower Appellate Court could not have set aside the findings of the trial Court partly decreeing the suit, there is a gross illegality and perversity, thus, urges this Court for setting aside the judgment and decree under challenge.

Learned counsel appearing on behalf of the respondent-Gram Panchayat submitted that the powers exercised by the lower Appellate Court under Order 41 Rule 21 CPC were wide enough for disagreeing with the findings of the Civil Court. The lower Appellate Court though referred to the mutation (Ex.PX) brought on record by way of additional evidence, which pertained to the fact that the descendants of Dulia were in possession, but did not rely upon the Ex.P16 and rejected the judgment to be in

personam and not in rem. Even the plaintiffs could not connect the previous numbers viz-a-viz jamabandi for the year 1956-57. The source of land bearing No.29/24 and 25 had gone unexplained. In the absence of any such source, the possession could not have been held and therefore, they could not be declared to be owners. The claim of proprietary rights, thus, was rightly rejected, for, it was an admission of the plaintiffs that there was no agreement between the plaintiffs and the Gram Panchayat/respondent. In support of his contentions, reliance to the judgment rendered by Hon'ble Supreme Court in **“Ravinder Kumar Sharma V/s State of Assam and others” AIR 1999 Supreme Court 3571** was laid to contend that the respondent can question adverse finding without filing cross-objection as it is optional and not mandatory.

In rebuttal, Mr. Vohra, relied upon the judgment rendered by Hon'ble Supreme Court in **“Banarsi and others V/s Ram Phal” AIR 2003 Supreme Court 1989.**

I have heard learned counsel for the parties and appraised the paper book and of the view that there is force and merit in the submissions of Mr. Vohra. Concededly the appeal filed by the Gram Panchayat against the judgment and decree of the trial Court with regard to the proprietary rights declaring the ownership to the extent of share of Tulsi, Shera and Nathu, had been dismissed and only one appeal i.e. appeal bearing No.103 of 1999 at the instance of the plaintiffs viz-a-viz the findings of the trial Court declining the share of Dulia remained pending. The question arises for consideration is whether the lower Appellate Court is empowered to exercise the powers in *suo motu* under Order 41 Rule 22 CPC or not. The

tenor and mode of the judgment does not even express any iota of presumption that the respondent/Gram Panchayat raised all the pleas by assailing the findings of the trial Court, whereby the suit was partly decreed in favour of the plaintiffs. For the sake of brevity, the findings rendered by the lower Appellate Court in paragraph No.11 reads thus:-

“11. I do not agree with the contention of the appellants/plaintiffs' counsel as far as the power of the appellate Court to see the validity of the impugned judgment and decree is concerned. When an appeal is filed against any judgment and decree, the appellant Court is to look into the entire evidence. The appeal is outcome of the suit and the appellant court can see whether such judgment and decree can be passed or not? As per latest amendment in Order 41 Rule 22 of C.P.C., it is clear that the other party can challenge the findings of the learned trial Court without filing any cross-objections. When such rights are given to the other party, the powers of the appellant Court are not limited or restricted. The entire judgment and decree become open before the appellate Court. Even if respondent Nos.1 is proceeded against ex parte the appellate Court can see whether the judgment and decree are rightly passed by the learned trial court or not. During the course of arguments, the learned counsel for the appellants filed the copy of order dated 23.02.2000 vide which appeal filed by Gram Panchayat was dismissed. From the perusal of that order, it is clear that the appeal filed by defendant Gram Panchayat was dismissed for want of prosecution as provided under Order 41 Rule 11 (2) C.P.C. and not on merits. No opinion was expressed on merits. Had that appeal been decided on merits then it could have been a different matter. So, the plaintiffs cannot ask this Court to restrict upto their appeal only, and should not adjudicate upon their right declared by the learned trial Court.”

and after giving the aforementioned finding, the lower Appellate Court proceeded to decide but did not refer to the contents of the documents, though the documents have been exhibited as Ex.P-14 and P-15 i.e. jamabandi commencing from 1943-44 till 1956-57. For the sake of brevity, para 13 of the judgment is extracted hereinbelow:-

“13. To connect the present numbers with the previous numbers the plaintiffs have produced the copy of jamabandi pertained to the year 1956-57, Ex.P14. Along with that copy they have produced the Hindi translation. The previous numbers of the land are also mentioned in the copy of which jamabandi pertaining to the year 1943-44 copy of which is Ex.P15 (whose Hindi translation is also filed). The previous numbers mentioned in Ex.P-15 and Ex.P14 do not tally with each other. The numbers mentioned in Ex.P15 are altogether missing in Ex.P14. It means that the land mentioned in Ex.P14. It means that the land mentioned in Ex.P14 is different from the land mentioned in Ex.P15. The plaintiffs cannot claim their possession over the land mentioned in Ex.P15 jamabandi for the year 1943-44. Moreover, as per Ex.P14 instead of previous numbers new numbers are khasra No.29/13, 16 and 17. From where the land falling in khasra No.29/24 and 25 has come is nowhere explained by the plaintiffs. They have not produced any evidence for those numbers. In these circumstances, it cannot be presumed that their possession over the land in dispute is continuing since very long. Furthermore, all the plaintiffs have claimed their possession over the entire property in dispute but the copies of the jamabandis produced by them pertaining to the year 1963-64 Ex.P12 and Ex.P13 falsify their case. As per Ex.P12, plaintiffs Shera is in possession of the land falling in khasra No.29/24. Other plaintiffs have no concern whatsoever with the same. IN this way as per Ex.P13 Tulsi was in possession of

the land falling in khasra No.29/25. Sheru was not having any right or interest in that number. It shows that their averments are not true. When they are not in possession of specific number how can they claim their ownership qua the same. Shera cannot ask to declare him owner of land falling in khasra No.29/25 and others cannot ask to declare them owners of khasra No.29/24, whereas the learned trial Court has declared them as owner of the entire property except the share of Dulia.”

There is no reference to the provisions of the 1953 Act. The documentary evidence has to be read in conjunction with the statutory provisions of law in a case where the affected party had approached the Court for claiming declaration of ownership/proprietorship being an occupant tenant. On the other hand, the trial Court had examined all the evidence threadbare, much less, provisions of law to form an opinion in favour of the plaintiffs except the share of Dulia.

There is no dispute to the judgment culled out in the judgment in “Ravinder's case (supra), but as noticed above, no argument of Gram Panchayat has been noticed enabling the Court to exercise the powers under Order 41 Rule 22 CPC. On the other hand, in “Banarsi's case (supra), the Hon'ble Supreme Court by taking into consideration all the facts in paragraphs 15 and 22, rejected the opinion expressed by the lower Appellate Court therein as being null and void. For the sake of brevity, paragraphs 15 and 22 reads as under:-

“15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the

appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and

thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.

22. For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court.”

As an upshot of my findings, I am of the view that it is fit case, where the matter is required to be revisited by the lower Appellate Court for adjudication of the appeal afresh as it has taken valuable right of the appellants-plaintiffs.

Accordingly, the judgment and decree of the lower Appellate Court is hereby set aside being not sustainable in the eyes of law and the matter is remitted back to the lower Appellate Court to decide the appeal afresh as expeditiously as possible preferably within a period of six months from the date of the receipt of the certified copy of this order.

Learned counsel for the parties as well as the parties are

directed to appear before the lower Appellate Court on 30.05.2018.

Resultantly, the present regular second appeal stands disposed of.

25.04.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**