

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

**RSA No.2078 of 2004 (O&M)
Date of Decision.04.09.2018**

Dalip and another

.....Appellants

Vs

Inder Pal and others

...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. A.P. Bhandari, Advocate
for the appellant No.2.

None for the respondents.

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AMIT RAWAL J. (ORAL)

The appellant No.1-plaintiff has not been successful in defending the judgment and decree of the trial Court before the lower Appellate Court, which has reversed the same.

The appellant No.1-plaintiff instituted the suit for declaration and permanent injunction on the premise that plaintiff was owner in possession of agricultural land measuring 215 kanals 17 marlas situated in village Boda, Tehsil Pehowa (hereinafter called the suit land) to the extent of 10/54 share and the mutation No.131 dated 11.6.1976 and decrees dated 27.9.95 and 13.2.93 were wrong, null and void and not binding on the plaintiff.

Plaintiff and defendants were real brothers and had right in the property along with three sisters and mother Kamla Devi. The suit property was a joint Hindu family property and Shera, father of plaintiffs and defendants, was acting as 'Karta'. Shera died on 10.01.1974. As per the provisions of Section 6 of the Hindu Succession Act, 1956, especially by applying the principle of notional

partition, the suit land was to devolve between plaintiff and defendants to the extent of 1/6th share and after death of Shera would fall equally amongst them along with widow and sisters. After death of Shera, a mutation bearing No.131 dated 11.6.1976 was wrongly sanctioned qua the suit land and on the basis of said mutation, daughters and widow of Shera suffered two aforementioned decrees in favour of defendant No.1, as a result of which defendant No.1 claimed himself to be owner of 5/9 share.

The aforementioned suit was contested by filing written statement wherein preliminary objection qua locus standi, non-joinder and misjoinder of necessary parties were taken. The averments made in the plaint were vehemently denied.

The trial Court on the basis of aforementioned pleadings framed following issues:-

- “1. Whether mutation No.131 sanctioned on 11.6.1996 in civil court decree dated 27.9.95 passed in civil suit No.542 of 1995 and decree dated 13.2.93 passed in civil suit No.58/93 are wrong, null and void, non est and not binding upon the rights of plaintiff? OPP*
- 2. If issue No.1 is proved whether plaintiff is entitled to relief of injunction as prayed for and is also entitled to relief of injunction as prayed for? OPP*
- 3. Whether suit of plaintiff is not maintainable in the present form? OPP*
- 4. Whether suit of plaintiff is bad for non joinder and mis-joinder of necessary parties? OPD*

5. Relief.”

The plaintiff did not step into the witness box but examined following witnesses and brought on record Ex.P1 to P13:-

Sh. Ram Niwas, V.R.K. DC Office, Kurukshetra PW1

Sh. Narsi clerk of J.S. Udasi, Advocate PW2

Sh. Krishan Kumar Clerk of Davinder Kumar Advocate PW3

On the other hand, defendant No.1 examined himself as DW1 and brought on record documentary evidence Ex.D1 and D2.

On the preponderance of evidence, the trial Court decreed the suit, however, the lower Appellate Court, as noticed above, reversed the same and the plaintiff has been held to be owner of 1/9th share.

Mr. A.P. Bhandari, learned counsel appearing on behalf of the appellants submitted that Excerpt Ex.P13 showed nature and character of the property to be ancestral and therefore, the notional partition amongst the male members was required to be effected since there were having other five brothers except father, thus, his share would have been 1/6th and after death of father, would have devolved equally amongst all the legal heirs including mother and sisters.

Before the lower Appellate Court both the parties i.e. appellant-plaintiff and respondents-defendants moved applications for additional evidence but application of the defendants was allowed and that of the appellant-plaintiff was rejected. Non-examination of the plaintiff or author of the Excerpt Ex.P13 while reading the contents thereof, could not be fatal, for, it was a case of documentary evidence. The civil court decrees dated 27.09.1995 and 13.2.1993

were collusive and not binding upon the plaintiff.

This Court was also apprised of the order dated 20.05.2004 whereby while issuing notice of motion, status quo with regard to possession was ordered to be maintained till the next date of hearing and the defendants were restrained from alienating the suit property.

On 05.11.2004, while admitting the appeal, following substantial questions of law were framed:-

- (i) Whether the doctrine of blending is per se applicable in the present case in view of the fact that the respondent himself admits that the part of the disputed property is ancestral in nature?
- (ii) Whether the excerpt (Exhibit P-13) is admissible in evidence especially since the same has been produced on the orders of the Court?
- (iii) Whether the substantive law would prevail upon the procedural law? and
- (iv) Whether the judgment and decree passed by the learned lower appellate Court is perverse?

The appeal had been filed by plaintiff Dalip and Ram Kishan-defendant No.4. On 03.12.2004, learned counsel for the appellants requested for withdrawal of the appeal. The aforementioned request was not opposed by the counsel for the respondents and the appeal was dismissed as withdrawn. The order reads as under:-

“RSA No.2078 of 2004

*Present: Mr. Ashok Giri, Advocate
for the appellants.*

*Mr. Deepak Gupta, Advocate
for the respondents.*

*Learned counsel for the appellants requests for
withdrawal of the appeal.*

*The aforementioned request is not opposed by
learned counsel for the respondents.*

Dismissed as withdrawn.”

Thereafter, an application bearing No.16-C of 2005 accompanied by affidavit of appellant No.2 Ram Kishan was filed to say that it was only Dalip Singh, who had withdrawn the appeal. In the aforementioned application on 01.03.2005, following order was passed by this Court:-

*“After hearing learned counsel for the parties,
order dated 3.12.2004 is clarified and the withdrawal
of the appeal is confined to plaintiff-appellant No.1
only. The appeal would survive in respect of
defendant-appellant No.2 as the learned counsel for
the plaintiff-appellant No.1 has pointed out that no
rights of defendant-appellant No.2 have been effected,
I deem it appropriate to fix the appeal for final
disposal on 14.03.2005.*

Be shown at the end of the urgent.”

From perusal of the aforementioned, it has been clarified that withdrawal of the appeal would be confined to appellant-plaintiff No.1 only.

There is no representation on behalf of the respondents, though they were earlier represented by counsel.

I have heard learned counsel for the appellant and appraised the paper book. The present appeal has been filed by plaintiff Dalip Singh and Ram Kishan-defendant No.4. This Court vide order dated 03.12.2004 permitted the appellants to withdraw the appeal. Thereafter, an application bearing No.16-C of 2005 was filed to say that it was only plaintiff-Dalip Singh, who had withdrawn the appeal. It is to be noticed that Dalip Singh-plaintiff has already admitted his 1/9th share. In these circumstances, no further cause of action survives for Ram Kishan-defendant No.4 to assail the finding of the lower Appellate Court in the absence of the plaintiff as qua plaintiff the appeal has already been dismissed as withdrawn.

The appeal stands dismissed.

(AMIT RAWAL)
JUDGE

September 04, 2018
Pankaj*

Whether Speaking/Reasoned Yes

Whether Reportable No