

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

**RSA No.4769 of 2010 (O&M)
Date of decision:12.03.2018**

Gurmail Singh (since deceased) through LR ... Appellant

Vs.

Surjan Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. H.K.Brinda, Advocate
for the appellant.

Mr. Deepak Bhardwaj, Advocate
for respondent No.1.

Ms. Devki Anand Sullar, AAG, Punjab.

AMIT RAWAL J. (Oral)

Appellant-defendant No.3 is in Regular Second Appeal against the judgment and decree dated 26.02.2007, whereby, civil suit bearing No.725/22.08.2001 preferred by plaintiff/respondent No.1, seeking declaration by challenging the decree dated 2.6.1994 and allotment letter dated 22.04.1991, was decreed and the appeal filed against the aforementioned judgment and decree was also dismissed.

The facts leading to filing of civil suit and present appeal which emanates from the record are that the plaintiff instituted a suit claiming that he was owner of $\frac{1}{4}$ share in the suit land, i.e., 8 kanals 10 marlas which was earlier in the name of his mother Isher Devi. Isher Devi had died in the year

1993 leaving behind the plaintiff as her legal heir. She was earlier married to Ram Rakha, who had died many years ago. Thereafter, she performed kareva marriage with Atra. Out of the aforementioned wedlock, plaintiff was born. Appellant-defendant no.3 had got some alleged allotment from the Punjab State i.e., Sale Department in the year 1991 in the shape of Form 'B' and on the basis of said allotment letter, defendant no.3 filed a civil suit titled as Gurmail Singh vs. Punjab State for mandatory injunction which was decreed vide judgment and decree dated 02.06.1994. In fact, the said judgment and decree dated 02.06.1994 and allotment letter dated 22.04.1991 were illegal, null and void and that judgment could not have taken away legal rights of the plaintiff, for, it was at the back of the plaintiff, much less, mother of the plaintiff, Isher Devi was not party in the civil suit. The revenue record revealed that Isher Devi was owner of 1/4th share in the suit land and therefore, the Punjab State/SDO, Civil was not having any right to issue any allotment letter dated 22.04.1991. One Pradesh Sarkar was the owner of 3/4th share in the property in dispute. The plaintiff came to know about the judgment and decree dated 02.06.1994 about two months ago during the mutation proceedings pending between the parties in the Court of SDO Civil, Ropar. The plaintiff requested the defendants to admit the claim in the property which was not adhered to, necessitating him to file a suit.

Defendants No.1 and 2 contested the suit by filing written statement taking preliminary objections qua maintainability, locus standi

and for want of notice under Section 80 of Code of Civil Procedure, whereas, defendant no.3 filed separate written statement by taking customary objection qua maintainability and limitation.

On the basis of the aforementioned pleadings, the trial Court framed the following issues:-

- “1. Whether the allotment dated 22.04.1991 in favour of the defendant no.3 is illegal, null and void? OPP*
- 2. Whether the judgment and decree dated 02.06.1993 are null and void and have no effect on the legal rights of the plaintiff? OPP*
- 3. Whether the plaintiff is in possession of 1/4th share in the land in suit as claimed? OPP*
- 4. Whether the suit is not maintainable in its present form? OPD*
- 5. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 6. Whether no notice under Section 80 CPC was served upon the defendants no.1 and 2? If so, its effect? OPD 1 &2*
- 7. Whether the plaintiff has not come to the Court with clean hands? If so, its effect? OPD*
- 8. Whether the suit is time barred? OPD*
- 9. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD*

10. *Whether the plaintiff is entitled to the declaration as prayed for? OPP*

11. *Whether the plaintiff is entitled to the injunction as claimed? OPP*

12. *Relief.”*

The plaintiff in support of pleadings examined following witnesses:-

PW1 - Surjan Singh-plaintiff himself.

PW2 – Gurdev Singh

PW3 – Sarwan Singh

PW4 – Ram Sarup

and brought on record the following documentary evidence which read thus:-

Ex.P1/A – Copy of mutation no.80.

Ex.P1/A – copy of mutation no.3179

Ex.P1 - document in Urdu

Ex.P2 – Voter lists

Ex.P3 – copy of ration card

Ex.P4 – copy of order dated 22.04.1991

Ex.P5 – copy of judgment dated 2.6.1994

Ex.P6 – copy of decree sheet dated 02.06.1994

Ex.P7 – copy of jamabandi for the year 1999-2000

Ex.P8 – copy of document (Ex.P3)

Ex.P9 – copy of document (Ex.P2)

Ex.P10 and copy of plaint Ex.PX.

On the other hand, defendants examined following witnesses:-

1. DW1 - Jarnail Singh
2. DW2 – Dass
3. DW3 – Dalwinder Singh

and brought on record the following documents:-

1. Ex.D1 - copy of General Power of Attorney
2. Ex.D2 - Form No.19
3. Ex.D3 - copy of letter
4. Ex.D4 copy of memo of presence
5. Ex.D5 Report of Qanungo
6. Ex.D6 copy of Roznamcha
7. Ex.D7 copy of letter
8. Ex.D8 report of Patwari
9. Ex.D9 proceedings of allotment of land 8K 10M.
10. Ex.D10 copy of receipt
11. Ex.D11 endorsement of SDO
12. Ex.D13 copy of judgment dated 27.9.2001
13. Ex.D12 copy of form-B.
14. Ex.D14 copy of judgment dated 02.06.1994
15. Ex.D15 copy of judgment dated 02.09.2003
16. Ex.D16 copy of decree sheet dated 2.9.2003

- 17. Ex.D17 copy of sale deed dated 31.10.2005
- 18. Ex.D18 report on the application
- 19. Ex.D19 20. Ex.D20,
- 21. Ex.D21 Form No.19
- 22. Ex.D22 and 23. Ex.D23 mutation no.3202

The trial Court on the basis of preponderance of evidence decreed the suit and civil appeal bearing No.28 of 26.03.2007 preferred by the appellant was also dismissed, vide judgment and decree dated 14.10.2010.

Learned counsel appearing on behalf of appellant-defendant no.3 submitted that the Lower Appellate Court has abdicated, much less committed illegality and perversity in decreeing the suit, particularly when plaintiff – Surjan Singh had categorically made a statement before the trial Court of abandoning the claim vis-a-vis issues no.1, 3 and 11 as noticed by the trial Court. The Lower Appellate Court sought the report from the trial Court on issue no.4. The trial Court, vide decision dated 22.07.2008 gave a finding by holding that respondent-plaintiff had withdrawn his claim regarding declaration of ownership and possession of 1/4th share in the land in dispute and as well as challenge to the allotment order dated 22.04.1991, much less relief of permanent injunction and the relief was only confined to the judgment and decree dated 02.06.1993 and in view of such situation, the appeal could not have been dismissed by the Lower Appellate Court.

In the previous suit bearing No.RT-78 of 2000 filed by the

respondent-plaintiff claiming permanent injunction, the plaintiff had laid the same claim with regard to 1/4th share which was declined by the trial Court, vide judgment and decree dated 02.09.2003. In the aforementioned suit, appellant-defendant no.3 had disclosed about the allotment letter, much less decree dated 02.06.1994 but no explanation has come forth in filing the suit in the year 2001, therefore, the suit was barred by law of limitation as per the provisions of Article 58 of Limitation Act, 1963 (in short “1963 Act”) as the suit could not have been brought within the ambit of Article 59 of 1963 Act. The decree was only acknowledging the allotment letter and once the claim qua allotment letter was abandoned, the decree dated 02.06.1994 (Ex.D14) could not have been set aside and thus, urged this Court for setting aside the findings under challenge.

Per contra, Mr. Deepak Bhardwaj, learned counsel appearing on behalf of respondent no.1 submitted that findings of the Court below with regard to ownership of Isher Devi to the extent of 1/4th share had not been denied but fact of the matter is that appellant-defendant no.3 could not have obtained the decree dated 02.06.1994 at the back of the respondent-plaintiff, despite the fact that appellant had abandoned the claim with regard to 1/4th share. Mutation Ex.P1/A clearly showed that Isher Devi widow of Ram Rakha had performed kareva marriage with Atar Singh and Ex.P1/A mutation showed that share of Isher Devi was inherited by Surjan Singh, Mohinder Kaur and Banti. Ex.P2 and Ex.P3 were the copies of voter list which showed that Isher Devi was wife of Atar Singh and plaintiff was born

out of their wedlock. Ex.P4 ration card also proved the same fact. The State of Punjab could not have been declined the ownership as per the jamabandi for the year 1999-2000 to the extent of 3/4th share in the suit land and Isher Devi to the extent of 1/4th share as the appellant had failed to challenge the mutation which was upheld by the Collector, vide order dated 13.08.2002.

Ms. Devki Anand Sullar, AAG, Punjab submitted that plaintiff has failed to discharge the onus with regard to inheritance of Isher Devi, much less no documentary evidence has been placed on record. The ingredients of Section 50 of Indian Evidence Act, are conspicuously wanting. The suit was hit by *doctrine akin to res judicata*, much less barred by law of limitation.

I have heard the learned counsel for the parties, appraised the impugned judgments and decrees of both the Courts below and of the view that there is force and merit in the submissions of Mr. H.KBrinda, Advocate.

In my view, the Lower Appellate Court has committed illegality in setting aside the decree dated 02.06.1994 which was only in respect of mandatory injunction directing the respondent-State to issue consequential order in pursuance to the allotment letter dated 22.04.1991, for, in view of the judgment and decree dated 02.06.1994, sale certificate dated 20.03.1997, much less possession of land measuring 8 kanals 10 marlas was delivered to the appellant-defendant no.3 on 12.05.2000. These documents, i.e., sale certificate and allotment letter have not been set aside.

Be that as it may, fact of the matter is that allotment letter is still holding the field.

There is another aspect of the matter. The respondent-plaintiff had instituted a suit on 15.05.2000 seeking injunction against the respondents-defendants (therein) including the appellant and had taken a plea qua 1/4th share, which was dismissed by the trial Court, vide judgment and decree dated 02.09.2003 (Ex.D15). The findings rendered by the trial Court in paragraphs 10, 11 and 12 of the present suit and paragraph 20 of civil suit No.78 of 2000 read as under:-

“10. Now let us recapitulate as to what is the matter directly and substantially in issue in the later suit, i.e., the present suit. When we keep in mind the order dated 20.02.2007 it is clear that plaintiff Surjan Singh has withdrawn his claim regarding ownership and possession over 1/4th share in the suit property, regarding the challenge to the allotment order dated 22.04.1991 and regarding permanent injunction. Therefore, the only relief which is apparently claimed in the present suit is for a declaration that the judgment and decree dated 02.06.1994 passed in civil suit no.RT-387 of 05.01.1993 is illegal, null and void. There is no doubt with regard to the fact that the genuineness and validity of the judgment and decree dated 02.06.1993 was not directly and substantially in issue in the previous suit no.RT-78 of 15.05.2000 which culminated

into judgment and decree dated 02.09.2003 Ex.D15 and Ex.D16. The provisions of Section 11 of the CPC provided as under:-

“11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

11. Since the matter which is directly and substantially issue in the present suit i.e. with regard to the validity of the judgment and decree dated 02.06.1993 was not directly and substantially in issue in the previous suit, therefore, the judgment of the present i.e., judgment dated 02.09.2003 will not operate as res judicata for the purpose of the present suit. The law laid down by the Hon'ble Apex Court in the pronouncement report in 2005(3) C.C.C. Page 183 of the Supreme Court will not be applicable in the circumstances of the present case for the reasons discussed above as the matter directly and substantially in issue in the present suit is

absolutely different from the matter which was directly and substantially in issue in the previous suit.

12. As an offshoot of my foregoing discussion the suit is found to be maintainable in the present form. Resultantly, the issue no.4 is decided against the defendants and in favour of the plaintiff.”

Paragraph 20 (civil suit no.78 of 2000)

“There is judgment Ex.D1 on the file passed by the learned Additional Senior Sub Judge, Ropar in case Gurmail Singh Vs. The State of Punjab, vide which the suit of Gurmail Singh for mandatory injunction was decreed against the State of Punjab and SDO ©, Ropar and the defendants were directed to issue sale certificate in favour of the plaintiff in respect of the land measuring 8 kanals 10 marlas. The suit property bears khasra number, but there is no evidence on the file in the shape of jamabandi and khasra girdawari which can show that the plaintiff is owner in possession to the extent of 1/4th share of the land belonging to Ishari Devi. The plaintiff was duty bound to prove the copy of the khasra girdawari and copy of jamabandi to show his possession over the suit land. The plaintiff has alleged that Ishri Devi performed a kareva marriage with one Attra but there is no evidence on the file to prove that when kareva marriage of Ishri Devi with Attra took

place. The mutation of Ishri Devi was never sanctioned in favour of the plaintiff. So, in view of the above discussion of evidence, it is clear that the plaintiff has failed to prove that he is owner in possession to the extent of ¼ share in the suit land. As such, the plaintiff is not entitled to the injunction as prayed for. Hence, both these issues are decided against the plaintiff and in favour of the defendant.”

It is crystal clear that the appellant had disclosed about the allotment letter dated 22.04.1991 which remained un-challenged. Even decree dated 02.06.1994 was already in existence. No explanation has come forth that plaintiff did not have the knowledge about the same. Limitation to challenge the said decree, as per the Article 58 of Limitation Act, is 03 years. However, a person can bring the suit after acquiring the knowledge within a period of three years for the purpose of cancellation of the registered document or instrument but the present case did not fall under Article 59 of Limitation Act. For the sake of brevity, Articles 58 and 59 of Limitation Act, read thus:-

58.	To obtain any other declaration.	Three years	When the right to sue first accrues.
59.	To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.

The plaintiff had been apprised of the aforementioned facts but

remained silent for more than three years, therefore, the suit was barred by law of limitation.

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.

As an upshot of my findings, judgment and decree of the both the Courts below is hereby set aside and suit of the respondent-plaintiff stands dismissed.

Accordingly, the appeal stands allowed.

(AMIT RAWAL)
JUDGE

March 12, 2018
savita

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