

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision: 26.07.2018

1. RSA No.278 of 2012 (O&M)

Bhana (deceased) through LRs

..... Appellant

Versus

Karan Singh and others

..... Respondents

2. CR No.5256 of 2013 (O&M)

Bhana

..... Petitioner

Versus

State of Haryana and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Amit Jain, Advocate
for the appellant (in both cases).

Mr. Saurabh Girdhar, AAG, Haryana.

Mr. Sandeep Sharma, Advocate
for respondents No.1 to 11 (in RSA-278-2012).
for respondents No.2 to 12 (in CR-5256-2013).

ANIL KSHETARPAL, J.

Vide this judgment, I shall be disposing of two cases bearing RSA No.278 of 2012 and CR No.5256 of 2013 as the issue which need determination is common and most of the parties are also common and counsel for the parties are also agreed that both the cases can be conveniently disposed of by a common judgment.

In the considered opinion of this Court, the following

substantial questions of law arise for consideration:-

1. Whether in a previous judgment arising out of a suit for permanent injunction, if a issue/question which is directly and substantially has been answered/decided, would operate as res judicata in subsequent suit?
2. Whether it is necessary to file the pleadings of the previous suit before question of res judicata is examined?

Defendant-appellant is in the regular second appeal against the judgment passed by the learned First Appellate Court reversing the judgment and decree passed by the learned trial Court in which plaintiffs seeking primarily declaration to the effect that the plaintiffs are co-owners in possession to the extent of equal share in the land measuring 8 kanals and 8 marlas. Other reliefs have also been sought for which would be taken note at an appropriate stage.

Undisputed facts are that Bansi was owner of 53 kanals and 9 marlas of land. He had only two daughters namely Phoolwati and Jagni. Initially, there was a dispute amongst the daughters when Jagni claimed that she is in possession of the entire property given by her father. The litigation culminated into a regular second appeal in the High Court being RSA No.2668 of 1986 wherein it was concluded that both the daughters are co-owners.

Plaintiffs No.1 to 4 and late Sh. Ram Mehar predecessor of plaintiffs No.5 to 11 purchased some part of the land vide registered sale deed dated 07.11.1986 after the judgment passed by the High Court. On the other hand, the defendant claims that she has purchased the property from Jagni vide sale deed dated 05.05.1989.

Learned trial Court dismissed the suit filed by the plaintiffs on the ground that the suit filed by the plaintiffs is barred by principle of res judicata in view of the previous judgment passed by the Court in civil suit No.155 of 31.05.1988 decided on 22.02.1992. However, the learned First Appellate Court has reversed the finding and held that the plaintiffs and defendant are co-owners in possession of the land with respect to half share of the land measuring 8 kanals and 8 marlas. It will be noted here that the remaining land which was initially owned by Bansi later on inherited in equal share by Phoolwati and Jagni has been compulsorily acquired by the State Government under the Land Acquisition Act, 1894. The revision petition is with respect to the proceedings arising out of apportionment of payment of compensation.

Learned First Appellate Court has held that the judgment of the Court dated 22.02.1992 is inter parties while deciding the suit for permanent injunction and issue of partition between the parties was only incidental and therefore, it would not operate as res judicata. The Court has further found that the pleadings of the previous suit have not been filed and therefore, it would be possible to conclusively decide the question of res judicata.

So question which arise is whether findings in the previous judgment inter-parties dated 22.02.1992 is res judicata or not. The issues framed while deciding the previous suit are extracted as under:-

- “1. Whether the plaintiffs are joint owners in possession of suit property as alleged?OPP*
- 2. Whether the defendant is exclusive owner in possession of Killa No.11/1 alongwith tubewell installed therein?OPD*
- 3. Whether the suit property has been partitioned as alleged? OPD.*

4. *Whether the plaintiffs are estopped from filing the present suit by their acts and conduct?OPD.*

5. *Relief.”*

Issue No.1 between the parties was whether plaintiffs, who are plaintiffs in the previous suit also, are joint owners in possession of the property or not. After appreciation of evidence, learned Court held as under:-

“There is no dispute that both Smt. Phool Wati and Smt. Jagni who are the real sisters were the joint owners in possession of the suit property. It is also so manifest from the perusal of the jamabandi for the year 1981-82, Ex. P2 and Ex.P9 and Khasra Girdawaris w.e.f. Kharif 1984 to Rabi 1987, Ex.P4, Ex.P7 and Ex.P8. But the question is whether the suit land is still joint or has been partitioned between them. Ex.D14 is the order dated 07.09.1985 passed by the Assistant Collector Ist Grade, Gurgaon, whereby he has ordered the partition of the suit land thereby directing the preparation of Naksha Zim. Accordingly, the land measuring 26 kanals 9 marlas comprising in Rect. No.28, 38, 56, 57, 64, 100, 101 and 105 was given to Smt. Phoolwati whereas the second portion of the land measuring 26 kanals 10 marlas comprising in Killa No.28, 40, 41, 56, 57, 64, 100, 101 and 105 fell to the share of Smt. Jagni. The details thereof are given in Ex.D11 and Ex.D12.

A contention has, however, been raised that the partition is not complete till the preparation of Naksha Zim. But the contention of learned counsel appears to be devoid of force. It is well settled that the joint status of the land comes to an end from the date of order of partition. Preparation of instrument of partition is only an executory act. In the context, reference may be made to Smt. Har Devi versus Ramjas and others 1974 PLJ 345 and Lala Ram versus the Financial Commissioner Haryana, Chandigarh 1992(1) RLR85.

Now comes the question to whom the suit land comprising in Rect. No.41, Killa No.11/1 was allotted in the partition

proceedings. The perusal of Ex.D123 altogether makes it clear that it fell exclusively to the share of Smt. Jagni. It appears that it has been so given to Smt. Jagni because of the concession extended by Smt. Phoolwati in favour of her sister Smt. Jagni. In the said partition proceedings, Smt. Phoolwati made a statement on 01.04.1983, the copy of which is Ex.D13 that the tubewell and the kothri were constructed by Smt. Jagni and so the land adjoining to the tubewell be given to her. When Smt. Phoolwati was not the owner of the disputed land and, therefore, I doubt that she had the right to alienate the same by way of transfer or otherwise. Thus, the sale deed dated 07.11.1986 Ex.P1 to the extent of sale of the suit land comprising in Rect. No.40, Killa No.5/4(1-0), 6/1(0-4), Rect. No.41, Killa No.1/1 (2-8), 10/4(2-8) and 11/1(2-8) is illegal, null and void and does not confer any right in favour of the plaintiffs. And so, the mutation Ex.P3 sanctioned on the basis thereof has no sanctity or validity in the eyes of law.”

Therefore, it is apparent that direct and substantial issue involved in the earlier suit was whether the parties are co-owners/co-sharers or not. It was answered against the plaintiffs in the previous suit and respondent-plaintiff herein. As per Section 11 of the Code of Civil Procedure, any issue which was directly and substantially in issue in the previous suit and has been finally decided between the same parties, the Court would not re-decide the aforesaid issue/issues. Section 11 of the Code of Civil Procedure, 1908 is extracted 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.

Explanation I- The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.] ”

In the considered opinion of this Court, once the judgment passed in the previous suit have been filed which notices the necessary

pleadings of the parties, discusses the evidence led by the parties and thereupon decide the very question involved in the present case, such findings would operate as res judicata. Learned First Appellate Court has referred to a judgment passed by the Hon'ble Supreme Court in the case of Ramchandra Dagdu Sonavane (dead) by LRs Vs. Vithu Hira Mahar (dead) by LRs (2009) 10 SCC 273 to conclude that since the pleadings of the previous suit have not been filed, therefore, the issue of res judicata cannot be examined. This Court has carefully read the aforesaid judgment. The Hon'ble Supreme Court was examining the question in a different context. Still further, it has not been laid down by the Hon'ble Supreme Court that in absence of pleadings of the previous suit, although, a detailed judgment is available on the file, issue of res judicata cannot be examined. It would always depend upon the facts and circumstances of each case. In the present case as extracted above, the issue which required determination in the previous suit and the present suit is same and identical.

Still further, it will be noticed in the previous judgment as well as in the present litigation also, there was proceedings for partition of the property before the competent authority. No doubt, it is true that deed of partition (sanad taksim) has not been produced on the file. It is the case of the plaintiffs that no deed of partition was ever prepared. However, that would not itself be sufficient to ignore the findings of the Court in the previous suit. In the previous suit, the Court has recorded a finding that partition has taken place which has been acted upon and the parties are in separate possession of the property which had fallen to their respective shares.

No doubt, learned First Appellate Court was correct in

recording a finding that in absence of sanad taksim (instrument of partition), the partition between the parties is not final. However as noticed earlier, in view of the findings of the Civil Court relying upon partition proceedings and various orders passed therein in the previous suit decided in the year 1992, a finding has been given that the parties are no more in joint possession of the property. Further, the learned First Appellate Court has committed an error in placing reliance on the judgment passed by the High Court in the year 1986 because after 1986, there is a subsequent judgment passed by the Court in 1992 i.e. 22.02.1992 to the effect that the partition between the parties is final. Hence, judgment passed in the year 1986 would not come to rescue the plaintiffs-respondents.

Still further, learned counsel for the appellant has drawn attention of the Court to another suit filed by plaintiff No.1 (in the present litigation) who was plaintiff No.2 in a suit filed on 14.12.2005 against the defendant and some other persons. In the aforesaid suit, the plaintiff claimed that the property is still joint and the parties are co-owners. The aforesaid suit was withdrawn vide order dated 06.06.2006 Ex.D-19 on the record. Hence, counsel for the appellant rightly contended that once one of the plaintiff has already abandoned his right by withdrawing the suit, the parties cannot be held to be joint owners of the property.

Still further, during partition proceedings statement of Phoolwati predecessor-in-interest of the plaintiffs is Ex.D-13 on the record wherein she has stated that certain land be given to her sister Jagni whereas in its place, she be given land along with old tubewell.

In view of the overwhelming evidence available on the file, although it is true that deed of partition has not been placed on file,

however, finality of partition between the parties can be deduced from the evidence available on the file and the findings arrived at in the year 1992.

Hence, both the questions are answered in favour of the appellant.

In view thereof, the judgment passed by the learned First Appellate Court is set aside.

All the pending miscellaneous applications, if any, shall stand disposed of accordingly.

Regular second appeal is allowed.

The revision petition is arising out of an order passed dismissing the application under Section 10 of the Code of Civil Procedure for stay of proceedings under Section 30 of the Land Acquisition Act, 1894. Counsels are agreed that decision of the regular second appeal would also govern the decision in the present revision petition. Hence, the revision petition is disposed of.

26.07.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No