

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

RSA No.4300 of 2012 (O&M)
Date of decision : 27.02.2018

Yash Pal and others

...Appellants

Versus

Gram Panchayat Rajheri, Yamuna Nagar and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. C.B. Goel, Advocate for the appellants.

Mr. R.S. Mamli, Advocate for respondent Nos.1 to 4.

ANIL KSHETARPAL, J.

The defendants-appellants are in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below.

Fraud has been played on the residents of the village. The office bearers of the Gram Panchayat, who are elected, are required to protect the property of the Gram Panchayat which is for the welfare of all the residents of the village like a trustee. However, trustees have behaved in totally irresponsible manner. Land reserved for common purposes is to be utilized not only by the members of the proprietary body but all the residents of the village, irrespective of the fact that they are owners of the agricultural land in the village or not.

The following substantial questions of law arise in the present

case:-

1. Whether the judgment and decree passed by the Court which is a nullity, void ab initio, result of deceit and fraud is required to be set aside by the Court by filing a suit for declaration within the prescribed period of limitation or it can be ignored by the Court in collateral proceedings also?
2. Whether the suit is required to be filed within the prescribed period of limitation to set aside a declaratory decree which is void ab initio, result of deceit and fraud?
3. Whether the judgment and decree which is result of fraud operates as res judicata in the subsequent suit?
4. Whether the subsequent suit would be liable to be dismissed under Order 7 Rule 1(j) of Code of Civil Procedure, on the ground that the previous proceedings initiated in the year 1982 have not been disclosed?
5. Whether the Appellate Court in exercise of powers under Order 41 Rule 33 of Code of Civil Procedure is entitled to pass a judgment/order required to be passed in accordance with law irrespective of the fact that whether the cross-appeals/objections have been filed or not?

FACTS:-

Predecessors of the appellants filed a suit for declaration and permanent injunction on 19.08.1969. The Gram Sabha, Village Rajheri was impleaded as defendant through Sarpanch. On notice, Gram Sabha contested the suit in superfluous manner. Gram Panchayat only produced one witness

on its behalf namely Lala Ram. When he appeared in the witness-box, he supported the case of the plaintiffs (in the previous suit). Hence, the suit was decreed on 29.06.1970. The land was described in the revenue record as Shamlat Deh Hasab Rasad Rakba Khewat.

Both the Courts below have recorded a finding which is not disputed before this Court that the family of then Sarpanch and Lala Ram, who appeared as a witness on behalf of Gram Panchayat, were beneficiaries of the previous suit. A huge land measuring 606 kanals and 8 marlas was involved. As per the revenue record, the land was being used for common purposes i.e. grazing ground for animals/pastures.

On 14.06.1982, the proceedings were filed challenging the validity of the judgment and decree dated 29.06.1970 before the Assistant Collector, Ist Grade. However, those proceedings were ultimately dismissed in default. The present suit was filed on 05.11.1999 pleading that the judgment and decree passed on 29.06.1970 is nullity, void ab initio, result of deceit and fraud, in collusion with the then Sarpanch of the Gram Sabha.

Both the Courts, as noticed above, decreed the suit filed by the plaintiffs.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

Learned counsel for the appellants has submitted as under:-

- A) The suit filed by the plaintiffs was barred by time.
- B) The land belongs to proprietary body, being described in the revenue record as Shamlat Deh Hasab Rasad Khewat and, therefore, the

proprietors are owners of the land.

- C) The judgment and decree earlier passed on 29.06.1970 operates as res judicata and hence, the Courts below have committed an error.
- D) The suit is not maintainable as in the earlier proceedings initiated in the year 1982 which was dismissed in default have not been disclosed.

NOW THE STAGE IS SET FOR DECIDING THE QUESTIONS OF LAW:-

1. Whether the judgment and decree passed by the Court which is a nullity, void ab initio, result of deceit and fraud is required to be set aside by the Court by filing a suit for declaration within the prescribed period of limitation or it can be ignored by the Court in collateral proceedings also?
2. Whether the suit is required to be filed within the prescribed period of limitation to set aside a declaratory decree which is void ab initio, result of deceit and fraud?

It is apparent from the record that the judgment and decree dated 29.06.1970 is result of deceit, fraud and collusion between the then Sarpanch of Gram Sabha. As noticed above, Gram Panchayat only examined one witness i.e. Lala Ram, who also supported the plaintiffs and deposed against the interest of Gram Sabha.

Both the Courts have found as a matter of fact that family of the then Sarpanch and Lala Ram are beneficiaries of the land under the judgment and decree. It is also not in dispute that the land was reserved and utilized for common purposes i.e. grazing of animals/pastures.

In the considered opinion of this Court, such judgment and decree is void ab initio and is not required to be got set aside by filing a declaratory suit. Such decree can be ignored by the Court in any collateral

proceedings. It is the fundamental Rule of law that a party who secured a possession or ownership by practicing fraud, cannot be allowed to enjoy the fruits thereof. It is not necessary for the Civil Court to formally set aside such void ab initio judgment and decree. In fact, the prayer for declaration made by the Gram Panchayat is unnecessary. The Gram Panchayat was entitled to file a suit for possession by asserting that the judgment and decree passed is void ab initio, nullity, result of deceit and fraud arising out of the collusion between the parties.

If an earlier judgment or instrument is void ab initio, nullity or without jurisdiction, the Courts are entitled to ignore the same even in the collateral proceedings. The reference in this regard can be made to the judgment passed by Hon'ble the Supreme Court in the case of *State of Maharashtra Vs. Parveen Jethalal (2000) 3 SCC 460*. Hon'ble the Supreme Court has held that although in different set of facts, if the instrument sought to be avoided was without jurisdiction, the suit for declaration is not required to be filed in such circumstances. In that case, Hon'ble the Supreme Court was dealing with the situation where State of Maharashtra had exercised the right of pre-emption and pursuant thereto the owner had executed a sale deed in its favour in the year 1976. Later on, the provision, giving superior right of pre-emption to the State, was struck down by the Hon'ble Supreme Court. The suit was filed by the owner in the year 1988 for declaration and possession by offering to refund the amount. In that context, the Court held that the declaratory suit is not required to be filed.

Hon'ble the Supreme Court further relied upon the previous judgment titled as *Ajudh Raj Vs. Moti, (1991) 3 SCC 136*. In this case also,

Hon'ble the Supreme Court held that if the order is without jurisdiction, it is not required to be formally set aside by the Civil Court. Further reliance can be placed upon the judgment of Hon'ble Supreme Court in *(2000) 7 Supreme Court Cases 543, Gram Panchayat of Village Naulakha Vs. Ujagar Singh and others*. In this case, Hon'ble the Supreme Court was dealing with almost similar situation where the then Sarpanch of the Gram Panchayat in collusion with the certain residents had got passed a decree. In para No.9 of the judgment, Hon'ble the Supreme Court held as under:-

“9. Further property of a public institution cannot be allowed to be jeopardised by persons who, at an earlier point of time, might have represented it and who were expected to effectively defend public interest and community property. Persons representing public bodies are expected to discharge their functions faithfully and in keeping with the trust reposed in them.”

This issue can also be examined from another angle. The property in dispute is a public property meant for common use of the residents of the village. As noticed earlier, the land was reserved and was being used as per the revenue record for grazing of cattles/pastures. Illegal possession over the land is continuous wrong being committed by the defendants-appellants. As such, the defence that the suit is being barred by limitation, would not be available. Encroachment of a public property is a public wrong. So long as the encroachment continues, the wrongful act continues. Hence, the encroachment of a public property is a continuing cause of action. Reference in this regard can be made to the judgment of *Hari Ram Vs. Jyoti Parsad and another*, *(2011) 2 SCC 682*. Proceedings initiated in the year 1982 also appear to be collusive, as after filing a petition same was got

dismissed for non-prosecution and no application was filed for restoration thereof.

In view of the discussion made above, questions of law Nos.1 and 2 are answered against the defendants-appellants.

3. Whether the judgment and decree which is result of fraud operates as res judicata in the subsequent suit?

Once, this Court has already found that the previous judgment dated 29.06.1970 was result of deceit, fraud, collusion and, therefore, nullity and void ab initio, the submission of the learned counsel for the appellants that the findings arrived at in the previous suit operates as res judicata would not be maintainable. As noticed earlier, in the year 1970, the judgment was passed only because the suit was not contested. Gram Panchayat did not take steps to contest the suit. Only the witness examined on behalf of Gram Panchayat also supported the stand of the plaintiffs deposed against the interest of Gram Panchayat. Hence, the finding of the Court in the suit decided on 29.06.1970 cannot be held to operate as res judicata.

4. Whether the subsequent suit would be liable to be dismissed under Order 7 Rule 1(j) CPC on the ground that the previous proceedings initiated in the year 1982 have not been disclosed?

Learned counsel for the appellant has relied upon Order 7 Rule 1 (j) as added in the Code of Civil Procedure by amendment in Punjab, Haryana and Chandigarh, which is extracted as under:-

“(j) A statement to the effect that no suit between the same parties, or between parties under whom they or any of them claim, litigating on the same grounds has been previously instituted or finally decided by a court of competent jurisdiction or limited jurisdiction, and if so, with what

results. (15-3-1991)”

Learned counsel submits that in the year 1982, the same judgment and decree was challenged before the Court of Assistant Collector and the aforesaid proceedings were dismissed for non-prosecution. He submits that since proceedings filed before the Assistant Collector have not been disclosed, hence, the plaint does not comply with the requirement of the aforesaid Rule and hence, liable to be dismissed. This Court has considered the arguments, however, do not find any substance therein for 3 reasons. Firstly, the previous proceedings initiated by the Gram Panchayat were before the Assistant Collector, Ist Grade under the Punjab Village Common Land Act, 1961 because of State amendment brought in by the Legislature authorizing the revenue authorities to ignore the previous judgments and decree passed by the Civil Court. However, later on the aforesaid amendment brought in by the Legislature was quashed by the High Court upheld by the Hon'ble Supreme Court with respect to retrospective amendments. Hence, the proceedings before the revenue authorities were not maintainable. Reference in this regard can be made to the judgment passed by Hon'ble the Supreme Court in the case of *State of Haryana Vs. Karnal Cooperative Farmers Societies Limited*, (1993) 2 SCC 363. This Court as well as Hon'ble the Supreme Court clearly held that the amendments made with retrospective effect are unconstitutional and inoperative. Secondly, the previous proceeding initiated before the Assistant Collector in the year 1982 was not a civil suit as required under Order 7 Rule 1(j). Further, Code of Civil Procedure does not provide that in case such Rule is not complied with, what would be the penal consequences. Order 7 Rule 1 provides that the plaint

shall contain the following particulars provided in the Rule.

In view of the discussion made above, this question of law is answered against the defendants-appellants.

5. Whether the Appellate Court in exercise of powers under Order 41 Rule 33 CPC is entitled to pass a judgment/order required to be passed in accordance with law irrespective of the fact that whether the cross-appeals/objections have been filed or not?

Gram Panchayat when filed the present suit prayed for decree of possession apart from the declaration and permanent injunction. However, both the Courts below have only decreed the suit qua declaration declaring the decree dated 29.06.1970 being void ab initio. However, the relief of possession has been left to be claimed through proceedings under the Punjab Village Common Lands (Regulation) Act, 1961 as applicable in State of Haryana.

In the considered opinion of this Court, once the Court came to the conclusion that the public property has been encroached upon and the defendants do not have any justification to remain in possession, the Civil Court should have proceeded to pass a decree for possession. This Court is conscious of the fact that both the Courts have not granted the decree of possession and Gram Panchayat has not filed any appeal. However, Order 41 Rule 33 CPC enables the Appellate Court while hearing the appeal to pass any decree or make any order which ought to have been passed notwithstanding the fact that there are no cross-objections or appeal by the respondents. Order 41 Rule 33 CPC is extracted as under:-

“33. Power of court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which

ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised In favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order.”

This Court is of the considered opinion that once the encroachment on a public property is continuing, the Court should not shy away from passing the decree for delivery of possession in favour of the Gram Panchayat.

In view thereof, this Court does not find any good ground to interfere with the concurrent findings of fact. However, the judgments and decrees passed by the Courts below are modified and a decree for possession is also passed in favour of Gram Panchayat-plaintiff and against the defendants.

The question of law is answered in favour of the Gram Panchayat-plaintiff.

In view of what has been observed above, the present Regular Second Appeal is dismissed. At the same time, Gram Panchayat shall be entitled to possession of the land in dispute. Decree for delivery of possession

is passed in favour of Gram Panchayat-plaintiff and against the defendant-appellants.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

27.02.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No