

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

RSA No.4934 of 2012

Date of Decision.19.01.2018

Balbir Singh and others

.....Appellants

Vs

Surain Singh

.....Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Vipin Mahajan, Advocate
for the appellants.

Mr. R.K. Arya, Advocate
for the respondent.

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AMIT RAWAL J.(ORAL)

The appellants-plaintiffs are aggrieved of the judgments and decrees passed by both the Courts below whereby the suit claiming the following relief has been dismissed.

“Suit for permanent injunction restraining the defendant from illegally and forcibly interfering and dispossessing the plaintiffs from the land measuring 7 kanals 7 marlas, comprised in Khewat No.52, Khatoni No.172, Killa No.79 (7-7) and the tubewell installed therein of which the plaintiffs are in peaceful and lawful possession, as per jamabandi for the year 1990-1991.”

Mr. Vipin Mahajan, learned counsel appearing on behalf of the appellants-plaintiffs submitted that the relief as noticed above was not only with regard to forcible interference and dispossession of the plaintiffs from the land measuring 7 kanals 7 marlas as described above but also with regard to tubewell. The appellants-plaintiffs had purchased the aforementioned property from their vendor vide sale deed dated 28.12.1993. The same was brought on

record much less exclusive possession was proved. In this regard, the issue framed was also answered in favour of the appellants-plaintiffs but in the penultimate paragraph, the trial Court did not decree the suit vis-a-vis the first relief by holding that in the absence of the sale deed, the plaintiffs have not been held to be in exclusive despite being a co-owner of 7 kanals 7 marlas of land and of tubewell to the extent of 1/4th share. The aforementioned finding has been accepted in verbatim by the lower Appellate Court so there is illegality and perversity. In this regard, he has drawn attention of this Court to the finding rendered by the trial Court in paragraph 8 of the judgment, which reads as under, thus, urges this Court for setting aside the judgments and decrees passed by the Courts below:-

“Issue No.1

8. Onus of providing this issue was upon the plaintiffs and for proving it, he has come upon the witness box as PW2 and has deposed that the suit land measuring 7 kanals 7 marlas is in his cultivating possession since the date of its purchase from Salwinder Singh and Jasbir Singh, vide registered sale deed dated 28.12.1993 who had further purchased it from Surat Singh son of Sh. Teja Singh, resident of village Pandher vide registered sale deed dated 23.11.1992. That, he has brought halqa patwari Jagdish Raj as PW1, who has also deposed that the plaintiff is cultivating possession upon the suit land i.e. khasra 79, since the date of its purchase. The plaintiff has also brought the jamabandi of the suit land as Ex.P2 a khasra girdwaris as Ex.P3 and Ex.P4 as per which, he is shown to be in cultivating possession over the suit land. The plaintiff counsel has also relied upon the cross-examination of the defendant's witnesses who have also admitted

that the plaintiff is in cultivating possession over the suit land. Moreover, the cultivating possession of the plaintiff over the suit land has not been denied by the defendant as well. Therefore, the plaintiff is in cultivating possession over the suit land. Therefore, this issue is decided in favour of the plaintiffs.”

Per contra, Mr. Arya, learned counsel appearing on behalf of the respondent-defendant submitted that it was incumbent upon the appellants-plaintiffs to place on record the sale deed from which they had drawn the ownership rights *vis-a-vis* the land as well as the tubewell but the defendant produced on the record the sale deed as Ex.D8. Therefore, the plaintiff failed to discharge the onus as per Section 101 of the Evidence Act, thus, urges this Court for upholding the judgments and decrees under challenge.

I have heard learned counsel for the parties and appraised the paper book. On simple and plain language of the finding rendered by the trial Court as extracted above, the exclusive possession of the plaintiffs with regard to 7 kanals 7 marlas has been admitted by the defendant. It is settled law that injunction can be granted against the co-owner if he is able to prove exclusive possession. This view of mine is derived from the *ratio decidendi* culled out by Full Bench judgment of this Court in **Bhartu Vs. Ram Sarup 1981 PLJ 204** and Division Bench judgment in **Bachan Singh Vs. Swaran Singh 2000(3) RCR (Civil) 70**. However, the sale deed Ex.P8 revealed that the vendor had only conferred 1/4th right of ownership *viz-a-viz* tubewell in favour of the appellants-plaintiffs. In my view, the appellants-plaintiffs did not have exclusive possession in their favour qua tubewell and therefore, the remedy for them was to seek partition. This aspect has totally escaped notice of the trial court and the lower Appellate Court as well.

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.

In view of the aforementioned, the judgments and decrees passed by both the Courts below are modified to the above extent by holding that the respondent-defendant is restrained from interfering in the peaceful possession of the appellants-plaintiffs or cause dispossession of the land as described above being in exclusive possession. The same shall be subject to granting partition vis-a-vis 7 kanals 7 marlas of land and as well as the claim in the tubewell.

The second appeal is allowed. The decree sheet be prepared accordingly.

January 19, 2018
Pankaj*

(AMIT RAWAL)
JUDGE

Whether reasoned/speaking	Yes
Whether reportable	No