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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 06.04.2018

1.

RSA No.837 of 2012 (O&M)

Nazam Singh

... Appellant(s)

Versus

Lachhman Singh

... Respondent(s)

2.

RSA No.4347 of 2014 (O&M)

Nazam Singh

... Appellant(s)

Versus

Lachhman Singh and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sherry K. Singla, Advocate
for the appellant(s).

Mr. RVS Chugh, Advocate
for the respondent(s).

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two appeals bearing **RSA No.837 of 2012** titled as **“Nazam Singh V/s Lachhman Singh”** arising out of the decision of the civil suit bearing No.95 of 2003 (for short '1st suit') claiming joint possession and **RSA No.4347 of 2014** titled as **“Nazam Singh V/s Lachhman Singh and others”**, arising out of the decision of the

civil suit bearing No.61 of 2010 (for short '2nd suit') seeking permanent injunction.

For the sake of brevity, the facts are being taken from **RSA No.837 of 2012.**

The appellant-Nazam Singh, assignee of Baggu Singh/defendant No.1 is aggrieved of the concurrent findings of fact, whereby the suit of the respondent-plaintiff has been decreed by the trial Court vide judgment and decree dated 18.11.2009, which was affirmed, in appeal, by the lower Appellate Court, vide judgment and decree dated 21.12.2011.

The facts as enumerated from the pleadings of the parties to the *lis* are that the respondent-plaintiff instituted the suit on the premise that one Baggu Singh/defendant No.1 along with other co-sharers was owner in joint possession to the tune of 1/3rd share of land measuring 116 kanals 8 marlas and 34 kanals 17 marals in revenue estate of Aspal, Tehsil Mansa. Defendant No.1 was defaulter of the Mansa Primary Co-operative Development Bank Ltd., Mansa. The aforementioned Bank after adopting legal process from the joint holding of the land bearing Rectangle No.20M/3(3-0), 4(8-0) total 11-0 kanals was auctioned by Sale Officer Assistant Registrar Co-operative Societies, Mansa on 20.07.1988. The plaintiff and defendant No.2 were joint highest bidders and accordingly, sale certificate was issued with regard to the land measuring 11 kanals. A mutation bearing No.1793 on the basis of the sale certificate was sanctioned in favour of the plaintiff and defendant No.2, namely, Amrik Singh. Prior to the aforementioned sale, an application for partition of the land measuring

116 kanals 8 marlas and 34 kanals 17 marals was submitted on 08.01.1987, which was decided on 28.04.1992 in case titled as Lachhman Singh Vs. Gehla Singh and others” by the Assistant Collector 1st Grade, Mansa. However, due to inadvertence, the land, which had fallen to the share of defendant No.1 after partition, was not reflected in the aforementioned mutation. Based upon the partition, mutation No.2031 was sanctioned on 06.12.1999. The plaintiff and defendant No.2 were, thus, entitled for ownership in joint possession to the extent of 220/325th share of the land measuring 16 kanals 5 marlas in lieu of land auctioned vide sale certificate dated 20.07.1988. Defendant No.1 took the possession of the land on the basis of partition certificate dated 28.04.1992, but came to know that land measuring 11-0 kanals was not included in the share of the plaintiff and defendant No.2 nor any other land was allotted to him and defendant No.2 in lieu of that land, therefore, there was a shortfall. The plaintiff requested the defendant No.1 to give the 220/325th share to the plaintiff and defendant No.2 in equal shares, but the said request was not acceded to, necessitating, the filing of the suit.

Upon notice, defendant No.1-Baggu Singh had put in appearance and submitted written statement, but thereafter he did not appear and was proceeded ex parte.

In his ex parte evidence, the plaintiff in support of the pleadings examined himself as PW-1 and Nasib Chand Superintendent (Retd.) DR Office Mansa as PW-2 and tendered into evidence Sale certificate (Ex.P-1), jamabandi for the year 1954-85(Ex.P-2), jamabandi for the year 1999-2000 (Ex.P-3), jamabandi for the year 1989-90 (Ex.P-4),

mutation No.2031 (Ex.P-5), certificate of partition (Ex.P-6) and jamabandi for the year 1994-95 (Ex.P-7).

The trial Court on the basis of the *ex parte* evidence decreed the suit and the appeal preferred by Baggu Singh/defendant No.1 was also dismissed.

Mr. Sherry K. Singla, learned counsel appearing on behalf of the appellant-defendant No.1 submitted that the suit was *ex facie* was not maintainable as the plaintiff and defendant No.2 were not owner of the suit property as the sale certificate pertained to Rectangle No.20M/3(3-0), 4(8-0) total 11-0 kanals, which fact is evident from the sale certificate dated 20.07.1988. In the partition proceedings, the aforesaid persons were assigned the aforementioned shares, whereas Baggu Singh was given a land bearing Khasra No.20//2, 3/2, 36//9/3 measuring 16 kanals 05 marlas. This fact is also evident from *sanad takseem* (Ex.P-16), even the jambandi for the year 1984-85 also reflected the note with regard to mutation bearing No.1793 in respect of land bearing Rectangle No.20M/3(3-0), 4(8-0) total 11-0 kanals, so is position in the jambandi for the year 1994-95 & 1999-2000, but the Courts below have rendered the findings in the suit by treating *ex parte* evidence as *sermon*. Both the Courts below were required to go into the documents particularly lower Appellate Court in depth for the purpose of adjudication of the *lis*, for, it is a clear cut case of a fraud, where the plaintiff and defendant No.2 have claimed the ownership of land belonging to defendant No.1, erstwhile owner of Baggu Singh, thus, urges this Court for setting aside the concurrent findings of fact.

Mr. Chug, learned counsel appearing on behalf of the

respondent-plaintiff submitted that in fact, the land, which was auctioned, was less than what was sought for, therefore, being a co-sharer, there was a deficiency in the area. It is, in that background of the matter, the share, aforementioned, as reflected in the suit, was sought. The defendants have failed to lead evidence. The unclinched and un-rebutted evidence could not be rebutted. It is not a case of misdirection and misleading, enabling this Court to set aside the concurrent findings, thus, urges this Court for dismissal of the regular second appeals.

I have heard the learned counsel for the parties, appraised the paper book, record of the Courts below and of the view that there is force and merit in the submissions of Mr. Singla, for, the sale certificate concededly Ex.P-1 pertained to Rectangle No.20M/3(3-0), 4(8-0) total 11-0 kanals, whereas in the partition proceedings, the aforementioned share had fallen to the kitty of the plaintiff and defendant No.2 and the other land i.e. 16 kanals 05 marlas, which was subject matter of the suit in favour of Baggu Singh. The plaintiff/respondent, therefore, could not have any right to claim that they were co-sharers in the aforementioned land as all the co-sharers were given respective shares in the aforementioned partition proceedings. The documents were not of a defendant, but of the plaintiff. The Courts below were required to go into the documents in correct perspective. The jamabandi and mutation were also the testimony of the same. There is a glaring illegality and perversity in the judgments and decrees, much less, there is a blatant misdirection.

Counsel for the respondent-plaintiff had not been able to rebut the aforementioned documents certifying the factum of the mutation and

partition proceedings.

In view of such matter, I am of the considered view that the no claim could be laid to determined share of Baggu Singh/defendant No.1. The suit was wholly misconceived.

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 V/s. 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 substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. 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 regards the appeal RSA No.4347 of 2014, once the

respondent-plaintiff was not found to be in exclusive possession, the Courts below could not have been granted injunction, in view of the partition proceedings.

For the foregoing reasons, the judgments and decrees of the Courts below are not sustainable in the eyes of law and the same are hereby set aside, accordingly, both the appeals bearing **RSA No.837 of 2012** and **RSA No.4347 of 2014** are allowed.

06.04.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**