

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

**RSA No.1977 of 2013
Date of Decision.09.02.2018**

Satbir Singh and another

.....Appellants

Vs

Sajno Devi and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. R.K. Sharma, Advocate
for the appellants.

Mr. Jaivir Yadav, Advocate
for the respondents.

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AMIT RAWAL J.(ORAL)

C.M. No.10419-C of 2017

The application for impleading the legal representatives of deceased-appellant No.2 namely Dharambir Singh is allowed subject to all just exceptions and the legal representatives are ordered to be brought on record.

Application is allowed.

RSA No.1977 of 2013

The appellants-defendants are in appeal against the judgment and decree rendered by the lower Appellate Court whereby the suit of the respondent-plaintiff seeking possession of the property in dispute has been decreed.

Before advertng to the rival contentions of the counsel appearing for the parties, it would be apt to give preface of the matter. Sajno Devi and Kanto daughter of Dharam Singh instituted the suit for possession

of house situated within the *abadi deh* of village Ladrawan, Tehsil Bahadurgarh, District Jhajjar as per the description given in the plaint on the premise that earlier their father namely Dharam Singh was owner in possession of one residential house measuring 178 square yards. The appellant No.1-defendant No.1 got executed a release deed in respect of the agricultural land from the father of the plaintiffs. The said release deed was challenged by the plaintiffs but the suit was dismissed against which appeal was filed and in the appeal, the suit of the plaintiffs was decreed. Earlier the defendants had filed a suit for permanent injunction against the plaintiffs regarding the suit property and the same was decreed in favour of the defendants on 17.01.2003. The appeal preferred before the lower Appellate Court was also dismissed vide judgment dated 28.05.2003. However, the defendants were found in possession of the suit property and injunction was granted not to dispossess except in due course of law, therefore, the necessity arose to file the present suit for possession. The plaintiffs also filed application before the Electricity Department regarding the connection and complaint against the defendants was given to the police that the defendant had taken forcible possession of the property in the year 2000.

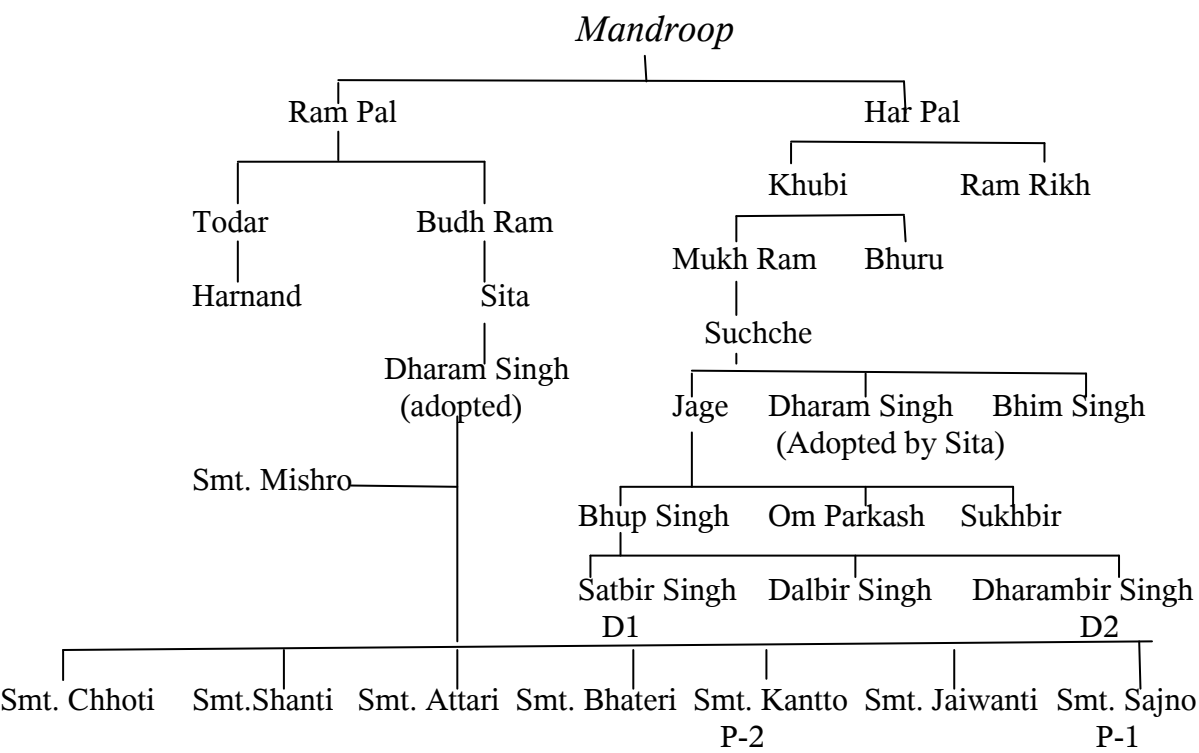
The aforementioned suit was contested by the appellants-defendants by taking the customary preliminary objections and in para 1 of the preliminary objection denied that the plaintiffs were neither owners nor in possession of the suit property, much less, it was owned and possessed by the defendants. While giving reply on merits, it was stated as under:-

“1. That para No.1 of the plaint is wrong and denied. It is vehemently denied that the father of the plaintiffs was owner and in possession of the dispute house as alleged by them. It is

submitted that the suit property is owned and possessed by the defendants and the plaintiffs have no concern with the same in any manner whatsoever. The true facts of the case are as under:-

That the father of the plaintiffs Sh. Dharam Singh and the defendants are the descents of a common ancestor namely Mandroop.

The pedigree table of the parties is as under:-



That Dharam Singh was adopted by Sita. It is submitted that previously a sizeable residential property including the suit property was jointly owned and possessed by the Joint Hindu Family constituting the members shown in the pedigree table namely Dharam Singh adopted son of Sita, Jage and Bhim Singh s/o Suchche.

That on 15.6.1968 there was a verbal family settlement between Dharam Singh, Bhup Singh, Parkash and Bhim Singh, in which the disputed house constituting one Dukria & two rooms adjacent to the street fell to the share of plaintiff's father Sh. Bhup Singh. After the verbal family partition, in the year 1970 the father of the defendants Sh. Bhup Singh constructed one under ground water tank, varanda, stair case, one in tin shed room in the first floor in the disputed house by investing a huge amount and since then the

same is exclusively owned and possessed by the defendants and the plaintiffs have no concern with the same in any manner whatsoever. The possession of the defendants over the disputed house is continuous since 15-6-1968 to up to date without any interruption, hostile and within the knowledge of the plaintiff.”

The replication to the aforementioned fact filed by the plaintiffs in paragraph 1 reads as under:-

“That the contents of Para No.1 of the written statement are wrong, illegal, hence denied and that of the plaint are reiterated to be correct. It is wrong to state that the house in question was the property of Joint Hindu Family as alleged. The house in question never remained joint as alleged. It is also wrong to state that on 15.6.1968 there was any verbal settlement between Dharam Singh v/s Bhup Singh etc. and the house in question felt the share of the Bhup Singh as alleged. It is wrong that the house in question is owned by the defendants as alleged. The defendants are only the tress-passers and not the owner of the same in any way.”

The trial Court dismissed the suit on the ground that the respondents-plaintiffs failed to prove the title, however, the lower Appellate Court reversed the finding. It is in this backdrop of the matter, the present appeal has been filed.

Mr. Sharma, learned counsel appearing on behalf of the appellants-defendants submitted that the judgment and decree of the lower Appellate Court suffers from illegality and perversity as it remained oblivious of the fact that the respondents-plaintiffs did not prove the title in the property, much less, of Dharam Singh. The pedigree table aforementioned has not been denied, though according to the appellants-defendants Dharam Singh was adopted by Sita but even if he was not adopted, he was real brother of Jage, who had three sons i.e. Bhup Singh, Om Parkash and Sukhbir. The appellants-defendants are sons of

Bhup Singh. In view of the non-denial of the factum that the property in dispute was joint property, the suit simpliciter for possession was not maintainable and remedy lied elsewhere. In fact, the appellants-defendants categorically stated that there was a verbal family settlement dated 15.06.1968 between Dharam Singh, Bhup Singh, Om Parkash (sons of Jage) and Bhim Singh (son of Suche) whereas the disputed house constituted one Dukira and two rooms adjacent to the street fell to the share of Bhup Singh, their father. After the verbal family settlement, the father of the appellants-defendants, Bhup Singh, constructed one underground water tank, varanda, stair case, one tin shed room for chaff-cutter in the ground floor and one room in the first floor in the disputed house by investing a huge amount. The factum of the filing of the subsequent suit was also not denied. In cross-examination, the respondent-plaintiff did not know the dimension of the house, much less, extent of the construction. Therefore, it cannot be believed that the person, who had in possession of the house would not know the correct dimensions of the same, thus, according to him, the lower Appellate Court committed illegality and perversity.

Per contra, Mr. Jaivir Yadav, learned counsel appearing on behalf of the respondents-plaintiffs submitted that there is categoric admission of the appellants-defendants with regard to ownership of the house in dispute by Dharam Singh. He had during the course of arguments referred to the record of the trial Court by pointing out para 1 of the reply on merits as extracted above to contend that after the extraction of the pedigree table, it was submitted that the property was owned by Dharam Singh adopted son of Sita, Jage and Bhim Singh s/o Suchche. Nowhere it has been mentioned that it was owned by Bhup Singh. This is a clear cut admission. Even in the affidavit submitted in

examination-in-chief, the ownership of the plot in the name of Dharam Singh had been admitted, which also surfaced in the cross-examination that other than the house in dispute, there were six more houses, which had already been distributed. All these facts weighed in the mind of the lower Appellate Court in reversing the finding rendered by the trial Court.

The title in the house was itself not in dispute, therefore, there was no occasion for the trial Court to dismiss the suit. Even the local commissioner appointed in the aforementioned proceeding found that fresh construction was going on. If the plaintiffs are married and residing somewhere else, they cannot be said to be not in possession of the property i.e. there may not be actual physical possession but symbolic possession.

The family settlement dated 15.06.1968 has not been proved through the family member as it was not witnessed by anybody, thus, urges this Court for upholding the finding rendered by the lower Appellate Court by dismissing the second appeal.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below and of the view that there is force and merit in the submissions of Mr. Sharma. The suit for possession is always based upon title. In this case, the respondents-plaintiffs have miserably failed to prove the title. Existence of house in *abadi deh* would not mean that it would shy away from proving the ownership of the property in the name of Dharam Singh. The stand taken in para 1 of the written statement on merits cannot be read in isolation but has to be read in conjunction and pith and substance of the written statement reveals that there was a bald statement that the suit property was jointly owned and possessed by the joint Hindu family. If at all, Bhup Singh had no share in the property, there was no occasion for the family

settlement. Since the family settlement had been proved by Satbir, the fact of the matter is that the pedigree table extracted above was not disputed. In my view, the trial Court rightly dismissed the suit as the character and nature of the property was joint and the remedy was to claim the partition. As regards the reference of the cross-examination of appellant-defendant No.1-Satbir Singh regarding existence of another six houses, I am of the view that other six houses would not give cause to claim title of the property unless and until some relative or resident of the village to prove that the house in dispute measuring 178 sq. yards situated in abadi deh had fallen to the share of Dharam Singh had been examined. The arguments raised by Mr. Jaivir Yadav with regard to admission is wholly misplaced, unjustified and hereby rejected. Unless and until the title is not proved, the suit for possession cannot be decreed. No evidence has been brought on record to show that they were in possession of the property prior to 2000 when the suit was filed.

The plaintiff have miserably failed to discharge the onus as enshrined under Section 101 of the Indian Evidence Act and cannot be permitted to rely upon the one line here and there in the examination-in-chief or cross-examination. The plaintiffs have to stand on their own legs.

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 judgment and decree passed by the lower Appellate Court suffers from illegality and perversity and the same is hereby set aside. Consequently, the judgment and decree passed by the trial Court is restored. Resultantly, the second appeal stands allowed. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

February 09, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No