

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

**RSA No.1978 of 2013 (O&M)
Date of Decision.19.02.2018**

Dalbir Singh and others

.....Appellants

Vs

Swaran Singh (deceased through LRs) and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Harkesh Manuja, Advocate
for the appellants.

Mr. Gaurav Kalsi, Advocate for
Mr. H.S. Batth, Advocate
for the respondents.

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AMIT RAWAL J.

The appellant-defendant Nos.2 to 4 are in regular second appeal against the judgment and decree rendered by the lower Appellate Court whereby the finding of the trial Court dismissing the suit claiming possession of land measuring 3 kanals 4 marlas bearing Khata No.39/175 as per description given in the plaint or in the alternative for joint possession as owner of land measuring 3 kanals 4 marlas bearing khata number 39/175 comprised in khasra No.85//9 (8-0), 10/1 (5-4) while partly decreeing the suit, has been set aside.

Before advertng to the rival arguments of the counsel appearing for the parties, it would be apt to give preface of the matter.

Swaran Singh, respondent-plaintiff instituted the suit on the ground that Atma Singh son of Bishan Singh, defendant No.1, was owner of land measuring 6 kanals 12 marlas being ½ share of the land measuring 13 kanals 4 marlas. By virtue of sale deed dated 3.6.1988, Atma Singh sold 3 kanals 4

marlas of land bearing khasra No.85//10/1 (3-4) min South (Dhakan), situated at village Vain Poin, Tehsil Khandoor Sahib, District Amritsar, which was in his possession as a co-sharer to the plaintiff for a valuable consideration of ₹15,000/- and claimed to have taken in possession. He had been cultivating the aforementioned land but defendant Nos.1 to 5 illegally and forcibly occupied the aforementioned land on which they did not have any right, as the aforementioned purchase was with regard to specific khasra number out of 13 kanals 4 marlas, therefore, his status was also of co-sharer to the extent of his ownership and in this backdrop of the matter, the alternative plea of joint possession was sought by claiming the partition of the land.

It was further averred that one Beant Singh son of Kishan Singh was owner of land measuring 5 kanals 12 marlas being half share of the land 13 kanals 4 marlas but, sold whole of his share in the said khata to defendant Nos.6 to 8, therefore, in order to avoid the legal complication and objection, vendees were arrayed as defendant Nos.6 to 8.

Defendant Nos.3 and 6 to 8 were served but they were proceeded ex parte. Defendant No.4 and 5 were duly served by way of munadi but nobody appeared and as such, they were also proceeded ex parte. However, defendant Nos.1 and 2 appeared through counsel. Later on, defendant Nos.3, 4 and 5 also appeared through counsel and defendant Nos.1 to 5 filed joint written statement by taking the customary pleas with regard to maintainability, locus standi etc. However on merit, it was pleaded that the sale deed was false and fictitious with an intent to grab the property of the defendants. Atma Singh never sold land measuring 3 kanals 4 marlas

to the plaintiff whereas the land measuring 6 kanals 12 marlas owned by Atma Singh was given to defendant No.2-appellant, Dalbir Singh, who had been cultivating the land as owner. The cultivation of the plaintiff was also emphatically denied.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff has got no locus standi to file the present suit? OPD*
- 2. Whether the suit is properly valued for the purpose of the court fee and jurisdiction? OPD*
- 3. Whether Atma Singh sold the land measuring 3K - 4 marlas to the plaintiff vide sale deed dated 3.6.1988 by way of specific numbers? OPP*
- 4. Whether the plaintiff had been coming into possession over the suit land? OPP*
- 5. Whether the plaintiff is entitled to the possession of the suit land? OPP*
- 6. Whether the plaintiff is entitled to the decree of joint possession in the alternative? OPP*
- 7. Relief.*

The respondent-plaintiff examined Sadha Singh as PW-1, Amrik Singh as PW-2, Subeg Singh as PW-3, Swaran Singh as PW-4 and tendered documents whereas the defendants examined defendant No.2

himself as DW1, Joginder Singh as DW-2, Boota Singh as DW-3 and defendant No.3 himself appeared as DW-4 and tendered documents.

The trial Court on the basis of both oral and documentary evidence and pleadings dismissed the suit by holding that the plaintiff failed to prove on record that he ever came into possession of the suit land whereas appellant-defendant No.2 by virtue of judgment and decree dated 13.12.1989, Ex.D4/2 and D4/3 had already got injunction restraining the defendants, therein, from the suit land, in essence, possession of the appellant was proved on record. In suit filed on 07.05.1988, the judgment and decree came to be passed on 13.12.1989 whereas the sale deed was executed on 3.6.1988. The judgment and decree was assailed by the respondent-plaintiff in appeal and the lower Appellate Court has partly decreed the suit by granting of ownership of the land comprising khewat/khata No.39/175 khasra No.85//10/1(3-4) as per jamabandi 1988-89 but with regard to joint possession, it was dismissed on account of lack of jurisdiction i.e. in view of Section 145 of the Punjab Land Revenue Act.

Mr. Harkesh Manuja, learned counsel appearing on behalf of the appellants submitted that there was no admissible evidence on record that prove that Atma Singh sold the land measuring 3 kanals 4 marals by virtue of sale deed dated 3.6.1988 to the respondent plaintiff. Burden of proving the same was on the plaintiff which had not been discharged, for, Swarn Singh in cross-examination admitted that khasra girdawari of the property in dispute was in the name of Dalbir Singh, appellant-defendant No.2 and feigned ignorance qua entry in his name after purchase of the land in dispute. He further admitted that the property in dispute was of Dalbir

Singh and in family partition, Bishan Singh had given property to Dalbir Singh. The aforementioned assertion demolished the entire case of the plaintiff, thus, there is abdication and misdirection of the aforementioned document and oral evidence.

He further submitted that Sadha Singh, PW-1 in cross-examination stated that he was not present when the sale deed was registered whereas PW-3, Subeg Singh stated that he was the son-in-law of the uncle of Swaran Singh, plaintiff. He further stated that he and Swaran Singh were accused in a case under Section 307 IPC. He also did not know about name of the scribe of the sale deed. Even no mutation with regard to the alleged sale deed was sanctioned in favour of the respondent-plaintiff. All the witnesses of the defendants were consistent and coherent with regard to possession of the appellant-defendant No.2. The trial Court while rendering the finding on issue No.3 to 5 categorically stated that issue with regard to ownership and possession of Dalbir Singh was decided by the Court in the year 1989 in the suit filed by Dalbir Singh in the year 1988 i.e. prior to the execution of the sale deed, whereas, the present suit was filed on 18.10.2004. The aforementioned judgment and decree has not been challenged. Ex.D4/1, certified copy of the order dated 22.10.2001 of the cancellation of mutation regarding the suit property sanctioned in favour of the plaintiff by then Additional Deputy Commissioner-cum-Collector, Amritsar was also not adverted to. There has to be direct and cogent evidence that to prove that respondent-plaintiff ever came into possession of the property or was dispossessed, thus, urges this Court for reversing the finding rendered by the lower Appellate Court.

Per contra, Mr. Gaurav Kalsi for Mr. H.S. Batth, learned counsel appearing for the respondents submitted that there is no illegality and perversity in the judgment and decree rendered by the lower Appellate Court being last court of fact and law as after examination of the entire evidence i.e. oral and documentary, it surfaced that jamabandi of the year 1988-89 Ex.PB regarding khasra No.85//10/1 measuring 5 kanas 4 marlas, it was not clear as to which 3 kanals 4 marlas of land was sold by Atma Singh and Bishan Singh to the plaintiff Swaran Singh or was put into possession, thus, the Court relegated the party to seek partition of the property by granting a status of ownership of the land comprising of khasra/khata No.39/175, khasra No.85//10/1(3-4). The Court while trying the injunction suit could not have adjudicated the issue of title, even if it is being pressed by the parties as it was required to be left open. For proving the registered sale deed, no examination of any attesting witness is required as it carries presumption of truth, being a public document. In the injunction suit, Atma Singh, Raghbir Singh and Bishan Singh i.e. defendant Nos.1, 2 and 5 were restrained from forcibly dispossessing, except in due course of law, Dalbir Singh and also alienation of the suit property to Amrik Singh or anybody else. The defendants were never prevented in the suit preferred by Dalbir Singh, appellant-defendant No.2, to take possession in accordance with law. It is in this backdrop of the matter, the suit aforementioned was filed, thus, urges this Court for upholding the findings given qua ownership in favour of the respondent-plaintiff.

I have heard learned counsel for the parties, appraised the paper book, records of the Court below and of the view that there is force and merit in the submissions of Mr. Manuja. It would be apt to reproduce the

finding rendered by the Court in the judgment and decree dated 13.12.1989 with regard to issue qua title in the suit filed by Dalbir Singh against the defendants therein i.e. the erstwhile vendors of the respondent-plaintiff:-

“Issue No.2.

10. The onus of proving this issue was on the plaintiff. PW1 Sucha Singh has deposed that he knew the parties to the suit and has seen the suit land. He deposed that Dalbir Singh is in possession of suit land for the last 15-20 years and he has also constructed a house in the suit land. PW2 Dalbir Singh has deposed that he is in possession of the suit property for the last about 17-18 years as owner. The defendants have sold part of the land of khasra No.76/21. He has further deposed that he has planted eucalyptus trees in khasra No.76/19. He has also stated that he constructed the house about 20 years back. He further deposed that he got prepared the site plan of disputed property and it bears his signatures. He further stated that the defendants threatened to demolish his haveli and to take possession forcibly. Defendants have no concern with the suit property.

11. Plaintiff Dalbir Singh has also proved on the file copies of jamabandis Ex.P2, P3 and copy of khasra girdawari Ex.P4 and a perusal of the same shows that plaintiff is in possession of the suit property. There is no evidence in rebuttal to the evidence led by the plaintiff. In view of the whole evidence on the file, I have come to the conclusion that plaintiff is in possession of the suit land as owner and he is entitled to injunction as prayed for. This issue is decided in favour of the plaintiff and against the defendants.

On plain and simple reading of the aforementioned finding, it surfaced that the trial Court held that it was Dalbir Singh, who was the owner of the property. In the absence of challenge to the aforementioned

finding, even the sale deed executed by Atma Singh in the year 1988 of 3 kanals 4 marlas, irresistible conclusion is liable to be drawn that he did not have title in the property, much less, the mutation Ex.D4/1 could be sanctioned. Though the lower Appellate Court declined the alternative relief of partition in view of the provisions of Section 145 of the Punjab Land Revenue Act, which oust the jurisdiction of the Civil Court for granting partition in respect of the agricultural land situated outside the limits of the city but the fact of the matter is that whether in suit for possession, the lower Appellate Court could have accorded ownership in favour of the plaintiff in the absence of any declaration claimed therein. The suit simplicitor was for possession on the basis of the sale deed. In my view, the lower Appellate Court has exceeded its jurisdiction in granting declaration. No doubt, as per the provisions of Section 54 of the Transfer of Property Act, attesting witnesses are not required but the fact of the matter is that once there was already an adjudication of ownership in previous litigation, finding, in my view, would apparently be hit by doctrine akin to *res judicata*.

There is another aspect of the matter. The contents of the sale deed revealed that vendors of the respondent-plaintiff had transferred possession to the plaintiff but in cross-examination he admitted that after the sale deed no khasra girdawari was entered in his name, meaning thereby, he was never put into possession. Despite acquiring the title by virtue of sale deed executed in the year 1988, no explanation has come forth of remaining silent for all the years till 2004 when ultimately suit was filed. Though no issue with regard to limitation was framed but as per provisions of Section 3 of the Limitation Act, extracted below, the objection can be taken and

pondered upon at any point of time in the proceedings arising from filing of the suit.

“3. Bar of limitation.—

(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act— (2) For the purposes of this Act—

(a) a suit is instituted—

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.”

All these facts in my view have not been taken into consideration by the lower Appellate Court, thus, there is abdication and misdirection, resulting into illegality and perversity.

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 granting status of ownership to the respondent-plaintiff is set aside and the judgment and decree passed by the trial Court is upheld. Resultantly, the appeal stands allowed in the above terms.

(AMIT RAWAL)
JUDGE

February 19, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No