

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

RSA No.1024 of 2014

Ranbir Singh and Anr.

....Appellants

Versus

Municipal Committee, Julana and Anr.

....Respondents

Date of Order: 27.3.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Amit Kumar Jain, Advocate for the appellants.

Mr. Raman B Garg, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

Appellants-plaintiffs are in second appeal against the judgment and decree of reversal dated 06.2.2014 passed by learned District Judge, Jind whereby the appeal preferred by the defendants-Municipal Committee, Julana (for short "the Committee") against the judgment and decree dated 21.7.2012 of the learned Civil Judge (Jr. Division), Jind, decreeing the suit of the plaintiffs, has been accepted, resulting into dismissal of suit.

The appellants-plaintiffs instituted the suit challenging the notice dated 20.7.2009 (Ex.P.2) whereby the Committee without specifying the alleged encroachment called upon them to appear before the Authorities. It was averred that the property was situated within the Lal Dora of old Julana village. The plaintiffs had constructed boundary wall in the court yard without any objection from any quarter since long. The width of Gali was found to be not homogeneous street and therefore defendant No.1-Committee issued the said notice to the plaintiffs at the instance of one Mahabir Singh, who was nursing a grudge against the plaintiffs.

Defendant Nos.1 & 2 contested the suit by taking preliminary

objections much less maintainability of the suit for want of issuance of notice under Section 52 of the Haryana Municipal Act, 1973 (for short “1973 Act”).

The trial Court from the pleadings of parties framed the following issues:

“1. Whether the plaintiff is owner in possession of the suit land?OPP (court yard).

2. Whether the suit is not maintainable in the present form?OPP

3. Whether the plaintiffs estopped to file and maintain the present suit by his own act and conduct?OPD

4. Whether the suit is bad for want of notice U/s 52 of Haryana Municipal Act?OPD

5. Relief.”

In order to prove their case, plaintiff examined PW1-Jashmer Singh, PW2-Mahabir Singh, PW3-Balbir Singh, PW4-R.C Ladwal, Naksha Naveej and PW5 Raj Kumar before closing the evidence. On the other hand, defendants examined Hans Raj, Clerk Municipal Committee, Julana as DW1 and thereafter closed their evidence.

The trial Court on the basis of evidence brought on record including the relevant documents decreed the suit holding that the Committee has not adduced any relevant document to prove ownership of property in dispute and granted the injunction to the plaintiffs. However, it was clarified that the defendants could take action against the plaintiffs only in due course of law after proper decision regarding the ownership of the suit property. Aforesaid judgment when assailed before the lower Appellate Court had been reversed while accepting the appeal on two grounds, namely, (i) the suit was not maintainable without serving notice under

Section 52 of the Act and (ii) as per the statement of DW2, the plaintiffs were found to be in unauthorized occupation of 13.5 x 22.2 feet area and had raised construction of boundary wall.

Learned counsel for the appellants submitted that the learned lower Appellate has committed illegality and perversity while accepting the appeal. The provisions of Section 52 of the Act have not been read in correct perspective, in the light of which no prior notice of one month was required in a suit instituted under Section 38 of Specific Relief Act, 1963. The notice (Ex.P.2) did not disclose as to what kind of violation of the provisions was committed. Since the notice was without jurisdiction, the suit cannot be said to have been not maintainable as it is well settled that any order without jurisdiction can be challenged by invoking the jurisdiction of the Court under Section 9 CPC.

Learned counsel for the respondents submitted that it has come on record that the plaintiffs had encroached the area and therefore no person can be permitted to occupy any inch of land being not in ownership. It is only in this background of the matter that the notice was sent to the plaintiffs. He thus prayed for dismissal of the appeal.

I have heard learned counsel for the parties and appraised the paper book with their able assistance.

From the perusal of record, it is evident that the column in respect of the alleged violation of Municipal loss was left blank. No encroachment was attributed to the appellants. Learned lower Appellate Court in my view has committed an error while relying upon statement of the witness, which had been made on the basis of some demarcation, which according to the plaintiffs had not seen the light of the day nor had been put

to him. No such reasoning, in my view, could have a ground for the lower Appellate Court to accept the appeal. It would be pertinent to reproduce the provisions of Section 52 of the Act, which reads as under:

“ 52. Suits against committee and its employees.

No suit shall be instituted against a committee, or against any employee of a committee, in respect of any act purporting to be done in its or his official capacity, until the expiration of one month next after notice in writing has been, in the case of a committee, delivered or left at its office, and in the case of an employee, delivered to him or left at his office or place of abode stating the cause of action and the name and place of abode of the intending plaintiff, and the plaint must contain a statement that such notice has been so delivered or left:

Provided that nothing in this section apply to any suit instituted under section 38 of the Specific Relief Act, 1963.”

As per provisions of Section 52 of the Act, exemption from sending prior notice of one month has been granted in a suit instituted under Section 38 of the Specific Relief Act, 1963, which deals with grant of injunction.

As a sequel of aforesaid facts and circumstances, I find that the lower Appellate Court has failed to address the major issue and committed irregularity while reversing a well reasoned judgment of the trial Court.

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.

Keeping in view the aforementioned, the judgment and decree passed by the lower Appellate Court is set aside and the judgment and decree passed of the trial Court is restored. However, it is made clear that in case parties have already compromised the matter then nothing survives for execution. If otherwise, the natural consequences of the judgment and decree passed by the trial Court, confirmed by this Court, shall follow. The second appeal is allowed in the above terms.

It is made clear that this order of mine shall not take away the right of the Committee to comply with the provisions of the Act thereby seeking removal of any specified alleged encroachment, if any in accordance with law.

March 27, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No