

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

RSA No.5146 of 2015

Date of decision:- 27.02.2018

Sarjeewan Singh

...Appellant

Versus

Vijay Kumari and Others

...Respondents

BEFORE: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. S.K. Chaudhary, Advocate,
for the appellant.

RITU BAHRI J. (Oral)

CM No. 12290-C of 2015 :

This is an application for condonation of delay of 17 days in re-filing the present appeal. For the reasons mentioned in the application same is allowed and delay of 17 days in re-filing the present appeal is condoned.

Accordingly, the present application stands disposed of.

Main Case:

The present appeal has been filed by the appellant against the judgment decree dated 25.02.2015 passed by Ld. District judge, Pathankot, whereby he suit of the plaintiff has been dismissed and judgment and decree dated 09.07.2013 passed by Civil Judge (Senior Divn.), Pathankot where the suit filed by the plaintiff/appellant to the effect that judgments and decree in Suit No. 334 of 1995, instituted on 04.11.1995 and decided on 04.12.1998 is illegal, void and similarly, decision of the Court of Appellate Court, Gurdashpur in civil appeal No 5 decided on 12.12.2003 in the appeal

from the suit No. 334 of 1995 and the judgment and decree, of the second appeal in this court in RSA No. 3030 of 2004 decided on 03.04.2006 between the parties to the said suit are illegal, void, the same has been dismissed by the trial court.

Consequently, appellant filed the present appeal.

Brief facts of the case are that, Sh.Vakila Ram was the owner of the land. Sh.Vakila Ram had sold the land measuring six marlas to the plaintiffs vide sale deed dated 09.08.1995 for a consideration of Rs.4,000/-. Mamta alias Mukta Saini D/o late Sh. Kishan Chand S/o Sh. Sewa Ram, resident of New Basti Saingarh, Pathankot, District Gurdaspur is minor and she cannot defend the suit herself and also she is being brought up by her real mother Smt.Vijay Kumari defendant No.1 who has no interest adverse to that of the minor. As such, she is being sued through her mother defendant No.1. Sh. Kishan Chand was the son of one Sh. Sewa Ram son of Sh. Kirpa Ram, R/o Thakarpura, Tehsil Pathankot, District Gurdaspur and not the son of Vakila Ram. Sh. Vakila Ram had only one son namely Sh. Tarsem Lal and he had no other son. Sh. Kishan Chand father of the defendant Nos.2 to 4 and husband of defendant no. 1 was not the son of Vakila Ram, but he was the son of Sewa Ram.

It has been further averred that the plaintiffs were not aware about the percentage of Sh.Kishan Chand joined Government Primary School Lahri Gujran, Tehsil Pathankot, District Gurdaspur on 14.05.1962 and left his school on 31.03.1967. In the school register also his father's name mentioned as Sewa Ram. Later on Sh.Kishan Chand left the Government Primary School at Lahri Gujran and joined Government High School at Taragarh Tehsil Pathankot on 10.10.1967 and left this school on 25.07.1969

and here also the name of father of Sh. Kishan Chand has been written as Sewa Ram. Names of his legal heirs i.e. Defendants nos. 1 to 3 are also mentioned in his discharge certificate. He was also drawing pension from State Bank of India Pathankot where also the name of his father was recorded as Sewa Ram. He lived in New Basti Saingarh Pathankot. Connection of water is also issued in his name with parentage of Sewa Ram. Kishan Chand instituted false suit against the plaintiff and defendant No.5 alleging himself to be the son of Vakila Ram. Earlier the plaintiffs were not aware of the parentage of Kishan Chand and after decision of the suit of the judgment impugned in the present suit the plaintiffs came to know about his actual parentage.

Upon notice, defendants Nos. 1 to 4 appeared and filed written statement taking preliminary objections that the suit is barred by principle of resjudicata. Defendants denied that Sh. Vakila Ram was the absolute owner of the suit land. Sh. Vakila Ram constituted the Joint Hindu Family with his son Sh. Kishan Chand and the suit land was the coparcenary property which being ancestral having come to them through four degrees of lineal descent with Kishan Chand having the notional share in it. It has been denied that Sh. Vakila Ram has sold the suit land as alleged to the plaintiff. He further stated that Kishan Chand was born in J&K and Sewa Ram was brother of Vakila Ram who might have got admitted Kishan Chand in this school and some discrepancy might have occurred. Other averments were denied and prayed for dismissal of the suit. None appeared on behalf of defendant No.5 and ultimately, defendant No.5 proceeded against ex parte.

From the pleading of the parties, following issues were framed:

1. Whether the plaintiff are entitled to suit for declaration as

prayed for ?OPP.

2. Whether the plaintiffs are entitled for vacant possession by removing malba as prayed for?OPP

3. Whether the suit of the plaintiffs is not maintainable in the present form?OPD

4. Whether the present suit is barred by principle of resjudicata?OPD.

5. Relief.

On the basis of evidence produced by the plaintiff as well as defendants, trial court found that, the plaintiffs are barred by principle of resjudicata to take the plea that Kishan Chand has been son of Sewa Ram. In the previous suit, titled as Kishan Chand Versus Tarsem Lal there was specific issue framed "whether the suit property constitute Joint Hindu Coparcenary property of the plaintiff, Vakila Ram and defendant No. 1 Tarsem Lal?'. This issue has been decided in favour of the plaintiff. Section 11 of the CPC specifically provides that where an issue has been directly and substantially in issue in a former suit between the same parties, then such issue shall not be tried by the Court, if it has been heard and finally decided by the Court. Further it is observed that, Kishan Chand in the previous suit has averred that he has preferred the suit of declaration and injunction bearing Civil suit No.476 of 1991 against Vakila Ram and defendant No.1 and the said suit for declaration holding the plaintiff as coparcener and the suit property being joint Hindu Family Coparcenary was decreed by the Court vide Judgment and decree dated 11.10.1993. Thus it is clear in civil Suit No. 476 of 1991 that Kishan Chand is coparcener along with Vakila Ram and Tarsem Lal and suit property is joint Hindu Family

Property and hence, trial court has rightly dismissed the appeal of the plaintiff.

Feeling dissatisfied with the findings of the trial court, appellant-plaintiff Sarjeewan Singh filed the appeal before the Lower Appellate Court, which was also opposed by the Counsel for the respondents-defendants after putting appearance on notice. An application under Order 41 Rule 27 was filed by the plaintiff to lead additional evidence before the High Court to take such plea at the stage of second appeal but it was dismissed. Plaintiffs have failed to prove that the factum of wrong parentage of Kishan Chand was not within their knowledge at the time of contesting the suit of the impugned judgments ExP8, Ex. P9 and Ex. P10. The date, month and the year of acquiring knowledge about such wrong parentage of Kishan Chand, after the decision of the aforesaid suit up to the stage of first appeal has neither been pleaded nor proved by the plaintiffs in this case. So once the plaintiffs have failed to prove that such wrong parentage of Kishan Chand was not within their knowledge at the time of contesting the previous suit in which the same sale deed, which is projected in the present suit to be legal, was under question, they could take such plea at the time of filing the written statement in the previous suit of the judgments which are impugned in the present suit. Hence, the second suit is definitely barred by way of principle of constructive res judicata. Such plea regarding wrong parentage of Kishan Chand could have been taken by the plaintiffs in the previous suit in which the matter in question regarding the nature of the property in dispute in the hands of Vakila Ram as well as Legality of the sale deed propounded by the plaintiffs in this suit was directly and substantially in issue between the same parties and their predecessor. On the

above said ground lower appellate court has rightly been dismissed the suit of the plaintiff.

Hence the present suit.

After going through the impugned judgment, it is apparent that plaintiff has failed to prove that such wrong parentage of Kishan Chand was not within their knowledge and plaintiffs have produced on record certain entries as mentioned in the public authority in which father's name of Kishan Chand has been recorded as Sewa Ram. However, the birth certificate of Kishan Chand has not been produced yet. Present appeal also met the same fate.

Hence, No illegality, much less perversity has been pointed out in the judgments of the lower courts below, warranting interference by this Court.

No substantial question of law arises for consideration in this appeal.

Hence, appeal stands dismissed.

27.02.2018

Riya Grover

(RITU BAHRI)

JUDGE

Whether speaking/reasoned Yes
Whether reportable No