

RSA No.2705 of 2017 (O&M)

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

RSA No.2705 of 2017 (O&M)

Date of decision: 05.09.2018

Manjit Singh

... Appellant

Vs.

Piara and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Sanjay Majithia, Senior Advocate with
Mr. Inderjeet Singh, Advocate
for the appellant.

Ms. Sarika Gupta, Advocate
for respondent no.1.

AMIT RAWAL J.

The present Regular Second Appeal has been preferred at the instance of appellant-defendant No.1, who has been successful before trial Court as the suit of the plaintiff/respondent No.1 was dismissed but the Lower Appellate Court reversed the findings.

The short point involved in the present appeal is whether suit on behalf of plaintiff claiming declaration to be co-owner in joint possession to the extent of 1/16 share in the suit land without being in possession thereof as per the provisions of Section 34 of Specific Relief Act was maintainable or not.

In order to answer the aforementioned question, it would be apt to refer to brief facts of the suit as well as defence taken in the written statement.

Plaintiff/respondent No.1-Piara instituted the suit on the ground

that one Haveli was her father, who died leaving behind Prem Singh, Waryam Singh, Sardara Singh, all sons, Harbans Kaur and plaintiff daughter. On 18.06.1971, Sardara Singh brother of the plaintiff, died unmarried and issueless left behind Prem Singh and Waryam Singh, his brothers, plaintiff and Harbans Kaur his sisters being Class-I legal heirs. Jeet Singh alias Manjit Singh-defendant No.1 son of plaintiff from her first marriage was not Class I heir but in connivance with revenue authorities got mutation bearing No.798 sanctioned regarding inheritance of deceased Sardara Singh. The aforementioned fact came to the knowledge of the plaintiff in the month of June 2010. The defendants despite having been approached did not accede to the request of the plaintiff, therefore, cause of action accrued to file the suit on 30.07.2010.

The defendants raised numerous preliminary objections qua limitation, having not approached the Court with clean hands and concealment of certain other facts. On merit, it was stated that Prem Singh, Waryam Singh, Harbans Kaur and plaintiff were not legal heirs of deceased. The plaintiff had the full knowledge and notice of mutation no.798 since the date of entry.

The trial Court on the basis of aforementioned pleadings framed the following issues:-

- “1. Whether the plaintiff is entitled for declaration as prayed for?OPP*
- 2. Whether the plaintiff is entitled for consequential relief of permanent injunction as prayed for?OPP*

3. *Whether the suit is within limitation?OPD*
4. *Whether suit is maintainable in the present form?OPP*
5. *Whether plaintiff has not come to the Court with clean hands and have concealed the material facts?OPD*
6. *Whether plaintiff is stopped by his acts, conducts and admission to bring and file the present suit?OPD*
7. *Relief.”*

The plaintiff examined the following witnesses:-

PW1 – Balkar Singh

PW2 – herself

PW3- Jarnail Singh

On the other hand, defendants examined Manjit Singh as DW1 and Beli Ram as DW2.

On the basis of aforementioned both oral and documentary evidence brought on record, the trial Court noticed that Manjit Singh had not denied the relationship between the parties while admitting Piaro as mother being sister of Sardara Singh and her other two brothers Prem Singh and Waryam Singh. On the other hand, plaintiff in cross-examination also admitted that Manjit Singh was in possession of the suit property, in essence, she was not in possession of the suit property. On the basis of the aforementioned pleadings by relying upon the judgment referred to therein, the trial Court dismissed the suit by holding that simpliciter suit for declaration without seeking consequential relief of possession, was not maintainable.

In a challenge laid to the aforementioned judgment and decree the Lower Appellate Court reversed the findings by holding that plaintiff and other LRs of Sardara Singh being in joint possession of every inch of joint land even if not in actual possession.

Mr. Sanjay Majithia, learned Senior counsel assisted by Mr. Inderjeet Singh, Advocate appearing on behalf of the appellant submitted that judgment and decree of the Lower Appellate Court is not sustainable in the eyes of law. As a matter of fact, Manjit Singh was left in the custody of his maternal uncles as Piaro had contracted second marriage. The appellant had been in possession of the suit property since 1963. The appellant had been brought up and looked after by maternal uncle and after the death of Sardara Singh, who died unmarried and issueless suo moto with the consent of other family members the mutation of inheritance of Sardara Singh was sanctioned in the name of Manjit Singh. Nobody challenged the mutation till filing of suit. The suit was filed at the instigation of her family members from her second husband and that too, when she was 86 years of age. The suit was not maintainable as it was barred by law of limitation having been filed after a period of three years of mutation. Even simpliciter suit for declaration without consequential relief of possession was also not maintainable in view of the judgment rendered by the Hon'ble Supreme Court in **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Viudhunagar Vs. Chandran and others, 2017(2) RCR (Civil) 1; 2017(3) SCC 702** . The plaintiff miserably failed to prove on record any document to assert the right in the estate of Sardara Singh, therefore, the Lower

Appellate Court ought to have drawn the adverse inference as per the provisions of Section 114(g) of Indian Evidence Act. In support of the aforementioned submission, reliance was also laid to the ratio decidendi culled out by the Hon'ble Supreme Court in **Union of India Vs. Ibrahim Uddin and another 2012(8) SCC 148; 2012(4) RCR (Civil) 727** and thus, urged this Court for reversing the findings of the Lower Appellate Court.

Per contra, Ms. Sarika Gupta, learned counsel appearing on behalf of respondent no.1 submitted that there is no illegality and perversity in the judgment and decree rendered by the Lower Appellate Court. Sardara Singh was the brother of Piaro, who was Class-II heir, whereas, Manjit Singh was born from the first marriage and was Class-IV heir. Preference has to be given to the Class-II heir and not Class IV heir. The relationship between mother and son had not been denied, much less ownership of land vis-a-vis Sardara Singh. The suit was not simpliciter for declaration and mandatory injunction but for joint possession as each and every co-owner has a right and interest in the property even if not in possession. Defendants had not been able to prove adverse possession which is permissible for a co-owner, in other words, co-owner is deemed to be in possession of each and every inch of land in the absence of actual physical possession and thus, urged this Court for upholding the findings under challenge.

I have heard the learned counsel for the parties and appraised the judgments and decrees of the Courts below.

The appellant-defendant has not only raised the objection qua non-maintainability but also set up a plea of adverse possession. In view of

such plea, ownership of the party i.e. Piaro is admitted. Further point which arises for adjudication is whether appellant-defendant has been able to set up a plea of adverse possession in the capacity of co-owner or not. Manjit Singh admittedly is Class IV heir and therefore, cannot be said to be co-owner.

No doubt, the mutation was effected way back in the year 1963-65 whereas Sardara Singh died in the year 1971 and during all this period till filing of the suit, Manjit Singh had been in possession of the suit property but fact of the matter is that his status was not of co-owner as he is Class IV heir, for, Sardara Singh was his uncle/maternal uncle. There is no limitation claiming right in the property on the basis of inheritance. This view of mine is derived from the judgment rendered by this Court in **Mohinder Singh Vs. Kashmir Singh 1985 PLJ 82**. The ratio decidendi culled out by the Hon'ble Supreme Court in **Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Viudhunagar's case (supra)** was in respect of the case where the plaintiff had claimed the relief of declaration and mandatory injunction and not of joint possession. There is no dispute to the aforementioned proposition that where a person who has not been found to be in possession, seeking declaration without relief of possession under Section 34 of Specific Relief Act, suit is not maintainable. In order to appreciate the controversy, paragraphs 3 and 36 of of the aforementioned judgment read thus:-

“3. The brief facts of the case are:

The Respondent No. 1, who shall be hereinafter referred to as plaintiff, filed Original Suit No. 33 of 2008 for the relief of declaration and mandatory injunction. Plaintiff's case in the plaint was that by Sale Deed dated 04.11.2007, he has purchased an area of 2 acres and 73 cents being part of Survey No. 188. The entire Plot No. 188 (area 7 acres and 84 cents) is recorded in the name of Defendant No. 1. Mandatory injunction was prayed to be issued, directing the Defendant Nos. 4 and 5 to correct the revenue records by entering the name of plaintiff in the suit property. The plaintiff's case was that the suit property belonged to one R. Padmanabhan who vide Sale Deed dated 28th August, 1992 on his behalf and on behalf of his minor sons transferred 2 acres 72 cents area being part of Survey No. 188 in favour of one Sanjay Ramasamy, correspondent of Annai Velankanni Women Teacher Training School. Sanjay Ramasamy executed a General Power of Attorney in favour of one Bhaskaran on 31.10.2007 and it was Bhaskaran who executed the Sale Deed dated 04.11.2007 in favour of the plaintiff. Plaintiff, further stated that when he went to Revenue Tehsildar for issuance of patta in his favour, he came to know that it is in the name of first Defendant. Consequently, the suit was filed, seeking declaration and mandatory injunction.

36. The plaintiff, who was not in possession, had in the suit

claimed only declaratory relief along with mandatory injunction. Plaintiff being out of possession, the relief of recovery of possession was a further relief which ought to have been claimed by the plaintiff. The suit filed by the plaintiff for a mere declaration without relief of recovery of possession was clearly not maintainable and the trial court has rightly dismissed the suit. The High Court neither adverted to the above finding of the trial court nor has set aside the above reasoning given by the trial court for holding the suit as not maintainable. The High Court in exercise of its jurisdiction under Section 100 C.P.C. could not have reversed the decree of the courts below without holding that the above reasoning given by the courts below was legally unsustainable. We, thus, are of the view that the High Court committed error in decreeing the suit.”

However, in the instant case, relief sought in the suit read as under:-

“Suit for declaration to the effect that the plaintiff is co-owner in joint possession to the extent of 1/16 share being sister of deceased Sardara Singh in the land comprised in khewat no.34, 35, 32, 33, 29, 30, 31, khatoni numbers 28//7, 14, 15, 17, 29//1, 2, 8/3, 9, 10, 11/1, 29//3/1, 18//21, 19/24, 25, 28/4, 5, 6,4//18/1, 19/2, 20/1, 21/2, 22, 23, 24, 14//2/1, 1/1/2, 3/1, 189, 14//1/1/1, 191 as per the jamabandi for the year 2005-06 situated in the area of village Kathor, H.B. NO.468, Tehsil

Dasuya, District Hoshiarpur and mutation no.798 regarding estate of Sardara Singh in favour of Manjit Singh alias Jeet Singh defendant no.1 in place of plaintiff is illegal, null an void having no effect upon the legal right of the plaintiff with consequential relief of permanent injunction restraining the defendant no.1 from alienating in any manner the suit property till final disposal of the present case.”

Every owner is in joint possession of the suit property. Though the Lower Appellate Court has accorded the status of Piaro and Manjit Singh of co-sharers but remained oblivious of the fact that Manjit Singh was not a Class II heir but Class IV heir, whereas, Piaro as per the admission of Manjit Singh-appellant/defendant is his mother and sister of Sardara Singh, in view of the provisions of Section 8 of Hindu Succession Act. The definition of Class II heirs as specified in Schedule reads as under:-

“i Father

ii. (1) Son's daughter's son, (2) son's daughter's daughter,
(3) brother, (4) sister

iii.(1) Daughter's son's son, (2) daughter's son's daughter,
(3) daughter' daughter's son, (4)
daughter's daughter's daughter.

iv.(1) Brother's son, (2) sister's son, (3) brother's
daughter, (4) sister's daughter.

v. Father's father; father's mother.

vi.Father's widow; brother's widow.

- vii.Father's brother; father's sister.
- Viii.Mother's father; mother's mother
- ix.Mother's brother; mother's sister.

Explanation: In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.”

In such circumstances, preference has to be given to Class II heir vis-a-vis Class IV. With the aforementioned clarification, the arguments of Mr. Majhithia, have not been able to bring the case within the realm of perversity enabling this Court to form a different opinion than the one arrived at by the Lower Appellate Court. Thus, the question posed, *ibid* is answered in aforementioned manner.

No substantial question of law arises for adjudication of the present appeal.

Resultantly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

September 05, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No