

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

RSA No.3819 of 2017 (O&M)

Date of Decision: February 12, 2018

Dalip Singh

...Appellant

Versus

Mohinder Singh

...Respondent

CORAM:- HON'BLE MR.JUSTICE HARINDER SINGH SIDHU

Present: Mr. Harjeet.S. Kotli, Advocate for
the appellant.

HARINDER SINGH SIDHU, J.

The defendant has filed this appeal against the judgment of the Ld. Lower Appellate Court, whereby, the appeal of the plaintiff – respondent against the decision of the Trial Court, dismissing his suit has been allowed.

The plaintiff had instituted a suit for declaration to the effect that he is owner in possession of land measuring 32 Kanals 15 Marlas, comprising in Rectangle and Killa No. 16//14(7-0) 17//3(8-0), 47//24/2/1 (3-2) 77//13/2/2 (0-9), 14/2 (0-19) 17/1 (3-14) 114//17/2(0-8) 18/2 (6-13) situated in the revenue estate of village Burj Hari, Hadbast No. 61 Tehsil and District Mansa and further declaring the judgment and decree dated 28.7.2015 passed in Civil Suit No.7 dated 05.01.2011 titled Dalip Singh vs. Joginder Singh to be null and void and ineffective qua the rights of the plaintiff. The case of the plaintiff was that he along with other co-sharers was in possession of total land measuring 201 Kanals 18 Marlas situated in the revenue estate of village Budheri, which also included the land

measuring 32 K 15 M, qua which the declaration was sought.

Partition application qua the aforesaid land was decided on 18.4.1991, whereafter, the plaintiff and his brother Joginder Singh became owners in possession to the extent of $\frac{1}{2}$ share each of land measuring 68 K 08 M. It was alleged that Joginder Singh had alienated land measuring 35 K 13 M, which was in excess of his share. The plaintiff being owner in possession of 32 K 15 M land neither Joginder Singh nor his vendees would have any connection therewith. Defendant Dalip Singh had got executed a registered sale deed dated 27.4.1984 from Joginder Singh for land measuring 08 K 08 M in a suit for specific performance, instituted by him against Joginder Singh. On the basis of the said sale-deed Dalip Singh was declared as co-sharer of the aforesaid land by Additional Deputy Commissioner, Bathinda vide order dated 4.2.1991. Dalip Singh preferred Civil Suit No.7 dated 5.1.2011 by misrepresenting facts and obtained a decree dated 27.7.2015 of declaration and joint possession and permanent injunction against Joginder Singh which was illegal and ineffective qua the rights of the plaintiff. It was pleaded that Joginder Singh had been missing for more than 20 years and the said decree obtained against a dead person was null and void.

The Ld. Trial Court dismissed the suit holding that as the plaintiff had not placed on record any death certificate of Joginder Singh to indicate that he had died hence the judgment and decree passed in civil suit No.7 of 2011 could not be declared to be null and void.

The plaintiff – respondent appealed against the order. The Ld. Lower Appellate Court noted that in Civil Suit No.7 filed by Dalip Singh

seeking the relief of declaration along with joint possession and permanent injunction against Joginder Singh the relief was claimed on the basis of the sale deed dated 27.04.1984, whereby, Dalip Singh was owner to the extent of ¼ share of the 32 Kanals 15 Marlas of share of Joginder Singh. In the suit, Joginder Singh had been proceeded against ex parte and the suit was decreed. It was noted that Mohinder Singh plaintiff was not a party in the said suit.

The Ld. Lower Appellate Court recast the issues as under:-

- “(i) *Whether the ex-parte decree dated 28.07.2015 passed in the civil suit no. 7 dated 5.1.2011 is null and void and nonest in the eyes of law?*
- (ii) *Whether the decree dated 28.7.2015 passed in the civil suit no. 7 dated 5.1.2011 is binding on the appellant or affects his rights in any manner?*
- (iii) *Whether the sale deed dated 27.4.1984 executed in favour of Dalip Singh by Joginder Singh entitles Dalip Singh to get the possession of and from the share of appellant-Mohinder Singh?*
- (iv) *Whether the appellant/plaintiff is entitled to the relief of declaration and permanent injunction?”*

It was held that as the plaintiff had been able to lead evidence and proved that Joginder Singh had not been heard of for more than seven years by those who would have naturally heard of him, therefore, in terms of the provisions of Section 108 of the Evidence Act, a presumption of his death could be raised. However, there could be no presumption with respect to the time and date as well as the manner of death. Hence, as it had not been proved that on the date of filing of the civil suit i.e. 5.1.2011 Joginder Singh was dead the judgment and decree dated 28.7.2015 could not be said to be

null and void. Further the judgment and decree dated 28.7.2015 could also not be invalidated in-collateral proceedings on the ground of being barred by limitation. Further as plaintiff Mohinder Singh was not a party in the said civil suit, the judgment would not be binding on him and does not affect his rights in any manner. Defendant Dalip Singh could claim only from the share of his vendor Joginder Singh and if Joginder Singh had alienated more than his share then the vendees from Joginder Singh would adjust their rights inter-se on the rule of priority as incorporated in Section 48 of Transfer of Property Act, 1882. It was accordingly held that on the basis of evidence on record plaintiff Mohinder Singh was entitled to seek declaration that he is co-owner in joint possession to the extent of ½ share of the suit land admeasuring 32 kanals 15 marlas and the judgment and decree dated 28.7.2015 passed in civil suit no.7 dated 5.1.2011 is not binding on him. He was also held entitled to a decree of permanent injunction restraining the defendants from taking exclusive possession of the suit land to the complete ouster of the plaintiff except in due course of law. Accordingly, the appeal was allowed and judgment and decree of learned trial Court was set aside.

Learned counsel for the appellant has not been able to point out any legal infirmity in the aforesaid findings. The judgment and decree dated 28.7.2015 in favor of the defendant-appellant has not been held to be null and void. However, as the plaintiff was not a party in the said suit, it obviously could not be binding on him and on the strength of said judgment and decree the defendant-appellant could not take exclusive possession of the suit land to the complete ouster of the plaintiff. In fact, learned counsel for the appellant could not even point out as to how the judgment of learned

lower Appellate Court is adverse to his interest.

No substantial question of law arises for consideration.

Accordingly, this regular second appeal is dismissed.

February 12, 2018

(HARINDER SINGH SIDHU)
JUDGE

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Whether Speaking / Reasoned	Yes
Whether Reportable	Yes / No