

In the High Court of Punjab and Haryana at Chandigarh

RSA- 4956 of 2017(O&M)

Date of Decision:8.3.2018

Mahender and others

---Appellants

vs.

Prithi and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Suman Jain, Advocate
for the appellants.

Rekha Mittal, J.

CM No. 13026-C of 2017

Prayer in this application is for condoning delay of 43 days in
refiling the appeal.

In view of averments made in the application and arguments
advanced by counsel for the applicants, application is allowed and delay of
43 days in refiling the appeal stands condoned.

Disposed of accordingly.

RSA No. 4956 of 2017

The present appeal directs challenge against judgment and
decree dated 4.5.2017 passed by the Additional District Judge, Palwal
whereby appeal filed by the respondents/defendants against dismissal of
their counter claim vide judgment and decree dated 2.3.2015 passed by the
Civil Judge (Junior Division), Hathin (hereinafter to be referred to as “the

trial court”) was allowed and the respondents/defendants/counter claimants were declared to be occupancy tenants vested with right of proprietorship as per the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953 (in short “the Act”) qua 1/4th share of appellants/plaintiffs in the suit land.

The appellants filed suit for declaration that they are the absolute owners in possession of the suit land and revenue record showing the respondents/defendants in cultivating possession of suit land is incorrect and liable to be rectified. The respondents/defendants filed counter claim seeking declaration that they are absolute owners in possession of 1/4th share of suit land and revenue record is liable to be rectified to that effect. Later, suit filed by the appellants was dismissed as withdrawn vide order dated 6.11.2013. However, the respondents/defendants continued with their counter claim which was in the nature of a cross suit. It was pleaded by the respondents/counter claimants that their predecessors-in-interest remained in possession of suit land for the past more than 100 years and they have acquired occupancy rights over the suit land. They filed a suit for declaration of their occupancy rights but due to the fact that incorrect copy of jamabandi for the year 1995-96 was provided to them by the revenue authorities, plaintiffs' share of 1/4th in the suit land was not decreed vide judgment and decree dated 16.7.2010. The jamabandi showed appellants'/plaintiffs' father to be owner to the extent of 1/4th share. Due to such mistake, when mutation was entered in favour of counter claimants/defendants, 1/4th share of appellants was not mutated in their favour.

Counsel for the appellants has assailed the impugned judgment primarily on the ground that counter claim preferred by the respondents/defendants is barred under Order II Rule 2 of the Code of Civil Procedure (in short “CPC”) as counter claimants earlier filed a suit claiming themselves having become owners of the suit land being occupancy tenants under Section 3 of the Act with a prayer for getting revenue entries corrected. The suit was decided by the Court on 16.7.2010 on the basis whereof mutation was entered in favour of the respondents/defendants.

The Court in appeal, in para 11 of the judgment, has noticed that unless the appellants/plaintiffs disputed and challenged judgment dated 16.7.2010, revenue officer was required to incorporate the judgment in the revenue record, however, mutation entered on the basis of judgment and decree dated 16.7.2010 i.e. mutation No. 4907 Ex. C-18 was given effect to the extent of 3/4th share and 1/4th share which stood in the name of present plaintiffs was not incorporated in the name of counter claimants by the revenue officers. Further held that counter claimants want to undo their mistake of not impleading the present plaintiffs for the reason that counter claimants had relied upon jamabandi for the year 1985-86 to implead the parties while there were two intervening jamabandis which showed the appellants/plaintiffs to be co-sharers as well. It has also been held that parties in the former suit were not the same and there was no relinquishment of any part of the remedy which was available against the plaintiffs. Rather, in regard to whole of the 45 kanals of land, declaration was sought and granted.

Counsel for the appellants has not disputed factual findings

recorded by the Court in Appeal that in the previous suit, the entire 45 kanals of land including 1/4th share of the appellants/plaintiffs was the subject matter seeking declaration of right of ownership on the basis of occupancy tenancy. It is also not denied that in the previous suit, appellants/plaintiffs were not impleaded as a party. It is also not disputed that the trial court in the previous suit vide judgment and decree dated 16.7.2010 (Ex. C-1) allowed claim of the respondents/counter claimants qua entire 45 kanals of land but as the appellants/plaintiffs were not a party to the lis, the revenue authorities had sanctioned mutation only to the extent of 3/4th share and mutation qua 1/4th share that stood in the name of the appellants/plaintiffs was not incorporated.

The question for consideration is whether the counter claim filed by the respondents is hit by provisions of Order II Rule 2 CPC. A relevant extract thereof, reads as follows:-

2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action

As per the settled position in law, Order II Rule 2 is based on the principle that the defendants should not be vexed twice for one and the

same cause. It provides that if a plaintiff omits any portion of the claim, which he is entitled to make or any of the remedies which he is entitled to claim in respect of the cause of action for his suit, he shall not thereafter sue for the portion claimed or for the remedy so omitted. The rule does not preclude a second suit based on a distinct and separate cause of action. In order to invoke the rule, two conditions must be satisfied, first, that the previous suit and the present suit must arise out of the same cause of action and secondly, that previous suit must be between the same parties. In the case at hand, the respondents/defendants included their entire claim seeking declaration of ownership on the basis of occupancy tenancy qua land measuring 45 kanals. However, owners of land to the extent of 1/4th share were not impleaded as a party in the previous suit that culminated in the judgment and decree dated 16.7.2010 and for that reason the respondents/defendants had to involve themselves in another bout of litigation for claiming declaration of ownership qua the share co-owned by the appellants/plaintiffs. As the present appellants/plaintiffs were not a party to the earlier suit, they cannot derive any advantage to their contention from the provisions of Order II Rule 2 CPC which is based upon the principle that the defendant should not be vexed twice for one and the same cause. In this view of the matter, the court in appeal has rightly set aside findings of the trial court by negating plea of the appellants/plaintiffs that counter claim filed by the respondents/defendants is barred under Order II Rule 2 CPC. At best, it can be said that the respondents/defendants failed to frame their counter claim in compliance with the provisions of Rule 1 of Order II CPC which says that every suit shall as far as practicable be

framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. However, failure of a litigant to frame suit in compliance with Rule 1 of Order II CPC would not enure to benefit of the contesting party if it is established that because of a bonafide mistake one of the parties could not be impleaded in the previous lis and decree passed therein would not be binding upon that party. In this view of the matter, contention raised by counsel for the appellants is not meritorious and liable to be rejected.

Counsel for the appellants has also made a vain attempt to contend that the respondents/defendants have failed to establish their plea with regard to occupancy tenancy. He has failed to point out relevant entries in the jamabandis to dispute factual findings recorded by the Court in appeal that the respondent/defendants fall within the scope of occupancy tenants, in terms of Section 5(2) of the Punjab Tenancy Act, 1887.

No other point has been raised.

For the foregoing reasons, the appeal fails and is accordingly dismissed in limine. No order as to costs.

(Rekha Mittal)
Judge

8.3.2018
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No