

RSA Nos.614 & 1655 of 1987 (O&M)

331

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

Date of decision : 29.01.2019

1.

RSA-614-1987 (O&M)

Mahi Pal and others

... Appellants

Versus

Madan Singh

... Respondent

2.

RSA-1655-1987 (O&M)

Madan Singh

... Appellant

Versus

Mahi Pal and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. B.S. Jaswal, Advocate
for the appellants in RSA-614-1987 and
for the respondent in RSA-1655-1987.

Mr. Kehsav Pratap Singh, Advocate
for the respondent in RSA-614-1987 and
for the appellants in RSA-1655-1987.

AMIT RAWAL, J.

This order of mine shall dispose of two regular second appeal bearing **RSA No.614 of 1987**, at the instance of the defendants, against the judgment and decree of the lower Appellate Court, whereby the appeal of the plaintiff against dismissal of the suit, has been partly allowed and other **RSA No.1655 of 1987**, at the instance of the plaintiff, against the judgments and decrees of the Courts below for not decreeing the suit in toto.

The facts which emanated from the pleadings are that Madan Singh instituted the suit on 14.03.1978 seeking declaration that the decree

RSA Nos.614 & 1655 of 1987 (O&M)

and order dated 18.07.1975 in Civil Suit No.293 titled as **Mahi Pal etc. V/s Madan Singh** and decree and order dated 03.12.1975 in Civil Suit No.491 of 1975 titled as **Mahi Pal etc. V/s Madan Singh**, were illegal, null, void and based upon the fraud and misrepresentation and after amendment, relief of possession, was sought. It was pleaded that agricultural land measuring 61 kanals 10 marlas and other agricultural land measuring 83 kanals 0 marals, subject matter of the plaint, was in possession of the plaintiff as owner. The parties were near relations, therefore, were in fiduciary relationship and after death of the mother of the plaintiff, he was dependent upon the defendants in matter pertaining to the land in dispute. The defendants brought the plaintiff to Kaithal twice or thrice and obtained his signatures before the petition-writer and also before the Courts, being meant for partition of joint land. The plaintiff came to know only in the month of February, when servants were obstructed by the defendants and that decree had been passed in the aforementioned civil suits, which were illegal, collusive and result of fraud and misrepresentation. There was no family settlement dated 01.01.1970, as referred to, as the plaintiff was minor.

The defendants opposed the suit by raising the plea of maintainability, *res judicata*, limitation and on merits, it was stated that the family settlement and decree was a volunteer act of the plaintiff, in fact, the defendants were in exclusive possession of the suit property. The factum of the plaintiff being minor was emphatically denied.

On the basis of the pleadings, the following issues were framed by the trial Court:-

"1. Whether the plaintiff had fiduciary relations with the

RSA Nos.614 & 1655 of 1987 (O&M)

defendants? OPP

2. Whether the decrees in question were obtained by misrepresentation and fraud etc., as alleged in para No.6 of the plaint? OPP

3. Whether the plaintiff is in possession of the suit land? OPP

4. If issue No.3 is proved, whether the defendants threatened to interfere in the possession of the plaintiff over the suit land except in due course of law? OPD

5. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD

6. Whether the plaintiff has suppressed material facts from the Court? If so to what effect? OPD

7. Whether the suit is barred under Section 11 CPC?

8. Whether the plaintiff has no cause of action? OPD

9. Relief."

In support of the case, the plaintiff examined Vikram Singh, Principal of Sarswati Sr. Sec. School, Behra Sandal Singh as PW1, Som Dev Principal, Achyara Public National Inter College, Sadholi Kadin District Saharanpur as PW2, Ram Ditta Office Kanungo Kaithal as PW3, and himself as PW4, Sumer Chand, father of the plaintiff as PW5, Mehar Singh as PW6, Ganpat as PW7 and tendered in evidence certain documents (Ex.P1 to Ex.P11), whereas the defendants examined Ch. Harpal Singh, Advocate Kaithal as DW1, Ravi Parkash Aggarwal Advocate Kaithal as DW2, Shri Dharam Chand deed writer as DW3, and himself as DW4, Shri P.P. Chabra, Sub Judge 1st Class Panipat as DW5, Kehar Singh as DW6, Singh Ram as DW7 and brought on record certain documents (Ex.D1 to

RSA Nos.614 & 1655 of 1987 (O&M)

Ex.D14).

The trial Court on the basis of the preponderance of evidence dismissed the suit. The lower Appellate Court while allowing of the appeal of the plaintiff held that the plaintiff miserably failed to prove fraud and misrepresentation, but since the decrees were not registered, declared the plaintiff to be owner of the land measuring 61 kanals 10 marals. It is, in these circumstances, both the parties have filed the appeals.

Mr. B.S. Jaswal, learned counsel appearing on behalf of the appellants in RSA-614-1987 and for the respondent in RSA-1655-1987 submitted that the lower Appellate Court committed perversity in holding that the decree was not based upon the family settlement, but on the basis of the compromise. The finding is totally beyond the pleadings of the parties and without any issue. Once the plaintiff miserably failed to prove that he was minor at the time of passing of the decree, suit should have been dismissed owing to pre-existing right and therefore, decrees did not require registration. The plaintiff also failed to prove the ingredients of fraud and misrepresentation. The second suit, in view of the provisions of Order 23 Rule 3A of the Code of Civil Procedure, was not maintainable and the remedy was to seek recall. The objections with regard to the maintainability of the suit as per the aforementioned provisions, were specifically taken in the written arguments. The decree was passed on the basis of the family settlement. No reasoning has been assigned for discarding the family settlement and therefore, judgment and decree of the trial Court dismissing the suit should have been upheld.

Per contra, Mr. Keshav Pratap Singh, learned counsel appearing on behalf of the respondent in RSA-614-1987 and for the

RSA Nos.614 & 1655 of 1987 (O&M)

appellants in RSA-1655-1987 submitted that the judgments and decrees were liable to be set aside in toto by granting the possession, once the plaintiff was held to be owner of the land measuring 61 kanals 10 marals. No reasoning has been assigned and therefore the judgment and decree of the lower Appellate Court cannot be sustained. Birth entry (Ex.P4) related to the plaintiff, which had been ignored wholly on the presuming ground. Once the lower Appellate Court found the family settlement to be false in view of Ex.D9 and Ex.D10, there was no question of arriving at a compromise, resulting into, decree for want of registration. In the plaint of Civil Suit No.491 of 1975, no particulars of compromise were given. Authentic school records (Ex.P1 and Ex.P2) have erroneously been ignored.

I have heard learned counsel for the parties, appraised the paper book and of the view that the following "Substantial Questions of Law" arises for determination:-

- 1. Whether the judgment and decree of the lower Appellate Court while affirming the finding of the trial Court that the plaintiff failed to prove the fraud and misrepresentation, could confer ownership to the plaintiff in respect of the suit land or not?.*
- 2. Whether the plaintiff, who had been held to be owner, the lower Appellate Court committed the perversity in not ordering the decree of possession or not?*
- 3. Whether the suit was maintainable in view of the embargo put under Order 23 Rule 23-A of CPC?*

Birth Certificate (Ex.P4) has only been tendered by the plaintiff. The law in proving and exhibiting the documents is no longer *res*

RSA Nos.614 & 1655 of 1987 (O&M)

integra. In order to lend support to the aforementioned view, I intend to rely upon the judgment of the Hon'ble Supreme Court in **Sait Tarajee Khimchand and other Versus Yelamarti Satyam and others, AIR 1971 (SC) 1865** and various other judgments, wherein it has been held that mere exhibition of the documents would not dispense with its proof.

It was obligatory upon the plaintiff to examine the witness from the concerned Department pertaining to the registrations of births and deaths. The documentary evidence of school (Ex.P1 and Ex.P2), in such circumstances, would pale into insignificance. It is a common practice amongst the parents not to give the correct age for the purpose of admission and other benefits. Once the plaintiff miserably failed to prove that he was not minor, the question arises whether he could be conferred the ownership. On the other hand, the defendants examined the advocates, who stated that the plaintiff not only signed the written statement and vakalatnama, but appeared and suffered the statement. Even the Presiding Officer, who passed the decree, had been examined. The lower Appellate Court failed to notice the provisions of Order 23 Rule 3-A of CPC, which read as under:-

" **ORDER XXIII**

Withdrawal and Adjustment of Suits

3A. Bar to suit.—*No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.*"

It is a settled law that if at all, there was some fraud and misrepresentation, the remedy for the plaintiff was to seek the recall of the order, instead of filing the second suit on 14.03.1978. Ex.P1, birth entry, no where, connected with Ex.P2. Harpal Singh, DW1 proved the written statement dated 18.07.1975 (Ex.D3), compromise (Ex.D2) and vakalatnama

RSA Nos.614 & 1655 of 1987 (O&M)

dated 17.07.1975 (Ex.D4). Despite extensive cross-examination, nothing contrary surfaced. DW2-R.P. Aggarwal, Advocate proved the application (Ex.D5), written statement (Ex.D6), vakalatnama (Ex.D7) and statement of the plaintiff recorded in the Court (Ex.D8). The applications dated 24.11.1974 (Ex.D9 and Ex.D10), are pertaining to the partition, which reflected that the plaintiff had participated in the partition proceedings. It has come on record that the plaintiff along with counsel himself appeared and not that beneficiaries of the decrees, under challenge, availing the services of the Advocate. The decision rendered by Hon'ble the Supreme Court in **Bhoop Singh Vs. Ram Singh and others (1995) 5 SCC 709** was referred to the Larger Bench and a three-Judges Bench of Hon'ble Supreme Court in **Phool Patti and another Vs. Ram Singh (dead) through LRs and another (2015) 3 SCC 465**, by upholding the findings of **Bhoop Singh's case** (supra), has held that the consent decree would not require registration. For the sake of brevity, the relevant para No.29 of **Phool Patti's case** (supra) reads as under:-

“29. The terms of the family settlement are not on record. As mentioned above, the family settlement could relate to the ancestral as well as self- acquired property of Bhagwana or only the ancestral property. It appears that it related only to the ancestral property and not the self-acquired property (hence the reference to a hibba). The decree relating to 32 kanals of land did not require compulsory registration, as mentioned above. However, the self acquired property of Bhagwana that is 20 kanals, therefore, in view of the law laid down in Bhoop Singh the gift of 20 kanals of land by Bhagwana in favour of Ram Singh, notwithstanding the decree in the first suit, requires compulsory registration since it created, for the first time, right, title or interest in immovable

RSA Nos.614 & 1655 of 1987 (O&M)

property of a value greater than ₹100/- in favour of Ram Singh.”

It is a matter of record that the family settlement of 1970 created the right in favour of the defendants, which was acknowledged by the plaintiff in the decrees, aforementioned, therefore, it was not a case conferring the right for the first time and requires registration. The lower Appellate Court, in my view, abdicated in setting aside the judgment and decree of the trial Court by granting declaration in favour of the plaintiff. The suit at the instance of Madan Singh is nothing, but an act of aggrandizement.

Keeping in view the facts and circumstances of the case, the substantial questions of law, as noticed above, are answered in favour of the appellants-defendants in RSA-614-1987. Resultantly, the judgment and decree of the lower Appellate Court is hereby set aside being not sustainable in the eyes of law and that of the trial Court is restored.

RSA No.614 of 1987 is allowed and RSA No.1655 of 1987 is dismissed.

29.01.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**