

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

**RSA No.2018 of 1989 (O&M)
Date of Decision.31.01.2019**

Chhidda

...Appellant

Vs

Jagdish

...Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. A.P. Bhandari, Advocate
for the appellant.

Mr. Umesh Aggarwal, Advocate
for the respondent.

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AMIT RAWAL J.

The present appeal is directed against the concurrent finding of fact whereby suit of the appellant-plaintiff for declaration and injunction and in the alternative for joint possession by laying challenge to the judgment and decree dated 3.11.1982 passed in Civil Suit No.286/9.8.82 titled as “Jagdish Vs. Fatte” in respect of the suit land has been dismissed and affirmed in appeal.

It was alleged that his uncle Fatte was owner in possession of land measuring 76 kanals 12 marlas being half share of land measuring 153 kanals 4 marlas. The disputed land aforementioned in the hands of Fatte was ancestral. He died unmarried and issueless on 5.5.1983. In such circumstances, plaintiff and the defendant being brothers and legal heirs/successors-in-interest claimed interest to the extent of half share i.e. 38 kanals 6 marlas each. However, the defendant played fraud upon the plaintiff and obtained a collusive, fraudulent and illegal decree vide judgment and decree dated 3.11.1982 against Fatte in respect of half share,

which was not sustainable as it required registration. Fatte did not surrender or relinquish his ownership as he had executed a registered Will dated 1.10.1980 in favour of plaintiff and defendant nor he appeared before the trial Court and therefore, fraud and misrepresentation was played upon him.

Defendant opposed the suit, raised the objection of provisions of Order 2 Rule 2 CPC and defended the decree to have been obtained in lawful manner without any element of collusiveness, fraud or misrepresentation. Fatte himself had engaged counsel and the decree was result of family settlement. Plaintiff had earlier filed suit bearing No.208 of 1983 and 325 of 1983 for declaration that they were owners in possession in equal shares of the suit land. Defendant disclosed the factum of the decree but the suit continued and ultimately was withdrawn on 26.07.1985 when reached at the stage of final arguments, thus, prayed for dismissal of the suit.

Plaintiff filed replication and denied the objection of res judicata but stated that civil suits No.208 of 1983 and 325 of 1983 were not decided on merits but dismissed as withdrawn as it was based on different cause of action.

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

- “1. Whether the plaintiff is owner in possession of the half left by deceased Fattee in the suit as alleged? OPP*
- 2. Whether the judgment and decree dt. 3.11.82 passed in civil suit No.286/1982 titled Jagdish Vs. Fatte in not binding on the plaintiff as alleged? OPP*

3. *Whether the suit is barred by the provisions of Order 2 Rule 2 CPC? OPD*
4. *Whether the plaintiff has got no locus standi to file the present suit? OPD*
5. *Whether the suit is not maintainable in the present form? OPD*
6. *Whether the suit is not within limitation? OPD*
7. *Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD*
8. *Whether the defendant is entitled to special costs, if so, to what amount? OPD*
9. *Whether the suit is bad for non-joinder of necessary parties? OPD*
10. *Relief.”*

The plaintiff in support of the aforementioned evidence examined PW1 Subahsh Chand, PW2 Chidda, PW3 Subhash Grover deed writer, PW4 Ram Singh, PW5 H.S. Paintal handwriting and fingerprint expert whereas defendant examined DW1 H.R. Sharma, Advocate, DW2 B.N. Sharma, Advocaes, DW3 Ashok Kumar Mittal, Advocate, DW4 Charan Singh, DW5 Dharam Pal deed writer, DW6 Som Nath Aggarwal handwriting and fingerprint expert, DW7 R.L. Aneja, Advocate, DW8 Jagdish and DW9 Sube Singh Process Server and tendered documents Ex.DX copy of mutation, Ex. DY copy of issues framed in the suit withdrawn by plaintiff in 1985 and copy of order dated 26.07.1985.

The trial Court after noticing the aforementioned

contentions and evidence dismissed the suit and affirmed in the appeal as noticed above.

Mr. A.P. Bhandari, learned counsel appearing on behalf of the appellant submitted that right of the appellant-plaintiff was affected as the plaintiff has been able to prove existence of the registered Will dated 01.10.1980 and the beneficiaries are none else but the parties to the *lis* to the extent of half share. The consent decree cannot confer any title in the absence of registration. Provisions of Order 23 Rule 1 CPC would not be attracted as there was no adjudication of previous suit on merits. The plaintiff had been in possession of the suit property. Even provisions of Order 2 Rule 2 CPC would not be applicable as the plaintiff was not aware of the decree dated 3.11.1982. The alleged family settlement on the basis of which the collusive decree was passed had not seen light of the day, thus, urges this Court for setting aside of the finding under challenge.

In support of aforementioned contentions, relied upon unreported judgment of this Court rendered in RSA No.852 of 2009 decided on 12.03.2015 titled as “**Mamraj Singh and Prem and others**” to contend that the Court has inherent power to rectify the mistake in case it is found that the judgment and decree was obtained by fraud. Regarding registration of consent decree, relied upon ratio decidendi culled out by Hon'ble Supreme Court in **Phool Patti and another Vs. Ram Singh (dead) through LRs and another (2015) 3 SCC 164** and decision of larger Bench in the same matter reported as **(2015) 3 SCC 465**.

Per contra, Mr. Umesh Aggarwal, learned counsel

appearing on behalf of the respondent submitted the concurrent finding of fact and law cannot be interfered with unless and until there is gross illegality and perversity, which is conspicuously wanting in the present case. The plaintiff was apprised of the decree dated 3.11.1982 but still continued with the suit and withdrew the same only in the year 1985, therefore, provisions of Order 2 Rule 2 and Order 23 Rule 1 CPC would be attracted. Plaintiff miserably to prove nature and character of the property as ancestral and therefore, land at the hands of Fatte was self-acquired. He could deal with the same in any manner. Even the previous counsel H.R. Sharma and B.N. Sharma, Advocates did not deny the revelation of decree in the written statement filed by the defendant in the previous round of litigation, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below and of the view that following substantial questions of law arise for consideration:-

1. Whether the suit of the plaintiff was barred by provision of Order 23 Rule 1 CPC?
2. Whether the judgment and decree dated 03.11.1982 required registration or not?

In order to appreciate the controversy, it would be apt to reproduce provisions of Order 23 Rule 1 CPC:-

“1. Withdrawal of suit or abandonment of part of claim.- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or

other person to whom the provisions contained in rules to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the court is satisfied,—

a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff,—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule

(3),

he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim,

without the consent of the other plaintiffs.”

On a plain and simple reading of provisions of Order 23 Rule 1 CPC, plaintiff is precluded from instituting a fresh suit in case permission to institute a fresh while withdrawing the suit is not granted. Written statement, which is part and parcel of the records of Courts below, reveals that defendant had disclosed the factum of decree dated 03.11.1982 but continued with the same and ultimately withdrew in 1985. In such eventuality, he cannot be permitted to re-agitate the issue. Instead plaint should have been amended and stretched suit for the final stage for arguments. This Court cannot lose sight of the fact that plaintiff did know about the existence of the decree but failed to lay challenge to the same, therefore, provisions of Order 2 Rule 2 CPC would also be attracted. The Will relied upon by the plaintiff has not been proved on record. Contents of previous written statement Ex.DW3/1 filed on behalf of defendant No.2 revealed that defendant No.2 acknowledged to have arrived at some settlement. Para 4 of said written statement Ex.DW3/1, issues framed therein Ex.DY as well as order dated 26.07.1985, Ex.DZ are reproduced herein below:-

“Para 4 of the written statement

4. Para No.4 of the plaint as stated is wrong and denied. It is denied that any alleged Will was executed. It is also denied that in the family settlement, defendant No.1 gave the suit land to the plaintiff as alleged. It is denied that plaintiff is the owner in possession of the suit land as alleged. However, it is submitted that

answering defendant used to look after defendant No.1 in his life time and that there had been a settlement in which defendant No.1 relinquished all his right, title and interest in respect of whole of the suit land in favour of the answering defendant and this fact is clear from the civil suit No.286/82 titled Jagdish versus Fateh decided on 3.11.1982 by the Court of Shri Raj Kumar Sub Judge, Faridabad. That Suit No.286/82 was filed by the answering defendant against defendant No.1 in which defendant No.1 admitted the claim of the plaintiff and to this effect also made a statement on oath and then the suit was decreed and a decree for declaration to the effect that answering defendant is the owner in possession of the whole of the suit land was passed and thus answering defendant is the sole owner in possession of the suit land and the plaintiff has no concern with the suit land at all.

Issues Ex.DY

Present: Sh. R.L. Aneja, Advocate for plff.

Sh. A.K. Mittal, Adv. for deft.

Costs paid. Plaintiff's counsel states that he has not to file any replication. The following issues are framed:-

- 1. Whether the deceased deft. no.1 had executed a Will dated 1.10.82 bequeathing all his movable and immovable properties in favour of the plff and deft.*

no.2 in equal shares? OPP

2. *Whether after execution of this Will, a family settlement had also taken place in the year 1981 wherein deft. no.1 gave suit properties to the plff and deft. no.1 in equal shares? OPP*

3. *Whether the plff has no locus standi to file the suit? OPD*

4. *Whether the suit is not maintainable in the present form? OPD*

5. *Whether the plff is estopped from filing the present suit by his act and conduct? OPD*

6. *Whether the plff has got no cause of action to file the suit? OPD*

7. *Whether the suit is false and frivolous and has been filed with ulterior motive to harass the defts? OPD*

8. *Whether the deft. no.2 alone is owner in possession of the suit property as alleged? OPD*

9. *Relief.*

Order dated 26.07.1985 Ex.DZ

Present: Sh. R.L. Aneja, Adv for the plaintiff.

Ch. Har Kishan, Adv. For the defendant.

Plaintiff made a statement for withdrawal of the suit.

In view of the statement of the plaintiff the suit of the plaintiff is dismissed as withdrawn. File be consigned to the record room.

*Announced:26.7.85**sd/-**Addl. Senior Sub Judge**Faridabad 26.7.85”*

Therefore, the decree did not confer the right for the first time as it was acknowledgment of the family settlement and as such, in view of the law laid down by Hon'ble Supreme Court in **Phool Patti's case** (supra), provisions of Registration Act requiring registration of decree would be attracted only in case a right accrued for the first time.

For the reasons aforementioned, I do not find any illegality and perversity in the concurrent finding of fact and law rendered by the Courts below. The substantial questions of law are answered in favour of the respondent and against the appellant. No ground for interference is made out. Resultantly, the second appeal is dismissed.

(AMIT RAWAL)
JUDGE

January 31, 2019

Pankaj*

Whether Reasoned/Speaking Yes

Whether Reportable Yes