

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

RSA No.3437 of 2012(O&M)

Date of decision: 30.9.2019

Prem Nath and anotherAppellants

VERSUS

Asha Khanna and othersRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. V.K. Sandhir, Advocate for the appellants.

Mr. Sumeet Mahajan, Senior Advocate with
Mr. Amit Kohar, Advocate and
Mr. Saksham Mahajan, Advocate for respondents No.1 to 4.

REKHA MITTAL, J.

CM No.15237-C of 2016

Prayer in this application is for bringing on record legal representatives (in short 'LRs') of Prem Nath Khanna (since deceased) – appellant No.1.

In view of averments made in the application supported by an affidavit of Neeraj Khanna, one of the applicants, the application is allowed and persons mentioned in para 3 of the application are allowed to be brought on record as LR's of deceased Prem Nath Khanna subject to just exceptions and for the purpose of present lis.

Amended memo of parties is taken on record.

Disposed of accordingly.

CM No.15238-C of 2016

Counsel for the applicant-appellant would state that the present application may be dismissed as not pressed.

Ordered accordingly.

RSA No.3437 of 2012

Challenge in the present appeal has been directed against concurrent findings recorded by the Courts whereby suit for partition and rendition of accounts was dismissed, counter claim of defendants No.1 to 4 was allowed to the extent that they are entitle to get share in the FDRs. The property situated at Railway Crossing No.22, Islamabad, Amritsar is to be partitioned and by virtue of that defendant No.1 is to get 1/5th share in the suit property and rent derived from such property. It was made clear that 2/5th share of such rent of property shall go to the plaintiff and 2/5th of share to defendants No.9 and 10 and defendants No.2 to 8 shall not get any right in the property at Islamabad. Further held that since the property at Greater Kailash, Delhi has already been adjudicated by way of award and rule of Court and as such award and rule of Court given by the Court at Delhi is kept intact for conferring right in the property at Delhi in favour of defendants No.1 to 4. The other property at Amritsar has also been adjudicated by way of compromise Ex.DA/1 and judgment passed in case No.420 of 1975 decided on 16.01.1976 has attained finality and the parties shall remain bound by such decree, copy of which is Ex.DA/3 and judgment as Ex.DA/2. Regarding the FDRs, defendant No.1 will get 1/5th share. The plaintiffs No.1 and 2 will also get 1/5th share and defendants No.9 and 10 will also get 1/5th share each. The other defendants are not entitle to any share in the FDRs.

The decree and judgment passed by the trial Court resulted in filing of Civil Appeal No.385 of 2009 titled Neeraj Khanna and others (defendants No.5 to 10 in the suit) Vs. Jatinder Nath Khanna and others including plaintiffs Prem Nath Khanna and Pran Nath Khanna. Another appeal bearing No.386 of 2009 was filed by plaintiffs/appellants Prem Nath Khanna and another Vs. Jatinder Nath Khanna and others in which defendants No.5 to 10 (appellants in CA No.385 of 2009) were impleaded as respondents No.5 to 10. Both the aforesaid appeals were separately decided by the Additional District Judge, Adhoc, Fast Track Court, Amritsar vide judgment and decree dated 10.04.2012 but appeals were decided by recording exactly the same finding.

Sh. Prem Nath Khanna and another (plaintiffs in the suit) have filed the instant appeal to assail the decree and judgment dated 10.04.2012 passed in Civil Appeal No.386 of 2009. However, no appeal has been preferred either by the plaintiffs/appellants or by defendants No.5 to 10 to challenge the decree and judgment passed in CA No.385/2009 decided on even date.

Counsel for the appellants, in line with the averments raised in paras 2, 3 and 4 of the grounds of appeal, has argued that Sh. P.C. Grover, Advocate, counsel for the appellants before the first Appellate Court was hospitalized on 10.04.2012 and had never sent any message in the Court not to appear in the case. Sh. P.C. Grover, Advocate could not appear on 07.04.2012 as he had to rush for medical check-up in the Escorts and Fortis Multi-specialty Hospital, Amritsar, therefore, his presence was wrongly marked on 07.04.2012. On 10.04.2012, Sh. P.C. Grover, Advocate was hospitalized in Sen Nursing Home, Amritsar and discharged from the said

hospital on 11.04.2012. It is argued with vehemence that as counsel for the appellants was not present in Court when case was called for hearing, the Appellate Court had no jurisdiction to decide the appeal on merit. To bring home his contention, he has referred to the provisions of Order 41 Rule 17(1) of the Code of Civil Procedure, 1908 (in short 'CPC'), reproduced in para 3 of the grounds of appeal. Counsel would apprise that Sh. P.C. Grover, Advocate filed his affidavits with regard to his being not present in the Court either on 07.04.2012 or 10.04.2012 and his having not addressed any arguments on 07.04.2012. It is further argued that the Appellate Court recorded two zimini orders on 29.03.2012 and in the second zimini order, there is reference that arguments were heard in part. It is argued that Sh. P.C. Grover, Advocate also filed affidavit that even on 29.03.2012, he did not address any arguments. It is further submitted that even the contesting respondents/caveators do not dispute that arguments were not heard on 29.03.2012.

Another submission made by counsel is that even otherwise order dated 29.03.2012 does not make the things clear if counsel for the appellants had completed his arguments on that date or the case was adjourned for hearing arguments of contesting respondents No.1 to 4 only. Counsel would submit that no affidavit has been got filed by contesting respondents No.1 to 4 of their Advocate before the first Appellate Court in order to counter the affidavits filed by Sh. P.C. Grover, Advocate. It is argued with vehemence that since the Court in appeal had decided the appeal without an opportunity of hearing to the appellants through their counsel, decree and judgment passed by the first Appellate Court cannot be allowed to sustain being in complete contravention of the provisions of

Order 41 Rule 17(1) CPC. Counsel would pray that in view of the preliminary submissions aforesaid, decree and judgment passed by the first Appellate Court may be set aside and the matter be remitted to the Appellate Court for decision of the appeal afresh. He would further state that in case preliminary submissions made by him are not accepted by the Court, he would make further submissions with regard to merits of the case.

Counsel representing respondents No.1 to 4, on the contrary, has refuted contention of the appellants that the appeal has been decided without hearing arguments on behalf of the appellants through Sh. P.C. Grover, Advocate. It is argued that since Sh. P.C. Grover, Advocate is a relative of the appellants because of his daughter being married in the family of appellants, affidavits filed by Sh. P.C. Grover, Advocate may not be given primacy vis-à-vis the orders passed by the first Appellate Court in discharge of its official functions. It is further argued that appellants are trying to take advantage of recording of incorrect date beneath the second order purported to be passed on 29.03.2012 and adjourning the case to 10.04.2012. It is further submitted that as a matter of fact, on 29.03.2012, the appeal was adjourned to 07.04.2012 and arguments on behalf of the appellants/plaintiffs were made by Sh. P.C. Grover, Advocate on 07.04.2012 and the case was adjourned to 10.04.2012 for conclusion of arguments. In support of his contention, he has referred to zimini orders recorded in CA No.385 of 2009 wherein there are no two orders dated 29.03.2012 and the order with regard to hearing arguments in part is dated 07.04.2012. It is further submitted that both the appeals since beginning were being taken up and adjourned to the same date(s), as such, the

appellants are trying to take advantage of a clerical error of mentioning date as 29.03.2012 beneath the second order when as a matter of fact the said order was recorded on 07.04.2012. He would argue that since counsel for the appellants sent a message through his clerk not to appear in the case on 10.04.2012, there was no option with the Court except to hear the arguments by counsel for respondents No.1 to 4 therein and thereafter the Court decided the appeal in accordance with law. He would further apprise that on 10.04.2012 even counsel for respondents No.5 to 10 in CA No.386/2009 and appellants in CA No.385/2009 namely Sh. P.C. Tuteja, Advocate also stated at bar not to appear in the case and the said fact has been duly recorded in order dated 10.04.2012 passed in both the aforesaid appeals. It is argued that counsel for the appellants appears to have got a hint during the course of hearing that the appeals may be decided against the appellants in both the cases and for that reason, they showed indifferent and unwarranted behaviour and refused to appear in the Court on 10.04.2012, thus they cannot derive advantage thereof by seeking setting aside impugned decree and judgment.

I have heard counsel for the parties, perused the paper-book and the records.

This Court, on 08.07.2019, passed order and a relevant extract therefrom, reads as follows:-

“Perusal of the records would reveal that Civil Suit No. 295 of 1989 titled “Shri Prem Nath Khanna and another vs. Shri Jatinder Nath Khanna and others” was decided (dismissed) by the Civil Judge (Senior Division), Amritsar vide judgment and decree dated 13.2.2009. The said judgment and decree

became subject matter of two appeals CA No.385 of 2009 titled “Neeraj Khanna and others vs. Jatinder Nath Khanna and others and No.386 of 2009 captioned “Shri Prem Nath Khanna and another vs. Shri Jatinder Nath Khanna and others”. Both the appeals were decided by the first Appellate Court i.e. Additional District Judge, Amritsar vide separate judgments and decrees of even date i.e. 10.4.2012. The judgment and decree passed in CA No. 386 of 2009 is subject matter of RSA No. 3437 of 2012. The judgment and decree passed in the other appeal filed by Neeraj Khanna and others has not been challenged in second appeal before this court.

Counsel for the appellants has made preliminary submissions on the premise that appellants did not get an opportunity of being heard in the matter, therefore, irrespective of merits of the case, the judgment and decree impugned is liable to be set aside and the matter needs remittance to the First Appellate Court for decision of the appeal afresh. He prays for time to make submissions that since in the present case the judgment and decree passed in CA No. 385 of 2009 arising out of the same judgment and decree passed by the trial court has not been impugned before this court, what are the implications in the given circumstances.”

In response thereto, counsel for the appellants has referred to the provisions of Order 41 Rule 33 CPC to contend that the Appellate Court has powers of widest amplitude to do complete justice between the

parties and can pass a judgment and decree that ought to have been passed by the trial Court. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court **Pralhad and others Vs. State of Maharashtra and another, 2010 (10) SCC 458.**

As has been noticed hereinbefore, the judgments passed in CA No.385 and 386 of 2009 are exactly identical. Perusal of grounds of appeal in CA no.385 and 386 would make it evident that both the parties have raised the same grounds contained in the same number of paras, to assail the decree and judgment dated 13.02.2009 passed by the trial Court. Defendants No.5 to 8 in the suit are sons of plaintiffs Prem Nath Khanna and Pran Nath Khanna. The interest of plaintiffs and that of defendants No.5 to 8 in the lis is not conflicting. Rather, the plaintiffs have claimed right in the suit properties for themselves as well as for their sons (defendants No.5 to 8). In appeal preferred by Neeraj Khanna and others (defendants No.5 to 10), in the opening para of grounds of appeal it has been mentioned that appellants/defendants No.5 to 10 being defendants in lower Court in partition suit, their status is analogous to that of plaintiffs clothing them with right to prefer appeal. Since Neeraj Khanna and others, appellants in CA No.385 of 2009 did not prefer an appeal before this Court to assail the decree and judgment dated 10.04.2012 passed in their appeal, findings recorded by the first Appellate Court in CA No.385 of 2009 have attained finality and would constitute res judicata in appeal filed by Sh. Prem Nath Khanna and another to challenge the decree and judgment dated 10.04.2012 in CA No.386 of 2009. Though there is no conflict of interest between the plaintiffs and defendants No.5 to 8 but even if Sh. Neeraj Khanna and others had decided not to file an appeal against decree and

judgment passed in CA No.385 of 2009, the appellants herein could seek necessary permission to prefer second appeal against the decree and judgment dated 10.04.2012 passed in CA No.385 of 2009 wherein they were otherwise impleaded on the array of respondents as respondents No.5 and 6. In this view of the matter, the appellants cannot be heard to say that judgment and decree passed in their appeal may be set aside and the matter be remitted to the Appellate Court for decision of the appeal afresh nor it is open for them to challenge the impugned decree and judgment on merits. If such a contention of the appellants is accepted, there would be two contradictory judgments and decrees dealing with identical disputed questions of law and fact. That being so, appeal preferred by Sh. Prem Nath Khanna and another is liable to be dismissed being barred by principle of res judicata. In the given facts and circumstances, the appellants cannot derive advantage to their contention by referring to Order 41 Rule 33 CPC or judgment relevant in that context.

In view of what has been discussed hereinbefore, the appeal fails and is accordingly dismissed leaving the parties to bear their own costs.

SEPTEMBER 30, 2019

‘D. Gulati’

(REKHA MITTAL)

JUDGE

Whether speaking/reasoned :

yes/no

Whether reportable :

yes/no