

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 3634 of 2013 (O&M)

Date of decision : 29.7.2019

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Pawan Kumar and another

.....Appellants

vs.

Dharampal and others

.....Respondents

Coram: Hon'ble Mr. Justice H. S. Madaan

Argued by : Mr. D.S. Nirban, Advocate for the appellants.

Mr. Devender Arya, Advocate for respondents No. 1 to 3

...

H. S. Madaan, J.

Plaintiffs – Dharampal and Mahender Singh, both sons of Data Ram son of Baksha Ram, residents of village Mundayan, Tehsil and District Mohindergarh, had brought a suit against defendants – Pawan Kumar son of Jai Lal son of Raje Ram, his father Jai Lal as well as father's sister Savitri, one Dalip son of Data Ram son of Baksha Ram, all residents of the same village, seeking a declaration that plaintiffs are owners in possession of 50/3090 share in total land measuring 154 kanal 1 marla, comprised in Khewat No. 1 Khatoni No.1, situated at village Mundayan, Tehsil and District Mohindergarh

and that judgment and decree dated 12.6.1993, passed in civil suit No. 436 dated 3.6.1993, titled as Pawan Kumar etc. vs. Dharampal etc. and mutation No. 492 dated 18.7.1994, sanctioned on basis thereof, are illegal, null and void and by way of consequential relief, the plaintiffs craved for grant of permanent injunction, restraining the defendants from encroaching upon any part of the suit land or alienating it in any manner.

As per version of the plaintiffs, they are owners in possession of the suit land on the basis of mutation No. 457 dated 28.10.1992, which is incorporated in the jamabandi for the year 1998-1999; the defendants in connivance with each other, while playing fraud and by way of impersonation got suffered impugned judgment and decree and thereafter got sanctioned impugned mutation on the basis thereof. As a matter of fact, plaintiffs had neither appeared in the Court, nor suffered the impugned judgment and decree.

On getting notice of the suit, only defendants No.1 and 2 appeared and filed a joint written statement, whereas defendants No. 3 and 4 did not appear, despite service and were proceeded against ex parte.

In the joint written statement filed on behalf of defendants No. 1 and 2, they had raked up preliminary objections, contending that the plaintiffs had suppressed the material facts from the Court. Such defendants challenged maintainability of the suit, further contending that the suit was barred by limitation. On merits, the

answering defendants denied that the plaintiffs were owners-in-possession of the suit land. They defended the impugned mutation as well as judgment and decree as legal and valid, the decree having been suffered by plaintiffs themselves. Refuting the remaining allegations, the answering defendants prayed for dismissal of the suit.

No replication was filed by the plaintiffs.

From the pleadings of the parties, following issues were framed:-

1. Whether the plaintiff is owner in possession of 50/3090 share in the suit land and Civil Court judgment in the case titled as 'Pawan Kumar versus Dharampal etc.' decided on 12.6.1993 and mutation No. 492 dated 18.7.1994 is null and void as ground mentioned in the plaint? OPP
2. Whether the suit of the plaintiff is not maintainable? OPD
3. Whether the plaintiff has no locus standi to file the suit? OPD
4. Whether the plaintiff is estopped from filing the suit due to his act and conduct? OPD
5. Whether the defendant is entitled to special cost? OPD
6. Relief.

Both the parties led oral as well as documentary evidence in support of their respective claims. However, no evidence in rebuttal was led by the plaintiffs.

After hearing the arguments, the trial Court decided issue No. 1 against the plaintiffs, whereas issues No. 2 to 5 were decided

against the defendants being not pressed.

As a cumulative effect of findings on issues, suit of the plaintiffs was dismissed with costs vide impugned judgment and decree dated 14.12.2010.

Feeling aggrieved, the plaintiffs had approached the court of District Judge, Narnaul, by way of filing an appeal. The appeal was assigned to Additional District Judge, Narnaul, who vide judgment and decree dated 16.8.2013, accepted the appeal, setting aside the judgment and decree passed by the trial Court and decreed the suit of the plaintiffs with costs.

Now, it was turn of the defendants to feel aggrieved and they have challenged the judgment and decree passed by the Ist Appellate Court, by way of filing Regular Second Appeal, notice of which was given to the plaintiff – respondents, who have put in appearance.

I have heard learned counsel for the parties, besides going through the record.

The trial Court had rejected the case of the plaintiffs, mainly for following reasons:-

1. PW-3 V.B. Kashyap, Hand Writing and Finger Print Expert, who had taken specimen thumb impressions and signatures of plaintiffs and after comparing the same with the disputed signatures on plaint, written statement, statement made in the Court in civil suit No. 436 dated 3.6.1993, power of attorney filed in civil suit No. 436 dated 3.6.1993, titled as 'Pawan

Kumar vs. Dharampal etc.' submitted his report Exhibit PW 3/B. In terms of the said report, the disputed thumb impression Q3 was not identical to the specimen thumb impression of plaintiff No.1 and disputed signatures had not been appended by plaintiff No.2 Mahender Singh. However, Gurdayal Singh Numberdar, had identified thumb impression and signature of the then defendants, but he was not examined by the defendants to prove that fact.

2. Defendant No.2 Jai Lal appearing as DW-4 had admitted in his cross examination that the parties to the suit had partitioned the land 55 years earlier i.e. somewhere in the year 1955 and if that was so, the pleadings made in the civil suit in question, that parties to the suit were member of Joint Hindu Family were false. Furthermore, the then plaintiff No.1 Pawan Kumar was minor in the year 1993, however no required permission was sought in that case.

3. Power of attorney filed on behalf of defendants was in the name of Sh. M.S. Yadav, Advocate. However, at the time of passing of judgment and decree some different counsel by the name of Sh. H.P. Yadav, Advocate was mentioned to be present on behalf of the then defendants.

4. In the earlier suit the then plaintiff Jai Lal is mentioned to be son of Raje Ram son of Baksha Ram, however, when he appeared in person as DW-4, he claimed himself to be adopted son of Nand Ram, which goes to show that the impugned judgment and decree were a result of fraud and impersonation.

5. Sh. M.S. Yadav, Advocate, had filed power of attorney and written statement on behalf of present plaintiffs in civil suit No. 436 dated 3.6.1993, had appeared as DW-3 and stated that defendants were identified by one Gurdayal Singh Numberdar and in his cross examination, above named DW-4 Jai Lal disclosed that above named Numberdar was alive. The best evidence to prove that present plaintiffs had suffered impugned judgment and decree, was to examine the abovesaid Numberdar, but it was not so done. Adverse inference was drawn against the plaintiffs for non-examination of Gurdayal Singh Numberdar.

6. Defendant No.2 Jai Lal who appeared as DW-4, has stated in his examination-in-chief that defendant No.1 Pawan Kumar had performed last ceremony of his grand parents in the disputed property i.e. which was received by him vide

impugned judgment and decree and he further deposed that defendant, Pawan Kumar had constructed a pucca platform therein for charitable purpose and it remained unexplained that if disputed property was not given to the defendants and till date plaintiffs are in possession thereof, then why they allowed defendant Pawan Kumar to perform last ceremony of his grand parents as well as allowed him raise construction pucca platform for charitable purpose in their property. Even to a naked eye signatures put by plaintiff No.2 Mahender Singh on documents of this case tallied with those available on power of attorney, written statement and statement made before Court in civil suit No. 436 dated 3.6.1993 and similar is the position of the thumb impression of plaintiff No.1 Dharampal when compared with the naked eye.

7. The plaintiffs had failed to prove that impugned judgment and decree was got suffered by defendants while playing fraud and impersonation and when the plea raised on behalf of the plaintiffs regarding non-availability of signatures of the defendants on written statement of this case, plea of Joint Hindu Family raised in the plaint of impugned judgment and decree, minority of present defendant

No.1 in the year 1993, are not sufficient for acceptance of plaint of the plaintiffs.

Learned Additional District Judge, Narnaul, has based his reasoning for acceptance of the appeal on the following factors:-

1. The trial Court had rejected the report of PW-3 V.B. Kashyap, Hand Writing and Finger Print Expert for the reason that the report is not signed by such expert. The trial Court was not justified in doing so since V.B. Kashyap, Hand Writing and Finger Print Expert appeared as PW-3 submitting his affidavit PW-3/A, producing his report and he was cross examined at length by counsel for the defendants. PW-3 V.B. Kashyap, Hand Writing and Finger Print Expert, had contended in his affidavit Exhibit PW 3/A that detailed reasons for his opinion are given in report Exhibit PW 3/B and under the circumstances, report should have been relied upon.
2. The plaintiffs had discharged their burden by not only producing report of expert but also examining the expert as a witness. On the other hand, the defendants had failed to rebut the evidence produced by the plaintiffs. The Ist Appellate Court has referred to the observations made by such expert in his report to the following effect :-

“And compared these disputed thumb impressions as well as signatures with the following :-

1) One specimen thumb impression S/1 of right hand of (Dharam Pal) on the specimen sheet taken before the Hon'ble Court, dated 16.9.2010.

2) One specimen thumb impression, S/2, of left hand of (Dharam Pal) on the specimen sheet taken before the Hon'ble Court, dated 16.9.2010.

3) Five specimen signatures, S/3 to S/7 of (Mahender Singh) on the specimen sheet taken before the Hon'ble Court, dated 16.9.2010.

After that I prepared my report which is Ex. PW 3/B. It is signed by me and is correct. Enlarged photographs of the disputed and specimen thumb impressions and signatures are Ex. PW 3/C to Ex PW 3/O. The photographs are the correct reproduction of the original detailed above.

In my opinion

1. The disputed thumb impression Q/3 on the statement in Court is absolutely no identical with the specimen thumb impression S/1 viz: the disputed and specimen thumb impression are not affixed by one and the same person i.e. by (Dharam Pal).

2. The disputed signatures D/1 to D/3 have

not been written by the writer of the specimen signatures S/3 to S/7 viz: the disputed and specimen signatures have not been written by one and the same person i.e. by Mahender Singh.

3. Referring to this evidence, the Ist Appellate Court had reached the conclusion that statement made in the Court on 3.6.1993, (Exhibit PW 3/Q) does not bear thumb impression of Dharampal, stands proved. Similarly, the disputed signatures do not tally with specimen signatures.

4. Plaintiffs have specifically stated that they had not appeared in the previous suit and not signed or thumb marked any documents. They had neither filed written statement nor made statement in the court to suffer the impugned consent decree. They had examined PW-3 V.B. Kashyap, Hand Writing and Finger Print Expert, therefore onus had shifted to the defendants to show that the plaintiffs had appeared in the previous suit and filed vakalatnama as well as made statement but they have not led any cogent evidence in that regard. Though they had examined Sh. M.S. Yadav, Advocate but in his cross examination he stated that he did not know Dharampal, Dalip and Mahender personally and under the circumstances some other persons could

have impersonated as Dharampal and Mahender.

5. The suit was filed on 3.6.1992. written statement, power of attorney filed on 3.6.1993 and even the alleged statement was made on that very date. Statement of defendants were also recorded on that date pointing out towards fraud and impersonation.

After hearing learned counsel for the parties, I find that science of comparison of finger prints is a perfect one. Finger prints of two individuals cannot tally in any manner. The plaintiffs had proved the best evidence available, by examining PW-3 V.B. Kashyap, Hand Writing and Finger Print Expert, who had submitted his report giving reasoning for arriving at the conclusion that the disputed thumb impressions of PW-1 Dharampal, did not tally with his specimen thumb impressions, both left and right and similarly disputed signatures of Mahender Singh did not tally with his specimen signatures. The Ist Appellate Court has rightly observed that once the expert has appeared as witness and got his statement recorded on oath, tendering in evidence his affidavit, making reference to the report submitted by him, which he got exhibited, mere fact that the report was not signed by the expert falls into insignificance and it could not be rejected for the reason that the same was not signed by the expert. The trial Court clearly fell in error in doing so, though the Court has power to compare the admitted and specimen signatures but then the report in that regard by the expert, who had carried out the comparison by scientific

means and then arriving at a particular conclusion, could not be ignored in such a manner. The Ist Appellate Court has mentioned in his judgment that he had compared the enlarged photographs of the disputed and specimen thumb impressions and signatures and found that disputed signatures did not tally with specimen signatures. Therefore, report by Hand Writing and Finger Expert could be believed in regard to signatures.

A case of civil nature is to be decided by preponderance of probabilities unlike a criminal case where burden is fixed upon the prosecution to prove its case against the accused beyond a shadow of reasonable doubt and such onus to prove guilt of the accused to hilt his stationary is on the prosecution and it never shifts. The accused may remain quiet throughout the trial and even then he may be acquitted if the prosecution is unsuccessful in its endeavour to prove its charge against the accused beyond a shadow of reasonable doubt.

The plaintiffs having discharged the onus by producing the best evidence available in the form of examining Hand Writing and Finger Print Export etc., burden shifted on the defendants to rebut that evidence. As rightly observed by the Ist Appellate Court, it was for the defendants to examine the Numberdar to prove that in fact it were the plaintiffs who had appeared in the civil suit in question and had got their statements recorded voluntarily. The defendants have neither examined any Hand Writing and Finger Print Expert on their behalf nor the Numberdar in question. Furthermore, the trial Court had rejected the claim of the plaintiffs by mis-appraisal of evidence

and wrong interpretation of law, rather by non-application of mind. Whereas the judgment delivered by learned Additional District Judge, Narnaul, is based upon proper appraisal and appreciation of evidence and correct interpretation of law.

The plaintiffs have successfully proved that the impugned judgment and decree are not sustainable and are liable to be set aside. Therefore, they deserve to be granted a declaration in that regard.

As far as the question that impugned judgment was passed on 12.6.1993 and mutation on its basis bearing no. 492 dated 18.7.1994 was sanctioned, whereas suit was filed on 5.2.2004, therefore is barred by limitation.

The courts below have not paid any attention to this important fact. Limitation for filing a suit for declaration is three years. Under Article 58 of the Limitation Act, the limitation prescribed for filing a suit for declaration is three years from the date when the right to suit first accrues.

Mutation on the basis of impugned judgment and decree having been sanctioned way back on 18.7.1994, the plaintiffs could not say that they were not aware of the impugned judgment and decree, though they have taken up a stand in their pleadings that they came to know about the impugned judgment and decree in first week of January 2004, when the defendants tried to take the forcible possession. But this contention does not appear to be cogent and plausible. Section 3 of the Limitation Act deals with bar of limitation proving that every suit instituted, appeal preferred, and application

made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. In the present case, the suit is clearly barred by time. In case the plaintiffs wanted to cross that bar, a heavy burden was then upon their shoulders that they came to know about the impugned judgment and decree in the year 2004 only and not prior to that. But they have not been able to cross that barrier. Dharampal plaintiff appearing as PW-1 in his affidavit PW 1/A that they came to know about the impugned judgment and decree for the first time in first week of January 2004, when defendants tried to take forcible possession and stored stones etc. for raising construction therein. Then defendants showed them copy of impugned judgment and decree. Thereafter they gave application in the police station. Proceedings under Sections 107/151 IPC were initiated. The plaintiffs collected relevant record from the Halqa Patwari and then filed a suit on 20.1.2004. In his cross examination he stated that all the three brothers are separate in cultivation for the last 10 years. In the cross examination plaintiffs stated that they came to know about this transaction (on exchange) when they (defendants) tried to cultivate it, giving rise to a dispute and the matter was reported to the police. Thus, version of the plaintiffs gets shaken in the said manner.

Similarly, Mahender Singh appearing as PW-2 in his affidavit Exhibit PW 2/A has contended so. Therefore, suit deserved to be dismissed being time barred, although even if it is taken that the impugned judgment and decree are not legal and valid documents, in

that eventuality also, the same were required to be challenged and got set aside within period of limitation. The earlier law that limitation does not apply to a void order does not hold good. Even a void order/judgment/decreed need to be got set aside within a period of limitation and if it is not so done, then the void order/judgment/decreed remain in existence and cannot simply be wished away. Therefore, the suit not having been filed within the period of limitation deserves to be dismissed. The trial Court was justified in doing so though on other grounds, whereas the Additional District Judge, lost sight of this ground while accepting the appeal and decreeing the suit of the plaintiffs.

Therefore, the appeal is accepted. The judgment and decree passed by the Ist Appellate Court are set aside and judgment and decree passed by the trial Court, dismissing the suit of the plaintiffs, are restored.

29.7.2019

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**(H.S. Madaan)
Judge**

Whether speaking / reasoned

Yes / No

Whether reportable

Yes / No