

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

RSA No.4332 of 2018(O&M)
Date of decision: 30.09.2019

Lakha Singh

... Appellant

Versus

Mukhtiar Kaur @ Tej Kaur and others

... Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI, JUDGE

Present: Ms. Charu Sharma, Advocate, for
Mr. M.K. Garg, Advocate for the appellant.

ARUN PALLI, J. (Oral)

Suit filed by the appellant-plaintiff was decreed by the trial court vide judgment and decree dated 30.01.2014. For the appeal against the said decree, preferred by respondent-defendant No.2, was accepted on 30.01.2018, and the judgment rendered by the trial Court was reversed, the plaintiff is before this Court in Regular Second Appeal. Parties to the lis, hereinafter, shall be referred to by their original positions in the suit.

In brief, the case set out by the plaintiff was that suit property, measuring 80 kanals 16 marlas, was a coparcenary property of Hindu Undivided Family. Gurdial Singh, the predecessor-in-interest of the parties, was the manager/Karta. Post death of Gurdial Singh, plaintiff and defendants being his natural heirs were entitled to inherit the estate of the deceased. For Gurdial Singh passed away on 23.08.1980, the plaintiff acquired 1/8th share in his estate. The Will dated 15.08.1980 propounded by defendants No.1 & 2, alleged to have been executed by late Gurdial Singh in their favour, was a fabricated document, therefore, even the mutation sanctioned on the basis

thereof was liable to be set aside. However, defendant No.2 on the basis of the said mutation got a land measuring 59 kanals 5 marlas, transferred in his favour, vide a transfer deed from defendant No.1. Thus, the suit.

In defence, defendants No.1, 2 & 3 pleaded, *inter alia*, that present suit was barred by principle of *res judicata* and the plaintiff had even concealed certain material facts from the Court. The nature of the suit property was not ancestral and coparcenary, and was rather the self acquired property of late Gurdial Singh. Thus, he was fully authorized to execute the Will dated 15.08.1980. Therefore, the suit was liable to be dismissed.

Defendants No.5 & 7 though filed a separate written statement, but on the same lines as defendants No.1, 2 & 3.

The trial Court, upon consideration of the matter, reached a conclusion that Excerpt Ex.P1, i.e. jamabandi for the year 1920-21, and its translation (Ex.XX), showed that suit property was not the self acquired property of Gurdial Singh, for, it was inherited by him from his father Kartar Singh whose name was found mentioned in the jamabandi for the year 1920-21. No note was given in the remarks column of the jamabandi, Ex.XX, if the property of Kartar Singh and Partap Singh was their self acquired property or not. Thus, the presumption was that property mentioned in the said jamabandi was inherited by Kartar Singh and his brother Partap Singh from their father Talok Singh. Thus, plaintiff was able to prove that the suit property remained undivided for four generations. Accordingly, the Will dated 15.08.1980 and mutation No.14379, were set aside and the plaintiff was declared to be the owner of 1/8th share in the suit property.

However, upon a due and comprehensive analysis of the matter in issue and the evidence on record, the appellate Court concluded that even

though the trial Court held the suit property to be ancestral and coparcenary in nature, but failed to determine issues No.2 to 8 on merits. In fact, issues No.2 to 8 were taken up together and decided in favour of the plaintiff in the wake of the finding recorded on issue No.1. Undoubtedly, the trial Court while determining issue No.1 held the suit property to be ancestral and coparcenary, but if in terms of issue No.2 the suit itself was not maintainable, the trial Court ought to have determined the same on merits. For, there was an express bar under Order 23 Rule 1 read with Rule 4 of the Code of Civil Procedure. An analysis of the plaint in the present suit and in an earlier suit, bearing No.258 dated 13.05.1998, Ex.D6, filed by the plaintiff, showed that khasra numbers pertaining to property mentioned in plaints of both the suits were the same. None other than plaintiff Lakha Singh (PW2) conceded in his cross-examination that even earlier he had filed a suit, wherein a compromise was effected. He also admitted that said suit was filed against his mother Mukhtiar Kaur, brother, namely, Atma Singh and his sisters. Thus, the parties to the lis were same in both the suits. He also admitted that pursuant to a compromise arrived at between the parties, he has withdrawn the earlier suit. Though he sought to maintain that he had not received any land pursuant to the said compromise, but the earlier suit was withdrawn only after receiving the land in favour of his son on the basis of the said compromise, vide sale deed dated 31.03.1999. Not just that, he also conceded in his cross-examination that Mukhtiar Kaur and Atma Singh had even given a land measuring 9 kanals to his son Mithu Singh. On the contrary, defendant Atma Singh had brought on record a compromise dated 31.03.1999, wherein plaintiff Lakha Singh had declared that he had already received his due share in the disputed land. In the statement made by

the plaintiff in the earlier suit on 31.01.1999, he testified, for he had compromised the suit, therefore, he did not wish to pursue it further and the same be dismissed as withdrawn. Accordingly, the suit was dismissed as withdrawn *in toto*.

Ex facie, while withdrawing the earlier suit neither did he pray for nor the Court granted him any liberty to file a fresh suit on the same cause of action. Therefore, in terms of Rule 4(b) of Order 23 CPC, he was precluded from instituting the fresh suit. The plea that defendants had not objected to the maintainability of the suit in terms of the Order 23 was also rejected in reference to the decision of this Court in **Jaswant Rai and others v. Municipality, Bathinda and others, 2015(1) PLR 265**, for it was obligatory upon the trial Court to apply the bar of Order 23 Rule 1 CPC. Thus, the only and the inevitable conclusion that could be reached: the suit filed by the plaintiff was barred under Order 23 of the Code of Civil Procedure.

On being pointedly asked, learned counsel for the appellant could not refer to anything on record to show if the conclusion recorded by the appellate Court was either contrary to the record or suffered from any material illegality. Thus, no ground is made out to interfere with the impugned judgment and decree rendered by the appellate Court.

The appeal being devoid of merit is accordingly dismissed.

(Arun Palli)
Judge

30.09.2019
Rajan

Whether speaking / reasoned:
Whether Reportable:

YES
NO