

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

SAO No. 22 of 2018 (O&M)

Date of Decision: May 23, 2019

Fateh Singh and others

.....APPELLANTS

VERSUS

Balram and others

.....RESPONDENTS

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Gaurav Mohunta, Advocate
for the appellants.

Mr. Keshav Partap Singh, Advocate
for the respondents.

Mr. Nitin Jain, Advocate
for respondent No. 9.

SURINDER GUPTA, J.(Oral)

Heard.

Plaintiffs-appellants filed suit seeking the relief of declaration
as follows:

“That a decree for declaration to the effect that the defendants have got no right title or interest whatsoever in the JOHAR in dispute fully detailed in para no. 2 of plaint and the impugned sale deed dated 17.06.1974, mutation no. 10874 allegedly executed in their favour by Dharam Singh etc. are illegal, null and void, ineffective, inoperative and are not binding upon the rights of all proprietors, right-holders and biswedars of SHAMLAT PATTI GORWA including the plaintiffs and hence, are liable to be set aside and the names of the defendants are liable to be deleted from the record of rights, may kindly be passed in favour of the plaintiffs and against the defendants, and a decree for permanent injunction to restrain the defendants from dispossessing the plaintiffs and other proprietors, right-holders and biswedars of SHAMLAT PATTI GORWA

from the user of the JOHAR detailed in para no. 2 of the plaint and from filing the same by putting earth or MALWA etc. and from raising any construction over the same or any part of it may also be passed in favour of the plaintiffs and against the defendants, alongwith the costs of the present suit.

Para no. 1 The Khasra No. 1347 (3-6) total measuring 3 Kanals 6 Marlas of Khewat No. 2120 Min, Khewat No. 2451 is a GAIR MUMKIN JOHAR and is being reflected in the name of SHAMLAT PATTI GORWA HASAB RASAD KABZA JAMIN in the record of rights and that the said Johar has been (being) used by all the proprietors, right holders and biswedars of all the SHAMLAT PATTI GORWA including the plaintiffs since the time immemorial for the purpose of bathing, taking water to their cattle and other similar purpose and said GAIR MUMKIN JOHAR is being depicted by letters A B E F in the site plan appended herewith and the same is bounded as measured as under:-

<i>East</i>	<i>:</i>	<i>Ganda Nala</i>	<i>=</i>	<i>178'0"</i>
<i>West</i>	<i>:</i>	<i>Kachcha Rasta</i>	<i>=</i>	<i>205'6"</i>
<i>North</i>	<i>:</i>	<i>JOHAR bearing Khasra No. 1348</i>	<i>=</i>	<i>60'6"</i>
<i>South</i>	<i>:</i>	<i>Property to the plaintiff No. 1</i>	<i>=</i>	<i>135'6"</i>

Learned Civil Judge (Sr. Divn.). Palwal decreed the suit of the plaintiffs to the effect that defendants have no right, title or interest in the *Johar* because their vendors had no right in more than 10 Gauge in the Khasra No. 1347 whereas they had sold 3 Kanal 16 Marlas vide sale deed dated 17.06.1974. The above sale deed as well as mutation No. 10874 on the basis of this sale deed was held as illegal, null and void and not binding on the rights of any biswedars of Shamlat Patti Gorwa.

Defendants No. 2 to 5 filed appeal before Additional District Judge, Palwal and learned lower Appellate Court remanded the case with observations in para Nos. 12 and 13 as follows:

12. After having heard learned counsel for both the parties, I reached to the findings that the learned trial

court has ignored the fact that the appellants/defendants are in lawful possession over the suit land, being co-sharers. It has been held by our own Hon'ble High Court in case titled as Bhartu Versus Ram Sarup, 1981 PLJ 204 that "sale of a specific portion of land described by particular Khasra numbers by a co-owner out of the joint Khewat-would be a sale of share out of the joint land-Pre emptible under Section 15(1) (b)-Words "sale of share of joint land"-Interpretation of-Includes in its ambit any sale out of the joint holding by a co-sharer irrespective of the fact whether the land sold is fractional share or specified portion comprised of particular khasra numbers-Right or pre-emption cannot be defeated simply by describing the land purchased in terms of specific khasra numbers instead of fractional share." The plaintiffs have no right, title or interest in the suit property and the same never reserved, as Johar. In the copy of khasra girdawari the suit land has been shown, as Gair Mumkin Plot and the sale deed is legal, valid and binding upon the rights of the plaintiffs, as the appellants/defendants have purchased the suit property from its rightful owners.

- 13- *The learned lower court has wrongly taken single number for calculating the share in khasra no.1347 and has not taken the entire shamlat land of Patti Gaurva and the share in the entire shamlat patti should have been calculated. Learned lower court has held that the suit land vest in Gram Panchayat, but on the other hand, has taken out the shares and has returned the finding to the effect that the vendors have less share. Every co-owner has a right to use the joint property in a husband like manner not inconsistent*

with similar rights of other co-owners.

While remanding the case, an application filed by the appellants before the lower Appellate Court seeking permission to lead additional evidence was also allowed.

While perusing the application with the assistance of learned counsel for the parties, I find that though the appellants have sought permission to allow the appellants to appear as witness and produce documents but it was nowhere specifically mentioned that out of petitioner whom they want to examine as a witness and which documents are to be produced.

Learned lower Appellate Court while allowing the application observed that “documents sought to be produced by way of additional evidence were very very much necessary for decision of the appeal” and granted permission to the appellants to lead additional evidence.

Learned counsel for the respondents has fairly conceded that the application filed by the respondents seeking permission to lead additional evidence is not happily worded as neither name of witness to be examined has been mentioned in their application nor documents sought to be produced were detailed therein. He submits that permission be allowed to the respondents to move fresh application before the lower Appellate Court giving the details of additional evidence sought to be produced in this case.

On perusal of the order dated 14.12.2017 remanding the case to the trial Court, I find that the Ist Appellate Court has not disagreed with the findings recorded by the trial Court on issues No. 3 to 6. In the event of the findings on issue No. 3 remaining intact the trial Court will not be in a position to record any different findings on this issue, which is as follows:

3. *“Whether the plaintiffs are entitled to the decree for permanent injunction, as prayed for, on the grounds mentioned in the plaint? OPP”.*

While remanding the case, learned lower Appellate Court has also recorded certain findings on merit regarding the right, title or interest of plaintiff in the suit property which will also come in the way of trial Court in recording fresh findings on the issues framed in this case. The order of the remand passed by the Ist Appellate Court does not fall within the parameters as laid down under Order 41 Rule 23, 23-A CPC. The Ist Appellate Court even after allowing permission to lead additional evidence could proceed further to decide the appeal on merits as per provision of Order 41 Rule 28 CPC, instead of remanding the case to the trial Court.

In view of my above discussions, the appeal is accepted. The order dated 14.12.2017 passed by the Additional District Judge, Palwal, is perverse and not legally sustainable, as such set aside.

The order of same day allowing permission to lead additional evidence is also vague, as such, is set aside. However, the appellants will have opportunity to move fresh application with better particulars. On filing of that application, learned Ist Appellate Court will proceed to decide the same on merits in accordance with law.

Parties are directed to appear before the Ist Appellate Court on 05.07.2019.

May 23, 2019
Jyoti-II

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:
Whether Reportable:

Yes/No
Yes/No