

**RSA-3087-2011 (O&M)
and connected case**

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

1.RSA-3087-2011 (O&M)

Jaswant Kaur and others

....Appellants

Versus

Parminderjit Pal Kaur and others

..Respondents

2.RSA-3099-2011 (O&M)

Jaswant Kaur and others

....Appellants

Versus

Charanjit Kaur and others

..Respondents

Date of decision:28.07.2022

Reserved on : 22.07.2022

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.G.C.Dhuriwala, Advocate for the appellants

Mr. M.L.Sarin, Sr. Advocate with
Mr. Himani Sarin, Advocate
and Mr. N.S.Dandiwal, Advocate
for respondent No.1 to 4 and 9

ANIL KSHETARPAL, J (Oral)

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in **Pankajakshi (Dead) through LRs vs. Chandrika and others, (2016) 6 SCC 157.**

2. Appellants have filed these two appeals challenging the concurrent findings of facts arrived at by the courts below in two consolidated suits. The first suit was filed by Sh.Babu Singh alias Sh.Gurdial Singh seeking decree of declaration that he is the owner in possession whereas defendants no. 6 to 8 are mortgagees and the plaintiff is the mortgagor and defendants no. 1 to 5 have no right, title or interest in the said property. The second suit was filed by Charan Pal Kaur, Sukh Pal Singh and Surinderjit Pal Kaur, heirs of late Smt. Basant Kaur for grant of decree of declaration that they are the owners in possession of the joint land to the extent of $\frac{2}{3}$ rd share.

3. Jamiat Singh was the common ancestor of the parties. He left behind Babu Singh alias Gurdial Singh, Munsha Singh and late Smt. Basant Kaur as his class I heirs. Consequently, the property was inherited by each of his Class I heir to the extent of $\frac{1}{3}$ rd share. In other words, Babu Singh alias Gurdial Singh, Munsha Singh and Basant Kaur became owners of $\frac{1}{3}$ rd share of the aid property. Munsha Singh sold his $\frac{1}{3}$ rd share of property to Basant Singh. Smt. Basant Kaur filed a suit to pre-empt the sale deed executed in favour of Basant Singh, which was decreed on 2.11.1968 consequently, Smt. Basant Kaur became owner of $\frac{2}{3}$ rd share in the joint land. The revenue record was corrected and Smt. Basant Kaur was depicted to be the owner of $\frac{2}{3}$ rd share. There was a suit filed by Babu Singh in District Court, Ferozepur claiming to be owner of $\frac{2}{3}$ rd share which is alleged to have been decreed on 2.05.1970. Smt. Basant Kaur, on coming to know of the aforesaid decree filed a civil suit no. 340 of 01.06.1982, claiming to be owner to the extent of

2/3rd share. Gurdial Singh alias Babu Singh was a defendant in the aforesaid suit. This suit was decreed on 02.08.1983 and Smt. Basant Kaur was declared owner of 2/3rd share. Smt. Basant Kaur died in November/ December, 1983. In June, 1984, there was an accidental fire in the judicial record room, Faridkot and the entire record, including the record of Smt. Basant Kaur vs. Gurdial Singh decreed on 02.08.1983 was destroyed in the accidental fire. Babu Singh initially mortgaged some property in favour of Manjeet Singh and Mahinder Singh which was redeemed afterwards. Thereafter, Babu Singh, vide mortgage deed executed on 15.05.1993 mortgaged the entire 65 kanals 13 marlas land in favour of Surjit Singh, Malkiat Singh and Sukhdev Singh. In the year 1999, the revenue authorities on the basis of a civil court decree dated 02.08.1983 entered Basant Kaur as the owner of 2/3rd share in the joint property. Babu Singh objected on the making of said entry, however, the revenue authorities sanctioned the mutation in favour of Smt. Basant Kaur. The appeal filed by Babu Singh was dismissed. Heirs of late Smt. Basant Kaur filed a suit for grant of decree of declaration against Babu Singh, Surjit Singh, Malkeet Singh, Sukhdev Singh and Parminder Pal Kaur seeking declaration that the mortgage deed dated 15.05.1988 executed by Babu Singh does not affect their rights to the extent of 43kanals and 15 marlas being 2/3rd share of 65 kanals and 13 marlas. Whereas Babu Singh filed a suit for declaration claiming that he is owner to the extent of 2/3rd share and the mutation sanctioned in favour of Class-I heirs of late Smt. Basant Kaur on the basis of decree dated 02.08.1983 is illegal.

4. Both the courts, on appreciation of evidence, have dismissed the suit filed by Babu Singh alias Gurdial Singh whereas the suit filed by the heirs of late Smt. Basant Kaur has been decreed.

5. Heard learned counsel representing the parties at length and with their able assistance perused the paperbook and the judgments passed by the courts below and the record of the courts below, which was requisitioned.

6. Learned counsel representing the appellant has repeatedly asserted that the judgment and decree dated 02.08.1983 has not been produced on the file, consequently, heirs of Smt. Basant Kaur cannot claim $\frac{2}{3}$ rd share in the property. He while drawing the attention of the Court to the passport of Babu Singh alias Gurdial Singh submitted that he never came to India, therefore, the decree if any, is non-est.

7. Per contra, learned counsel representing the respondents has drawn the attention of the Court to the documents Ex. DW1/B and DW1/A while submitting that the judgment and decree dated 02.08.1983 has been proved. He further submits that the plaintiff Babu Singh did not produce any document to prove the judgment and decree dated 02.05.1970, therefore, Smt. Basant Kaur was admitted as the owner of the $\frac{2}{3}$ rd share in the joint property. He submits that Babu Singh cannot be permitted to challenge the judgment and decree by filing a separate suit unless he proves fraud committed on him.

8/ Sh. Babu Singh alias Gurdial Singh has appeared as DW3. He does not dispute that Smt. Basant Kaur became owner of the joint property to the extent of $\frac{2}{3}$ rd share, after the decree for pre-emption

passed in her favour in 1968. On being questioned, he deposed that he did not file any suit against Smt. Basant Kaur in the year 1970. In such circumstances, it is evident that Smt. Basant Kaur was owner to the extent of 2/3rd share in the joint property. He further admitted that he was never in the cultivating possession of the property, though, he claimed that it is in the possession of the mortgagees.

9. In order to prove the judgment and decree, the legal heirs of Smt. Basant Kaur have examined the court official Hartej as DW1. He proved on file Ex.DW1/B, a copy of the entry of civil suit no. 340 dated 01.06.1986 from the court of Sh.J.K.Matta, Civil Judge, Sr. Division, Moga. In this copy of the diary/register for the year 1981-82, suit no. 340 dated 01.06.1986 between Smt. Basant Kaur daughter of Jamiat Singh vs. Gurdial Singh alias Babu Singh son of Jamiat Singh, resident of State of Johra (Malaysia) has been given. It has further been noted that Smt. Basant Kaur filed a suit for declaration that she is owner to the extent of 2/3rd share in the joint land. Complete details of the suit land, with reference to Khewat/Khatauni/Rectangle/Khasra Nos. has been given. It has also been noted that the suit land is located in village Mehna. In the remarks column, it has been specified that the suit of the plaintiff was decreed ex-parte, declaring the plaintiff to be owner of the 2/3rd share in the suit property vide judgment and decree dated 02.08.1983. Apart from that, Ex.DW1/A is a register of consignment of decided civil cases from the court. At Sr.No.3, civil suit no. 340/01.06.1983 decided on 02.08.1983, Smt. Basant Kaur vs. Gurdial Singh has been specified. Learned counsel representing the appellant

tried to take benenfit of the error in the last column where it has been wrongly recorded as Village Maliyawala and not Mehna. Even if Ex.DW1/A is ignored, still Ex.DW1/B proves that there was a decree passed in favour of Smt. Basant Kaur acknowledging her to be the owner of the 2/3rd share in the property. The heirs of Smt. Basant Kaur have also examined Hartej and Subhash Chand, the officials of the court who have proved that the judicial record was burnt in an accidental fire in June, 1984. Babu Singh filed a suit on 03.11.2000. The revenue authorities have already corrected the revenue record and have recorded Smt. Basant Kaur to be the owner of the said property. When the plaintiff himself denies filing of the suit in 1970 against Smt. Basant Kaur, then, there is no doubt about the ownership of Smt. Basant Kaur to the extent of 2/3rd share in the joint land.

10. In such circumstances, the argument of the learned counsel regarding not producing the decree dated 02.08.1983, is tenuous.

11. There is no substance even in the next argument of the learned counsel regarding Babu Singh alias Gurdial Singh never came to India in 1982-83. As already noticed, Babu Singh alias Gurdial Singh was impleaded as a defendant while giving his complete address of Malaysia. If Babu Singh claims that he was not served, the remedy is to file an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908. If he wants to challenge the judgment and decree on merits, the remedy is to file an appeal. He can maintain a separate suit, only if he proves that the previous judgment and decree was a result of fraud, misrepresentation or coercion. In the absence thereof, separate suit shall

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not be maintainable. The decree passed by the civil court can be assailed in a separate suit on the limited grounds. The plaintiff has neither alleged nor proved those facts. Consequently, finding no merits in the case, both the appeals are dismissed.

12. All the pending miscellaneous applications, if any, are also disposed of.

28.07.2022

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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

**(ANIL KSHETARPAL)
JUDGE**