

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Date of Decision: 13.01.2023
Regular Second Appeal No.232 of 1990 (O & M)

Kaur Singh & others

..... APPELLANT(S)

VERSUS

Dayal Singh (deceased) through LRs & others

..... RESPONDENT(S)

. . .

CORAM: **HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA**

. . .

PRESENT: - Mr. Abhishek Goel, Advocate, and Mr. Pritam Singh Saini, Advocate, for the appellants.

Ms. Kamalpreet Kaur, Advocate, for respondent Nos.1 and 3 to 5.

. . .

Tribhuvan Dahiya, J (Oral)

CM No.6848-C of 2022

This is an application for brining on record legal representatives of respondent No.1, Dayal Singh.

The application is allowed, and legal representatives of respondent No.1, as mentioned in Para 3 of the application, are ordered to be impleaded as parties to the appeal subject to all just exceptions, for the limited purpose of prosecuting this appeal only.

Amended memo of parties is taken on record.

Main Case

This is defendants' appeal against the judgment of reversal.

2. The facts as pleaded by the parties in brief are, respondents-plaintiffs (hereinafter referred to as, 'plaintiffs') filed a suit for possession of the suit land on the basis of a decree dated 19.11.1956 passed by the Sub Judge, Sirsa. They also sought consequential relief of permanent injunction restraining the defendants from alienating the suit land in any manner and cutting the trees standing thereon. It was averred that plaintiffs No.1 and 3 to 5, and one Hakam Singh, since deceased, had filed a civil suit bearing No.341 of 1955, titled *Hakam Singh & others v. Jaggar Singh & others*, for declaration to the effect that the sale of suit land by Jaggar Singh to the defendants herein on 17.01.1955 was null and void, and not binding on the plaintiffs' rights after death of Jaggar Singh. This suit was decreed in favour of plaintiffs No.1 and 3 to 5 on 19.11.1956 on the basis of a compromise to the effect that the appellants-defendants (hereinafter referred to as, 'defendants') shall pay a sum of ₹ 750 to the plaintiffs by 20.11.1957, failing which the suit would stand decreed. The said condition was not fulfilled by the defendants, and the amount was not deposited by them on or before the date fixed. Resultantly, the suit stood decreed in favour of the plaintiffs therein and the defendants were liable to deliver possession of the suit land as per the decree/compromise. The present plaintiffs are legal representatives of Jaggar Singh, who died in June 1981. Accordingly, possession of the suit land has been sought on the basis of decree dated 19.11.1956.

3. The suit was contested by the defendants, alleging that decree dated 19.11.1956 regarding the suit land on the basis of alleged compromise was never passed. The compromise was stated to be against law and void *ab initio*, as defendant Nos.2 and 3 were minor at that time. The

compromise was not entered into in accordance with law and no permission was taken from the Court, nor any Court Guardian was appointed.

4. Upon completion of pleadings, the following issues were framed:

1. Whether the plaintiffs are entitled to the possession of the suit land on the basis of decree dated 19.11.1956 as alleged in the plaint? OPP
2. Whether the plaintiffs are entitled to the relief of injunction as alleged in the plaint? OPP
3. Whether the plaintiffs have no *locus standi* to file the present suit? OPD
4. Whether the plaintiffs have no cause of action? OPD
5. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD
6. Whether the plaintiffs have waived their right if any in the suit land? OPD
7. Whether the suit is out of limitation? OPD
8. Relief.

5. While returning the findings on Issue No.1, the trial Court held that the suit filed by the plaintiffs, bearing No.341 of 1955, itself was not maintainable, since provisions of Section 7 of the Punjab Customs (Power to contest) Act, 1920 (hereinafter referred to as, 'the Act of 1920') barred any person from contesting any alienation of non-ancestral immovable property on the ground of it being contrary custom. It was held that the property transferred by Jaggar Singh was non-ancestral. In this regard, reliance was placed on copies of *jamabandis* for the years 1943-44

and 1951-52 (Exh.D2 and D3) which showed that the suit land was owned by *shamlat thula*, and Jaggar Singh and others were in possession as *gair marusi* tenants. By virtue of Section 5 of the Punjab Tenancy Act, 1987, they had become owners thereof. That being the position, the suit could not have been filed by the plaintiffs under Section 7 of the Act of 1920. Therefore, the decree, dated 19.11.1956, passed in civil suit bearing No.341 of 1955, being in contravention of the statute was a nullity, and could not be executed.

6. The plaintiffs were non-suited on another ground also. The trial Court held that defendants No.2 and 3 were minors at the time of passing of the decree dated 19.11.1956. They were not represented by natural guardian, though Reader of the Court was working as guardian *ad-litem*. It appeared to the Court that the guardian had not acted in the manner beneficial to the minors. The contract being to the detriment of the minors, the decree, which was based on the contract/compromise only, was held to be a nullity as per Section 11 of the Contract Act, 1872. After holding the decree null and void, the trial Court did not go into the question as to whether subsequent deposit of the amount of ₹ 750 by the defendants would have any effect on the decree in question.

7. Issue Nos.2 to 4 were also decided against the plaintiffs based on the findings on Issue No.1. On Issue Nos.5 and 6, no evidence was led by the defendants, and the same were decided against them. On Issue No.7, it was held that the suit was within limitation as it had been filed within three years of death of Jaggar Singh on 06.06.1981, as per Article 2(b) of the Punjab Limitation (Custom) Act, 1920. The suit was, accordingly, dismissed.

8. The plaintiffs went in appeal against the judgment and decree dated 24.12.1987 passed by the trial Court. The lower appellate Court, by its judgment dated 09.11.1989, reversed the trial Court judgment and decreed the suit holding that on non-payment of Rs.750/- to the plaintiffs they had become owners of the suit land and were entitled to its possession on the basis of decree dated 19.11.1956. It was held that the compromise in question stood proved by the testimony of plaintiff Dayal Singh, PW-1, and Wajir Chand, PW-3, as also the fact that the defendants were to pay a sum of ₹ 750 to the plaintiffs in terms thereof. Defendant Kaur Singh, DW-1, stated that he and his brother purchased the suit property for a consideration. Since they were in need of money, a compromise was entered into with the plaintiffs, and they had to pay a sum of ₹ 750 in terms thereof, which was the approximate price of the suit land at that time. Defendant No.1 Kaur Singh, is real brother of defendants No.2 and 3, Dasuanda Singh and Zora Singh respectively, who were minor at the time of execution of the agreement. Based on that, it was held that civil suit No.341 of 1955 was compromised after being duly contested by defendant No.1, that could not be held to be illegal or un-warranted. The trial Court had appointed Reader of the Court as Court Guardian on behalf of the minor defendants on an application filed for that purpose.

9. Regarding the Act of 1920 the lower appellate Court held, “The suit land may be ancestral or non-ancestral, but that has to do nothing with the present case, rather the suit land being non-ancestral land, it was within the competence of the respondents-defendants to have admitted the suit of the plaintiff.”

10. Learned counsel for the appellants-defendants contends that the judgment passed by the trial Court being well reasoned should be upheld. He has further placed reliance upon amendment to Section 7 of the Act of 1920, which is to the effect that no person can contest alienation of immovable property, whether ancestral or non-ancestral, on the ground that such alienation is contrary to custom. This amendment, carried out by the Punjab Act No.12 of 1973, was retrospectively made applicable. Therefore, the very basis to file suit No.341 of 1955 did not exist, and the consequent decree dated 19.11.1956 was a nullity. Possession of suit land could not have been sought based upon such a decree. He has placed reliance upon a Division Bench judgment of this Court passed in *Kamakar Singh & others v. Didar Singh & others*, 2011(2) RCR (Civil) 550, in that regard.

11. *Per contra*, learned counsel for the respondents-plaintiffs contends that the judgment of the lower appellate Court deserves to be upheld. She further submitted that the Punjab Act No.12 of 1973 amending Section 7 of the Act of 1920 does not apply to the facts of the case, since the amendment has not been extended to the State of Haryana, where the suit land lies.

12. Learned counsel for the parties have been heard and record perused.

13. The undisputed facts on record are, the decree passed in civil suit No.341 of 1955 on 19.11.1956 (Exh.P13) is final. It was never challenged by the defendants. It is also an admitted fact that an amount of ₹ 750, that was to be deposited on or before 20.11.1957 in terms of the decree, was not deposited.

14. Unamended Section 7 of the Act 1920 barred any person from contesting any alienation of non-ancestral immovable property being contrary to custom. By the subsequent amendment of 1973, the bar was extended to alienation of immovable properties whether ancestral or non-ancestral. Section 7 of the Act of 1920, as amended by Act 12 of 1973, reads as under:

Notwithstanding anything in the contrary, contained in section 5, Punjab Laws Act, 1872, no person shall contest any alienation of immovable property, whether ancestral or non-ancestral or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom.

There is no document on record which could establish that the Punjab Act 12 of 1973, amending Section 7 of the Act of 1920, was made applicable to the State of Haryana as well. Before going into the issue as to whether the amended provisions of Section 7 would render the decree dated 19.11.1956 a nullity or not, it needs to be ascertained whether the provision could at all be invoked in this case.

15. Therefore, substantial question of law that arises for consideration is, *whether the decree dated 19.11.1956 can be declared a nullity by invoking provisions of the Act of 1920, as amended by the Punjab Act 12 of 1973, though it has attained finality prior to the amendment?*

16. The Division Bench of this Court in *Kamakar Singhs* case (*supra*), relied upon by learned counsel for the appellants, follows the law laid down by the Supreme Court in *Darshan Singh vs. Ram Pal Singh*, AIR

1991 SC 1654 and *Shakuntla Devi vs. Kamla*, 2005(2) RCR (Civil) 668, and holds that the Punjab Act No.12 of 1973, retrospectively takes away the right of recovering possession under the customary law. The relevant part (paragraphs 8 to 11) of the judgment reads as under:

8. There is no dispute that original cause of action of the appellants is based on general custom against alienation of immovable property except for necessity or consent of the male descendants/collaterals. The said custom was enforceable under Section 5 of the Punjab Laws Act, 1872 read with Punjab Custom (Power to Contest) Act, 1920. Previous declaratory decree is based on the said cause of action. By Ordinance No.2 of 1973 which was replaced by Act 11 of 1973, enforcement of the said right was abrogated and thereafter no decree for enforcing the said right could be passed. Interpreting the said provision, a bench of three Hon'ble Judges of the Hon'ble Supreme Court held in *Darshan Singh* that the effect of amendment was to take away even vested rights. It was observed :-

“37. We are also of the view that while providing that "no person shall contest any alienation of immovable property whether ancestral or non-ancestral or any appointment of an heir to such property", without preserving any right to contest such alienations or appointments as were made after the coming into force of the Principal Act and before the coming into force of the Amendment Act, the intention of the legislature was to

cut off even the vested right; and that it was so by implication as well. There is no dispute as to the proposition that retrospective effect is not to be given to an Act unless the legislature made it so by express words or necessary implication. But in the instant case it appears that this was the intention of the Legislature. Similarly Courts will construe a provision as conferring power to act retroactively when clear words are used. We find both the intention and language of the Amendment Act clear in these respects.”

9. Following the above judgment, it was observed in Kesar Singh:-

“5. In view of the above position, the view of the learned Judge that the appellant is not entitled to raise the executability of the decree in execution is not correct since the Amendment act was applicable at the time of passing the decree by the appellate court and the above decree, therefore, is nullity. When the matter goes to the root of the jurisdiction, it is settled law that it can be raised even in execution also. Under those circumstances, the High Court was not right in rejecting the revision of the appellants stating that they are not entitled to raise the plea of nullity. In this view of settled legal position, it does not serve any purpose to remand the matter to the executing court for fresh orders.”

10. In Surain Singh, doubt was expressed about the correctness of the view taken in Kesar Singh on the ground that the question of finality of the decree for declaration was not considered in which case, view taken in Darshan Singh could not apply to decree which had become final. The matter was referred to a three member Bench. In Shakuntla Devi v. Kamla and others, (2005) 5 SCC 400, in para 10, it was noticed that before the three Judge Bench could give judgment in Surain Singh, appeal was dismissed for non-prosecution and no final adjudication took place in that case. Accordingly, a fresh reference was made to a Bench of three Hon'ble Judges which was decided vide judgment reported as Shakuntla Devi v. Kamla and others (2005) 5 SCC 390. Therein, after referring to other judgments on the point including Mathura Prasad Bajoo Jaiswal v. Dossibai N.B.Jeejeebhoy, (1970) 1 SCC 613, Chief Justice of AP v. LVA Dixitulu, (1979) 2 SCC 34, Ashok Leyland Limited v. State of TN, (2004) 3 SCC 1 and Sonapat Coop.Sugar Mills Limited v. Ajit Singh, (2005) 3 SCC 232, it was held that if law is altered after the earlier decision, earlier decision will not operate as *res judicata* between the same parties. It was concluded as under:-

“22. Thus, the law is clear on this point i.e. if a suit is based on an earlier declaratory decree and such decree is contrary to the law prevailing at the time of its consideration as to its legality or is a decree granted by a

court which has no jurisdiction to grant such decree, principles of *res judicata* under Section 11 CPC will not be attracted and it is open to the defendant in such suits to establish that the declaratory decree relied upon by the plaintiff is not based on a good law or court granting such decree did not have the jurisdiction to grant such decree.”

11. In view of *Shakuntla Devi*, it can safely be held that decree dated 18.4.1944 as affirmed by the Lahore High Court on 4.11.1947 no longer remained binding after 1973 Amendment Act retrospectively taking away right to enforce right under the customary law of recovering possession where alienation was without legal necessity. There being no contrary view except observation in referring order in *Surain Singh*, the view taken in *Shakuntla Devi* has to be followed and the finality of decree has to be held to have been taken away by operation of law and suit of the appellants is, thus, not maintainable. They cannot be granted decree for possession even on the basis of earlier decree. The question has, thus, to be answered against the appellants and in favour of the respondents.

17. The view taken by this Court in *Kamakar Singh* case (*supra*) by placing reliance on *Shakuntla Devi* case (*supra*) appears to be not in consonance with the law laid down by the Supreme Court upon considering the issue in a subsequent judgment in *Lekh Raj (Dead) through L.Rs & Ors. vs. v. Ranjit Singh & Ors.*, 2017 AIR (SC) 4016. While giving findings in *Kamakar Singh* case (*supra*) the division Bench was conscious of the

observation in the reference order passed in *Surain Singh* case (2001) 9 SCC 250 that law laid down in *Darshan Singh* case (*supra*) followed in *Kesar Singh* case (1996) 7 SCC 711 could not be applied to rights of the parties which stood finally settled. However, the Division Bench proceeded to hold otherwise by relying upon the judgment passed in *Shakuntla Devi* case (*supra*) which held, if law is altered after the earlier decision, it will not operate as *res judicata* between the same parties. However, subsequent to the decision of this Court in *Kamakar Singh* case (*supra*), the issue was specifically dealt with by the Supreme Court, i.e., the effect of amendment Act 12 of 1973 on a *lis* which has been finally settled between the parties. It was held that the amended Act could not take away vested/crystallised rights of the parties which had attained finality in a *lis* prior to the amendment. The judgment was passed after considering the law laid down in *Darshan Singh* as well as *Kesar Singh* cases (*supra*). The relevant paragraphs of the judgment are as follows:

17. It is clear from the fact that the suit was filed in 1962 whereas the appellate Court passed the decree in 1965 and the amendment in the Act was introduced and came into force in 1973. So the *lis* had already attained the finality much before the amendment came into force.

18. Second, the amendment was held retroactive in nature as would be clear from Para 4 of *Kesar Singh* (*supra*), which reads as under:

4. The controversy is no longer *res integra*. This Court in *Darshan Singh v. Ram Pal Singh*,
MANU/SC/0378/1991MANU/SC/0378/1991 : 1992

Supp(1) SCC 191 considered the effect of the Amendment Act, 1973 on the customary right of the Punjab Custom (Power to Contest) Act, 1920 and held that: (SCC pp. 219-22, paras 51-60)

“Considering the above principles, the provisions of the principal Act, the statement of objects and reasons and the provisions of the Amendment Act and the decisions of the Punjab High Court and of this Court, we are of the view that Section 7 of the principal Act as amended by the Amendment Act is retroactive and is applicable to pending proceedings. The decisions of this Court dated 28-11-1986 in Ujagar Singh v. Dharam Singh, CA No. 1263 of 1973(SC) and in Udham Singh v. Tarsem Singh, CA No. 1135 of 1974(SC) dated 15-7-1987 do not need reconsideration.”

(emphasis supplied)

19. Third, the amendment being retroactive, it was applicable only to those proceedings, which were pending on the date when the amendment came into force, i.e. 1973, or where the proceedings were initiated after the date of amendment.

20. In our considered view, in order to take benefit of the amendment, it was necessary for the Appellants (judgment-debtors) to have filed the second appeal against the decree of the first appellate Court and if the second appeal had

been decided after 1973, the impact of the amendment on the rights of the parties could have been considered in the context of the amendment in the light of law laid down by this Court in Kesar Singh's case (supra). It was, however, not done because, as mentioned above, the decree in question, had already attained the finality in 1965.

21. If the rights of the parties had already been crystallized then, in our opinion, subsequent change in law would not take away such rights which had attained finality due to lis coming to an end inter se the parties prior to such change.

22. In the case of Kesar Singh (Supra), the Plaintiff had filed the suit in 1978 and second appeal arising out of the suit in 1979, so, the lis was initiated after 1973. It is due to this reason, it was held that the rights of the parties were governed by the amending Act. Such is not the case here. The law laid down in Darshan Singh and Kesar Singh (supra) cannot, therefore, be applied to the facts of this case.

23. There is one more distinguishing fact due to which law laid down in Darshan Singh and Kesar Singh (supra) cannot be applied to the facts of this case. It is not in dispute that the provisions of the Amendment Act of 1973 are applicable only to the State of Punjab whereas the case in hand arises out of State of Haryana. There is nothing on record to show that the provisions of this Act were extended to the State of

Haryana also and, if so, since when and by which adaptation of the laws.

18. In the instant case also, the decree in question was passed between the parties on 19.11.1956, which was not challenged and attained finality. Amendment to the Act of 1920 came much later in 1973. The suit for possession was filed by the plaintiffs based on that decree on 01.05.1982, claiming the rights which stood vested in them. Therefore, as per proposition of law settled in *Lekh Raj* case (*supra*), which this Court is bound to follow, the subsequent amendment could not have the effect of taking away the rights that stood crystallised in plaintiffs’ favour way-back in 1956. It is also noted in *Lekh Raj* case (*supra*) that provisions of the Amendment Act 1973 do not apply to the State of Haryana as the same has not been extended thereto.

19. The substantial question stands answered accordingly, that as per settled proposition of law, the decree, dated 19.11.1956, which has attained finality cannot be declared a nullity on the basis of subsequent change/amendment in law by the Punjab Act 12 of 1973, nor can the rights vested in the plaintiffs in terms of the decree be taken away on that basis.

20. In view of the aforesaid, the instant appeal fails, and the same is hereby dismissed.

(Tribhuvan Dahiya)
Judge

January 13, 2023
avin

Whether Speaking/ Reasoned:
Whether Reportable:

Yes/ No
Yes/ No