

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-6004-2014
Reserved on: 21.07.2023
Date of decision: 02.08.2023

GURSEWAK SINGH & ORS.

..Appellants

Versus

BALDEV SINGH AND ORS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. G.S. Lalli, Advocate
for the appellants.

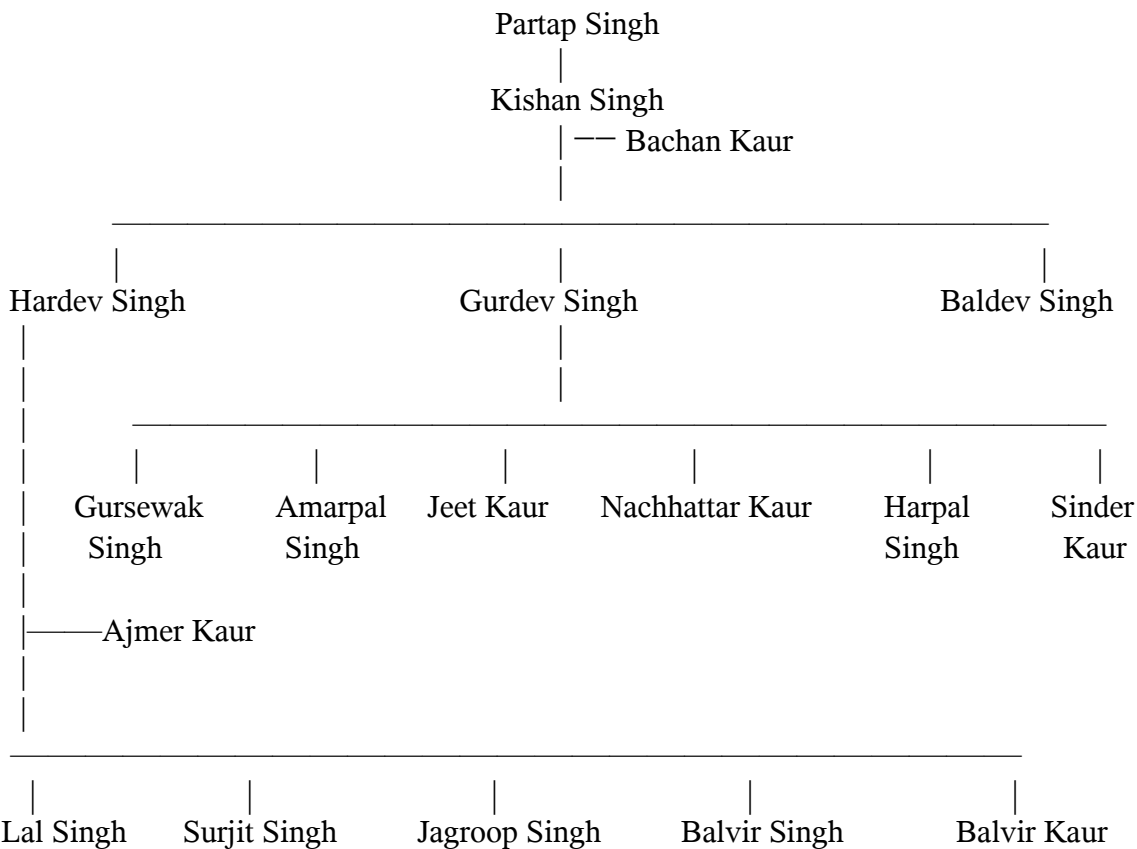
Mr. Sapan Dhir, Advocate
for respondent No.1.

Ms. Shrinkhla Singh, Advocate
for Mr. Tushar Sharma, Advocate
for respondent No.3 to 6, 11 and 12.

ANIL KSHETARPAL, J.

1. The correctness of findings of fact arrived at by the Courts below is challenged by the plaintiffs in this appeal. Their suit for grant of decree of declaration to the effect that late Sh. Krishna during his lifetime partitioned the entire agricultural land, which was further reiterated by another memorandum of partition dated 09.06.1977, and that, the parties are the separate owners in possession of the area allocated to them, has been dismissed by both the Courts below. At this stage, it would be appropriate

to draw a family tree to ensure clarity, which is drawn as under:-



2. In the considered view of the Court the following two questions require adjudication:-

1. Whether unregistered memoranda of family settlement are inadmissible as evidence?
2. Whether a previous judgment passed in a suit seeking an injunction be considered as *res judicata* in a subsequent suit seeking a declaration decree, unless the specific issue in question was directly and substantially contested in the previous suit and the pleadings of the first suit were never produced or proved?

3. The plaintiffs namely Sh. Gurdev Singh and Sh. Hardev Singh, sons of Sh. Krishan Singh claimed that late Sh. Krishan Singh during his lifetime allocated the specific shares amongst them, which was acknowledged in the memorandum of partition dated 14.09.1968. After the death of Sh. Krishan Singh, another memorandum of partition was executed

between the parties on 09.06.1977. Defendant No.1 and Sh. Baldev Singh have started resiling from the arrangement and consequently, the suit has been filed. On notice, the defendant contested the suit on the ground that the agreement dated 09.06.1977, being unregistered, is not admissible in evidence. It was asserted that no partition took place either on 14.09.1968 or on 09.06.1977. Defendant No.6 to 9 and 14 to 16 by filing the written statement claimed that they have purchased 6 kanals land vide sale deed dated 25.11.2002, from the plaintiff Sh. Gurdev Singh, Sh. Balvir Singh, Sh. Lal Singh and Sh. Hardev Singh.

4. From the pleadings of the parties, the following issues were culled out by the trial Court for adjudication:-

“1. Whether the plaintiffs are owner in possession of the property in dispute as prayed for? OPP

2. Whether the plaintiffs are entitled for declaration, as prayed for? OPP

3. Whether the plaintiffs are entitled for permanent injunction, as prayed for? OPP

4. Whether the plaintiffs have no locus-standi to file the present suit? OPD

5. Whether the suit of the plaintiffs is barred by time of limitation? OPD

6. Whether the plaintiffs are estopped by their act and conduct from filing the present suit? OPD

7. Whether the suit of the plaintiffs is bad for non-joinder of necessary parties? OPD

8. Whether the suit of the plaintiffs is bad for mis-joinder of necessary parties? OPD

9. Whether the defendants are entitled to special costs of Rs.5,000/- under Section 35-A CPC? OPD

10. Relief.”

5. The plaintiffs in the oral evidence examined Sh. Subhash Kumar, who identified the handwriting and signatures of the scribe Sh. Bindra Ban Sheori, scribe of memorandum dated 14.09.1968, PW-3 Sh. Harnek Singh, the marginal witness of memorandum dated 14.09.1968,

PW-3 Sh. Pritam Singh son of Sh. Mastan Singh, who identified the signatures of his father Sh. Mastan Singh on memorandum dated 09.06.1977, PW-4, Sh. Senapati Rai son of Sh. Ram Nath (scribe), who proved the hand writing and signatures of his father Sh. Ram Nath, scribe of the memorandum of partition dated 09.06.1977, PW-5 Sh. Baldev Singh, the marginal witness of memorandum of partition dated 14.09.1968, PW-6 Sh. Hardev Singh, the plaintiff and PW-7 Sh. Navdeep Gupta, the hand writing and finger print expert.

6. On the other hand the defendants in the oral evidence examined DW-1 Sh. Bhushan Kumar, DW-2 Sh. Vikas Kumar and DW-3 Sh. Baldev Singh (defendant No.1).

7. Both the Courts below dismissed the suit while giving the following reasons:-

- i. Ex.P1 (memorandum dated 14.09.1968 and deed of partition dated 09.06.1977 Ex.P-3, being unregistered documents, are not admissible in evidence. In fact, Ex.P-3 is extension of Ex.P-1.
- ii. In the revenue record, the land is still reflected as a joint land.
- iii. The plaintiff is guilty of concealing the previous suit No.326 dated 10.06.1985, which was decided on 12.09.1986 and, therefore, the suit is liable to be dismissed under Order VII Rule 1(j).
- iv. As per the doctrine of *res judicata*, the finding with regard to the property being joint in an injunction suit, is final between the parties.
- v. The suit filed by the plaintiff is barred by the

limitation period as the cause of action arose in the year 1996, whereas, the suit was filed on 01.08.2003.

8. The First Appellate Court has also stated that PW-6 Sh. Hardev Singh states that no oral partition has taken place, whereas, Sh. Harnek Singh PW-2 states that partition took place after the execution of Ex.P-1 and Sh. Baldev Singh, another marginal witness of Ex.P-1 states the partition of the property through Ex.P-1.

9. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the judgments passed by the Courts below along with the requisitioned record as well as the written arguments submitted by the learned counsel representing the parties.

10. The written arguments submitted by the learned counsel representing the appellants are reproduced as under:-

“Substantial Question of law : -

a) Whether the documents Exhibit P-1 and P-3 which are family settlements are memorandum of partition or a partition deed, in view of the recital regarding the transfer of possession prior to the execution of the document, clearly rendering it memorandum?

It is submitted as under: -

1. That the document P-1 dated 14.09. 1968 and Ex P-3 dated 9.6.1977 is proved by the statements of Scribe PW1, who wrote the Ex. P/1 and entered in the register (Ex. P2) and the register was produced in the Court as P-2. Secondly PW1 in his statement deposed that all the entries were signed by the signatories in each other's presence and the entry made in his register. Contents were read over to Kishan Singh whose land is being partitioned among his three sons by the intervention of relatives and friends, and that partition which was held earlier is recorded to keep the record.

2. That Ex. P1 recitals in which it is mentioned "So, I hereby partitioned my land as the relatives and Panchayat had partitioned the land orally" (Page 64, 2nd Para). "This partition had been done by the relatives and the panchayat on oral date. So, it is necessary to write this in writing in order to resolve the dispute."

(Page 68 of paper book).

3. (Page 67 of paper Book, last three lines) We have already transferred the possession as per agreement regarding partition and the possession has been taken at the spot.

4. That there are two attesting marginal witnesses PW2 and PW3 who thumb marked the P-1 on the asking of Kishan Singh. PW2 deposed (Page 72 of paper book last two lines below the said page) "Voluntarily that was told by him during his life land time that I have distributed the you put your amongst all the three sons, I put thumb impression, on his request, my thumb impression, where he told me to put. Next in the middle of page 72 "Only the I have put my thumb impression on witness is not The attesting same. supposed to know the contents of document and questions related to contents has no relevance.

5. It is settled law that once document is proved, it attains prevalence over oral testimony. Hence, no oral evidence is permissible to disprove the contents of the proven document, where recitals if documents have prevalence over oral evidence.

6. That Ex. P3 which was written death of Kishan Singh and was between the widow of Kishan Singh namely Bachan Kaur and her three sons, where recitals start with "That land which is already with the parties. While our father has partitioned by keeping record of agreement dated 14.9.1968, we admit it is correct, now we partition our land as written below." Specific Khasra numbers were allotted to each one. Which were given effect in Jamabandi, which are Exhibit from P-5 to P-10 each one allotted Khasra Number as is written in the memorandum.

7. That PW3 Pritam Singh son of Mastan Singh is marginal attesting witness of Ex.P3 dated 9.6.1977 who proved the execution of Ex.P3 deposing that no physical transfer or partition of land is done before him or what share anyone got, he does not know. Again said I have put only my signatures as witness only. Again said it is wrong that any partition is done through Ex.P3. That PW4 is scribe of Exhibit P3 who is son of Ram Nath who is scribe of Ex. P3.

8. PW4 deposed that it is typed by Ram Nath, Deed writer, all the registers of his father deed writer are in his possession as PW4 used to work with his father and can recognize his signatures and typing and brought copies of register. PW deposed that this record is regarding agreement and nothing to do with partition.

9. That PW5 is again a marginal witness of Ex P-1, in which he deposed that he is just witness to agreement and put his thumb mark and no possession was transferred before him. Again deposed that land was in

the name of Kishan Singh.

10. PW6 is Navdeep Gupta, who is handwriting expert and tender his affidavit Ex.PW6/A alongwith report Ex. P11 in which Ex.PW6 stated regarding signatures of defendant no.1 Baldev Singh, which are found to be of defendant no.1, it necessitated as defendant his refused signatures on the Ex.P-1 and P-3 when it is proved that all three sons of Kishan Singh along with him signed Ex. P-1.

11. That last page of Ex.P3 dated 9.6.1977 it is again clarified and written that we all accept dated as agreement correct 14.9.1968 and if anyone denies he will pay Rs.50000/- to others as fine.

12. Exhibit P-5 to Exhibit P-10 Jamabandies made on and entries are corrected the basis of Ex.P-1 and P-3. Agreements are acted upon and given effect to.

13. Since memorandum of partition Ex.P1 and P3 are proved by witnesses, and the recitals in Ex P/1 which is memorandum of partition executed by Kishan Singh subsequent to oral partition.

14. That any witness as question asked to regards the factum of oral partition which did not take place in their presence, are of no value whether they have correctly or incorrectly stated, because that is beyond their testimony and knowledge of earlier acts which took place in their absence

15. That basing the judgment of the learned these Courts below on the statements of the factum of witnesses regarding oral nor not know partition which they did supposed to know is against law.

16. That the recitals of document P-1 proved to have been executed by Kishan Singh by testimony of these witnesses and testimony of PW1 who was acquainted with handwriting and signatures of the deed writer and identifies the same.

17. That once the document is proved, it attains prevalence over oral testimony, the contents of the documents seen, interpreted and weighed in totality and to judge the intention of the author of the document regarding disposition of his property during life time and after his death.

18. That no oral evidence is permissible to the contents of the proved disprove document.

19. CITATIONS:-

a) It is held by this Hon'ble Court in RSA 395 of 2021, Date of Decision 16.07.2021 "It is thus, apparent that the Supreme Court, consistently, held that even if a document is not admissible in evidence due to lack of registration, the Courts would lean in favor of upholding the same. In this case, as noticed the family settlement stands proved. It is also proved that it has been acted upon since 1990. The question is whether the Court should disturb the same on a technical grounds The

answer to the aforesaid question has to be in the negative.” This judgment squarely covers the present appeal.

b) Further held in above order, Rule of Estoppel applies in the given facts of this case and operates against the respondents and it is not the case of respondents that such distribution is inequitable. Further quoting Para 42 of S. Shanmurgam Pillai Case (Supra) after an exhaustive consideration of the authorities on the subject it was observed as follows "Equitable principles such as estoppel, election, family settlement, etc. are not mere technical rules of evidence They have an important purpose to serve in the administration of justice. The ultimate aim of the law is to secure justice. In recent times in order to render justice between the parties, courts have been liberally relying on those principles. We to would hesitate narrow down their scope.

ii) Kale and others Vs Deputy Director of Consolidation and others (1976) 35 CC 119.”

11. Whereas, the learned counsel representing the defendant has filed a list of dates and events and made the following submissions:-

“1. It has been clearly proved on record by way of oral as well as documentary evidence that no partition has ever taken place. The alleged documents Ex. P-1 & P-3 are unregistered documents and even those documents would also show that partition was to be effected upon, which cannot be claimed to be memorandums. Moreso, the plaintiffs in their oral evidence in this very suit, have categorically admitted that no partition took place, which evidence of theirs is completely against and contradictory to their pleadings. 2. Furthermore, the said documents have already been judiciously disbelieved by the Court vide judgement and decree dated 12.09.1986, which has attained finality. Even another Civil suit filed by the plaintiffs amongst themselves on the basis of the same alleged partition deed/memorandum dated 09.06.1977 had been dismissed on 24.07.1993. Therefore, the principle of Res-Judicata also applies to the present litigation. Reliance is placed on 1994 (2) SCC 14; 2005 (10) SCC 51; 2014 (4) RCR (Civil) 955 & 2016 (4) SCC 434.

3. The instant Civil Suit for Declaration is totally barred by limitation.

4. The judgment dated 16.07.2021 of this Hon’ble Court in RSA-395-2021 : Gian Chand v. Bhagwant Rai does not apply to the instant case as the same is on completely different facts.”

12. Now, the Bench proceeds to analyze the reasons recorded by

the Courts below for dismissing the suit, while discussing the issues arising for adjudication in the present case.

The first issue that arises for adjudication is, “whether unregistered memoranda of family settlements are inadmissible as evidence?”

13. The Court now proceeds to discuss the first issue. The first reason assigned by the Courts below while dismissing the suit is with respect to non-admissibility of the two alleged memoranda of family settlement, which were proved on record. The first settlement deed was executed on 14.09.1968, whereas, the second settlement deed was made on 09.06.1977. On a careful perusal of the settlement deed dated 14.09.1968, it is evident that with the intervention of the relatives and the Panchayat, the land had already been divided by way of family settlement. In para No.2 and last paragraph of the settlement deed, it has specifically been noted that the family property has been divided amongst the family members namely Sh. Krishan Singh son of Sh. Pratap Singh and his three sons namely Sh. Gurdev Singh, Sh. Hardev Singh and Sh. Baldev Singh. It was specifically recorded that the family owns the agricultural land at two places namely Barnala as well as village Sangera. The land located at Barnala was given to Sh. Gurdev Singh and Sh. Hardev Singh jointly, whereas, the 8 acres land in village Sangera, which was located adjacent to Rohiwala field, was exclusively given to Sh. Baldev Singh. Sh. Krishan Singh kept 10 acres of barani land in village Sangera. 8 Kanal land in village Sangera was allocated to Sh. Hardev Singh and Sh. Gurdev Singh. Even, the arrangement was made in the settlement deed with regard to the land which was under mortgage.

14. After the death of Sh. Krishan Singh, the parties again sat together and decided to honour the memorandum of family settlement dated

14.09.1968. After specifically referring to the aforesaid settlement, the parties referred to the specific khasra numbers located at village Barnala as well as at village Sangera. It is apparent that the settlement reached in 1977 was identical to the original settlement reached in 1968. The provision was also made that the land measuring 103 kanals and 18 marlas shall continue to be owned and managed by their mother Smt. Bachan Kaur and after her death, the three brothers will jointly inherit the property. This 103 kanals and 18 marlas land is also located in village Sangera.

15. On a careful reading of both the documents (i.e. memoranda of settlement), it becomes clear that through these documents, the family settlement arrived with the intervention of the respectables and the members of Panchayat, was only acknowledged. In the document executed in the year 1968, it was specifically stated that the possession of the properties has already been delivered and the dispute stand resolved. It was also noticed that this document was prepared in order to summarize what was orally agreed to between the parties. Thus, it was in the form of memorandum of family settlement and no right for the first time was created by the aforesaid family settlement. It may be noted here that in **Kale and others Vs. Deputy Director of Consolidation and others, (1976) 3 SCC 119**, the Supreme Court after discussing in detail the previous judicial decisions held that the Courts lean in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. It was also held that if the family settlement suffers from a legal lacuna or a formal defect, the rule of estoppel is pressed into service and applied to shut out the plea of the person who being a party to the family arrangement seeks to unsettle a settled dispute. In para 10, the Court laid down the essentials of a family

settlement, which are extracted as under:-

“In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

(1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17 (2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.”

16. If all the six tests laid down by the Apex Court are applied to the facts of the present case, it becomes evident that both the documents pass all the tests. In fact, the Court has emphasized in the fourth test that if

the property is divided through the document of a family arrangement, then such document requires valid registration. However, both the documents are in the form of a memorandum and that does not itself create or extinguish any right in the immovable property, that is why it does not fall within the mischief of Section 17(2) of the Registration Act, 1908. Recently, the aforesaid judgment has been reiterated in **Ravinder Kaur Grewal and others Vs. Manjit Kaur and others, (2020) 9 SCC 706**. After analyzing the case law on the subject, the Court held that such document does not require registration and if due to any legal formal defect, it is found that such document requires registration then rule of estoppel can be invoked to uphold the document. In view of the aforesaid discussion, the findings of the District Court to hold that such documents are inadmissible in evidence, are set aside.

17. The second reason assigned by the Court does not need much deliberation. The revenue record carries a rebuttable presumption of law. Once there were two different documents executed between the parties during the span of nearly 9 years, there was no doubt about the division of the property with the intervention of the respectables and members of Panchayat. It may be noted here that since it was a Joint Hindu Property, therefore, each member of the family had some already existing rights due to their existence in the family and no new rights in the property were being created. The entries in the revenue record stand rebutted in view of the documents, which were duly signed by the parties.

18. The next reason assigned by the Court is with regard to the concealment of filing the previous petition. In fact, both the Courts have failed to take note of the fact that the aforesaid suit was not filed by the plaintiffs but filed by Sh. Baldev Singh along with his mother Smt. Bachan

Kaur. Moreover, Order VII Rule 1 provides that the plaint shall contain the following particulars. By way of local amendment (i.e. State Amendment), Clause (j) has been added, which is extracted as under:-

ORDER VII

1. Particulars to be contained in plaint.

.....

(j) a statement to the effect that no suit between the same parties, or between the parties under whom they or any of them claim, litigating on the same grounds has been previously instituted or finally decided by a Court of competent jurisdiction or limited jurisdiction, and if so, with what results.”

19. It may be noted here that the failure to disclose the fact of previous institution of suit itself would not be sufficient to dismiss the same, particularly when during the progress of the suit the aforesaid fact has been disclosed and the parties have proceeded with the case. This action may entail cost, however, dismissal of the suit, only on this particular ground that is technical is not appropriate, particularly when Order VII Rule 1 does not specifically require the Court to dismiss such suits.

20. Both the Courts below have also held that the issue of partition of the property through the family settlement is in fact ‘*res judicata*’ because of the judgment (Ex.D-4) passed in a suit for perpetual injunction decided on 12.09.1986. A perusal of the judgment proves that the aforesaid suit was filed by Sh. Baldev Singh and Smt.Bachan Kaur against Sh. Gurdev Singh, Sh. Hardev Singh and Sh. Harbans Singh. Primarily, the suit was filed against Sh. Harbans Singh. Sh. Baldev Singh and Smt. Bachan Kaur prayed for the decree of perpetual injunction restraining defendant No.1 and 2 from alienating the suit land located in village Sanghera with respect to the land comprised in specific khasra numbers in favour of defendant No.3 or anyone else. It may be noted here that in the aforesaid

suit, the land located in village Sangera, which did not fell to the share of Sh. Gurdev Singh and Sh. Hardev Singh, was the subject matter of the litigation. In the previous injunction suit, the Court on appreciation of evidence, framed the following issues for adjudication:-

- “1. Whether the present suit has been filed by the plaintiff in collusion with defendants No.1 and 2? OPD*
- 2. Whether the plaintiffs are entitled to injunction as prayed for? OPP*
- 3. Relief”*

21. In that case because the property which fell to the share of the plaintiffs was not involved, hence, they did not appear in evidence, though, they pleaded the family settlement dated 09.06.1977. The Court decided the first issue against defendant No.3 as the defendant failed to prove that the suit was filed by Sh. Gurdev Singh and Smt. Bachan Kaur in collusion with defendant No.1 and 2.

22. While deciding the issue No.2, the Court noticed that the defendant No.1 and 2 have not come forward to make any statement, whereas, defendant Sh. Harbans Singh failed to make a statement with regard to the family settlement.

23. Thus, the Court held that the land is still joint amongst all the co-sharers. This particular finding has been heavily relied upon by the Courts below to debar the plaintiffs from seeking relief on the basis of two memoranda of family settlement. It may be noted here that firstly, the aforesaid suit was only filed for grant of injunction. Moreover, the subject matter of the previous suit was not identical to the land in dispute in the present case. In the present case, primarily the suit has been filed by the plaintiffs with respect to the property located in village Barnala, which was not the subject matter of the previous suit. The perusal of pleadings would

have helped the Court to determine what was decided by the judgment.

However, the pleadings of the previous suit have not been produced. It is well settled that the pleadings cannot be proved by recitals of all the allegations mentioned in the judgment. Moreover, it is also a well settled rule that the issue in question must be directly and substantially in issue, in the previous litigation, before the doctrine of '*res judicata*' is invoked to debar a party from claiming its right. It is evident from the reproduction of issues framed by the Courts below that the correctness or enforceability of family settlement dated 09.06.1977, was not the subject matter of litigation directly and substantially.

24. The bar of *res judicata* is also not applicable as the correctness and validity of the memorandum of family settlement arrived at in the year 1968 was never the subject matter of adjudication in the previous suit. Unless it is established that a particular issue was directly and substantially in issue in the previous judgment, the bar of *res judicata shall* not be applicable.

25. This question can be examined from another perspective. In a previous suit for injunction, there was no issue with regard to the inadmissibility in evidence, correctness and the validity of the family settlement deeds arrived at in the year 1968 and 1977. In such circumstances, the aforesaid finding arrived at by the Courts below, which is only incidental, would not result in debarring the plaintiffs from claiming on the basis of the aforesaid two memoranda of family settlement. In fact, the plaintiffs in this suit were the defendants No.1 and 2 in the previous suit and the property at village Sangera, that had fallen to the share of the defendants as per the family settlement, was the subject matter of the litigation. Hence, the plaintiffs herein, who were defendants No.1 and 2 in the previous suit neither appeared in evidence nor produced the related

documents to substantiate their plea.

26. In Syed Mohd. Salie Labbai Vs. Mohd Hanifs (dead) by LRs and others, (1976) 4 SCC 780, the Supreme Court after analysing the doctrine of *res judicata* held that before the said doctrine is applied, the Court must apply the following conditions to the facts of the case:-

“In the light of these arguments of the parties and the history of a the case, we would now proceed to decide the points in controversy in this case. We would first deal with the question of res judicata. In support of this plea the defendants have relied on Exts. B-5 to B-9, B-12, B-16, B- 28, B-30, B-31 and B-73 in support of their case that these judgments constitute and operate as res judicata, and particularly judgments given in those suits which were brought in representative capacity under O. 1, r. 8 of the Code of Civil Procedure. Before we analyse these judgments, it may be necessary to mention that before a plea of res judicata can be given effect, the following conditions must be proved-

(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be; identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction.”

27. In para 18 of this judgment, the Supreme Court held that in absence of the pleadings of the earlier suit, sometimes it is not possible to finally opine upon the doctrine of *res judicata*.

28. In V. Rajeshwari (Smt.) Vs. T.C. Saravanabava, 2004 (1) SCC 551, the Supreme Court after discussing in detail the case law on the subject held as under:-

“11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for

the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal (See: (Raja) Jagadish Chandra Deo Dhabal Deb Vs. Gour Hari Mahato & Ors. AIR 1936 Privy Council 258, Medapati Surayya & Ors. Vs. Tondapu Bala Gangadhara Ramakrishna Reddi & Ors. AIR 1948 Privy Council 3, Katragadda China Anjaneyulu & Anr. Vs. Katragadda China Ramayya & Ors. AIR 1965 A.P. 177 Full Bench). The view taken by the Privy Council was cited with approval before this Court in The State of Punjab Vs. Bua Das Kaushal (1970) 3 SCC 656. However, an exception was carved out by this Court and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the Trial Court. The opposite party had ample opportunity of leading the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had through out been in consideration and discussion and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.

13. Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. May be in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai (Dead) By Lrs. & Ors. Vs. Mohd. Hanifa (Dead) by Lrs. & Ors. (1976) 4 SCC 780, the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in Gurbux Singh Vs. Bhooralal (1964) 7 SCR 831, placing on a par the plea of res judicata and the plea of estoppel under Order II Rule 2 of the Code of Civil Procedure, held that proof of the plea in the previous suit which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in the two suits and, therefore, it is necessary for the defence which raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous

pleadings. Their Lordships of the Privy Council in Kali Krishna Tagore Vs. Secretary of State For India in Council & Anr. pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issues in the previous suit and what was heard and decided. Needless to say these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.

14. That apart the plea, depending on the facts of a given case, is capable of being waived, if not properly raised at an appropriate stage and in an appropriate manner. The party adversely affected by the plea of res judicata may proceed on an assumption that his opponent had waived the plea by his failure to raise the same. Reference may be had to Pritam Kaur w/o S. Mukand Singh Vs. State of Pepsu and Ors. AIR 1963 Punjab 9 (Full Bench) and Rajani Kumar Mitra & Ors. Vs. Ajmaddin Bhuiya AIR 1929 Calcutta 163, and we find ourselves in agreement with the view taken therein on this point). The Privy Council decision in Sha Shivraj Gopalji Vs. Edappakath Ayissa Bi & Ors. AIR 1949 Privy Council 302, appears to have taken a different view but that is not so. The plea of res judicata was raised in the Trial Court, however, it was not pressed but it was sought to be reiterated at the stage of second appeal. Their Lordships held that being a pure plea in law it was available to the appellant for being raised. Their Lordships were also of the opinion that in the facts of that case, apart from the principle of res judicata, it was unfair to renew the same plaint in fresh proceedings. The Privy Council decision is distinguishable.

15. Reverting back to the facts of the present case, admittedly the plea as to res judicata was not taken in the Trial Court and the First Appellate Court by raising necessary pleadings. In the First Appellate Court the plaintiff sought to bring on record the judgment and decree in the previous suit, wherein his predecessor-in-title was a party, as a piece of evidence. He wanted to urge that not only he had succeeded in proving his title to the suit property by the series of documents but the previous judgment which related to a part of this very suit property had also upheld his predecessor's title which emboldened his case. The respondent thereat, apprised of the documents, did not still choose to raise the plea of res judicata. The High Court should not have entered into the misadventure of speculating what was the matter in issue and what was heard and decided in the previous suit. The fact remains that the earlier suit was confined to a small portion of the entire property now in suit and a decision as to a specified part of the property could not have necessarily constituted res judicata for the entire property, which was now the

subject matter of litigation.”

29. It is evident that in para 15, the Supreme Court even held that if the earlier suit is confined to a small portion of the entire property, then the previous decision shall not necessarily constitute *res judicata* for the entire property which becomes the subject matter of litigation in a subsequent suit. Hence, both the Courts have erred in granting declaration that the present suit was barred by doctrine of *res judicata*.

30. Keeping in view the aforesaid discussion, question No.2 is also answered in favour of the appellant.

31. In view of the foregoing discussion, the Regular Second Appeal is allowed. The judgments passed by the Courts below are set aside and the suit filed by the plaintiff shall stand decreed.

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

02nd August, 2023
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No