

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No. 3125 of 1985 (O&M)
Date of decision : February 10, 2016

Jai Narain (deceased) through L.Rs and another

..... Appellants

Versus

Sultan and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. M. L. Sarin, Senior Advocate with
Mr. Nitin Sarin, Advocate
for the appellants.

Mr. Arun Jain, Senior Advocate with
Mr. Khushagra Mahajan, Advocate
for respondent No.1.

Mr. Lokesh Sinhal, Advocate
for respondent Nos. 3 and 4.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

The appellants-plaintiffs are aggrieved of the judgment and decree dated 7.10.1985 rendered by the lower appellate court accepting the appeal filed by Sultan-defendant No.1

filed against the judgment and decree dated 8.10.1983 whereby the civil suit bearing No. 456 of 1982 titled as Jai Narain and another Vs. Sultan and others has been decreed.

Jai Narain and Dal Chand filed a suit for declaration on the premise that they were owners in possession of the agricultural land bearing khewat No. 696, Khata No. 993 Khasra No. 5583/41 measuring 2 Kanal 14 Marlas. Khewat No. 755 Khata No. 1073 Khasra No. 5585/42(1-2-5) total measuring 3 bighas 16 biswas and 5 biswani situated within the revenue estate of village Gurgaon, Tehsil and District Gurgaon, on the basis of judgment and decree dated 28.7.1977 passed in civil suit No. 256 of 1977 titled as Jai Narain and Dal Chand Vs. Mehar Chand to the extent of 2/3rd and 1/3rd share respectively. The suit was contested by Sultan-defendant No.1 stating therein that the mutation dated 28.4.1978 effected in his name is legal and justified and judgment and decree dated 28.7.1977 had been obtained by the appellants-plaintiffs by playing fraud upon Mehar Chand as he had no right and title in the property being a money lender.

In the aforementioned suit, Chameli and Chhoto-defendant Nos. 2 and 4 appeared as plaintiff's witnesses and supported the version of the plaintiffs by stating that they have relinquished their right in the land in dispute. The trial court on the basis of oral and documentary evidence, much less, on examination of the statement and aforementioned assertions decreed the suit by holding that Mehar Chand was absolute owner of the property, therefore he validly passed on the right vide judgment and decree

dated 28.7.1977.

Aggrieved against the judgment, Sultan-defendant No.1 alone filed the appeal under Section 96 CPC. The lower appellate court reversed the finding. In essence, judgment and decree of the trial court has been set aside.

Mr. M. L. Sarin, learned Senior counsel assisted by Mr. Nitin Sarin, Advocate submits that the lower appellate court while accepting the appeal filed on behalf of Sultan examined veracity of the judgment and decree dated 28.7.1977 as if, the same was under challenge whereas the aforementioned decree had not been challenged even by setting up the counter claim in the suit filed on behalf of the appellant, thus, there is illegality and perversity in the judgment and decree passed by the lower appellate court as the same is not sustainable in the absence of any challenge to the aforementioned judgment and decree and submits that this court on the basis of pleadings as well as grounds of appeal vide order dated 11.11.2013 framed the following substantial question of law:-

“i) Whether the alleged decree in favour of the plaintiffs secured in the presence of their father defeat the right of the defendant, who claimed a right to the property as a heir to the father by treating the property as falling to the estate of father remaining undisposed?

ii) Whether the property was joint family property in which the defendant had a share and the father could not have therefore lawfully consented to a decree being passed in favour of the plaintiff without the defendant being made a party to the suit?

In pursuance to the aforementioned observations, Sultan had filed an affidavit dated 17.2.2014 stating therein that he did not have objection in disposal of the appeal, in case the appellant is granted 1/6th share in the land in dispute.

During the pendency of the aforementioned appeal, the objections at the instance of L.Rs of Vidya Devi and Chhottu filed an application for bringing on record legal representatives as well as for impleadment on the ground that Mehar Chand was not the sole owner of the property as the property in his hands was ancestral, therefore, all the siblings of Mehar Chand had right viz-a-viz their respective share and also filed application under Order 41 Rule 27 CPC. CM No. 4358-C of 2014 to place on record the documents in support of aforementioned observations by way of additional evidence.

Mr. Arun Jain, Senior counsel assisted by Mr. Khushagra Mahajan, learned counsel appearing on behalf of respondent No.1 submits that his client is bound by the assertion aforementioned as noticed in the affidavit being entitled to 1/6th share.

Mr. Lokesh Sinhal, learned counsel appearing on behalf of respondent Nos. 3 and 4 submits that the judgment and decree dated 28.7.1977 cannot be said to be binding upon them as they were not made party. The oral and family settlement without joining the sisters was not legal in law and they are entitled to their respective shares. The other litigations were also pending viz-a-viz the same Annexures R-1 to R-6 in CM No. 4358-C of 2014 have

been placed on record, much less they have executed a relinquishment deed, therefore, it would entail multiplicity of litigation, thus, legal representatives are necessary to be impleaded.

Mr. M. L. Sarin, learned Senior counsel, in rebuttal submits that they have no right to file an independent appeal, in the absence of any challenge to the judgment and decree. The same was only assailed by Sultan.

I have heard learned counsel for the parties and appraised the paper book.

It would be apt to reproduce paragraph 9 of the judgment of the lower appellate court.

“The necessary outcome of my findings on issue Nos.1 and 2 is that the mutation of inheritance of Shri Mehar Chand deceased bearing No. 7213 dated 28.4.1978 shall have to be styled and held as legal, valid and binding. I accordingly upset the findings of the learned trial judge on issue No.3 as well decide the same against the plaintiffs. The learned counsel for the appellant also rightly urged that since the plaintiffs had advanced divergent and conflicting plea in their two suits, so they had approbated and reprobated and were estopped by their own acts and conduct from filing the suit which deserved to be dismissed on this score as well. Holding that the plaintiffs are estopped from filing the suit by their own acts and conduct, I also set aside the findings of the court below on issue No.5”.

From the perusal of paragraph 9 of the finding rendered by the lower appellate court it is evident that defendant Nos. 2 and 4 namely Chameli and Chhotto conceded the claim of

the appellants-plaintiffs. The relevant portion of the same reads thus:-

“But I am not satisfied with this contention because being a sole owner of the property in dispute Mehar Chand had admitted the claim of the plaintiffs. Being the sole owner of the property in dispute he has admitted the suit of the plaintiffs and in his statement, the present decree was passed by the court according to the prescribed provisions of CPC.”

In my view, the appellate court has committed illegality and perversity in accepting the appeal of Sultan in the absence of challenge to the judgment and decree dated 28.7.1977 as passed in Civil Suit No. 256 of 1977. No counter claim or independent suit has been filed.

I am of the view that plaintiffs should not stake claim viz-a-viz 1/6th share, which, as noticed above, the lower appellate court ought not to have set aside entire judgment and decree, in the absence of challenge by the other defendants. The plea of Mr. M.L.Sarin has substance as plaintiff's witness conceded his claim.

In view of the facts noticed above, I am of the view that substantial questions of law noticed above are answered in favour of the appellants-plaintiffs and the judgment and decree of the lower appellate court is hereby modified to the extent that Sultan-defendant No.1 is held to be owner of 1/6th share of the entire property measuring 3 bighas 16 biswas and 5 biswanis and the plaintiffs shall be owners in respect of remaining land.

In view of the aforementioned, the appeal stands partly allowed.

(AMIT RAWAL)
JUDGE

February 10, 2016
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