

(1991) 01 P&H CK 0129

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 430 of 1987

Amar Singh

APPELLANT

Vs

Man Phool and Others

RESPONDENT

Date of Decision : 24-01-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : (1991) 99 PLR 645

Hon'ble Judges : A.S. Nehra, J

Bench : Single Bench

Advocate : S.K. Bansal, for the Appellant; S.S. Rathor, for the Respondent

Final Decision : Allowed

Judgement

A.S. Nehra, J.—This appeal is directed against the judgment and decree dated 12-11-1986 passed by the Additional District Judge (IV), Faridabad.

2. Sitting up the following pedigree table-

Ami Chand | ----- | | Ghashi
(died) Farlal (died) | | Ram Parshad (died) Roshan (died) | | |
----- | | | | Man Phool Hansa Munshi (died) Amar Singh
(defendant (defendant Smt. Nathia (Plaintiff) No. 1) No. 2) widow of the Shri
Munshi (defendnat No 3)

The brief facts of the case are that the plaintiff appellant filed a suit for declaration claiming himself to be the owner in possession of one-half share of the suit land situated in village Fulera, detailed in paragraphs 2 and 3 of the plaint. The case of the plaintiff, precisely stated is that Ram Parshad, father of the present respondents Nos. 1 and 2 and father-in-law of respondent No. 3, who was village head-man fraudulently, illegally and in collusion with the revenue authorities got the suit land mutated in his name in the year 1941. Ram Phool, father of the present plaintiff-appellant, was in private service and thereafter he joined the military service on 14-8-1942 and after his retirement he had been

drawing his pension till his death on 15 4-1978 It was alleged in the plaint that the, mutation was got sanctioned on the pretext that the father of the, plaintiff-appellant was missing since long, whereas he was very much alive and was in service and he was however, an illiterate and innocent person and had not knowledge about the mutation. The plaintiff has further alleged that his father remained in cultivating and physical possession of the suit land till his death and after the death of his father, the plaintiff himself-is in cultivating possession of the suit land. It was further stated that the plaintiff came to know about me fraudulent act in the year 1982 (sic) then he was intending to take loan, from the bank after getting the suit land mortgaged.

3. The respondents strongly contested the suit, challenges it on the objections of locus standi, maintainability, cause of action and limitation and the relationship of the plaintiff as a son of Ram Phool was also disputed. The .defendants had taken the stand that the plaintiff appellant wants to grab the suit land.

4. On the pleading of the parties, the following issues were framed:-

1. Whether the plaintiff is owner in possession of half share of the suit land ?
2. Whether the mutation dated 23.2.1941 has been obtained fraudulently? If so, to what effect ?
3. Whether the plaintiff has ho locus standi to file the suit ?
4. Whether the suit is not maintainable ?
5. Whether the plaintiff has be cause of action ?
6. Whether the suit is barred by principle of re judicata?
7. Whether the suit is barred by limitation ?
8. Relief.

5. Issue Nos. 1, 2 and 7 being inter-connected, were taken up together by the trial Court.

6. The defendants did not admit the land having come to Ram Parshad, vide impugned mutation Exhibit P. 5. They rather set up that the land is owned and possessed by them from the time of their fore fathers. Jamabandi for the year 1933-34 (Exhibit P 6) read in conjunction with jamabandi for the year 1968-09 (Exhibit P-2) and Jamabandi for the year 1973-74 (Exhibit P-3). evidences that the lend in suit was earlier owned by Ram Phool. These documents further read in conjunction with mutation dated 23-2-1941 (Exhibit P-5) manifest that the land thereafter came to be mutated in the name of the defendants Mutation Exhibit P5 was sanctioned in favour of the defendants on the ground that Ram Phool was not heard of since long. Defendants Nos. 1 and 2 and the husband of defendant No. 3 are collaterals of Ram Phool as is evident from the pedigree table. This relationship has also been clearly admitted fey Man Phool appearing as DW 1 the trial Court, after, going through the evidence, held that the plaintiff

is the son of Ram Phool. It was further held that at the time of sanction of the impugned mutation Exhibit P-5, Ram Phool was alive. Issue No. 2 was decided in favour of the plaintiff, whereas issues Nos. 1 and 7 were decided in favour of the defendants. In view of the finding on issues No. 3, it was held that the plaintiff has locus standi to file the suit. Issues No. 4 and 5 (sic) decided in favour of the defendants and the suit of the plaintiff was dismissed with costs on 6-2-1986 by Additional Senior Sub Judge, Faridabad. Aggrieved by the judgment and decree of the trial Court, the plaintiff appellant filed an appeal before Additional District Judge (IV, Faridabad. During the pendency of the appeal before the lower appellate Court, the plaintiff appellant filed an application for amendment of the plaint which was disallowed by it. The appeal filed by the plaintiff appellant, was dismissed on 12-11-1986 by Additional District Judge (IV), Faridabad.

7. It has been argued by the learned, counsel for the plaintiff appellant that the mutation dated 23-2-1941 has been obtained fraudulently that Ram Phool, father of the plaintiff appellant was alive in 1941 and he was in private service; and that thereafter Ram Phool joined military service on 14-8-1942 and after his retirement he had been drawing his pension till his death on 15-4-1978. It was alleged in the plaint that the mutation was got sanctioned on the pretext that the father of the plaintiff appellant was missing, since long, whereas he was very much alive and was in service and he had no knowledge about the mutation. The trial Court framed issue No. 2 as under:-

Whether the mutation dated 23-2-1941 has been obtained fraudulently ? If so, to what; effect ?"

The trial Court decided this issue No. 2 in favour of the plaintiff-appellant which has not been set aside by the lower appellate Court. It was argued that mutation Exhibit P-5 had been sanctioned during the lifetime of the owner on the false ground that the owner was missing since long. The learned counsel for the plaintiff appellant submitted that Ram Phool died on 15-4-1978 and it being a finding of fact cannot be interfered with in his second appeal. Thus, argued the learned counsel if Ram Phool died in the year 1978, the mutation which was got sanctioned by the defendants in their favour in the year 1941 on the basis that Ram Phool was missing since long, was of no consequence and did not entitle the defendants to claim ownership. According to the learned counsel, it was never brought to the notice of Ram Phool that any such entry was made in favour of the defendants. Admittedly, Ram Phool was alive when the defendants were co-sharers in the suit land. In these circumstances, the question of becoming owners by the defendants did not arise. Therefore, the finding of the learned lower Courts on issue No. 1 is set aside and this issue is decided in favour of the plaintiff appellant.

8. Learned counsel for the respondent agreed that Ram Phool did not file any suit during his lifetime to claim possession from the defendants when, according to the mutation, the land was mutated in their favour. Prima facie the argument may appear to be attractive but once it is found that mutation Exhibit P-5 was

got sanctioned illegally based on false report, then the defendants cannot be allowed to take any benefit of the entries based on such report. It is well settled that mere non-participation in the rent and profits of land by a co-sharer does not amount to an ouster so as to give title U the other co sharers in possession. The defendants, being co-sharers of the plaintiff- appellant, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff. There is no cogent evidence on the record to show that Ram Phool had the knowledge of the adverse entries against him in the revenue record. In support of the above mentioned contention the learned counsel for the plaintiff-appellant has relied upon *Surjal Singh and Ors. v. Gurdev Kaur* 1985 R. L. R. 188. It has been proved from the documentary evidence, i.e. jamabandi for the year 1933-34 (Exhibit P-6) read in conjunction with jamabandi for the year 1968-69 (Exhibit P 2) and jamabandi for the year 1973-74 (Exhibit P-3), that the land in suit was earlier owned by Ram Phool as a co-sharer with the defendants. Once it is held that Ram Phool was a co-sharer, the co-sharer, can arrogate to himself the exclusive ownership of the suit land. Possession of a co sharer will be deemed to be for and on behalf of the other co-sharers. Possession of one co-sharer will not amount to ouster or denunciation of the title of the other co sharers. The finding of the learned lower Courts on issue No. 7 is wrong because the defendants were in possession of suit land as co sharers of the father of the plaintiff-appellant. Therefore, the suit filed by the plaintiff appellant is within time and the learned lower Courts have wrongly held that the suit filed by the plaintiff-appellant is barred by limitation.

9. Since the plaintiff appellant is the owner of half share of the suit land and mutation Exhibit P-S has been obtained fraudulently; therefore, the plaintiff appellant has locus standi to file the suit. The finding on issue No. 5 given by the learned lower Courts is set aside and this issue is decided in favour of the plaintiff appellant because he has a cause of action. While deciding issue No. 4, both the Courts below have held that the suit is barred under Order 2, Rule 2, CPC, because the plaintiff-appellant filed a suit qua the land in village Maujamabad against the defendants. Copies of which are Exhibits P-10 and P-11, alleging that the land in village Maujamabad had been fraudulently got mutated by the respondents in their names. It has been held that in that suit, present suit land was not included and, therefore, the suit is barred under Order 2, Rule 2, Code of Civil Procedure. Learned counsel for the appellant has argued that Order 2, Rule 2, C P C, is not applicable to the present case because the rule contained in Order 2, Rule 2, CPC, is designed to counteract two evils, namely, the splitting up of remedies; and at the same time, before the principles contained in this provision can be applied, three conditions must be satisfied, i.e. firstly, the earlier suit and the second suit must arise from the same cause of action; secondly the two suits must be between the same parties; and thirdly, the earlier suit must have been decided on merits. Learned counsel for the appellant has

relied upon a judgment of this hon''ble Court reported as Abnashi Singh and Others Vs. Smt. Lajwant Kaur and Another, . I have gone through judgment Exhibit P-10. The suit was not contested between the parties add it was not decided on merits. Therefore, the present suit is not barred under Order 2. Rule 2, C.P.C., and therefore, finding of the learned lower Courts on issue No. 4 is set aside and this issue is decided in favour of the plaintiff appellant, hold it that the suit is maintainable in the present form.

10. Learned counsel for the respondents has argued that the plaintiff appellant is not proved to be in possession of the suit land and that even the father of the plaintiff-appellant has not been proved to be in possession of the suit land after 1941 and thus the suit is badly time-barred. It was further argued by the learned counsel that in view of the authority reported as Lehna Singh v. Ram Singh 1981 P. L. J. 470 , the plaintiff- appellant has no cause of action. It was further argued by the learned counsel for the respondents that in view of Ram Saran and Another Vs. Smt. Ganga Devi, . the plaintiff appellant, having not sought the relief of possession and having claimed mere declaration, cannot maintain the suit, tarn Sarah's case (supra) is not applicable to the facts of the present case, because in that case the suit was not filed by a co-sharer against other co sharers. Similarly, Lehna Singh's case (supra) is not applicable to the facts of the, present case, because in that case also the suit was not filed by a co sharer against other co-sharers.

11. It has been held by this Hon''ble Court in a judgment reported as Pritam Singh v. Tara Singh 1986 P. L. J 177, that a co-sharer is entitled to a decree for declaration only. Therefore, the suit filed by the plaintiff appellant is within time and the finding of the learned lower Courts on issue No. 7 is set aside.

12. In view of the above-mentioned discussion, the appeal is allowed, the judgments and decrees passed by learned lower Courts are set aside and the suit for declaration, filed by the plaintiff appellant, is decreed with costs.