
(1999) 09 P&H CK 0043
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 5091 of 1997

Balbir Kumar Jatti

APPELLANT

Vs

Shivala Bhikhamsar and Others

RESPONDENT

Date of Decision : 17-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 92

Citation : (2000) 125 PLR 539 : (1999) 4 RCR(Civil) 557

Hon'ble Judges : R.L. Anand, J

Bench : Single Bench

Advocate : Kanwaljit Singh, for the Appellant; V.K. Jain and J.L. Malhotra, for the Respondent

Judgement

R.L. Anand, J.—This is a Civil revision and has been directed against the order dated 7.8.1993 passed by Addl. District Judge, Jalandhar, who allowed the application of the plaintiffs under Order 23 Rule 1 C.P.C. and allowed the plaintiffs to withdraw the appeal as well as the suit with permission to file a fresh suit on the same cause of action subject to payment of Rs. 200/- as costs.

2. Some facts are necessary to be mentioned in order to appreciate the order itself.

Shri Shivala Bhikhamsar and Sarovar Kar Sewa Trust, village Mahamadpur, Tehsil and District Jalandhar through Madan Lal Batra, its General Secretary and Shivala Bhikhamsar, village Mahamadpur through Mahant Shri Perma Nand Ji Giri Jatti filed a suit for possession of 142 Kanals and 18 marlas of land as detailed in the head-note of the plaint against Balbir Kumar, Satnam Singh, Kartar Singh, Bhajan Singh and Faquir Singh alleging that Shivala has religious sanctity and it was founded by Bhisham Patama, the grandfather of the Pandavas, at a distance of 2 kilometres from Alwailpur on the Adampur-Alwalpur Road. Land measuring 110 kanals 14 marlas situated in village Mahamadpur and 63 kanals 6 marlas situated in village Arjanwali was attached with the Shivala and this land was used to be managed by defendant No. 1 as Mahant, who abused his position and mis-

managed the Shivala as well as the property. He was guilty of contravening tenants, traditional customs, usages and, rules of the institution. He married against the rules of the Dera and damaged Shivling of Bhagwan Shankar which aroused feelings of great anguish and resentment among the devotees. He did not keep the account of the income of the Dera and had misappropriated the funds and the property of the institution thereby bringing the religious institution to disrepute and the faith of the general public and devotees suffered. A meeting was held on 19.4.1981 under the Presidentship of Pandit Daulat in the premises of Shivala Bhikhamsar, in which all failings of defendant No. 1 were brought home to him, who expressed his regret and gave an express undertaking that he would relinquish and abandon his Mahantship within a year before Baisakhi of 1982. A sub-committee consisting of respectable was constituted to collect the funds for the improvement of the Dera for the cleaning of the Sarovar. It was also resolved that meeting of Dera Sadhu Samaj Dasham Sanyas Mandal be also approached to suggest the name of fit devout person possessing a pure and sterling character for the Mahantship of the Dera. The said resolution was signed by defendant No. 1 along with others. A meeting was subsequently convened on 24.4.1982 under the Presidentship of Shri Sagali Ram, Municipal Commissioner wherein defendant No. 1 relinquished his Mahantship in accordance with his undertaking and he further gave undertaking that he would harvest the standing crop of wheat and would vacate the land by 20.5.1982. Mahant Puran Nand Ji Giri Jatti was selected as Mahant of the Dera and the name was suggested by Doaba Sadhu Samaj Dasham, Sanyas Mandal, who was installed as Mahant on 24.4.1982 according to the traditional ceremonies in the presence of Sadhu Mandal and the general public. The defendant No. 1, was also present at that time who also signed the proceedings. Chadar ceremony and Bhandara and installation of Mahant was done on that day. Shivala Bhikhamsar and Sarovar Kar Sewa Trust, Bhikhamsar was constituted under the guidance of the Mahant and the society for managing the property of Shivala was got registered on 16.6.1982 under the Societies Registration Act. Shri Madan Lal Batra is the General Secretary of the plaintiff No. 1 vide resolution dated 12.3.1984. The property of Shivala is being managed by plaintiff No. 2, who keeps the records of the income and expenditure. A regular record of the dead persons whose bones are immersed in the holy Sarovar is also maintained by him. Four rooms have also been constructed in this Dera at the cost of Rs. 20,000/- collected from the donation. Defendant No. 1 vacated the land in dispute on 20.5.1982 as per his promise and the same was given on lease to one Saroop Singh son of Ram Singh of village Mahmadpur vide lease deed dated 22.5.1982. The land situated in village Arjanwal was given to one Naranjan Singh son of Jamiat Singh vide lease-deed dated 25.6.1982 by the plaintiff No. 2. Before the pattedar could take the possession of the land in dispute, the defendant No. 1 took the possession of the same by force on 1.6.1982 and he is in wrongful possession of the same. It is also alleged by the plaintiffs that defendant No. 1 is also in wrongful possession of other land Arjanwal and he has inducted defendants Nos.2 to5 in the land in dispute and as such they have been impleaded as co-defendants. Also it is the

case of the plaintiffs that defendant No. 1 has sold 7 Kanals 10 merlas of land in village Arjanwal to Fakir Singh for a sum of Rs. 23,437.50 through registered sale deed dated 18.6.1984. Defendant No. 1 is neither owner of the property nor he is Mahant of the Shivala and nor the property has been sold for the benefit of the Shivala and as such the sale is not binding on the plaintiffs: Defendants Nos. 1 to 6 are in wrongful possession of the property in dispute and as such the plaintiffs are entitled to recover an amount of Rs. 15,000/- from the defendant by way of mesne profits of the suit land for the last two years, i.e. from Kharif, 1982 to Rabi, 1984, for use and occupation. With above allegations, the plaintiffs have virtually filed the suit for possession and for the recovery of the amount by way of mesne profits.

The suit was contested by defendant No. 1, who took several objections such as that the plaintiffs have no locus standi to file the present suit; that neither Shivala Bhikhamsar and Sarovar Kar Sewa Trust was in existence nor there could be any against the tradition of the Muth; that the plaintiffs are not the juristic persons and they are not competent to file the present suit; that the suit has been filed mala fide to grab the land and the same is not maintainable in the present form; that the plaintiffs have no cause of action; that the suit is bad for multifariousness and that the suit is barred under Order 2 Rule 2 C.P.C. On merits, the stand of the defendant No. 1 was that there was a Shivala temple and a tank known as Bhikhamsar in village Mahmadvpur and the defendant No. 1 succeeded as Mahant of the said Dera after the death of Mahant Itwar Jati, who was previously known as Vishasher before he took over the Dera. Defendant No. 1 is the son of Itwar Jati and had been managing the temple and the Sarovar. He never mis-managed and mis-conducted the affairs of the Shivala and the tank. He never married against the rules of the Dera nor damaged the Shivala as alleged. He had been discharging his duty with utmost respect to Lord Shiva. Itwar Jati previous Mahant was also married. There are other Deras of Gosain Sanyasis wherein Mahants are married. Defendant No. 1 also denied that he did not keep the accounts regularly. He also denied about the meeting dated 19.4.1982. He further stated that he never relinquished the office of Mahant nor he gave any undertaking to harvest the crop and to hand over the possession on 21.5.1982 to the plaintiffs nor he ever signed any writing as alleged. By denying all, the material averments of the plaint, defendant No. 1 prayed for the dismissal of the suit. The suit was also contested by defendants Nos. 2 and 3 and their stand was similar to defendant No. 1. The additional factor pleaded by defendant No. 2 was that he had taken the land situated in village Mahmadvpur on lease vide lease-deed dated 14.9.1983 from defendant No. 1 and is paying Rs. 500/- per acre annually. Defendant No. 6, who also filed the written statement stated that there was no such trust as stated by the plaintiffs in the plaint and he is the bona fide purchaser of the land measuring 7 Kanals 10 marlas through registered sale-deed dated 8.6.1984 and is protected u/s 42 of the Transfer of property Act.

Re-Joinder was filed by the plaintiffs in which they reiterated the allegations of

the plaint by denying those of the written statement and from the pleadings of the parties the trial Court framed the following issues:-

1. Whether the plaintiffs have got no locus standi to file the present suit? OPD
2. Whether the suit is not maintainable in the present from? OPD
3. Whether the plaintiffs are estopped from bringing the present suit by their own acts and conduct? OPD
4. Whether the suit is not maintainable in the absence of compliance of provisions of Sections 92 of the Code of Civil Procedure? If so its effect? OPD
5. Whether the Civil Court has got no jurisdiction to try the present suit? OPD
6. Whether the suit has been properly valued for the purpose of court fee and jurisdiction? If not so, to what effect? OPD
7. Whether the suit is bad for non-joinder of necessary parties? OPD
8. Whether the plaintiff is owner of the property in dispute? OPP
9. Whether the plaintiff is entitled to the possession of the property in dispute? OPP
10. Whether the plaintiff is entitled a sum of Rs. 15,000/- as mesne profits from the defendants? OPP
11. Whether defendant No. 1 has relinquished his Mahantship in respect of the plaintiff Shivala? If so its effect? OPP
12. Whether Mahant Parma Nand Ji Giri Jatti was installed as Mahant of the plaintiff Shivala? OPP
13. Whether the suit is barred under the provisions of Order 2 Rule 2 CPC? OPD
- 13-A. What is the effect of the sale made by defendant No. 1 in favour of defendant No. 6? OPD
14. Relief.

The parties led oral as well as documentary evidence in support of their respective cases and finally the suit of the plaintiffs was dismissed mainly on the ground that the plaintiffs have not complied with the provisions of Section 92 C.P.C. It is not necessary for me to incorporate the findings of the trial Court. Aggrieved by the judgment and decree of the trial court dated 3.6.1993, the plaintiffs filed an appeal before the first Appellate Court and during the pendency of the appeal they filed an application under Order 23 Rule 1 CPC. to withdraw the appeal as well as the suit with liberty to file a fresh one on the same cause of action. It was alleged by the plaintiff-appellants in the application that their suit has been dismissed on technical ground i.e. for non-compliance of the provisions of Section 92 C.P.C. and for that reason the appeal is likely to fail. Notice of the

said application was given to the respondents, who filed the reply and opposed the application, it was averred by the respondent that the application is not maintainable; that the lower Court has rightly dismissed the suit after considering the full facts and record; that a valuable right had accrued to respondent No. 1 under the impugned judgment and decree and the appellants cannot be allowed to take the advantage of their own mistake.

The learned Appellate Court for the reasons given in paras Nos. 4 and 5 of the order allowed the application and permitted the plaintiffs, to withdraw the appeal as well as the suit with permission to file a fresh suit on the same cause of action subject to payment of Rs. 200/- as costs and aggrieved by the said order dated 7.8.1997 passed by the first Appellate Court, the present revision by the defendant namely Balbir Kumar Jatti.

3. I have heard Mr. Kanwaljit Singh, Advocate, on behalf of the petitioner, Mr. V.K. Jain, Sr. Advocate, on behalf of the respondents and with their assistance I have gone through the records of the case.

4. Before I see the legality of the order dated 7.8.1987, I would like to reproduce the observations made by the first Appellate Court in paras Nos. 4 and 5 of the impugned order, which are as under:-

"4. I have considered the arguments advanced by the learned counsel for the parties and I have minutely gone through the lower Court record. The learned counsel for the respondents has cited the case law given in Baru Ram and Another Vs. Baldeva and Others, , wherein it has been observed by his Lordship that where the defect was pointed out in the written statement and in spite of that the plaintiff still continues with the suit, he cannot be allowed to withdraw the suit with permission to file fresh suit on the same cause of action at appellate stage.

5. I have given a thoughtful consideration to the case law referred above. However, to my mind, the facts of the said case are distinguishable from those of the present appeal. The controversy in Baru Ram v. Baldeva (supra) was raised regarding the locus standi of the plaintiff to file the suit. In the replication also the appellant had resisted in his stand that he has locus standi to file the suit. However, in the appeal, he wanted to withdraw the suit with permission to file the fresh one on the same cause of action, in representative capacity, as envisaged by Order 1 Rule 8 C.P.C. It was, therefore, observed by his Lordship that the plaintiff could not be allowed to take benefit of order 23 rules 1 and 2 at the appellate stage. In the present case, the objection though was raised originally in the written statement, it related to non-maintainability of the suit on account of non compliance of the mandatory provisions of Section 92 C.P.C. An issue in this regard was also framed by the tower court which was decided against the appellants and in favour of the respondents, it will be worth while to mention here that the present suit has been filed by Shri Shivala Bhikhamsar. and Sarovar Kar Sewa Trust village Mahmadpur, Adampur Alwalpur Road, Tehsil

and District Jalandhar through Sh. Madan Lal Batra, its General Secretary and Shivala Bhikharnsar, village Mahmadpur, Adampur Alwalpur Road, Tehsil and Distt. Jalandhar through Bihtmam Majant Shri Purna Nand Ji Giri Jati. This, it cannot be inferred that the suit was instituted by an individual in his personal capacity. Consequently, it will not be expedient in the interest of justice that the appellant who is juristic person shall suffer on account of negligence of its office-bearers. Non-compliance of Section 92 C.P.C. can be safely termed as a formal defect in the suit on account of which the appellant is bound to fail. The other factors discussed above, to my mind, also constitute sufficient ground for allowing the permission to the appellant/plaintiffs to institute fresh suit for the subject matter of the present suit. In *Vikas Vs. Harjit Singh and Others*, a prayer for withdrawal of the suit was made on the ground that notice u/s 80 C.P.C. was not given. It was observed by his Lordship that as the suit is not maintainable, there was no reason to withhold the permission for filing a fresh suit on the same cause of action."

5. As I have stated above the first Appellate Court had allowed the application of the plaintiffs under Order 23 Rule 1(3) C.P.C. which lays down that where the Court is satisfied that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. The reading of the above would show that the Court before granting permission under Order 23 Rule 1(3) must be satisfied that the suit was bound to fail by reason of some formal defect or that there are otherwise independent sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. If this Court comes to the conclusion that there was no formal defect in the suit, the application under Order 23 Rule 1 C.P.C. could not and ought not to have been allowed. I cannot comment upon the finding of the trial court as to whether the provisions of Section 92 C.P.C. are applicable or not because I am not sitting in appeal. This aspect is within the domain of first Appellate Court which will examine the legality and propriety of the decree of the trial Court. But after going through the pleadings of the parties, this Court is of the opinion that the suit of the plaintiffs was simple. It was a suit for possession on the strength that the land in dispute belongs to the deity. Defendant No. 1 was the Mahant of the property. He was supposed to act in a honest manner and not adversely to the interest of the idol. If anybody puts a hostile title to the deity, it is always competent for the deity through its next friend to file a suit for possession. It is the case of the plaintiffs that defendant No. 1 had dealt the property of the deity adversely against its interest by leasing or selling it out to different persons and this act of the defendant No. 1 is hostile. That is the reason the deity through its General Secretary or Mahant had filed a suit for possession simplicitor. A reading of the plaint would show that it is not the case of the plaintiffs at all that there was any

breach of express or constructive trust created for public purposes or a charitable or religious nature. Also it was not the case of the plaintiffs that direction of the Court was necessary for the administration of such trust. In this view of the matter, it will always be open to the Appellate Court to examine whether the provisions of Section 92 C.P.C. in this case are attracted or not.

6. So far as this Court is concerned, I am of the opinion that the frame of the suit was correct. There was hardly any formal defect in the frame of the suit nor there was any sufficient cause for allowing the plaintiffs to withdraw the suit in order to file a fresh one on the same cause of action.

7. Resultantly, I allow this revision, set aside the impugned order dated 7.8.1997 and give the directions to the first Appellate Court to re-admit the appeal to its original number and after giving notice to the parties decide the same on merits as early as possible but not later than one year, after taking note of the observations made above.

The parties through their counsel are directed to appear before the first Appellate court on 11.10.1999.