
(2014) 09 P&H CK 0192
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 4234 of 2011

Hari Singh

APPELLANT

Vs

Surjit Singh

RESPONDENT

Date of Decision : 22-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 2 Rule 2

Citation : (2014) 4 RCR(Civil) 955

Hon'ble Judges : Rajiv Narain Raina, J

Bench : Single Bench

Advocate : B.R. Mahajan, Senior Advocate and Gaganpreet Kaur, Advocate for the Appellant; Hemant Bassi, Advocate for the Respondent

Judgement

Rajiv Narain Raina, J.—In this order, the parties are referred to by their original positions in the suit. This revision is against the order dated 28th April, 2011 passed by the learned Additional Civil Judge (Senior Division), Naraingarh held the suit filed by the plaintiffs, private respondents herein, for declaration to challenge sale order dated 23rd July, 1993 and the conveyance deed dated 31st August, 1993 in respect of the evacuee property filed after 18 years (Suit No. 202 of 2010) to be maintainable. The trial Court has proceeded further in deciding the preliminary issue in favour of the plaintiffs-respondents No. 1 to 4. The defendants in the suit who are petitioners in this revision, had purchased 11K-14M of land situated in the revenue estate of village Jatwar, Tehsil Naraingarh, District Ambala in restriction auction open only for Harijans. The defendants were auction purchasers and the sale was confirmed by the Settlement Officer (Sales), Ambala vide order dated 23rd July, 1993 and possession was delivered to the auction purchaser by the Department vide Rapat No. 476 dated 28th August, 1993. The conveyance deed was issued 3 days thereafter.

2. On 3rd September, 1993, Thakur and Shama, predecessors in interest of the private defendants, present respondents, filed Civil Suit No. 279 of 1993 for

permanent injunction against the State of Haryana, Tehsildar (Sales), Ambala and Bhag Singh auction purchaser claiming that they are in cultivating possession of the suit property for the last more than 30 years and are entitled to transfer of land under Government instructions, praying for a permanent injunction restraining the defendants from interfering in the possession over the suit land.

3. The suit was contested by the Department as well as Bhag Singh from whom the petitioners purchased the land being Harijans and entitled participate in restricted auction of evacuee property. The suit was dismissed by the Civil Judge (Senior Division), Ambala City vide judgment and decree dated 1st June, 2006. Civil Appeal No. 69 was dismissed on 9th December, 2006. Regular Second Appeal No. 2472 of 2008 filed by the defendants as legal representatives of Thakur and Shama was dismissed by this Court on 30th October, 2009 holding that the defendants and appellants are not Harijans and have no right to challenge the auction. This Court returned a finding that the defendants had failed to prove possession after 28th August, 1993. The following order was passed in the appeal 30th October, 2009:-

"I have heard learned counsel for the appellants, perused the impugned judgments and find no reason to hold that any question of law, much less a substantial question of law arises for adjudication. Admittedly, the appellants are unauthorized occupants. The appellants' claim that the land should have been allotted to them pursuant to press notes and policies framed by the State, cannot be accepted, as the land in dispute was reserved for allotment to Harijans. The suit land has been purchased by respondent No. 3, a Harijan, in a limited auction. The appellants admittedly are not Harijans and, therefore, have no right to pray for allotment or challenge the validity of the auction. As regards the appellants possession, the appellants have failed to rebut the warrant of possession dated 28.8.1993, the Rapat Roznamcha No. 476 dated 28.8.1993, that records the delivery of possession to respondent No. 3. It would also be necessary to mention herein that following the delivery of possession, the Khasra Girdawaris for the years 1993-94, 1998-2001 and 2001 to 2003 record respondent No. 3 in possession of the suit land. In view of the concurrent findings of facts recorded by the courts below and in the absence of any substantial question of law, the appeal is dismissed with no order as to costs."

4. Bhag Singh son of Sewa Singh sold the suit land to Smt. Purni vide sale deed dated 1st August, 2006. Smt. Purni died and was survived by defendants No. 3 to 8 as the legal representatives. Defendants No. 3 to 8 are the petitioners in the instant petition. Having lost the legal battle on 30th October, 2009 before this Court in appeal and duly represented at the hearing filed a fresh suit bearing Civil Suit No. 202 of 2010 against the State of Haryana, Tehsildar (Sales) Ambala and the petitioners claiming that the land in dispute being evacuee property was owned by defendants No. 1 and 2 and their predecessors were in possession and entitled to ownership as per Government policy and instructions but was wrongly

auctioned by official defendants No. 1 and 2 in violation of the policy and therefore they claimed a declaration that the sale deed dated 23rd July, 1993 and the conveyance deed dated 31st August, 1993 and warrants of possession dated 28th August, 1993 are illegal, null and void and not binding on the plaintiffs and claimed permanent injunction restraining the defendants (petitioners) for interfering in their possession.

5. The suit was contested by the State and by the petitioners by filing separate written statement inter alia raising preliminary objection to the effect:-

"(i) Suit is hopelessly time barred having been filed after 17 years of sale of property by auction dated 27.5.1993 and confirmation of sale on 23.7.1993 and delivery of possession vide Rapat No. 476 dated 28.8.1993 and conveyance deed dated 31.8.1993.

(ii) The plaintiff did not file any appeal or revision against auction in question.

(iii) The suit is barred by constructive res-judicata as in earlier case, findings have been recorded the plaintiffs, being non-Harijans, cannot challenge the auction restricted to Harijans.

(iv) Jurisdiction of Civil Court is barred.

(v) Suit barred under order 2 Rule 2 CPC."

6. Learned trial Court vide order dated 16th September, 2010 framed two preliminary issues:-

"1. Whether the suit of the plaintiff is barred by principle of res judicata? OPD.

2. Whether the suit of plaintiff is maintainable or not as the question of law is involved."

7. Learned trial Court held vide impugned order dated 28th April, 2011 that the earlier suit was for permanent injunction and the present suit is for declaration and the subject matter being different, does not act as a res judicata and the question of limitation is a mixed question of law and fact and can be looked into after evidence has been adduced by the parties. The trial Court has held the suit maintainable and liable the suit to proceed further.

8. Aggrieved by the order dated 28th April, 2011, the petitioners have approached this Court on its revision side.

9. Mr. Baldev Raj Mahajan, learned Senior counsel submits that the plaintiffs in the fresh suit have been held to be non Harijans in the appeal by this Court in the earlier proceedings, to which, they were party. They have, therefore, prayed for allotment or challenged the validity of the restricted auction. The judgment in appeal has become final between the parties and the predecessors in interest of the defendants-petitioners. The learned court a quo has answered the preliminary objection in favour of the plaintiffs without noticing the earlier judgment and the findings recorded by this Court. If the land is evacuee

property, then Harijans would have no locus standi to initiate the proceedings to challenge restricted auction made in favour of Harijans and property duly conveyed in 1993.

10. Mr. Mahajan relies on a decision of this Court in *Mai Chand v. Joint Secretary Rehabilitation*, 1985() R.R.R. 158 : 1986 PLJ 73, wherein it is observed:-

"4. As has been pointed out right in the beginning of this judgment and is not disputed before me that the land had been sold in favour of the petitioners as a result of restricted auction, i.e., only Harijan were entitled to bid. In view of this admitted fact, to my mind, respondent No. 3 had no locus standi to challenge that auction as he himself could never be a bidder. The approach of the Settlement Commissioner that there is no law laying down as to who can assail the proceedings of restricted auction is just meaningless. This respondent not being a Harijan could not possibly participate in the auction. Before a person can successfully assail some body's rights in a Court or before a quasi-judicial Tribunal, he has essentially to show that he is aggrieved by the order sought to be assailed. Only a person whose rights have been affected can be an aggrieved person. In the absence of any such grievance he obviously cannot have a locus standi to impugn an action which does not affect him. As has been pointed out above, this respondent not being a Harijan cannot possibly assail proceedings of this restricted auction."

11. A similar view has been taken by the Division Bench of this Court in *Krishna Devi v. The Commissioner, Ambala Division & others*, CWP No. 10374 of 2006 decided on 25th January, 2007.

12. In view of this settled position of law, the impugned order holding the suit to be maintainable cannot be sustained. It is the further contention of Mr. Mahajan that the earlier civil suit 269 of 1993 was contested and dismissed on the basis of the sale deed, conveyance deed and warrants of possession and all these orders were within the knowledge of the opposite party. The present suit has been filed after 17 years and is hopelessly barred by limitation as required to have been filed within 3 years under articles 58 and 59 of the Limitation Act, 1963.

13. Learned counsel goes on to submit that the sale order, conveyance deed and warrants of possession were available at the time of filing of the earlier suit but was not claimed as a relief by the plaintiff respondents restricting their claim on long possession of evacuee property. Therefore, the suit is also barred under Order 2 Rule 2 of the CPC and for this reason as well, the impugned order is not liable to be sustained.

14. On the point of *res judicata*, Mr. Mahajan well argues that the finding in the suit for permanent injunction based on title operates as *res judicata* in the subsequent suit between the parties. He cites *Sulochana Amma Vs. Narayanan Nair*, where the Supreme Court has observed:-

"The pleading that the remedy of injunction is an equitable relief and in equity, the doctrine of res judicata cannot be extended to a decree of a Court of limited pecuniary jurisdiction would not be tenable in the contention. In a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata. In the instant case, when the right and interest of the respondent were questioned in his suit against "K", the validity of the settlement deed and the terms thereof were gone into. The civil Court found that "K" acquired life estate under the settlement deed executed by his wife conferring vested remainder in the respondent and on its basis the respondent was declared entitled to an injunction against "K" who was prohibited not only from committing acts of waste, but also from alienating the properties in favour of third parties. The later suit of injunction to which the appellant was a party also binds the appellant. Therefore, even the decree founded on equitable relief in which the issue was directly and substantially in issue and decided, and attained finality, would operate as res judicata in a subsequent suit based on title where the same issue directly and substantially arises between the parties."

15. The same view has been reiterated by the Supreme Court in *Aanaimuthu Dehvar v. Alagammal*, 2005 (3) CCC 183 SC; by observing:-

"On the examination of the case pleaded by the parties in the former suit and judgment rendered therein, we find that the plea of ownership to the suit house was substantially involved for seeking relief of permanent injunction. Undoubtedly, such plea of ownership could and ought to have been raised in the former suit. Therefore, this subsequent suit filed by the present appellant as purchaser from Muthuswami is barred by constructive res judicata and the High Court was right in holding accordingly."

16. Lastly, Mr. Mahajan has read out the prayers in both the suits to impress upon the Court that there is no substantial difference in their pith and substance. He particularly refers to paragraph 1 of the plaint itself of the fresh suit and points to an admission by the plaintiffs that they "were in possession" of the land in dispute. This is a very material admission which the opposite party cannot wriggle out of. If they lost possession in 1993, then the suit brought after 17 years is not only barred by limitation, res judicata, Order 2 Rule 2 of the CPC but is in abuse of the process of the Court on which ground alone, the order deserves to be set aside.

17. On the other hand, Mr. Bassi has appearing for the respondents has had a hard time countering the argument of the learned senior counsel except to submit that res judicata is a mixed question of law and fact and cannot be treated as a preliminary issue. For this he cites a short order passed by the learned Single Judge in *Sursati v. Bachan Singh and others*, 1987 PLJ 329; The order reads:-

"The present suit was filed by the petitioner for permanent injunction restraining the respondents from interfering in his possession. One of the defences raised was that the suit is barred by the principles of res judicata as a similar suit between the same parties instituted previously had already been dismissed. Issue No. 3 was framed with respect to his plea. On the day when the plaintiff was to lead his evidence, the defendant moved an application for treating Issue No. 3 as a preliminary issue which was allowed by the impugned order. Aggrieved thereby, the plaintiff has come up in revision.

2. The question of res judicata is a mixed question of law and facts and is not a pure question of law. Only an issue of law which does not require any evidence to prove it can be treated as a preliminary issue and that too when the suit can be disposed of on its decision.

3. Therefore, the trial Court acted illegally in the exercise of its jurisdiction in treating Issue No. 3 as a preliminary issue. The impugned order is accordingly set aside. No costs.

Petition accepted."

18. To proliferate the legal principle, he cites Shyam Dutt Vs. Ashok Kumar and Another, ; of the learned Single Judge of the Himachal Pradesh High Court where the Court has observed that to establish res judicata, questions of fact have to be decided which cannot be at the preliminary issued stage. On point of limitation, Mr. Bassi relies on Khaja Quthubullah Vs. Government of Andhra Pradesh and others, . On the strength of this ruling, he submits that limitation is not open to decision as a preliminary issue and a plaint cannot be rejected on ground of bar of limitation. On the same principle, he refers to Sidh Nath and Others Vs. District Judge and Others, . The Court has observed that an issue as to limitation bar is a mixed question of law and fact and it is within the Court's discretion to try it or not as a preliminary issue. If the prayer is refused, there would be no interference in revision.

19. In Usha Sales Ltd. Vs. Malcolm Gomes and Others, , the Bombay High Court laid down as follows:-

"12.....The Court may try an issue relating to the jurisdiction of the Court or to the legal bar to the suit as a preliminary issue but this is more in the nature of a discretion rather than a duty and the Court is not bound to try any issue despite the provision contained in sub-rule (2) of Rule 2 of Order 14 of the Code. The words "it may try" are clearly indicative of the fact that discretion is given to the Court and no duty is cast upon the Court to decide any issue as a preliminary issue."

In the same chain of thought, counsel relies lastly on a decision of the learned Single Judge of the Gauhati High Court in Thanda Bala Choudhury and Another Vs. Birendra Kumar Choudhury, ; that in cases of mixed questions of law and fact and bar of suit, the same cannot be decided as a preliminary issue. There is no

dispute with the propositions of law put forward by Mr. Bassi in support of his client's case relying on the selection of rulings as above but none of those cases can be read in isolation or torn from the present facts as governing the legal principles involved in this case, which is on its own facts, where a large number of factors intertwine in their interplay. A cumulative examination of the judgments relied upon by Mr. Mahajan as explained by him in the background of the facts of this case I have no remaining doubt that the impugned order is improper and has been passed with material irregularity and without examining the intricacies of law and facts involved. I have no hesitation to think or say that the present suit is an abuse of the process of the Court.

20. Mr. Bassi could not dispute that his clients are not Harijans in the face of the order of this Court in appeal which has become final. On the principle of locus standi alone, the respondents deserve to be non-suited. They cannot usurp land earmarked for Harijans from evacuee property. No other policy was shown to the court from where rights in evacuee property have been taken away from the petitioners claiming through their predecessors in interest.

21. I would need to recall that the learned Single Judge of this Court had heard the parties and dismissed the revision by an elaborate judgment dated 14th February, 2012 after reserving the judgment on 18th November, 2011.

22. Aggrieved by the order, the petitioners filed a review application RA No. 34-CII-2012 in the present revision which was allowed on 16th August, 2013 and the order dated 14th February, 2014 was recalled and it was ordered that the matter be listed for fresh hearing as per roster. That is how the matter was placed before me. For the foregoing reasons, this petition is accepted and the order dated 28th April, 2011 passed by the learned Additional Civil Judge, Senior Division, Naraingarh is set aside. The parties would bear their own costs.