

(1992) 10 P&H CK 0041

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 1747 of 1990

Om Parkash

APPELLANT

Vs

Prabhu Dayal

RESPONDENT

Date of Decision : 23-10-1992

Acts Referred:

Citation : (1993) 2 LJR 139 : (1993) PLJ 324 : (1993) 2 RRR 66

Hon'ble Judges : J.L.Gupta, J

Advocate : Mr. Rajiv Takkar, Advocates., Ajay Aggarwal, K.S. Mangat, Mr. V.K. Jain, Senior Advocate, R.K. Sharma, Advocate, Mr. R.S. Mittal, Senior Advocate, Advocates for appearing Parties

Judgement

Jawahar Lal Gupta, J. (Oral)

1. Two parcels of land measuring 7 kanals 15 marlas and 22 kanals, 12 marlas have led the parties to a second round of litigation.

2. The first round started with regard to a dispute relating to 7 kanals 15 marlas on October 10, 1974 A civil suit was filed by the present plaintiff respondents, against the defendantappellant for possession. The suit was decreed by the learned trial court. The judgment was affirmed by the lower appellate court. Regular second appeal No. 1723 of 1979 culminated in a compromise between the parties. As a result, the respondents in the present appellant case agreed to give 4 kanals 3 marlas of land to Umed Singh.

3. The second round relates to the other parcel of land measuring 22 kanals, 12 marlas. On July 8, 1974, appellant Nos. 1 to 3 executed a leased deed for 99 years in favour of defendantappellant No. 4 Umed Singh. In 1985, the present respondents instituted a suit for declaration that the lease was not binding on them and that they were entitled to a decree for possession with an alternative prayer that the defendant No. 4 shall be deemed to be holding the land in dispute under the plaintiffs on the same terms and conditions as enumerated in the lease deed dated 8.7.1974."Notice of the suit was given to the defendants.

Two separate written statements were filed the first on behalf of defendant Nos 1 to 3 and "the second on behalf of defendant No. 4. So far as defendant Nos 1 to 3 are concerned, they pleaded that the leased deed executed by them in favour of defendant No. 4 was valid and that the plaintiffs had no locus standi, right or title in the property. Defendant No. 4 primarily averred that the names of defendant No. 1 to 3 were appearing in the revenue papers as being in possession of the land in suit and that is why defendant No. 4 took the land in dispute on lease from defendant Nos 1 to 3. In case, the lease in question is held to be illegal and void the defendant Nos 1 to 3 may kindly be ordered to return the consideration amount of Rs. 13,000/ to the answering defendant." On these premises, he also avers that "the defendant No. 4, however, has no objection if a decree as prayed for in the alternative be passed in favour of the plaintiffs."

4. The learned trial court framed the following issues :

1. Whether the leased deed dated 8.7.1984 executed by defendants No. 1 to 3 in favour of defendant No. 4 is illegal and unauthorised as allowed ? OPP.

2. Whether the suit is not maintainable in the present form ? OPD.

3. Whether the suit is barred by limitation ? OPD.

4. Whether the plaint does not disclose any cause of action ? OPD.

5. Whether the suit is not properly valued for the purposes of court fee and jurisdiction ? OPD.

6. Whether the suit is collusive on behalf of plaintiff and defendant No. 4, if so, its effect ? OPD.

7. Whether the suit against the defendants No. 2 and 3 is not maintainable as alleged in preliminary objection ? OPD.

8. Relief.

It decided issue Nos. 1, 4 and 7 against the Judgment and decree passed by the learned trial court having been reversed by the lower appellate court, the defendants have come up in the present second appeal.

5. I have heard Mr. R.S. Mittal, the learned counsel for the appellants and Mr. V.K. Jain for the respondents.

6. Mr. Mittal has made a threefold submission. He contends that parcel of land measuring 22 kanals, 12 marlas is "appurtenant" to the land measuring 7 kanals, 15 marlas and since Umed Singh, appellant No. 4 has been held entitled to land measuring 4 kanals, 3 marks out of 1 kanals, 15 marlas, he is entitled to a proportionate share even in the land measuring 22 kanals, 12 marlas. He also contends that the findings recorded by the learned trial court on the basis of the constructive res judicata and limitation have been erroneously reversed by the learned lower appellate court. On this premises, it is urged that the suit filed by the plaintiff respondents deserves to be dismissed.

7. The claim made on behalf of the appellants has been controverted by Mr. Jain, appearing for the respondents.

8. So far as the first contention raised by the learned counsel for the appellants is concerned, it deserves notice that in the written statement filed by defendantappellant No. 4 (Umed Singh) no claim for either of proportionate share or on any other basis has been made by him. In fact, he has categorically averred that he executed the leasedeed on payment of Rs. 13, 000/ in favour of defendantappellants 1 to 3 as their names appeared in the revenue papers. In view of this categorical admission in the written statement, the claim now sought to be made by the learned counsel for apparently untenable.

9. Equally lacking in merit is the alternative contention that the appellant, Umed Singh having been granted a share of 4 kanals, 3 marlas out of 7 kanals, 15 marlas he is automatically entitled to a proportionate share in the land measuring 22 kanals, 12 marlas which is a part of the Shamlat Deh of the village. There is nothing under the law which may entitle the appellant to automatically claim a share in the Shamlat land of the village, in pursuance to a settlement of the dispute which culminated in the decision of R.S.A. No. 1723 of 1979 decided by the High Court on August 26,1983 (Ex. P7). It has been held by the trial court and the lower appellate court that the appellantrespondents were owners and were entitled to the possession of land measuring 7 kanals, 15 marlas. At the stage of hearing of the second appeal in the High Court, there was a compromise between the parties as a result of which land measuring 4 kanals, 3 marlas was given to appellant No. 4. Nothing has been brought on record to indicate either the term of the compromise or the circumstances in which the land was given. It is not clear at to whether it was given in consideration of some money or on account of some other reason. No plea having been taken in the written statement in this behalf and no ownership right having been claimed by the appellant in the written statement, it would not be fair to allow the claim at the stage of the second appeal.

10. So far as the plea of constructive res judicata is concerned, the learned counsel submits that while filing a suit for possession of land measuring 7 kanals, 15 marlas, the plaintiffrespondents ought to have filed a claim even in respect of the land which is the subjectmatter of the present dispute. He further submits that in the written statement filed on behalf of defendant Nos. 1 to 3, the locus standi of the plaintiffrespondents to institute the second suit having been categorically challenged, the plea of constuctive res judicata should be deemed to have been raised and the findings recorded by the learned trial court should have been upheld by the lower appellate court.

11. For determining the plea, it is essential to determine the cause of action. There is nothing on record to indicate that the cause of action in the first suit was the same as that in the second suit. There being no identity of causes of action, it is difficult to accept the contention that the claim as made out in the present suit ought to have been made in the suit instituted on October 10, 1974. If the

defendants had raised a plea with regard to the suit being barred by principles of res judicata, it would have been, possible for the Court to frame a proper issue which would have enabled the parties to adduce relevant evidence. In that situation, the cause of action would have been identified and the court would have been in a position to record a finding either way. The plea having not been raised, the parties had no occasion to adduce any evidence with regard to the actual cause of action and therefore, it would not be fair to debar the plaintiff respondents on the plea of constructive res judicata.

12. It is only the pleaded case which has to be proved. The Court has to adjudicate the claim of the parties as made out in their pleadings. There being no plea of constructive res judicata or ownership raised in the pleadings of the parties, the first two contentions raised by the learned counsel cannot be sustained.

13. This leads to the question of limitation. Mr. Mittal contends that the suit is governed by the provisions of Article 59 of the Limitation Act while Mr. Jain relies on Article 65 to contend that the suit is for possession of immovable property and that the period of limitation for this purpose is 12 years. Relevant portions of Articles 59 and 65 may be extracted as under :

"Description of suit

Period of Limitation

Time from which period begins to run.

59. To cancel or set aside an instrument or decree or for the rescission of a contract.

Three years

When the facts entitling the plaintiff to have instrument or decree cancelled or set aside or the contract rescinded first become known to him.

65. For possession of immovable property or any interest therein based on title

Twelve years

When the possession of the defendant becomes adverse to the plaintiff."

A perusal of Article 59 shows that when a plaintiff prays for the cancellation or setting aside of an instrument or decree or for the rescission of a contract, the prescribed period of limitation is three years from the date when the facts entitling him to have the instrument cancelled etc. become known. Have the plaintiffs asked for the cancellation or setting aside of any instrument or decree or for the rescission of a contract ?

14. One has to look to the plaint to find an answer. As already noticed, the prayer in the suit is for a declaration that the lease dated 8.7.1974 executed by the defendant Nos. 1 to 3 in favour of defendant No. 4 is not binding upon the

rights of the plaintiffs. No cancellation or rescission has been sought. Only a declaration to the effect that the lease deed does not bind the plaintiffs, has been claimed. Further, a decree for possession of the land in suit has also been prayed for. An alternative prayer for a declaration that defendant No. 4 shall be deemed to be holding the land in dispute under the plaintiffs has also been made. All these prayers are squarely covered by the provisions of Article 65 whereunder the claim for possession can be made within 12 years. The leased deed had been admittedly executed on July 8, 1974 and even if it is assumed that the possession was handed over on the same day, the plaint having been presented to the court in October, 1985 was well within the period of 12 years as prescribed under Article 65.

In view of the above, I am unable to sustain any of the three contentions raised by the learned counsel for the appellants. No other point was urged.

Consequently, this appeal is dismissed. In the circumstances of the case, the parties are left to bear their own costs.