

(2017) 04 SHI CK 0066
In the High Court Of Himachal Pradesh
Case No : 181 of 2002

SAUJU DECEASED THROUGH HIS LRS NIRMAL KASHYAP AND APPELLANT
OTHERS

Vs

GULAB SINGH & ORS RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 41 Rule 27](#)

Citation : (2017) 04 SHI CK 0066

Hon'ble Judges : Dharam Chand Chaudhary

Bench : Single Bench

Advocate : J L Kashyap, Ramakant Sharma, Basant Thakur

Final Decision : Dismissed

Judgement

1. Plaintiffs are in second appeal. They are aggrieved by the judgment and decree passed on 8th March, 2002, by learned Additional District Judge, Solan, in Civil Appeal No.31-S/13 of 2001, whereby while allowing the appeal, the judgment and decree passed by learned trial Court in Civil Suit No.6/1 of 1995, has been reversed and as a consequence thereof the suit dismissed.

2. The bone of contention in the present lis is land bearing Khasra No.574/66/2 and 303, measuring 6-2 bighas, situate at village Sheel, Tehsil and District Solan, HP. The appellants-plaintiffs claim themselves to be the exclusive owners in possession of the suit land in exclusion of their brother Matha, the predecessor-in-interest of the respondents, hereinafter to be referred as "the defendants". The suit so filed by Ghanu, Sauju, appellant-plaintiff No.2 and Devi Saran, predecessor-in-interest of appellants No.2 to 8, for declaration to the effect that the plaintiffs are the owners in possession of the suit land and that the revenue entries showing the defendants also co-owners in possession thereof are wrong, illegal, null and void, hence inoperative against the plaintiffs. According to them, the previous owner of the suit land was one Devi Ram. He initially mortgaged the

same with the plaintiffs, three brothers and later on by way of oral sale sold the same to them. Mutation Nos.491 and 492 and also the entries in Jamabandi for the year 1960-61 have been pressed into service in this behalf. The entries for the first time in the Jamabandi for the year 1969-70 showing their brother Matha as co-owner-in-possession of the suit land, are stated to be against the order of mutation. The subsequent entries in the Jamabandis for the years 1973-74 and 1993-94 showing the defendants to be the co-owners-in-possession of the suit land are also stated to be illegal, null and void. It has further been pleaded that the defendants on the basis of wrong entries have started causing interference in the suit land. The plaintiffs though requested them to desist from such unlawful activities, but of no avail.

3. In the written statement by way of preliminary objections, questions of maintainability of the suit and the plaintiffs having no locus-standi to file the same have been raised. It is contended that in view of the constant entries in the Jamabandis for the years 1969-70, 1973-74 and 1993-94, they are co-owners in possession of the suit land and such long standing entries in the revenue record cannot be held illegal, null and void. As regards mutation Nos.491 and 492, the same are stated to be wrong. The defendants claim themselves to be co-owners-in-possession of the suit land. As per their further case set out in the written statement, the plaintiffs and their brother deceased-defendant Matha had joint family. The affairs of the family and lands used to be managed by them jointly. The suit land is stated to be purchased from the common fund of the joint family. The plaintiffs, therefore, have no legal right to claim that the suit land is in their exclusive ownership and possession.

4. Learned trial Court has framed the following issues: 1. Whether the plaintiffs are owners-in-possession of the suit land as alleged? OPP.

2. Whether the plaintiffs are entitled to decree of declaration as prayed? OPP.

3. Whether the suit is not maintainable as alleged? OPD.

4. Whether the defendants are co-owner and cosharers on the suit land as alleged? OPD.

5. Whether the entry in mutation No.491 and 492 are wrong as alleged? OPD.

6. Relief.

5. The parties were put to trial. The plaintiffs in turn have examined Shri Paras Ram, appellant No.8 as PW-1 and Leela Dutt (PW-2). They have also placed reliance on the orders of mutation Exts.P-7 and P-8 and the entries in the Jamabandi for the year 1960-61, Ext.P-2. They have also produced in evidence the Jamabandis for the years 1964-65 Ext.P-3, 1969-70 Ext.P-4, 1973-74 Ext.P-5 and 1993-94 Ext.P-6.

6. On the other hand, defendant No.1 has stepped into the witness box as DW-1. They have also placed reliance on the same documents, i.e., Jamabandis for the

years 1969-70, 1973-74, 1993-94 and 1998-99 Exts. D-1 to D-4.

7. Learned trial Court on appreciation of the evidence, has decreed the suit. However, learned lower appellate Court in appeal has reversed the judgment and decree so passed by learned trial Court and dismissed the suit.

8. The legality and validity of the judgment and decree under challenge has been questioned on the grounds inter alia that learned lower appellate Court has not appreciated the facts that the suit land was mortgaged with the plaintiffs by its previous owner Devi Ram and later on the same was sold to them. Mutations No.491 and 492 attested qua the sale/redemption of the suit land have been wrongly brushed aside. The entries in the Jamabandis for the years 1960-61 and 1964-65 Exts.P-2 and P-3 were also wrongly ignored. The factum of name of Matha for the first time appeared in the Jamabandi for the year 1969-70, Ext.P-4, without any basis has also not been taken into consideration. There being no evidence that Matha had also any role in creation of the mortgage and subsequently acquisition thereof by way of sale, the findings to the contrary recorded by learned lower appellate Court are stated to be without any basis. It is further contended that the defendants have miserably failed to prove that the suit land was purchased from common funds of joint Hindu family. The findings to the contrary recorded are also stated to be neither legally nor factually sustainable. The findings that the sale could have only been effected by way of registered sale deed are also not correct, as according to plaintiffs, oral sale was permissible at that time and there was no need of registration of the sale deed. The issue of limitation was wrongly taken up, as no plea to this effect was ever taken by the defendants. Otherwise also, the limitation being mixed question of law and facts could have not been taken up suo-moto by learned lower appellate Court. The evidence available on record has also not been appreciated in its right perspective. The judgment and decree has, therefore, been sought to be quashed and set aside.

9. The appeal has been admitted on the following substantial questions of law:
(1) Whether the findings of the learned first appellate Court are against the evidence on record?

(2) Whether the Registration Act was not in force in the District of Solan at the relevant time? If so, the sale in question was valid?

(3) Whether it was not open to the learned District Judge to go into the question of limitation when such plea was not raised by the defendants?

(4) Whether the findings of the learned District Judge are result of misreading and misconstruing the evidence on record?

10. Appellants opted not to put in appearance on the appointed date. They have been proceeded against *ex parte* and I proceed to dispose of the appeal finally.

11. Shri Ramakant Sharma, Advocate, learned Counsel representing the respondents-defendants has vehemently argued that learned lower appellate

Court has rightly appreciated the long standing revenue entries showing the respondents-defendants to be co-owners in possession of the suit land to the extent of 1/4th share. The issue of limitation being legal in nature, according to him, can even be raised without there being any pleadings to this effect on record. Further that the appellants-plaintiffs have miserably failed to prove that it is they alone to whom the suit land was mortgaged by its previous owner Devi Ram and later on the same was sold to them. Mr. Sharma, therefore, has urged that the judgment and decree under challenge calls for no interference by this Court in the present appeal.

12. The substantial questions of law No.1 and 4 pertain to the misreading, misconstruction and misappreciation of the evidence available on record and on that count the judgment and decree under challenge is allegedly vitiated. The 2nd question of law pertains to the non-applicability of the Registration Act in that part of Solan District where the suit land is situated and as such the findings to the contrary that the registered sale deed was required for effective and valid transfer of the suit land are stated to be erroneous and legally unsustainable. As per 3rd substantial question of law, without there being any pleadings in the written statement, the question of limitation allegedly a mixed question of law and facts should have not been gone into nor any conclusion drawn that the suit was time-barred.

13. I proceed to dispose of the questions of law with the help of given facts and circumstances and the evidence available on record and also the submissions made on behalf of the respondents-defendants. The suit land is measuring 6-2 bighas and comprised under Khasra Nos.574/66/2 and 303. If mutation No.491, Ext.P-7, attested and sanctioned on 19th June, 1963 at village Deothi, is seen Devi Ram owner thereof has been shown as mortgagor, whereas Ghanu, Sauju and Devi Saran, the plaintiffs have been shown as mortgagees. It is seen from this document that the suit land was later on sold by mortgagor to the mortgagees by way of oral sale in a sum of `5,500/-. Another mutation bearing No.492, Ext.P-8, reveals that the suit land was got redeemed. Learned lower appellate Court has dismissed the suit on account of being persuaded with the facts that the plaintiffs and their brother deceased Matha were members of joint Hindu family and the long standing entries in the revenue record show said Shri Matha as co-owner in possession of the suit land. An adverse inference was drawn against the plaintiffs on account of their failure to examine Devi Ram, the previous owner of the suit land to prove that they alone were mortgagees/ vendees in exclusion of their brother Matha.

14. Learned lower appellate Court has rightly drawn an adverse inference against the plaintiffs because it was Shri Devi Ram, who alone could have thrown some light to substantiate the plaintiffs' case that it is they who were mortgagees and subsequently purchased the suit land from him in exclusion of their brother deceased Matha. Shri Devi Ram aforesaid has, however, not been examined. Not only this, but either of the plaintiffs did not appear in the witness box and

satisfied by examining PW-1 Paras Ram, their Special Power of Attorney. True it is that as per the testimony of PW-1, the plaintiffs were old and aged, as such, he was appointed by them their attorney. He, however, admits in his cross-examination that one of the plaintiffs Shri Sauju Ram used to come to the Court and attend each and every hearing. He could move out and his mental condition was also good. He and plaintiff Devi Saran, however, are stated to be hard of hearing and their eye-sight also weak. The plaintiffs themselves could have stepped into the witness box, however, as they failed to do so and may be to avoid their cross-examination, which would have been conducted by learned Counsel representing the defendants and hence an adverse inference on this score can also be drawn against them.

15. Even if orders of mutations Exts.P-7 and P-8 are believed to be true, though not supported by any other and further evidence, in that event also when Matha was found to be in possession of the suit land to the extent of 1/4th share during Girdawari conducted in the area where the suit land is situated he must have occupied the same being the real brother of the plaintiffs and their remaining holdings joint. The defendants' case that Matha was coowner in possession of the suit land, is substantiated from the own statement of Paras Ram (PW-1) as according to him, he came to be recorded in possession of the suit land during the course of Girdawari of the land conducted in the area in the year 1968. If coming to his own testimony in the cross-examination, he tells us that the Girdawari generally is conducted by the Patwari by sitting at one place and collecting information from the right-holders and sometimes from third persons also. Meaning thereby that as per own version of PW-1 deceased Matha was recorded co-owner in possession of the suit land during the course of Girdawari conducted by the Patwari. PW-2 also admits that Patwari visits the village to conduct the Girdawari and made the entries, i.e., Girdawari as per the factual position on the spot. Meaning thereby that deceased Matha was in possession of the suit land and it is for this reason Girdawari of the suit land was entered in his name also being the coowner in possession. It is the Girdawari so entered in the name of deceased Matha in the year 1968 was given due effect in the revenue record because in the subsequent Jamabandi for the year 1969-70, Ext.P-4/Ext.D-1 his name came to be entered as co-owner in possession of the suit land alongwith his brothers Ghanu, Sauju and Devi Saran, the plaintiffs.

16. The present, therefore, is not a case where the entries showing deceased Matha being co-owner in possession are without any basis and rather on the basis of Girdawari entries which used to be placed before the revenue officer concerned and then given effect in the revenue record. The present, therefore, is not a case where it can be said that the entries showing deceased Matha as co-owner in possession of the suit land are without any basis. The subsequent entries in the Jamabandis for the years 1973-74, Ext.P-5/Ext.D-2, 1993-94, Ext.P-6/Ext.D-3, also substantiate the claim of the defendants. The red entries below remarks column of the Jamabandi for the year 1973- 74, Ext.P-5 further reveal that on the death of Matha, mutation No.591 of the suit land came to be

sanctioned and attested in favour of the present respondents/defendants. It is not the case of the plaintiffs that mutation No.591 was not sanctioned or attested in their presence. Therefore, on this score also, it lies ill to say that they were not in the knowledge of entries showing deceased Matha and his successors, the present respondents as co-owners in possession of the suit land. It was, therefore, well within the knowledge of the plaintiffs that Matha has also been recorded co-owner in possession of the suit land and after his death the suit land to the extent of the share of said Shri Matha was mutated in the names of the present respondents. It is, therefore, doubtful that the suit having been instituted on 20th September, 1995 is well within the period of limitation.

17. Now coming to the legal position, even if the question of limitation has not been raised in the written statement as a defence, the suit in case is time barred, can be dismissed. Support in this regard can be drawn from the ratio of the judgment rendered by a Division Bench of this Court in *M/s. Roshan Lal Kuthiala and another v. Raja Rana Yogendra Chandra and others*, 1995 (1) Sim.L.C. 2. The Apex Court has also held in *V.M. Salgaocar and Bros. v. Board of Trustees of Port of Mormugao and another*, (2005) 4 SCC 613 that it is the duty of the Court to dismiss a suit instituted after the period of limitation prescribed irrespective of the plea of limitation having not been set up as a defence.

18. The discussion hereinabove leads to the only conclusion that learned lower appellate Court has appreciated the evidence in its right perspective while reversing the judgment and decree passed by the trial Court and dismissing the suit. The issue of limitation has also been rightly taken up by learned lower appellate Court in view of the legal position discussed supra. The contentions to the contrary in the memorandum of appeal are neither factually nor legally sustainable. As a matter of fact in the given facts and circumstances and the evidence available on record, the plaintiffs can not claim themselves to be exclusive owners in possession of the suit land. One of the plaintiffs, Ghanu expired issueless. The surviving plaintiffs Sauju and Devi Saran alone cannot claim themselves to be his legal representatives. Matha and on his death the present respondents being real brother/nephews of said Shri Ghanu are also his legal representatives. On this score also, they would have become co-owners in the suit land. It being so, substantial questions of law No.1, 3 and 4 do not arise at all in the present appeal.

19. If coming to the substantial question of law No.2, it is no where the case of the plaintiffs that Registration Act was not applicable in that part of District Solan where the suit land is situated. No such issue, therefore, can be raised in the second appeal. Otherwise also, the suit land having been acquired by way of sale is not in controversy. The defendants have also not raised any such question in the written statement and rightly so because to question the sale would have been contrary to their stand also that they are co-owners in possession of the suit land. As a matter of fact this being not a point in issue, learned lower appellate Court has taken up the same at its own without there being any

pleadings in this regard brought on record by either side. This point cannot either be set up in issue nor any substantial question on this score arises for adjudication in the present appeal.

20. In view of what has been said hereinabove, I find no illegality or infirmity in the judgment and decree under challenge. The same, therefore, calls for no interference by this Court in the present appeal and rather deserves to be affirmed. The appeal is accordingly dismissed. No order as to costs.