

**SUPREME COURT OF INDIA**

Nasib Kaur

Vs.

Col. Surat Singh

C.A.No.1276 of 2013

(A.K.Patnaik and H.L.Gokhale JJ.)

12.02.2013

**JUDGMENT**

**A. K. PATNAIK, J.**

1. Leave granted.

2. These are the appeals against the common judgment dated 11.11.2009 of the High Court of Punjab and Haryana in R.S.A. Nos. 2579 of 1997 and 2482 of 2008 by way of special leave under Article 136 of the Constitution.

3. The facts very briefly are that Col. Surat Singh filed Civil Suit No. 735-T on 18.04.1987 for declaration that the plaintiff was the owner and was in possession of suit land. The plaintiff's case in the suit was that while he was in joint holding of some land, he sold 2 bighas and 16 biswas of land out of his share without specifying any khasra nos. to Col. Girdhar Singh and his family members (defendant nos. 1 to 4) and thereafter defendant nos. 1 to 4 sold the land in pieces to defendant nos. 5 to 8 in the suit specifying the khasra nos. and mutation nos. 1120 and 1174. As the plaintiff did not sell the land specifying the khasra nos. to Col. Girdhar Singh and his son, they had no right to sell specific pieces of land with specific khasra nos. The plaintiff's further case in the plaint was that the specific khasra nos. which had been mutated in favour of defendant nos. 3, 4 and 5 were not in accordance with the registered sale deed in favour of Col. Girdhar Singh and his family members. Defendant Nos. 1 to 4 did not contest the suit, whereas defendant Nos. 5 to 8 appeared and filed their written statements. On the pleadings of the parties, the trial court framed issues and by its judgment and decree dated 20.02.2004 found that the areas of land sold under the sale deed dated

17.07.1978 by the plaintiff was less by 1 Biswas than the area in the mutation entries and similarly the area of land sold by the plaintiff as Attorney of Nanak Singh was less than the area shown in the mutation entries. The trial court, therefore, ordered for correction of the mutation entries, but directed that the corrections to be carried out would have no effect as regards the possession of the suit property, which has to continue as before and would be liable to be changed as and when any partition proceeding is effected between the co-sharers. Col. Surat Singh filed an appeal C.A. No. 1721 on 20.03.2004 before the Additional District Judge, Patiala, but by judgment and decree dated 18.03.2008 the Additional District Judge, Patiala, dismissed the appeal.

4. Col. Surat Singh also filed Civil Suit No. 148-T on 09.03.1987 for permanent injunction restraining the defendants from raising any construction on the suit property or alienating the same in any manner whatsoever. The plaintiff's case in the suit was that he sold 2 bighas and 16 biswas of land out of the joint holding of his own share without specifying any khasra nos. to one Col. Girdhar Singh and his son on 17.07.1978 and Col. Girdhar Singh has thus become a co-sharer to the extent of 2 bighas and 16 biswas in his joint holding of the property. Col. Girdhar Singh, however, did not file any partition proceedings seeking partition of his share out of the joint holding. Thereafter, Col. Girdhar Singh sold the share to the extent of 2 bighas and 16 biswas of land to the defendants in February, 1987 and the defendants are now threatening to raise a new construction near the farm house of the plaintiff in a place of their choice on the plea that they had purchased the land without specific khasra nos. from Col. Girdhar Singh. The defendants contested the suit by filing a written statement and their plea in the written statement inter alia was that their predecessor-in-interest (Col. Girdhar Singh and his son) had purchased the suit property from the plaintiff and his uncle, Nanak Singh, vide sale deeds dated 17.07.1978 and 19.07.1979 and the plaintiff has himself delivered possession of the property purchased by their predecessor-in-interest without khasra nos. Their further plea in the written statement was that Col. Girdhar Singh had constructed his kothi and quarters and planted Eucalyptus trees on the suit property and the plaintiff has not raised any objection and the plaintiff was, therefore, estopped by his act and conduct from filing the suit. On the pleadings of the parties, the trial court framed issues and in its judgment and decree dated 18.08.1998 held that the plaintiff has sold 4 bighas and 16 biswas of land to Col. Girdhar Singh and others which is in possession of the defendants and hence the plaintiff was not entitled to injunction. Aggrieved, Col. Surat Singh filed an appeal C.A. No. 16-T/1989-90 before the learned District Judge, Patiala, but by judgment and decree dated 16.05.1997, the Additional District Judge, Patiala, dismissed the appeal.

5. Aggrieved by the judgments and decrees passed by the Additional District Judge, Patiala, dismissing the two civil appeals, the wife of the plaintiff, Smt. Dulari Singh, filed second appeals R.S.A. nos. 2579 of 1997 and 2482 of 2008 before the High Court and by the impugned common judgment, the High Court allowed the appeals and set aside the judgments and decrees of the trial court and the first appellate court in the two suits and decreed the suit of the plaintiff for possession qua land measuring 17 karams X 45 karams after declaring the plaintiff to be the owner of the said property. The High Court has also held that the plaintiff was entitled for relief of permanent injunction restraining the defendants from raising any construction in the said property or alienating the said property. Aggrieved, the defendants nos. 5 to 8 in Civil Suit No.735-T/18.04.1987 and the legal heirs of defendants nos. 1 and 2 and the other defendants in Civil Suit No. 148-T/09.03.1987 have filed these appeals.

6. Learned counsel appearing for the appellants submitted that in both the suits, the trial court recorded findings that the appellants had purchased the suit property from Col. Girdhar Singh and his family members to whom the plaintiff had himself delivered possession of the suit property in the years 1978 and 1979 at the time of execution of the two sale deeds and hence the appellants were in possession of the suit properties and the first appellate court had also concurred with those findings and dismissed the First Appeals of the respondents but the High Court reversed the judgments of the trial court and the first appellate court. He submitted that the High Court's jurisdiction under Section 100 of the Code of Civil Procedure, 1908, (for short the 'the CPC') was limited to only deciding substantial questions of law which arise in a case and in this case there was no substantial question of law which arose for decision and, therefore, the findings of the first appellate court affirming the findings of the trial court could not have been disturbed by the High Court.

7. Learned counsel for the respondents, on the other hand, submitted that this Court has held in *Ishwar Dass Jain vs Sohan Lal* [(2000) 1 SCC 434] that when material evidence is not considered, which if considered, would have led to an opposite conclusion, a substantial question of law arises for decision which the High Court can decide in a Second Appeal under Section 100 C.P.C. He submitted that the High Court had, therefore, framed a substantial question of law in the impugned judgment: whether the courts below have failed to consider the material evidence on record. He submitted that the core issue in this case is the very identity of the land sold by the plaintiff as Attorney of Nanak Singh and the trial court and the High Court had not addressed this core issue and hence a substantial question of

law had arisen for decision by the High Court. He relied on Achintya Kumar Saha vs. Nanee Printers and Others [(2004) 12 SCC 368] in support of this submission. He submitted that the High Court answered the aforesaid substantial question of law in favour of the respondents after considering the material evidence led in the suit. He submitted that the High Court found on the basis of the evidence that was adduced in the suit by the parties that Col. Surat Singh (plaintiff), as Attorney on behalf of Nanak Singh, had sold two bighas of land with regard to specific khasra nos. i.e. 167 min (1-10) and 166 min (0-10) by sale deed Ex.PW-7/2 and the appellants by virtue of the sale deed in their favour took possession of the portion marked EHGF in the site plan Ex.PW-9/A whereas the portion sold was in the western side of portion marked ABCD as the said portion was owned by Nanak Singh. He submitted that the High Court has held in the impugned judgment that the portion on the eastern side, i.e., marked with letters EHGF belongs to the plaintiff Col. Surat Singh and has accordingly declared that the land measuring 17 karams X 45 karams as depicted with letters EHGF in site plan Ex.PW-9/A was owned by plaintiff Col. Surat Singh and the plaintiff was entitled to the relief of permanent injunction restraining the defendant from raising any construction in the aforesaid suit property or alienating the aforesaid suit property.

8. We find that in Civil Suit No. 735-T/18.04.1987, plaintiff Col. Surat Singh had prayed for declaration, injunction and possession and the suit was partly decreed for correction of some mutation entries but the trial court clearly held that it would in no manner have any effect upon the possession of the parties to the suit which may be determined and finalized as and when partition proceedings are taken up and decided. Against the decree of the trial court, the plaintiff filed first appeal C.A. No. 1721 on 20.03.2004 and the Additional District Judge held by its judgment and decree dated 18.03.2008 that the trial court is right in coming to the conclusion that plaintiff had not produced cogent evidence that he was the owner of the suit property. Relevant extract from para 29 of the judgment of the first appellate court which records the aforesaid findings and discusses the evidence in support of the finding is quoted hereinbelow:

“It was incumbent upon the plaintiff to produce on record, the revenue record relating to the suit property, so as to ascertain the share of the plaintiff, as alleged by him. The perusal of jamabandi Ex.PW-4/1 for the year 1978-79; jamabandi Ex.PW-7/V for the year 1978-79; jamabandi Ex.PW-4/1 show that these pertain only to land measuring 29 bighas 5 biswas, which is recorded to be the ownership of Col. Surat Singh and other co sharers and in possession of one Baghel Singh. Jamabandi Ex.DW7/V pertains to land measuring 29 bighas 5 biswas + 9 bighas 12

biswas + 0-4 biswas which is recorded to be the ownership of Col. Surat Singh and other co-sharers and only land measuring 9 bighas 12 biswas comprised in khasra No.165(3-1), 166(3-0), 167(1-16) and 168(1-15) is recorded in exclusive possession of Col. Surat Singh. The trial court has rightly held that other than the said revenue record no jamabandi of the suit land has been produced by the plaintiff. It has further rightly held that as per sanad takseem Ex.PW7/A the land has been partitioned between different co-sharers, which is mentioned as 72 bighas 8 biswas of which 15 bighas 12 biswas fell to the share of Col. Surat Singh. But even when the plaintiff has filed the present suit for declaring his to be owner in possession of the suit property, he did not bring forth on file any revenue record pertaining to the suit property except jamabandies Ex.PW4/1 and Ex.PW7/V pertaining to the year 1978-79 which are incomplete and do not depict the entire property of Col. Surat Singh as a co-sharer along with other co-sharers. Trial court has rightly held that extent of ownership and possession of the plaintiff as alleged by him was to be proved by him, by bringing on record documents from which he drew his title over the suit property. But no revenue record in the form of jamabandi has been produced on record, so as to prove the extent of ownership and possession of the plaintiff, so in the absence of any documentary proof regarding ownership of the suit property and the revenue record produced by the plaintiff being incomplete and relating to the year 1978-79, whereas the present suit was filed in 1987, copy of the sanad Takseem Ex.PW7/A depicting the share of Col. Surat Singh, are not sufficient to establish the extent of the property of which Col. Surat Singh was the owner. Though, Sanad Takseem Ex.PW7/A was prepared on 30.8.92, but no revenue record after the preparation of the sanad takseem has been produced, so as to prove that the possession has been delivered and partition had been duly acted upon.”

9. We find that in Civil Suit No. 148-T/9-3-1987, the plaintiff Col. Surat Singh had prayed for permanent injunction restraining the defendant from raising any construction or alienating in any manner whatsoever on the suit property and on the basis of the pleadings of the parties one of the issues framed was whether the defendants are owners and are in possession of the property purchased by them from Col. Girdhar Singh and others but by order dated 08.08.1990 the trial court deleted this issue and finally by judgment dated 08.08.1990 dismissed the suit. The plaintiff thereafter filed Civil Appeal No.16 on 19.09.1990 and contended before the Additional District Judge inter alia that the trial court was not right in deleting Issue No.2 by order dated 08.08.1990 at the stage when the parties had already led their evidence on that issue and the decision on this issue was necessary for

deciding the suit itself but the Additional District Judge rejected this contention of the plaintiff with the following reasons:

“The simple prayer of the plaintiff made in the suit is that the defendants be restrained from raising construction over the suit land, or alienating the same. He has admitted in his plaint and replication that the predecessor-in-interest of the defendants; namely, Girdhar Singh, purchased the land from him and Nanak Singh, while the same was still joint. Naturally the defendants will become co-sharers in the land after purchasing the same from Girdhar Singh, as they would step into his shoes. In these circumstances, there was no necessity for framing an issue that the defendants are the owners of the suit land.”

10. The aforesaid discussion of the findings of the first appellate court in the two cases shows that in the suit for declaration of title, the plaintiff had not been able to produce any evidence to prove his ownership over and possession over the suit land. Moreover, in the suit for injunction, the first appellate court had held that the plaintiff had admitted in plaint that Col. Girdhar Singh, the predecessor-in-interest of the defendants, had purchased the land from him and Nanak Singh while the same was joint and hence there was no necessity for framing the issue (issue No.2) that the defendants are owners and are in possession of the suit land. We find on a reading of the sale deed dated 17.07.1978 (Ex.PW7/1) executed by the plaintiff that possession of land measuring 2 bighas 16 biswas out of the share of the plaintiff was handed over to Col. Girdhar Singh and his family members and it is not in dispute that Col. Girdhar Singh and his family members thereafter sold this land to the appellants. We also find on a reading of the sale deed dated 19.07.1979 (Ex.PW7/2) executed by the plaintiff as Attorney of Nanak Singh that the possession of the land measuring 2 bighas out of the share of Nanak Singh was also given to Col. Girdhar Singh and his family members and it is not in dispute that Col. Girdhar Singh and his family members thereafter sold this land to the appellants in 1987. Thus, the appellants were in lawful possession of the said areas of land by virtue of the two sale deeds and the plaintiff had not been able to establish that he was the owner of the suit land and consequently he is entitled to declaration of his title, recovery of possession and injunction.

11. The plaintiff, however, contended in the second appeal before the High Court that material evidence had not been taken into consideration by the first appellate court and the High Court has framed the following substantial question of law:

“Whether the Courts below have failed to consider the material evidence on record?”

Having framed the substantial question of law, the High Court should have pointed out in the impugned judgment the material evidence which had not been considered by the first appellate court, which if considered, would have established ownership of the plaintiff to the suit property. Instead of pointing out the material evidence which has not been considered by the first appellate court, the High court has made its own assessment of the entire evidence as if it was the first appellate court and held that the plaintiff was the owner of the suit property and was entitled to possession of 17 karams X 45 karams of land depicted in letters EHGF in the site plan Ex.PW-9/A and that he was also entitled to the relief of permanent injunction restraining the plaintiff from raising any construction in the said property or alienating the said property. The High Court has itself noticed in the impugned judgment that the land depicted in the site plan Ex.PW-9/A as EHGF was delivered to Col. Girdhar Singh and his family members at the time of execution of the sale deed by the plaintiff as Attorney of Nanak Singh on 19.07.1979 and the appellants had taken possession of the aforesaid land from Col. Girdhar Singh and his family members in 1987. The appellants were, thus, in legal possession of the suit property and the High Court in exercise of its powers under Section 100 CPC could not have reversed the findings of the trial court and the first appellate court and decreed the suits for declaration of title and for recovery of possession and injunction in favour of the respondents so as to adversely affect such legal possession of the appellants.

12. In *Achintya Kumar Saha vs. Nanee Printers and Others* (supra) cited by learned counsel for the respondents, this Court found that the main issue around which the entire case revolved was whether the agreement dated 05.07.1976 was a licence or a tenancy and though this issue was before the trial court and the agreement was held to be a licence, the lower appellate court had not adjudicated upon this issue and this Court held that when the core issue is not adjudicated upon, it raises a substantial question of law under section 100 CPC. In the present case, the core issue was whether the plaintiff was the owner of the suit property and the first appellate court has held in C.A. No. 1721 on 20.03.2004 that the plaintiff has not been able to prove his ownership over the suit property and has further held in C.A. No.16-T filed on 19.09.1990 that the plaintiff's own admitted case in the plaint is that the appellants had purchased the suit property from Col. Girdhar Singh and his family members and were in possession of the same and hence the plaintiff was not entitled to declaration of his title, recovery of possession and injunction. In this

case, therefore, the first appellate court had decided the core issue against the plaintiff and no substantial question of law arose for decision in this case by the High Court under Section 100, CPC.

13. In the result, these appeals are allowed and the impugned common judgment and decree of the High Court is set aside. Considering, however, the peculiar facts and circumstances of the case, the parties shall bear their own costs.