

**(2011) 07 P&H CK 0029**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Regular Second Appeal No"s. 4519 of 2009 with Regular Second Appeal No. 3050 of 2007

Madan Pal Singh

APPELLANT

Vs

Ashok Kumar and others

RESPONDENT

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**Date of Decision:** July 26, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 1 Rule 8, Order 1 Rule 8(4), Order 23 Rule 3, Order 9 Rule 8

**Citation:** (2011) 164 PLR 105

**Hon'ble Judges:** Mehinder Singh Sullar, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

Mehinder Singh Sullar, J.

As identical factual matrix is involved, therefore, I propose to dispose of above indicated two appeals, by virtue

of this common judgment, in order to avoid the repetition. Moreover, since the Courts below duly recapitulated and described the compendium of

the pleadings and evidence brought on record by the parties in detail, so, there appears to be no necessity to again reproduce and repeat the same

in the instant regular second appeals. However, the facts have been extracted from RSA No.4519 of 2009 titled as Madan Pal Singh v. Ashok

Kumar and others, for ready reference in this context.

2. The crux of the facts, culminating in the commencement, relevant for deciding the present appeals and emanating from the record, is that Dhian

Singh son of Parwara (since deceased), now being represented by his LRs contesting respondents No.1 to 5 (for brevity the original plaintiff) filed

the suit for himself and in a representative capacity on behalf of all other co-mortgagors, under Order 1 Rule 8 CPC and sought a decree for

declaration to the effect that the collusive judgment and decree dated 18.7.1992 (Ex.P7) passed in civil suit bearing No.71 of 1992 titled as Om

Parkash etc. v. Telu etc. by the Sub Judge, Ist Class, Kaithal, are illegal, null, void and not binding on their rights. The original plaintiff and other

co-mortgagors continued to be its owners and the impugned decree does not clothe the defendant Nos.1 to 38 with its ownership, with a

consequential relief of permanent injunction, restraining them (Om Parkash etc. respondent-defendant Nos.1 to 38) (for short the ""contesting

defendants"" ) from alienating the suit land in any manner.

3. The case set up by the original plaintiff, in brief in so far as relevant, was that he alongwith other co-mortgagors (defendant Nos.39 & 40) and

other cosharers are the owners of big chunk of the land, including the land in dispute. Their predecessors-in-in-terest were stated to have

mortgaged the suit land in favour of predecessors-in-interest of the contesting defendants. It was claimed that defendant Nos.1 to 35 earlier filed

civil suit bearing No. 1264 of 1990 titled as Janak Singh etc. v. Telu in the Court of Civil Judge, Kaithal, seeking the relief of declaration to the

effect that the plaintiffs were mortgagees with possession of the land in question, which had not been redeemed within the prescribed period of 30

years and as such, they had become its owners and in possession, by way of prescription, in a representative capacity, without complying with the

mandatory provisions of Order 1 Rule 8 CPC. As soon as, the plaintiffs and other similarly situated persons came to know about the pendency of

the suit secretly filed by the contesting defendants, they moved an application for impleading them as parties in that suit as their interest had not

been watched properly by Telu. In that eventuality, the contesting defendants got the earlier suit filed by Janak Singh etc. dismissed under Order 9

Rule 8 CPC, by virtue of order dated 28.11.1991 (Ex.P6), which had attained the finality.

4. The case of the original plaintiff further proceeds that instead of restoring the earlier suit, the contesting defendant Nos.1 to 38 again filed another civil suit bearing No.71 of 1992 (Ex.P2) for the same relief and illegally and secretly obtained the collusive decree (Ex.P7) in their favour in the absence of the plaintiffs and without complying with the mandatory provisions of Order 1 Rule 8 CPC. Thereafter, the contesting defendants started claiming their ownership right qua the suit land. They (plaintiffs) asked them to admit their claim, but in vain, which necessitated them to file the suit challenging the decree (Ex.P7) on various grounds depicted in the plaint, being illegal, null, void and non est etc.

5. The defendants contested the suit and filed the written statement, inter-alia pleading certain preliminary objections of, maintainability of the suit; estoppel, misjoinder and nonjoinder of necessary parties, cause of action and locus standi of the plaintiffs. According to the contesting defendants that the decree (Ex.P7) was legally passed and binding on the plaintiffs. In this manner, they claimed that their mortgagee rights have already matured into ownership by way of prescription. It will not be out of place to mention here that the contesting defendants have stoutly denied all other allegations contained in the plaint and prayed for dismissal of the suit.

6. In the wake of pleadings of the parties, the trial Court framed the following issues for adjudication of the case:-

1. Whether the plaintiff alongwith defendant no.39 and 40 and other persons, is co-sharer/co-owner in the suit land? OPP
2. Whether the suit No.1264/90 was dismissed under order 9 rule 8 CPC? If so, to what effect? OPP
3. Whether the civil court decree in Civil Suit No.71/1992 passed by the court of Ms.Navita Singh, the then S.J.I.C, Kaithal is null & void, nonest as alleged in para no.11 of the plaint? OPP
4. Whether the suit is time barred? OPD
5. Whether the suit filed against the dead person. If so, to what effect? OPD
6. Whether the plaintiff is estopped from filing the present suit? OPD
7. Relief.

7. In order to substantiate their respective pleaded stands, the parties to the lis, produced on record the oral as well as documentary evidence.

8. The trial Court decreed the suit of the plaintiffs, by means of impugned judgment and decree dated 17.8.2004, the operative part of which is

(para 31) as under:-

As a sequel to my above discussion, this suit is partly decreed with costs and a decree of declaration is passed in favour of the plaintiff and against

the defendants to the effect that the Judgment and decree dated 18.7.1992 passed in Civil Suit No.71 of 1992 titled as 1 Om Parkash etc. v. Telu

etc., passed by the court of Ms. Navita Singh, the then Sub Judge, Ist Class, Kaithal, is illegal, null and void and is not binding on the rights of the

plaintiff and or on the rights of other mortgagors, nor the same clothe defendants No.1 to 38 with the ownership rights qua the suit land.

Furthermore, a decree of permanent injunction is also passed in favour of the plaintiff and against defendants No.1 to 38 and these defendants are

restrained from alienating the suit land to anybody on the basis of impugned Judgment and decree dated 18.7.1992. However, the remaining relief

as sought for by the plaintiff, is declined. Decree-sheet be prepared accordingly. All the un-exhibited documents placed on the file, be returned

back to the parties concerned as per rules against proper receipt after placing the photostat copies of the same on the file. File after due

compliance be consigned to record-room.

9. Aggrieved by the decision of the trial Court, Madan Pal Singh, one of the contesting defendants, filed the appeal, which was dismissed as well,

by the Ist Appellate Court, by way of impugned judgment and decree dated 9.3.2007.

10. The appellant-defendant Madan Pal Singh still did not feel satisfied with the impugned judgments and the decrees of the Courts below and filed

the present regular second appeal bearing No.4519 of 2009. Although appellant Om Parkash son of Thath Singh (defendant No.36) did not file

any first appeal challenging the decision of the trial Court, but still, he filed the regular second appeal bearing No.3050 of 2007 in this Court. That

is how I am seized of the matter.

11. Having heard the learned counsel for the parties, having gone through the record with their valuable help and after bestowal of thoughts over the entire matter, to my mind, there is no merit in the instant appeals in this context.

12. As is evident from the record that civil suit bearing No.1264 of 1990 (Ex.P1) filed by Janak Singh etc. against Telu, was dismissed under Order 9 Rule 8 CPC, by means of order dated 28.11.1991 (Ex.P6). Janak Singh plaintiff therein, neither filed any application for restoration of the suit, nor filed any appeal in the higher Court. That means, the order (Ex.P6) of dismissal of earlier suit had already attained the finality. Instead of reviving the earlier suit, the contesting defendants concealed the factum of dismissal of previous suit and filed another civil suit bearing No.71 of 1992 (Ex.P2) regarding the same subject matter, which was legally barred under Order 9 Rule 9 CPC and obtained the collusive decree dated 18.7.1992 (Ex.P7) by playing fraud on the Court.

13. Not only that, a perusal of the written statement (Ex.P3) filed by defendant Telu in civil suit bearing No.1264 of 1990 (Ex.P1) would reveal that he had not contested the suit and had filed a vague written statement. Ex.P9 is the statement of Telu, which would suggest that later on compromise was effected between the parties therein and Telu had consented to pass the decree, as per compromise (Ex.C1), although he was not competent to compromise the matter on behalf of all the co-owners. Thus, his admission, without any authority or power, was meaning less and not binding on all other co-owners.

14. This is not the end of the matter. In civil suit bearing No.71 of 1992 (Ex.P2), Telu defendant therein had filed an admitted written statement (Ex.P3) and the decree (Ex.P7) had been passed on the basis of his admission. As he was not empowered/authorized to admit the claim of the plaintiffs in the earlier suit on behalf of all the co-owners, therefore, the decree (Ex.P7) passed on illegal admission, would not bind the other co-owners.

15. In this manner, to me, suppression of material facts of dismissal of earlier suit under Order 9 Rule 8 CPC, which legally bars the 2nd suit under

Order 9 Rule 9 CPC, vague admission of Telu, without any authority or power and for want of proper permission under Order 1 Rule 8 CPC, is

meaningless and would amount to a fraud with the court and the civil court is competent to declare such collusive decrees as illegal, which have

been obtained by committing the fraud on the Court. This matter is not res Integra and now is well settled.

16. An identical question came to be decided by the Hon"ble Apex Court in case titled as Sukhnandan Singh etc. v. Jamiat Singh and others, 1971

P.L.J. 278, and it was held as under:-

Collusion in judicial proceedings is normally associated with secret arrangement between two persons that the one should institute a suit against the

other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding the claim put forward is fictitious, the

contest feigned or unreal and the final adjudication a mask, designed to give false appearance of a genuine judicial determination, and this is

generally done with the object of confounding third parties. In such a proceeding the contest is a mere sham. Even in the wider sense the word

collusion suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some

improper purpose.

17. Again, reiterating the concept of fraud, the Hon"ble Supreme Court in case A.V. Papayya Sastry and Others Vs. Government of A.P. and

Others, , has ruled that fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by

taking undue advantage of another. In fraud, one gains at the loss of another. Even the most solemn proceedings stand vitiated if they are actuated

by fraud. Fraud is thus an extrinsic collateral act, which vitiates all judicial acts, whether in rem or in personam. It was further held that any

judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eyes of the law. Such a

judgment, decree or order by the first court or by the final court has to be treated as nullity by every court, superior or inferior. It can be challenged

in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

18. Therefore, the contrary arguments of the learned counsel for the appellants that the indicated collusive decree (Ex.P7) is legal and binding,

stricto sensu deserve to be and are hereby repelled under the present set of circumstances, as the law laid down by the Hon"ble Apex Court in

Sukhnandan Singh and A.V. Papayya Sastry's cases (supra), mutatis mutandis is applicable to the facts of the present case and is the complete

answer to the problem in hand. Hence, keeping the law laid down by the Hon"ble Supreme Court into focus, to my mind, the trial Court has rightly

decreed the suit of the plaintiffs in this relevant connection.

19. Sequelly, the decision of the trial Court was upheld by the Ist appellate Court, by virtue of impugned judgment dated 9.3.2007, the operative

part of which is (para 9) as under:-

It is not disputed that the predecessors of the present plaintiffs had mortgaged the suit land to the predecessors of defendants. The said land was

not redeemed. The mortgagees claiming title by prescription filed a civil suit No. 1264 of 1990 against Telu, for himself, and as representative of

other mortgagors, under Order 1 Rule 8 CPC. Copy of the plaint and written statement are Ex.P1 and Ex.P3. In that suit an application under

Order 1 Rule 10 CPC was filed on 3.4.1991 by plaintiff and other owners that Telu was colluding with plaintiffs and so they be impleaded as

defendants. Copy of the same has been proved as Ex.P.4. That suit was dismissed on 28.11.1991 under Order 9 Rule 8 CPC vide order Ex.P.6.

Thereafter a fresh civil suit was filed on 14.3.1992 by the said mortgagors again, against Telu, for himself, and as representative of mortgagors,

under Order 1 Rule 8 CPC. Copy of the plaint of second suit is Ex.P.2. The present plaintiffs and other owners were again not impleaded as

defendants. The said Telu, who was supposed to represent all the owners of the land, filed an admission written statement Ex.P.5. He also made a

statement in the court on 22.12.1990 Ex.P9 to the effect that a compromise had been effected between the parties vide written compromise

Ex.C.1 and he had no objection if the suit of plaintiffs was decreed. Consequently, the suit of plaintiffs was decreed vide order dated 18.7.1992

(Ex.D.21). The plaintiffs of that suit were declared as owners in possession of the suit land measuring 106 Kanals 7 Marias.

For suits filed in representative capacity Under Order 1 Rule 8, sub clause (4) reads as follows:-

No part of the claim in any such suit shall be abandoned under subrule (1) and no such suit shall be withdrawn under sub-rule (3) of rule 1 of

Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has

given, at the plaintiff's expense, notice to all persons so interested in the manner specific in sub-rule (2) Order 23 Rule 3(b) reads as follows:-

(1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded in the

proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.

(2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

The impugned order Ex.D21 nowhere states that any such permission was granted by the court as required by the provisions of Order 23 Rule

3(b) or that the court had given any notice to the defendants as required under Order 1 Rule 8(4) and Order 23 Rule 3(b)(ii). The defendants have not produced any such orders on the file.

It is clear from the above that the impugned decree dated 18.7.1992 was contrary to the aforesaid statutory provisions and hence it was void. It is

also clear from the aforesaid discussion that the said decree had been obtained by playing a fraud on the court and the mortgagors. So the said

decree was rightly declared as illegal, null and void by the trial court.

20. Meaning thereby, the Courts below have taken into consideration and appreciated the entire relevant evidence brought on record by the

parties in the right perspective. Having scanned the admissible evidence in relation to the pleadings of the parties, both the courts below have

recorded the above-mentioned concurrent findings of fact. Such pure concurrent findings of fact based on the appraisal of evidence, cannot

possibly be interfered with by this Court, while exercising the powers conferred u/s 100 CPC, unless and until, the same are illegal and perverse.



No such pater(sic)t illegality or legal infirmity has been pointed out by the learned counsel for the appellants, so as to take a contrary view, than

that of well reasoned decision already arrived at by the Courts below, in this behalf.

21. No other meaningful argument has been raised by the learned counsel for the appellants to assail the findings of the Courts below in this regard.

All other arguments, relatable to the appreciation of evidence, now sought to be urged on behalf of the appellants, in this relevant direction, have

already been duly considered and dealt with by the Courts below.

22. Similarly, the entire matter revolves around the re-appreciation and re-appraisal of the evidence on record, which is not legally permissible and

is beyond the scope of second appeal. Since no question of law, muchless substantial, is involved, so, no interference is warranted, in the impugned

judgments/decrees of the Courts below, in view of the law laid down by Hon"ble Apex Court in case Kashmir Singh Vs. Harnam Singh and

Another, in the obtaining circumstances of the present case.

23. No other legal point, worth consideration, has either been urged or pressed by the learned counsel for the parties.

24. In the light of aforementioned reasons, as there is no merit, therefore, the instant appeals are hereby dismissed as such.