

(1996) 09 P&H CK 0011

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1559 of 1984

Salwant Singh and Others

APPELLANT

Vs

Surinder Singh and Others

RESPONDENT

Date of Decision: Sept. 19, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9, Order 9 Rule 9, 11

Citation: (1997) Supp CivCC 363 : (1997) 3 CivCC 363 : (1997) 115 PLR 160 : (1997) 2 RCR(Civil) 170

Hon'ble Judges: R.L. Anand, J

Bench: Single Bench

Advocate: R.S. Bindra, for the Appellant; M.L. Sarin and Rahul Rathore, for the Respondent

Final Decision: Dismissed

Judgement

R.L. Anand, J.

Salwant Singh, defendant No. 1 Darshan Singh & Harpreet Singh defendants 2 and 3 in the trial Court, have filed the present regular second appeal, which has been directed against the judgment and decree dated 26.4.1984 passed by the Court of Additional District Judge, Faridkot, who affirmed the judgment and decree dated 20.9.1979 passed by the Court of Sub Judge Ist Class, Muktsar who decreed the suit of the plaintiffs-respondents, namely, Surinder Singh, Jagdish Singh, Surjit Kaur, Gurdev Singh and Maharaja Singh, who are sons and daughter of Sulakhan Singh deceased.

2. The pleadings of the parties can be summarised in the following manner:-

3. Land measuring 15 Bighas and 18 Biswas, as detailed in the head note of the plaint, was owned by Sulakhan Singh son of Jhanda Singh. He was originally the resident of village Hudiara (Now in Pakistan). He shifted to Burma. After the partition of the country, the land was allotted to him at village Saunke, Tehsil

Muktsar and during consolidation proceedings the land measuring 134 kanals 16 Maria was allotted to him. Sulakhan Singh died on 26.8.1971, leaving behind the plaintiffs, defendant No. 7 Smt. Amrit Kaur, his widow and defendants Nos. 8 to 10, namely, Hardev Singh, Sukhdev Kaur and Gurcharan Kaur, who are also the son and daughters of Sulakhan Singh deceased. The plaintiffs along with defendants Nos. 7 to 10 succeeded to the property of Sulakhan Singh as his heirs. According to the plaintiffs, defendants Nos. 1 to 4 were in unlawful possession of the land in dispute. Defendants Nos. 1 to 3, namely, Salwant Singh, Darshan Singh and Harpreet Singh, alleged that they purchased the property from defendant No. 5 Bahal Singh through defendant No. 6 Sham Singh, who was the attorney of defendant No. 5. The land is alleged to have been purchased by defendants Nos. 1 to 4 on 22.11.1968. The plaintiffs alleged that Bahal Singh defendant No. 5 has no right to alienate the property of Sulakhan Singh. Defendant No. 4 Gurdit Singh also asserted that he had got some land in exchange from defendant No. 1 Salwant Singh. The said exchange is neither admitted by the plaintiffs nor they are bound by the same. The plaintiffs alleged that according to defendants Nos. 1 to 4, earlier Sulakhan Singh during his life time brought a suit bearing No. 1195 of 1970 in the Court of Sub Judge, Muktsar, and the said suit was dismissed in default on 18.10.1971. Defendants Nos. 1 to 4 also alleged that the legal representatives of Sulakhan Singh filed an application for restoration of the suit and the same was also dismissed on 21.5.1973. The plaintiffs are not bound by the proceedings alleged to have been initiated by Hardev Singh, defendant No. 8, because the plaintiffs were minor at that time and if any negligence has been committed by Hardev Singh, their brother, in the prosecution of those proceedings, it is not binding upon them.

4. Notice of the suit was given to the defendants!. Joint written statement was filed by defendants Nos. 1, 2, 4 and 5, and they took the objection that the plaintiffs had no locus standi to file the suit; that the suit was not within time; that the suit was barred by the principles of res judicata. According to these defendants, Sulakhan Singh died in Pakistan and that the plaintiffs are not the heirs of Sulakhan Singh. After the death of Sulakhan Singh the property was inherited by Bahal Singh defendant No. 5, who had sold the same vide sale deed dated 22.11.1968 to defendants Nos. 1 to 2 for a consideration of Rs. 25,000/-. These defendants are in possession of the land since then. The land was purchased for consideration and they are the bona fide purchasers. Defendant No. 3 filed a separate written statement but his stand was common with that of his co-defendants Nos. 1, 2, 4 and 5.

5. From the pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether Sulakhan Singh deceased was the owner of the suit property? OPP.
2. Whether Sulakhan Singh died on 26.8.1971? OPP.

3. Whether the plaintiffs are the heirs of said Sulakhan Singh? OPP.
4. Whether the suit is within limitation? OPP.
5. Whether the plaintiffs have no cause of action? OPD.
6. Whether the present suit is barred by the principle of res judicata? OPD.
7. Whether the defendants Nos. 1 and 2 are the bona fide purchasers for value of the suit property as alleged in para 1 of the written statement? OPD.
8. What is the effect of the judgments dated 18.10.1971 and 21.5.1973 on the present suit? OP Parties
9. Relief.

The parties led oral and documentary evidence in support of their case. On the conclusion of the trial, it was held by the trial Court that Sulakhan Singh deceased was the owner of the property in dispute and that he died on 26.8.1971, as alleged by the plaintiffs and not in Pakistan as stated by the contesting defendants. Issue No. 3 was also decided in favour of the plaintiffs and they were held to be the heirs of Sulakhan Singh, along with defendants Nos. 7, 8, 9 and 10. Issue No. 4 was decided in favour of the plaintiffs and against the contesting defendants and it was held that the present suit, which was filed on 14.9.1976 was-within limitation. Issues Nos. 5, 6, 7 and 8 were decided against the defendants by the trial Court holding that the present suit is not barred by the principles of res judicata; that defendants Nos. 1 and 2 are not the bona fide purchasers; that the judgment dated 18.10.1971 and the order dated 21.5.1973 have no effect on the present suit and finally the suit was decreed as prayed for.

6. Aggrieved by the judgment and decree of the trial Court, the contesting defendants filed the first appeal in the Court of Additional District Judge, Faridkot, who vide the impugned judgment and decree dated 26.4.1984 dismissed the appeal. Still aggrieved by the judgments and decrees of the Courts below, the present appeal is by Salwant Singh, Darshan Singh and Harpreet Singh, defendants Nos. 1 to 3.

7. I have heard Shri R.S. Bindra, Senior Advocate, with Shri Rajive Bhalla, Advocate, appearing on behalf of the appellants, and Shri M.L. Sarin, Senior Advocate, with Mr. Hemant Sarin, Advocate and Mr. Rahul Rathore, Advocate appearing on behalf of the respondents, and with their assistance have gone through the record of this case. Before me the learned counsel for the appellants has assailed the findings of the courts below on issues Nos. 4, 7 and 8 only and I shall confine my discussion on these issues.

8. It was submitted by the learned counsel for the appellants that the present suit of the plaintiffs was barred by limitation. Mr. Bindra submitted that mutation on the death of Sulakhan Singh was entered in the revenue record in the year 1963 in the

name of Bahal Singh, when it was objected to by one Pritam Singh. The mutation was ultimately sanctioned in favour of Bahal Singh in 1967. Exhibit D2 shows that mutation was entered in the year 1963 itself. This argument is without any merit. It is not established on the record that the present plaintiffs, who are the L.Rs. of Sulakhan Singh, were ever present at the time of the entering of the mutation in the year 1963 or at the time of sanctioning of the mutation in the year 1967. The plaintiffs could not know that Bahal Singh was claiming adversely to the interest of their father Sulakhan Singh or against their interest. I have already stated that it has been proved on the record that Sulakhan Singh died on 26.8.1971 and not before the partition of the country. The present suit has been filed by the plaintiffs on the basis of their title after the death of Sulakhan Singh against the trespassers, who have no right in the land in dispute through Bahal Singh as he never became the owner of the property in dispute on the basis of wrongful mutation. The original owner of the property can successfully file a suit within 12 years of the limitation from the date when the possession of the adversary becomes adverse. In this view of the matter, I affirm the findings of the Courts below when they have held that the present suit of the plaintiffs was within limitation.

9. Learned counsel Shri Bindra then submitted that the present suit of the plaintiffs is barred under the provisions of Order 22 Rule 9, C.P.C., because earlier during his life time Sulakhan Singh filed Civil Suit No. 1195 of 1970 for possession and it was dismissed in default for prosecution on 18.10.1971. Some of the legal representatives of Sulakhan Singh filed application for the restoration of the suit and this application was dismissed on 21.5.1973. With the death of Sulakhan Singh and with the non-restoration of suit No. 1195 the said suit had abated and the present plaintiffs, who are the successors/some of the L.Rs. of said Sulakhan Singh, therefore, were precluded from filing the present suit. Order 22 Rule 9, C.P.C., lays down that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. The submission raised by the learned counsel Shri Bindra may look alluring at the first instance with the help of the document (Exhibit D3) - a certified copy of the order dated 21.5.1973 - but on deeper scrutiny I have come to this conclusion that this argument is totally devoid of any merit. Before Shri Bindra could succeed on his argument, he will have to establish that the cause of action of the present suit was the same which was the subject-matter of suit No. 1195 of 1970, which was dismissed in default. In order to appreciate this aspect it was incumbent upon the clients of Mr. Bindra to produce on record the copies of the pleadings, i.e., the plaint, written statement and replication of suit No. 1195 of 1970, the issues and the judgment dated 18.10.1971. None of these documents has been placed on record, so as to know whether the earlier suit filed by Sulakhan Singh during his life time was based on the same cause of action, as now claimed by the present plaintiffs. In the absence of any pleadings it cannot be said that the present suit is barred under Order 22 Rule 9, C.P.C. or under Order 9 Rule 9, C.P.C. or under the principles of res judicata. As I have just said that Exhibit

D3 is the certified copy of the order dated 21.5.1973, a reading of it would show that the application for restoration of the suit dismissed in default, was dismissed mainly on the ground of limitation. It may be mentioned here that in the said application the defendant-appellant Salwant Singh took the stand that Sulakhan Singh died in Pakistan and not on 26.8.1971, as alleged by the applicants and this plea was rejected. It was also held that the applicants, who moved the application for the restoration of the suit, were the legal representatives of deceased Sulakhan Singh. Learned counsel for the appellants has not been able to show any documentary evidence or even the oral evidence to establish that suit No. 1195 instituted on 16.11.1970 by Sulakhan Singh was a suit for possession based on the present cause of action. It cannot be lost sight of the fact that the said application for the restoration of the suit was moved by some of the legal representatives of Sulakhan Singh and the present plaintiffs were not party in those proceedings. Even if it is assumed for the sake of argument that the action earlier taken by some of the legal representative of Sulakhan Singh for the restoration of the suit will remain binding upon the present plaintiffs, still it has to be established by the defendants-appellants that "he present suit is based on the same cause of action as required under Order 22 Rule 9, C.P.C. Even the defendant Salwant Singh, when appeared in the witness-box, nowhere states that the earlier suit of Sulakhan Singh was of possession and he challenged the wrong mutation in the name of Bahal Singh or that he challenged the sale deeds in favour of defendants Nos. 1 and 2, allegedly executed by Bahal Singh through his attorney Shri Sham Singh. Not an iota of suggestion was even put to the witnesses of the plaintiffs that earlier their father Sulakhan Singh filed a similar suit. This point has been dealt elaborately by the Courts below holding that there is no effect on the present suit of the earlier orders dated 18.10.1971 and 21.5.1973. Resultantly, I affirm the findings of the Courts below on issue on 8.

10. Last contention which was raised by the learned counsel for the appellants was when he assailed the findings of the Courts below on issue No. 7 Mr. Bindra submitted that it is proved on the record that his clients are the bona fide purchasers for value and the decree for possession in favour of the plaintiffs cannot be granted and that the interest of his clients has to be protected. The argument is again devoid of any merit because before the trial Court it was conceded by the clients of Mr. Bindra that they were not the bona fide purchasers for consideration and it will be useful for me in this regard to quote the observations of the trial Court, which are contained in para No. 12 of the judgment:-

".... There is no plea of adverse possession in this case as the defendants have claimed themselves to be bona fide purchasers for value (regarding which, significantly enough, no argument was advanced)." The trial Court further observed in para No. 13 of the judgment as follows:-

"13. As already mentioned, the learned counsel for the defendants seem to have shown much grace by not advancing any argument in support of the proposition contained in issue No. 7 to the effect that defendants No. 1 and 2 are the bona fide purchasers for value of the suit property because obviously a person without title could pass on no right to a third party.

A faint attempt was made by the clients of Shri Bindra to convince the first appellate Court that they were the bona fide purchasers for value and their case falls u/s 41 of the Transfer of Property Act. In order to invoke the provisions of this Section it is necessary for the transferee to prove:

- (i) Ostensible ownership of the transferor,
- (ii) Express or implied consent of the real owner.
- (iii) Payment of consideration by the transferee in good faith and reasonable care on the part of the vendee that he ascertained the power of the transferor to transfer the property.

In the present case there is nothing to show that Bahal Singh was in possession of the property of Sulakhan Singh; that his express or implied consent was taken when it was sold through his attorney Shri Sham Singh in the year 1968. Bahal Singh all the times was taking into his head that his uncle had died in Pakistan. The fact was that the death of Sulakhan Singh took place on 26.8.1971 and he was very much alive at the time of the alleged sanction of the mutation, which was even sanctioned in the face of the contest given by Pritam Singh. There is not an iota of evidence to show that the vendees ever tried to ascertain about the whereabouts of Sulakhan Singh and his family members the present purchasers - are the residents of village Saunke, where the land in dispute is situated and it cannot be said that they were ignorant of Sulakhan Singh and his prospective heirs were still alive. It has been rightly remarked by the first appellate Court that the mutation of inheritance has been sanctioned of a living person even when contest has been raised by Pritam Singh. The first appellate Court was also justified in observing that the vendees had colluded with Bahal Singh in getting the property in their favour. In this view of the matter, it cannot be said that the present defendant was a bona fide purchaser or that he was a purchaser for consideration. This Court is of the considered opinion that essential ingredients of Section 41 of the Transfer of Property Act have not been proved so as to protect the title of the property with regard to sale deeds executed on 22.11.1968 by Bahal Singh. In this view of the matter I again affirm the findings of the Courts below on issue No. 7.

11. No other point was urged before me.

12. Resultantly, the present appeal is devoid of any merit and the same is hereby dismissed, leaving the parties to bear their own costs.