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BANARSI DAS

v.

BRIG MAHARAJA SUKHJIT SINGH AND ANR.

OCTOBER 21, 1997

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[SUJATA V. MANOHAR AND D.P. WADHWA, JJ.]

C

Civil Procedure Code 1908—Section 100 (as it existed prior to the amendment Act of 1976)—Section 41 Punjab Courts Act. 1918 (which is pari materia with the aforesaid Section 100)—Second appeal—Whether maintainable—Held, yes. Jurisdiction of High Court invoking of—Held, rightly invoked.

D

Evidence Act, 1872—Oral evidence—Admissibility of—Held, in the absence of the documentary evidence the plaintiff could not rest his case on oral evidence.

E

Practice and Procedure—First Appellate Court—Jurisdiction—Held, cannot go beyond the limits of the pleadings, evidence and the issues involved—Substantial error and defect in the procedure by the First Appellate Court—Findings based on mere suspicion and bias—High Court was right in setting aside the judgment of the first appellate court.

Exercise of jurisdiction—Procedure prescribed by law—Held, when law prescribes as to how jurisdiction is to be exercised and power is conferred for that purpose, it has to be exercised in that way.

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The Appellant plaintiff instituted a suit seeking a decree for permanent injunction against the Respondent-defendants. The appellant—Plaintiff's case was that he was in peaceful cultivation of the land which he had got from his father; and that the first respondent defendant through his attorney allowed the second respondent defendant to take forcible and illegal possession of the suit land who raised construction thereon. It was further the appellant-plaintiff's case was that the land was an evacuee land belonging to the Central Government and that his grandfather was a sub lessee.

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The respondents denied the aforesaid allegations and contended that the first respondent herein was the owner of the land though in the revenue record the Central Government was mentioned as cultivator. The Second respondent

put forth that he had bought the land from the first respondent by way of a sale deed, the possession of which land was delivered on the same day. A

In support of this case the appellant only examined the witnesses orally as evidence whereas the respondents produced documentary evidence in support of their case besides adducing oral evidence. The Trial Court dismissed the suit of the appellant-plaintiff who went in appeal before the District Judge, who had reserved the findings of the Trial Court and decreed the suit. The Second Respondent defendant went in second appeal before the High Court. The High Court allowed the appeal and restored the order of the Trial Court dismissing the suit. Aggrieved, the appellant plaintiff came up in appeal before this Court. B C

On behalf of the appellant plaintiff it was contended that the High Court was in error in entertaining the Second appeal without there being any substantial question of law involved and that the Second appeal was entertained in violation of the procedure prescribed under Section 100 C.P.C. On behalf of the respondents it was submitted that the Second appeal was filed under Section 41 of the Punjab Courts Act 1918, which was in pari metaria with Section 100 of the Code as it existed prior to the amendment. D

Dismissing the appeal, the Court

HELD : 1. The whole approach of the first appellate court was based merely on suspicion and bias against the second respondent. It was certainly the case where there was a substantial error or defect in the procedure as prescribed by the court and the High Court was justified in entertaining the Second appeal. [589-G] E

2.1. The first appellate court lost sight of the fact that there was no documentary evidence to support the case of the plaintiff. No record was produced from the office of the rehabilitation department. No Revenue record whatsoever was produced to show the possession of the plaintiff. The first appellate Court appeared to have made a case of the plaintiff which was neither pleaded nor was there anything to support that. [589-E] F G

2.2. There was no evidence that the plaintiff was in possession of the suit land. Seeing the issues and the evidence on record, the conclusion is irresistible that there is no evidence to show that the plaintiff was in possession of the land. In the absence of the documentary evidence which could have been available, the plaintiff could not rest his case on oral evidence which H

A was against the record produced by the defendants. [589-E]

2.3. The first appellate court clearly fell in error in coming to the conclusion that the sale deed was invalid without there being any issue to that effect and without the vendees in whose favour the sale deed was executed being parties to the suit. [589-D]

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3.1. Once having held that the second appeal was maintainable, the High Court was right in setting aside the judgement of the first appellate-Court as it was based on no evidence; was against the record; and was against the procedure prescribed by law. [589-H; 590-A]

C

3.2. No doubt procedure is meant to advance justice but when law prescribes as to how jurisdiction is to be exercised and power is conferred for that purpose, it has to be exercised that way. [590-A]

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4. For a second appeal to be maintainable, it has to satisfy the parameters as laid in Section 41 of the Punjab Courts Act or Section 100 of the Code as the case may be. [590-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5639 of 1994.

E

From the Judgment and Order dated 20.5.92 of the Punjab & Haryana High Court in R. S. A. No. 1686 of 1990.

K.G. Bhagat, Kamal Baid (G.G. Singh) for Ms. Kusum Chaudhary for the Appellant.

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R.K. Talwar for (Goodwill Indeevar), O.K. Khuller for (R.C. Kohli) for the Respondents.

The Judgment of the Court was delivered by

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D.P. WADHWA, J. Plaintiff is in appeal. He is aggrieved by the judgment dated May 20, 1992 of the Punjab and Haryana High Court passed in regular second appeal whereby his suit for injunction both perpetual and mandatory was dismissed. The trial court had also dismissed the suit though he succeeded in the first appeal.

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Plaintiff instituted his suit on May 3, 1986. The sole defendant was Brig. Maharaja Sukhjot Singh. The plaintiff sought a decree for permanent injunction

restraining him from interfering in the land measuring 42 kls 12 mls situated in the revenue estate of Jalandhar of which the plaintiff claimed to be in cultivating possession. During the pendency of the suit the plaintiff impleaded Balbir Singh Chandi as defendant No. 2 and amended plaint was filed on June 1986. Now, the plaintiff said that the first defendant through his attorney Pritpal Singh allowed the second defendant to take forcible and illegal possession of land measuring 1 Kanal 12 mls. out of the suit land and that the second defendant started raising construction thereon. The plaintiff, therefore, also sought a relief for mandatory injunction directing the defendants (now respondents) to demolish the construction, remove the rubble and vacate the illegal and forcible possession of the land of which he was dispossessed. Claim of the plaintiff was that he was in peaceful cultivating possession of the land and that he got possession of the land through his father Relu Ram who in turn got from his father Ishar. Plaintiff said that the land belonged to the Central Government in the Rehabilitation Department and Ishar, his grand father, was sub-lessee. The land according to him was an evacuee land. The defendants denied the allegations of the plaintiff. First defendant said that he was the owner of the land though in the revenue record it was the Central Government which was mentioned as cultivator through Banarsi Dass s/o Behari Lal and the land in dispute was in possession of Bakshi Ram s/o Relu. It was submitted that it was Banarsi Dass who was the allottee. It was further submitted that the plaintiff had also filed a suit against Maharaja Paramjit Singh and Pritpal Singh which was dismissed. It was stated that it was Bakshi Ram who was in actual cultivation possession of the land. Second defendant in his written statement said that the plaintiff was not the owner and that in the revenue record he was not shown to be in possession of the land. He pleaded that the land measuring 1 kl and 12 mls was purchased by Atam Parkash, Amandeep and Jaswinder Kaur from Maharaja Sukhjit Singh first defendant through his attorney Pritpal Singh by a sale deed (Exhibit D-1) dated February 17, 1986 which was also signed by Bakshi Ram as witness who was in actual possession of the land. Second defendant then said that mutation was duly sanctioned (Exhibit D-2) on May 5, 1986. Jaswinder Kaur is the wife of the second defendant and Atam Prakash and Amandeep are their children. Second defendant said that the possession of the land subject matter of the sale deed was delivered on the same day and thereafter certain construction was made. The second defendant said that suit against him was not true.

On the pleadings of the parties following issues are framed by the trial court:

- A "1. Whether suit is not maintainable in the present form? OPD.
2. Whether plaintiff is in possession of suit land? OPP.
3. Whether plaintiff is entitled to injunction prayed for? OPP.
4. Whether suit is bad for non-joinder of necessary parties? OPD.
- B 4A. Whether defendant No. 2 is entitled to compensatory cost, if so to what amount? OPP.
5. Relief."

C In support of his case the plaintiff examined himself and two other witnesses, namely. Om Parkash (PW-2) and Jagjit Singh (PW-3) and rested his case. No documentary evidence was produced in support of his pleas in the plaint. Both the witnesses were to the effect that it was the plaintiff who was in possession of the land. Second defendant appeared as his witness (DW-1). He admitted to the purchase of the land by his wife and children on February 17, 1986, sanction of mutation on May 5, 1986. He also filed certified copy of the Jamabandi for the year 1979-80 (Exhibit D-3). He however, admitted that the plaintiff was in possession of the back side of the land purchased as per Exhibit D-1 and that he was cultivating the same. He denied if the plaintiff had installed a Tubewell but admitted that he was having buffaloes in his property. He denied the suggestion that the land purchased by his wife and minor children was not owned by the first defendant. Bakshi Ram appeared as second witness for the defendants. He admitted that he was having disputes with the plaintiff who was his brother. He however, said that the land covered by sale deed Exhibit D-1 was in his possession and that earlier Banwari Lal son of Behari Lal was the lessee of the first defendant. He said that he had delivered the possession of the land to the second defendant. Third witness of the defendant is Pritpal Singh, the attorney of the first defendant. He said the first defendant was the owner of the land and that the land covered by Exhibit D-1 was in possession of the first defendant through Bakshi Ram. He said that the suit land was never in possession of the plaintiff and that about 20 kanals of land had been sold out of that land and that the vendees were in possession of their respective portions and they had constructed houses thereon. That is all the evidence in the case.

H The trial court by its judgment dated September 27, 1988 decided issue 1 in favour of the plaintiff. Issues 4 and 4A were not pressed, issues 2 and 3 were decided against the plaintiff and the result was that the suit of the

plaintiff was dismissed. The plaintiff went in appeal before the District Judge. A
It was heard by Additional District Judge, Jalandhar who reversed the findings
of the trial court on issues 2 and 3 and decreed the suit. The appellate court
was rather harsh on the second defendant and passed severe strictures
against him. It was of the opinion that the construction on the land covered
by sale deed Exhibit D-1 was without any sanctioned plan as no sanctioned B
plan was produced on the record of the suit. The observation of the learned
Additional Judge, in our view was not relevant to the issues involved in the
case. He further found that forgery had been committed in the Jamabandi
Exhibit D-5 which, as noted above, is for the year 1979-80. In this, in the
column name and particulars of the owner the names of the wife and minor
children of the second defendant were mentioned. The second defendant had C
explained that it was the mistake committed by the Patwari in the certified
copy (Exhibit D-3) and that an entry was made in the wrong column. We think
second defendant is right in his submission as we find that in this way
document mutation is shown to have been made on May 5, 1986 against entry
2302 which is of the mutation register. Further if at all such a forgery had been D
committed by the second defendant there was no occasion for him to file this
document in court. He had produced this document to prove that the mutation
was only sanctioned in favour of his wife and children on May 5, 1986 after
the land had been purchased by the sale deed Exhibit D-1. The first appellate
court lost sight of the fact that there was no documentary evidence to
support the case of the plaintiff. No record was produced from the offices of E
the rehabilitation department. No revenue record whatsoever was produced
to show the possession of the plaintiff. The first appellate Court appeared to
have made a case of the plaintiff which was neither pleaded nor was there
anything to support that. He termed sale deed Exhibit D-1 and sanction of
mutation Exhibit D-2 as false documents "intended to play fraud on the law
of registration and are invalid and not binding on the plaintiff." F
We do not find any justification for such a finding.

Exhibit DW-3/C is another document on record which is Jamabandi for
the year 1963-64. This document showed that the suit land was in possession
of the Banwari Lal s/o Behari Lal, Amru and Darshan sons of Ishar. Both G
Amru and Darshan are brothers of the plaintiff. According to the Additional
District Judge this document had also been tempered with. In that instead of
the words Banarsi Dass, the words 'Banwari Lal' had been manipulated. There
is again nothing on the record for the learned Judge to return such a finding.
Moreover, his comments on the conduct of the second defendant were quite
misplaced and reading of his judgment shows that perhaps it was the second H

A defendant who was on trial before him. This certainly resulted in miscarriage of justice.

The second defendant went in second appeal before the High Court. The High Court quashed these remarks made against the second defendant and in our view rightly. The High Court also found that there was no evidence that the plaintiff was in possession of the suit land. The High Court also said that the approach of the learned Additional District Judge was not correct in as-much as it was not for the defendants to show that they were in lawful possession of the land and unless they did so the-plaintiff would succeed. There was no issue and no prayer by the plaintiff that the sale deed Exhibit D-1 was void and that the land in fact was purchased by the second defendant though in the names of his wife and two sons. Further since the vendees i.e. the wife and the children of second defendant were not parties in the suit the learned Additional District Judge could not have given a finding about the validity of the sale deed Exhibit D-1. The High Court also commented on the finding of the learned Additional District Judge that it was the plaintiff who was in possession of the land when there was no evidence on the record about the tempering of any documents in the revenue records. The High Court disapproved the adverse remarks made by the Additional District Judge against the second defendant when his conduct was not in issue in the suit. The High Court, therefore allowed the appeal and restored the order of the trial court dismissing the suit.

Mr. Bhagat, learned counsel for the appellant (the plaintiff) submitted that the High Court was in error in entertaining the second appeal without there being any substantial question of law involved and further that the second appeal was entertained in violation of the procedure prescribed under Section 100 of the Code of Civil Procedure.

Section 100 of the Code which was amended by the Amendment Act. 1976 and as it exists now is as under :

G “100(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court , subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of Law.

H (2) An appeal may lie under this section from an appellate decree passed ex-parte.

- (3) In an appeal under this section the memorandum of appeal shall precisely state the substantial question of law involved in the appeal. **A**
- (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
- (5) The appeal shall be heard on the question so formulated and the respondent shall at the hearing of the appeal, be allowed to argue that the case does not involve such question: **B**

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear. For reasons to be recorded, the appeal of any other substantial question of law, not formulated by it if it is satisfied that the case involves such question.” **C**

Prior to the amendment, Section 100 of the Code was as under :

“100(1). Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely: **D**

- (a) the decision being contrary to law or to some usage having the force of law; **E**
- (b) the decision having failed to determine some material issue of law or usage having force of law; **E**
- (c) a substantial error or defect in the procedure provided by this code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. **F**

(2) An appeal may lie under this section from an appellants decree passed ex parte.”

Mr. Khuller, learned counsel for the second respondent, submitted that the second appeal was filed under Section 41 of the Punjab Courts Act 1918 which was in pari materia with section 100 of the Code as it existed prior to the Amendment Act of 1976. Section 41 of the Punjab Courts Act. 1918 is as under : **G**

“41. Second appeals: (1) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High **H**

- A** Court on any of the following grounds, namely;
- (a) the decision being contrary to law or to some custom or usage having the force or law;
- B** (b) the decision having failed to determine some material issue of law or custom or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908 (V of 1908) or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.
- C** [Explanation - A question relating to the existence or validity of a custom or usage shall be deemed to be a question of law within the meaning of this section].
- D** (2) An appeal may lie under this section from an appellate decree passed *exparte*."

Mr. Khuller referred to a Full Bench decision of the Punjab & Haryana High Court in *Ganpat v. Smt. Ram Devi & Ors.*, AIR (1978) Punjab and Haryana 1321 where a similar issue was raised and the court held that Section 41 of the Punjab Courts Act was nevertheless applicable in spite of the amended Section 100 of the Code. Reference in that connection was made to section 4 of the Code which is as under :

- F** "4. Savings (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.
- G** (2) In particular and without prejudice to the generality of the proposition contained in sub-section (1) nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

H Mr. Bhagat conceded that the second appeal under Section 41 of the Punjab Courts Act was maintainable and he did not press his objection based on the amended Section 100 of the Code. We, therefore need not examine the

question if Section 4 of the Code would save the applicability of Section 41 of the Punjab Courts Act in view of Section 101 of the Code which says that no second appeal shall lie except on the grounds mentioned in Section 100 and Entry 13. of list III (Concurrent List) of Seventh Schedule of the Constitution which reads :

“Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution. Limitation and Arbitration.”

The question which, thus, arises for consideration is, if the second appeal in the High Court was maintainable in view of restrictions contained in Section 41 of the Punjab Courts Act. We find no impediment in the jurisdiction of the High Court in entertaining the second appeal in the present case in view of clause (c) of sub-section (1) of Section 41 of the Act. The first appellate court clearly fell in error in coming to the conclusion that the sale deed (Exhibit D-1) was invalid without there being any issue to that effect and without the vendees in whose favour the sale deed was executed being parties to the suit. Again there was a clear error of jurisdiction committed by the first appellate court when it gave a finding that ‘Jamabandi’ was forged and fabricated, when no such plea was raised by the plaintiff and there was no evidence to that effect. If we see the issues and the evidence on record, the conclusion is irresistible that there is no evidence to show that the plaintiff was in possession of the land or of his claim to be in possession being the son of Relu Ram and grandson of Ishar. No revenue record was produced by the plaintiff in support of his case. No witness from the Rehabilitation Department of the Central Government was examined to show that it was an evacuee land. In the absence of the documentary evidence which could have been available, the plaintiff could not rest his case on oral evidence which was against the record produced by the defendants. In this view of the matter, the first appellate court could not return a finding that it was the plaintiff who was in possession of the land or that any forgery was committed by the defendants. The whole approach of the first appellate court was based on mere suspicion and his possible bias against the second respondent than an evidence of which there was none and when there was not issue as well to support his findings. It was certainly the case where there was a substantial error or defect in the procedure as prescribed by the Code and the High Court was justified in entertaining the second appeal. Once having held that the second appeal was maintainable, the High Court was right in setting aside the judgment of the first appellate court as it was passed

A on no evidence; was against the record; and was against the procedure prescribed by law. No doubt procedure is meant to advance justice but when law prescribes as to how jurisdiction is to be exercised and power is conferred for that purpose, it has to be exercised that way. For a second appeal to be maintainable, it has to satisfy the parameters as laid in Section 41 of the Punjab Courts Act or Section 100 of the Code as the case may be. In this view of the matter, we consider it unnecessary to refer to any of the decisions cited at the bar to contend when the High Court will interfere in the Second appeal and when it will stay its hands.

We, therefore, find no merit in this appeal and dismiss the same with costs.

M.P.

Appeal dismissed.