

(2013) 07 P&H CK 0398

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 754 of 1986

Ajwinder Singh and Others

APPELLANT

Vs

Milkhi Ram and Others

RESPONDENT

Date of Decision : 09-07-2013

Acts Referred:

Citation : (2013) 07 P&H CK 0398

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : M.S. Kang, for the Appellant; Kanwaljit Singh , Mr. H.P.S. Ishar, Advocate and Mr. Manjul Sood, LR of Ramesh Chander (Party-in-Person), for the Respondent

Final Decision : Partly Allowed

Judgement

K. Kannan, J.—The second appeal is against the judgments decreeing the suit filed by the plaintiff for recovery of possession. The defendant is before this Court in appeal. The starting point for consideration of the case would be the effect of the previous proceedings in which the plaintiff had earlier sought for declaration, and recovery of possession and for accounting from several persons including person by name Rattan Devi. The properties had been the subject of bequest by one Amin Chand in the late 19th century where there had been some directions for performance of trust. The bequest also provided that the surplus proceeds over the expenses for running and maintaining a share shall be distributed amongst his sons. The plaintiff was a representative of one of the sons and amongst the defendants in the earlier suit, the contest was entered by a son's widow by name Rattan Devi. The suit filed on a previous occasion by the plaintiff resulted in a decree for declaration of his title to the property but as far as his claim to title was concerned, the Court held that Rattan Devi was liable for only account for the surplus income for the properties to which the plaintiff was entitled but the prayer for recovery of possession could not be granted. The present suit came to be filed by the very same plaintiff referring to the fact that

Rattan Devi had no title to the property at all; indeed, his own title had been established but she had purported to effect the sale in favour of her brother's son and he is in possession of property. The contention was that transaction of sale by Rattan Devi to the defendant was hit by lis pendens and the sale itself was void ab initio.

2. Two Courts below have granted decree as prayed for. In appeal the point urged on behalf of the contesting defendant is that the plaintiff's prayer for recovery of possession has already been denied and he will be barred by res judicata from pleading for recovery of possession of property. The contest is also on the basis that the plaintiff had no valid cause of action to sue for recovery of possession of property his 1/4th share, when his suit for earlier relief had failed. Based on respective pleadings, I am of view that the case would require to be adjudged on the following substantial questions of law:-

1. Whether the Courts below did not err in granting a decree for 1/4th share when the plaintiffs' earlier suit for possession under Ex. P5 against the defendants' predecessors' title had failed?

2. Whether the plaintiffs had a valid cause of action to file the suit for recovery of possession?

3. Whether the defendants' predecessors from Rattan Devi who had already suffered a decree against her under Ex. P-5 had any lawful title to properties?

3. As regards the plaintiff's entitlement to a share in the property, the decision has become final between the parties, namely the plaintiff and the defendants, who were representatives in interest of Rattan Devi, one of the defendants to previous suit. The issue cannot be reopened again and the decree finding that the plaintiff was the owner of a fractional share in the property would have to be upheld. In the present suit, the plaintiff has only made a point that Rattan Devi was herself not the owner of the property and she had no right to sell the property. The purchase by the defendants was, therefore, invalid and there shall be a liability for surrendering possession of the property. It was not as if Rattan Devi was a trespasser of the property. She was a widow of one of the sons and was entitled to hold possession of the property for performance for the trust connected with the properties. The plaintiff's own relief could only be for delivery of the property in specie, if the trust was completely liquidated. The nature of trust in this case is the existence of a sarai and the use of the property as guest house for travellers. The contention now urged on behalf of the respondent-plaintiff through the learned Senior Counsel appearing on behalf of the respondent is that the sarai has ceased to exist and that is how the defendants themselves are in possession of the property. The property in possession of the defendant is in respect of certain lands which are adjoining the sarai and the adjoining lands were meant to generate monies for incurring expenses for the charity connected with the sarai. A transaction of sale allowing for user of the property and for securing income from the property itself is not an anathema to

the creation of trust. On the other hand, it is the existence of other properties that provide the wherewithal to sustain the trust. The bequest made by Amin Chand itself provides for a contingency that if the trust ceased to exist, the property will revert to the sharers. The expressions found in the Will dated 01.03.1998 which is extracted is as follows:-

With regard to the land of the garden near the pucca serai known as garden Bangiwala my Will is like this:-

That this land and garden shall be considered as attached to the serai and its management shall be in the hands of heir who shall be the owner and in possession of Chak Bajowara. The manager of garden Bangiwala shall be responsible for repairs of the pucca serai situated in this land on the road from Hoshiarpur to Mahilpur because the income of the aforesaid garden has been left for the management of the serai.

If for any reason the serai ceases to exist or falls down then the malba of the site of the serai and the garden Bangiwala shall be partitioned between the heirs as ancestral property. So long as the serai exists the land adjacent to the serai wherein the garden has been grown, shall not be partitioned nor shall it be mutated in favour of a third person nor shall it be made liable for the payment of any debt because this area had been left for the repairs and maintenance of the serai. However, if any amount is left over and above the expenses of repairs, all the co-sharers can divide it in accordance with the rule of inheritance and if the expenses or repairs cannot be met from the income of this land then the person in possession of the estate shall be liable for repairs.

4. Since the nature of interest created in respect of the property has been qualified as contingent in previous decrees, I am not prepared to reopen the issue and examine the nature of interest which the plaintiff had. I take the judgment already rendered granting the plaintiff's ownership to the property as fully established and that right to take possession alone could be contingent on the cessation of sarai. There is no pleading in the suit for the plaintiff's prayer for recovery of possession as obtaining through a change in circumstances or fresh cause of action that the sarai ceased to exist and therefore, the contingency as contemplated in the bequest has arisen. I cannot take an argument made on behalf of the respondent as the basis for granting of a relief in favour of the plaintiff in this case. The question of whether the defendants are owners of the property does not simply arise for they would only take such right which their vendors had. If Rattan Devi had herself suffered decree in a suit instituted by the present plaintiff against her and others, there is no need for replicating the same finding that a purchaser also does not get anything and purchaser is bound to recognize the plaintiff's title to the property.

5. The substantial question would, therefore, obtain the following return of findings that the Courts below were justified in granting a decree for plaintiff's title to the property as concluded through an earlier judgment under Ex. P5. The

defendants, who had purchased the property from Rattan Devi obtain no better right than their own vendor had and their possession could be surrendered to plaintiff only if the plaint disclosed the cause of action for recovery of possession, supported by pleading that sarai ceased to exist and the contingency as contemplated in the bequest had arisen.

6. The earlier decree which the plaintiff has filed against Rattan Devi has provided for relief of accounting against her. The contesting defendants who have purchased the property from Rattan Devi will be similarly bound by the judgment but cannot retain the income which they have realized. Consequently, the plaintiff will have only benefit of decree which he has already obtained namely of right to the property declared as established but his prayer for recovery of possession from the defendant is declined. The defendants are liable to account for the income from the properties and they are entitled to show any expenses incurred in the performance of the charities if the charities do exist. If they do not, it is a different issue in which case they will be liable for accounting for the income of the property. The decree granted now for accounting shall be preliminary in nature and the plaintiff is at liberty to apply to the Court for passing of final decree for an accounting. The plaintiff is also at liberty to institute his own suit for recovery of possession if he is able to show that the cause of action has arisen for such a course and this is only by way of clarification that disposal of this case and rejection of the plaintiffs claim for recovery of possession now cannot be said to disentitle him from making such a prayer if a fresh cause of action is shown.

7. In this case the suit is only for recovery of possession. The relief of recovery of possession is not given. It is only on a finding that the contingency as contemplated has not arisen that the defendants shall be liable for an accounting from the date of institution of the suit which right is in the nature of future determination. The Court, therefore, provides a relief of what is expedient even though not specifically claimed even while denying to the plaintiff the prayer for recovery of possession. The judgments of the trial Court and the Appellate Court are modified and the second appeal is allowed in part to the above extent.