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(1982) 11 P&H CK 0042

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 184 of 1974

Arjan Singh — APPELLANT

Vs

Hem Raj — RESPONDENT

Date of Decision : 08-11-1982

Acts Referred:

Citation : (1983) PLJ 56 : (1986) RRR 458

Hon'ble Judges : G.C.Mittal, J

Advocate : G.C. Garg, Advocate, Sarjit Singh, Advocate., Advocates for appearing Parties

Judgement

G.C. Mittal, J.—There were three sets of cosharers in 151 Kanals 12 Marlas of land. In this litigation, we were concerned with the land shown in possession of one set. That set consisted of three brothers, namely, Hem Raj, Jagdish Rai and Banarasi Dass, who were jointly shown in possession of 48 Kanals 15 Marlas of land, out of total holding of 151 Kanals 12 Marlas of land, having equal shares amongst themselves. By a sale deed dated 12th June, 1957, Banarsi Dass sold the entire land consisting of 48 Kanals 15 Marlas in favour of Arjan Singh, Jit Singh, Puran Singh and Ram Singh sons of Mukand Singh for Rs. 5,000/ and gave possession of entire 48 Kanals 15 Marlas of land to them. On 6th May, 1960, Hem Raj and Jagdish Rai filed the present suit for possession of 2/3rd share of 48 Kanals 15 Marlas of land to them. On 6th May, 1960 Hem Raj and Jagdish Rai filed the present suit for possession of 2/3rd share of 48 Kanals 15 Marlas on the plea that only 1/3rd share was owned by Banarsi Dass and, therefore, Arjan Singh and others became owners of 1/3rd share only. The suit was contested by the vendees and Banarsi Dass was proceeded against exparte. The trial Court found that the plaintiffs were owners of 2/3rd share of 48 Kanals 15 Marlas of land or 2/9th share in the total holding of 151 Kanals 12 Marlas of land, but held that on the basis of oral family partition Banarsi Dass was sole owner of the property sold. The trial Court also found that the venees were bona fide purchasers for consideration and therefore, their sale was protected under section 41 of the Transfer of Property Act. The sold land was under mortgage and it was held that the vendees had redeemed mortgage on payment of Rs. 3,200/. With the aforesaid findings, the suit was dismissed. On plaintiff''s appeal, the lower appellate Court came to the conclusion that the plaintiffs were proved to be owners of 2/3rd share of the land in dispute and that no partition was proved. The lower appellate Court had allowed additional evidence in the form of production of two registered mortgage deeds dated 30th July, 1951 and 22nd June, 1956, which showed that the land in dispute was mortgaged by the plaintiffs and Banarsi Dass, wherein it was admitted that they had 1/3rd share each. The lower appellate Court concluded that there was no merit in the plea of oral partition of the year 195354 as till 22nd June, 1956, all the three brothers admitted the property in dispute to be owned by them jointly. It also concluded that the vendees were not bona fide purchasers, as the plaintiffs were recorded as owners in the revenue records not only upto the date of sale but even till the filing of the suit. Since the vendees had redeemed the entire mortgage, therefore, a decree for possession was passed on payment of Rs. 2134/. The vendees have come to this Court in second appeal.

2. After hearing the counsel for the parties I am of the view that it is clearly proved on the record of the case that the plaintiffs are owners of 2/3rd share of 48 Kanals 15 Marlas of land and owner of 2/9th share in 151 Kanals 12 Marlas of land. The two plaintiffs along with their third brother Banarsi Dass were shown in exclusive possession of 49 Kanals 15 Marlas of land, which land was held by them in equal shares and the sale of the entire land by Banarasi Dass had to be treated as if he was selling his 1/3rd share since he had no authority to sell the shares of his two brothers. This result would follow subject to the decision on the point whether the vendees can take protection of section 41 of the Transfer of Property Act as bona fide purchasers. It is not disputed that at the time of sale in the year 1957 as also at the time of filing of the suit in the year 1969, the plaintiffs were duly recorded as owner along with Banarsi Dass. Under the Land Revenue Act if partition of agricultural land takes place even by consent of the parties, it is recognised only when report is made to the Patwari and then proceedings are taken under the Land Revenue Act for finalisation of partition in accordance with law. Admittedly, nothing of the sort was done in this case. The vendees'' plea was that there was an oral partition in the year 195354 as is recited in their sale deed, but that fact is not borne out from any other evidence. Therefore, such an oral partition cannot be accepted. The trial Court, in reading the statement of one of the plaintiffs to mean that agricultural land was partitioned. The learned counsel for the venees could not read a line from the statement of the plaintiff to the effect that agricultural land was even partitioned between the parties or along with other cosharers. If that had been so, it would have been duly recorded in the revenue records.

3. Moreover, the lower appellate Court was justified in permitting the parties to lead additional evidence, which is in the nature of registered documents being mortgage deeds.Till 22nd June, 1956, Banarasi Dass was admitting that they were owners in equal shares. No evidence has been brought on the record that

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after 22nd June, 1956, and before 12th June, 1957, there was ever any partition between the three brothers making Banarsi Dass as the sole owner of the property. If there was partition and Banarsi Dass was made the sole owner of 48 Kanals 15 Marlas of land, then it had to be shown which other property was allotted to the plaintiffs. The statement of one of the plaintiffs which was being relied upon by the venees to prove partition was to the effect that in partition residential house was allotted to Banarsi Dass. Therefore, residential house goes to Banarsi Dass according to the statement of the plaintiff, and the entire agricultural land goes to Banarsi Dass because of the oral partition. The resultant effect is that nothing is left for the plaintiffs and whole of the property goes to Banarasi Dass. Otherwise, evidence could be brought that 48 Kanals 15 Marlas of land, which is in dispute, was allotted to Banarasi Dass and which other property of equal value was allotted to the other two brothers. There is no evidence worth the name on the record in this behalf. Accordingly, I hold that the plaintiffs are the owners of 2/3rd share in the land in dispute and Banarsi Dass could sell only 1/3rd share.

4. Coming to the other aspect of the matter, when it is clearly recorded in the revenue records, which were in existence at the time of sale, that 48 Kanals 15 Marlas of land were owned by the three brothers, the vendees could not purchase whole of the land from one of the cosharers. Section 41 of the Transfers of Property Act is attracted only when the vendees make bona fide enquiry and purchase the same from an ostensible owner. Here if whole of the property had been recorded in the ownership for the vendees, but once all the three brothers are recorded as owners, it was the primary duty of the vendees to make enquiry and if they had done so, they would have clearly come to know that Banarasi Dass was not the sole owner. Therefore, it is not a case where it can be said that they are bona fide purchasers. The purchase from a total stranger or a nonowner on these facts would be nothing but a paper transaction and section 41 of the Transfer of Property Act would never apply to such facts. Therefore, the vendees will be deemed to have purchased only the share of Banarsi Dass i.e. 1/3rd share of 48 Kanals 15 Marlas and 1/9th of 151 Kanals 12 Marlas of land i.e. they will step into the shoes of Banarsi Dass and no more.

5. It was then urged by the learned counsel that a decree for joint possession cannot be granted in view of Sukh Dev v. Parsi, plaintiff and others, A.I.R. 1940 Lahore 473, and only a declaration could be granted that the possession of the vendees would be as cosharers in which the plaintiffs will have 2/3rd share subject to the right of partition. I find merit in this contention. Therefore, the decree will have to be modified to this extent.

6. It was not disputed that the vendees had redeemed the entire mortgage. Therefore, they are clearly entitled to payment of Rs. 2134/. On payment of Rs. 2134/ the mortgage of 2/3rd share of the plaintiffs would also stand redeemed.

7. For the reasons recorded above, the decree of the lower appellate Court is modified and a declaration is granted that the plaintiffs are cosharers to the

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extent of 2/3rd share of 48 Kanals 15 Marlas of land in which Arjan Singh and other vendees are cosharers to the extent of 1/3rd share and their possessions shall be as cosharers subject to partition. The plaintiffs are allowed three months'' time to deposit Rs. 2134/ before the trial Court (if not already deposited under the decree of the lower appellate Court) and on payment of the same, the mortgage regarding their share would stand redeemed. The parties are left to bear their own costs.

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