
(2006) 08 P&H CK 0306
In the Punjab And Haryana At Chandigarh
Case No : S.A.O. No. 38 of 2005

Rachhpal Singh

APPELLANT

Vs

Harswaran Singh and others

RESPONDENT

Date of Decision : 07-08-2006

Acts Referred:

Citation : (2006) 4 RCR(Civil) 671

Hon'ble Judges : Vinod K.Sharma, J

Advocate : Mr. H.S. Bhullar, Advocate. Mr. Shailendra Jain, Advocate., Advocates for appearing Parties

Judgement

Vinod K. Sharma, J.

1. This appeal has been filed by the appellantplaintiff against the order passed by the learned Appellate Court, vide which the judgment and decree passed by the learned trial Court was set aside and the case has been remanded back to the learned trial Court with the direction to allow the appellant/defendant to produce additional evidence with regard to the execution of General Power of Attorney dated 4.8.1970 as well as correction of saled deed and also to permit Mangal Singh, defendant, to produce evidence on issue No. 6 and to decide all the issues afresh. The case of the appellantplaintiff is that he is residing in Switzerland. His brother Harswaran Singh, defendant, by making misrepresentation that he had general power of attorney of the appellantplaintiff sold his share in land to his son Swaranjit Singh by way of saled deeds dated 11.11.1988 and 22.11.1988. It was also pleaded by the appellantplaintiff that defendant No. 1 had no right or authority to deal with the property falling to his share as he was not appointed as attorney; therefore, the saled deeds executed by him on his behalf were void ab initio. The appellantplaintiff further alleged that Swaranjit Singh, defendant No. 2 further sold the land, which was purchased by him from defendant No. 1, to defendant No. 3 to 6 by executing saled deeds dated 30.11.1988 and 28.12.1988 in their favour, which he could not have done as he had no right or title to the property as the saled deeds in his favour executed by defendant No. 1 were illegal

and void.

2. Suit was contested by Mr. Harswaran Singh, Swaranjit Singh as well as defendant No. 3 Mangal Singh. It may be pertinent to point out that defendant No. 9 Lakhwinderjit Singh son of Harswaran Singh who was impleaded as a party also contested the suit. Stand taken by the defendant No. 3 was that the saledeeds were legally executed in his favour by Harswaran Singh on the basis of power of attorney of the appellantplaintiff Rachhpal Singh and he rightly sold the same to Mangal Singh and other defendantrespondents.

3. Mr. Mangal Singh filed a written statement taking a plea that the land was purchased by him in good faith for consideration and they were in possession thereof.

4. However, Mr. Lakhwinder Singh, respondent No. 9, newly added defendant, in his written statement had claimed ownership of whole of the land on the basis of Will dated 20.9.1962.

5. On the basis of the respective pleadings of the parties, following issues were framed :

"1. Whether plaintiff is entitled to declaration prayed for ? OPP

2. Whether plaintiff is entitled to alternative relief of joint possession of suit land ? OPP

3. Whether suit is not maintainable ? OPD

4. Whether Gobind Sharan Singh is authorized to file the present suit ? OPD

5. Whether suit has been signed and verified by duly authorized person ? OPD

6. Whether plaintiff is owner of 1/5th share of the suit land ? OPD"

Thereafter following additional issues were framed on 10.5.1991 :

"6A. Whether plaintiff executed general power of attorney in favour of defendant No. 1 authorizing him to sell his property, if so to what effect ? OPD

6B. Whether alleged sale deeds dated 21.11.1988 executed by defendant No. 1 in favour of defendant No. 2 are void ab initio, illegal, unauthorized, without consideration and result of misrepresentation and fraud, if so to what effect ? OPD

6C. Whether saledeeds dated 30.11.1988 and 28.12.1988 executed by defendant No. 2 in favour of defendant Nos. 3 to 6 are illegal, void ab initio, unauthorised without consideration, and result of misrepresentation and fraud, if so to what effect ? OPD

7. Relief."

6. The suit was decreed by the learned trial Court by holding that under Issue Nos. 6 and 6A, there was no general power of attorney dated 4.10.1970

executed by the appellantplaintiff in favour of Harswaran Singh, on the basis of which it was alleged that he had executed two salededs dated 11.11.1988 and 22.11.1988 in favour of Swaranjit Singh. Therefore, it was held that the salededs are void and accordingly the subsequent salededs were also held to be bad in law and it was further held that the appellantplaintiff is co owner, remained in possession of the share and accordingly a decree for joint possession was also passed in his favour. The defendantrespondents challenged the judgment and decree of the learned trial Court before the learned Appellate Court. An application was also moved under Order 6 Rule 17 CPC for amendment of the pleadings to say that due to bona fide mistake on the part of the deed writer while drafting of salededs dated 11.11.1988 and 22.11.1988, the date of power of attorney was wrongly mentioned as 4.10.1970 whereas in actual, it was 4.8.1970. The said application was dismissed by the learned Appellate Court. However, the said order was challenged by way of revision before the High Court, which was accepted by holding as under :

"The learned counsel for the respondent states that the application has been filed after gross delay but keeping in view the fact that no evidence is to be led states that he has no objection if such amendment is carried out. In view of the statement of the learned counsel for the respondent, the application dated 1.4.2002 is allowed and amendment as prayed for is allowed."

7. After that amendment written statement was filed taking a plea that during the pendency of the suit, the salededs dated 11.11.1988 and 22.11.1988 were got corrected by mentioning therein that the date of power of attorney on the basis of which original salededs were registered was 4.8.1970 and not 4.10.1970. These corrected salededs were registered on 25.10.2001. Thereafter, an application was made under Order 6 Rule 17 CPC to add para 3(a) in the written statement as referred to above, which was dismissed by the learned Appellate Court, but the same was allowed by the High Court vide order dated 29.5.2004. In the meanwhile, an application under Order 41 Rule 27 CPC was filed by the defendantrespondents to produce additional evidence for proving the execution of the corrected salededs. This application was also contested by the appellantplaintiff primarily on the ground that while allowing the application under Order 6 Rule 17 CPC, the High Court vide order dated 29.5.2004 had recorded the undertaking of the appellant that he was not to lead any evidence in support of the amendment and therefore, additional evidence could not be allowed. However, the learned lower Appellate Court came to the conclusion that application for additional evidence instituted on 18.12.2003 was already pending when the order was passed by the High Court allowing the amendment under Order 6 Rule 17 CPC. The appellant further contended that he never gave any undertaking nor pressed the application for additional evidence and therefore, this application deserves to be allowed.

8. The learned Appellate Court accepted the contention of respondent defendants and allowed the application for additional evidence to prove the facts, which

came into existence after the case was decided.

9. Mr. Mangal Singh, defendant also moved an application under Order 41 Rule 27 CPC whereas Balwinder Singh, respondentdefendant also moved an application under Order 41 Rules 23, 23(a) and 25 CPC read with Section 151 CPC, in which it was pleaded that 1/5th share of land in dispute was purchased by him from Swaranjit Singh, defendantrespondent and possession was delivered to them in good faith and he was bona fide purchaser without notice. This plea was taken by him in the written statement and therefore, he was protected under Sections 41 to 44 and 54 of the Transfer of Property Act. He made an application for framing of additional issues that they purchased the property in good faith for consideration and that as the learned trial Court had taken a view that there was no power of attorney executed by plaintiffrespondent on 4.10.1970. It was submitted that now the date has been got corrected by moving an application under Order 6 Rule 17 CPC. Therefore, they were entitled to have their case proved on merit, which was earlier not done. It was also noticed that Mr. Mangal Singh and Balwinder Singh had already filed application under Order 41 Rule 21 read with Section 151 CPC for permission of the Court to contest the application on merit.

10. It was the case of Mr. Mangal Singh that on the basis of the plea taken by him and also keeping in view the fact that the amendment was allowed by the High Court, additional issue was required to be framed as under :

"Whether the defendant Nos. 3 to 6 purchased the property in good faith bona fide for consideration ?"

The learned lower Appellate Court allowed the application moved under Order 41 Rule 27 CPC for additional evidence by ignoring that the High Court while allowing petition under Order 6 Rule 17 CPC had categorically undertaken that no evidence was required to be led. Now merely by saying that as the application for additional evidence was already pending and no undertaking was given not to press the application for additional evidence, the same could not be allowed.

11. The reasoning given by learned lower Appellate Court cannot be accepted as it failed to notice that the application under Order 6 Rule 17 CPC was allowed by the High Court in view of an undertaking to the effect that amendment was in the nature of correction of clerical error, which did not require any additional evidence. The parties were bound by the said order and it was not open to learned Appellate Court to take a contrary view. Therefore, the order of the learned Appellate Court allowing the parties to lead additional evidence cannot be sustained. It may further be noticed that even other applications allowed by the learned Appellate Court were because of the fact that amendment of the written statement had been allowed by the High Court and therefore, the necessity has arisen to frame additional issues also. The learned Appellate Court had amended issue Nos. 6(a) and (b) in view of applications made as under :

"6(a) Whether the plaintiff executed general power of attorney dated 4.8.1980 in

favour of the defendant No. 1 authorising him to sell the property ? If so, to what effect ? OPD

6(b) If issue No. 6(a) is proved, then whether the saledeeds dated 11.11.1988 and 22.11.1988 and got corrected on 25.4.2001 executed by defendant No. 1 in favour of defendant No. 2, are illegal, unauthorised and void ab initio and were without consideration and were result of misrepresentation and fraud ? OPP "

The learned lower Appellate Court did not frame the additional issue as claimed by holding that issue No. 6C already framed covers the additional issue as claimed. Issue No. 6C reads as under :

"6C. Whether the saledeeds dated 30.11.1988 and 28.12.1988 executed by defendant No. 2 in favour of defendant Nos. 3 to 6 are illegal, void ab initio unauthorized without consideration and result of misrepresentation and fraud, if so to what effect ? OPD"

The learned lower Appellate Court also allowed the application of the defendantsrespondents, who were proceeded ex parte permitting them to join the proceedings by observing that as the case was being remanded back, the defendantsrespondents would be entitled to join the proceedings. In view of the above findings, the case was ordered to be remanded back to the learned Trial Court by setting aside the judgment and decree passed by the learned trial Court.

12. The finding recorded by the learned lower Appellate Court cannot be sustained because the very basis for allowing the applications referred to above was based on the premises that after amendment of the pleadings, the parties were entitled to lead evidence.

13. It is not in dispute that the application made under Order 6 Rule 17 of the Code of Civil Procedure, 1908 for amendment of the pleadings was rejected by the learned lower Appellate Court, against which a revision petition was filed in the High Court by the defendantsrespondents. The application for amendment was accepted by this Court on an undertaking given by the defendantrespondents that the amendment was in the nature of a correction of a clerical error and no evidence is to be led. This specific undertaking has been ignored by the lower Appellate Court merely on the ground that an application for additional evidence was filed by the defendantrespondents before the Appellate Court which was pending on the date, when the decision was taken by the High Court. The learned lower Appellate Court had allowed the application for additional evidence by observing that no undertaking was given by the defendantrespondents before the High Court that the said application would not be pressed. By accepting this statement the Appellate Court has allowed the application for additional evidence. In this background, it would be noticed that the other applications regarding framing of additional issue as well as for permission to allow the defendants to participate in the proceedings are based on the liberty granted to the defendantrespondents to lead additional evidence. Thus, the order of the lower Appellate Court is contrary to the undertaking given

in this Court. The procedure adopted by the lower Appellate Court cannot be sustained as it was not open to the lower Appellate Court to reframe the issue on the asking of the parties and allow to them to lead the additional evidence to fill in lacuna in their case. In fact, by observing that under changed circumstances parties are to lead additional evidence, the Court has allowed the parties to fill in lacuna, which is not permitted under the provisions of Order 41 Rule 27 CPC. After allowing the amendment, in view of the undertaking given before this Court, the lower Appellate Court was bound to decide the matter on merit and in case there was any difficulty in deciding the matter, it was open to the lower Appellate Court to call for a report and decide the matter.

14. Learned counsel for the appellant/plaintiff had argued that if the date of power of attorney is taken to be 4.8.1970 in pursuance to the amendment made in the written statement, the same would not advance the case of the defendant/respondents as in the power of attorney given in favour of defendant No. 1, no power to sell was given to him. Therefore, on the basis of the general power of attorney the sale deeds executed were null and void and therefore, findings recorded by the learned trial Court could not have been reversed. The contention of the learned counsel was that power of attorney is to be strictly construed and any action taken beyond the power given in the power of attorney is to be treated as void. However, no finding is required to be given on this, as this contention is to be considered by the learned lower Appellate Court while deciding the issue on merit.

In view of what has been stated above, the appeal is accepted, impugned order is set aside and the case is remanded back to the learned Lower Appellate Court for decision on merit. It is made clear that nothing said herein above should be considered to be opinion on merit of this Court.

Disposed of.