
(1988) 02 P&H CK 0004

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 617 of 1978

Sheotaj and Others

APPELLANT

Vs

Pahlad (Deceased) Represented By His Legal Representatives
and Others

RESPONDENT

Date of Decision : 01-02-1988

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : (1988) 02 P&H CK 0004

Hon'ble Judges : Manmohan Singh Liberhan, J

Bench : Single Bench

Advocate : Rojesh Chaudhry, for the Appellant; M.L. Sarin and Miss Jai Shree Thakur, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh Liberhan, J.—This is an appeal arising out of the judgment and decree of the Additional District Judge, Narnaul, dated 15.12.1977.

2. The facts giving rise to the lis are these: Pahlad Nand Plaintiff filed a suit for possession by partition with respect to his half share in the property in dispute. Further declaration was sought that sales dated 22.8.1969, 4.11.1971, registered on 7.11.1971, 3.2.1972, 7.4.1972, 22.7.1972 and 22.9.1972 in favour of Defendants Nos. 13 to 20 were illegal and void to the extent of half share of the Plaintiff. It was averred, the Plaintiff was away for his job. the Defendants taking advantage of his absence demolished part of the joint property in the year 1967 and disposed of the debris. The said act of the Defendants resulted in an assurance by them by way of family settlement to the effect, they will not do so in future and they would reimburse the Plaintiff for the acts already done by them with respect to the joint property. On their failure to stand by the assurance, a suit for injunction was preferred by the Plaintiff against some of the Defendants which was decreed on 24.4.1968. Defendant No. 1, 2 and their uncle admitted Plaintiffs' claim in suit. The Defendants in violation of the said decree

still executed the sale deeds.

3. The Defendants controverted the said allegations. The Plaintiffs' share and relationship was denied. The family settlement was challenged. It was averred that admission made by Defendants Nos. 1 and 2 and their uncle in the earlier suit was not binding on the Defendants. It was inter alia averred, the suit was not maintainable, as Plaintiff's possession was denied, suit was barred by the principle of res judicata, the Plaintiff was estopped from filing the suit ; it was barred by time. The Defendants Nos. 13 to 20 claimed that they being bonafide purchasers the sales were protected u/s 41 of the Transfer of Property Act. Further claim with respect to the improvement made by them was put forth. The suit was alleged to be bad for multifariousness. The following issues were framed:-

1. Whether the Plaintiff is a co-sharer to the extent of 1/2 share in the property in dispute ? O. P. P.

2. In case of proof of issue No. 1 in favour of the Plaintiff, whether the transfers of property in dispute by Defendants Nos. 1 to 12 in favour of Defendants Nos. 14 to 20 as entered in para No. 5 of the plaint are binding on the Plaintiff qua his half share in the property in dispute ? O. P. D.

3. Whether the suit is bad for multifariousness ? O. P. D.

4. Whether the suit is barred by principle of res judicata ? O. P. D.

5. Whether the suit is barred by principle of estoppel ? O. P. D.

6. Whether the suit is not maintainable in the present form ? O. P. D.

7. Whether the Defendants are entitled to compensatory costs u/s 35-A, C. P. C. ? If so, to what amount ? O. P. D.

8. Whether the suit is properly valued for court fee and juris-disction ? OPP.

9. Whether the suit is barred by limitation ? O. P. D.

10. Whether the Defendants have effected any improvements ? If so, to what extent and to what effect ? OPD.

11. Whether the Plaintiff has got no locus standi to sue ? O. P. D.

12. Whether the rights of the Defendants Nos. 18, 19 and 20 are protected as being bona fide purchasers ? OPD.

13. Whether there was any litigation previously? If so, its effect ? OPD.

14. Relief

The trial Court came to the conclusion that the Plaintiff was the joint owner of the property in dispute to the extent of half share and was in constructive possession of the same ; the sales effected beyond half share of the Defendants were illegal and void. However, the sales to the extent of the share of the

vendees shall be protected subject to the right of other share-holders. The sales are to be protected according to the order of precedence in which they have been effected. The suit was found to be properly valued for purposes of court-fee and jurisdiction and it was found that the suit was maintainable in the present form. It was further found that the suit was within limitation ; the sales were not bona fide and the Defendants could not claim improvements, thus were not entitled to any compensation. The Plaintiff was found to have a locus standi to maintain the suit. Resultantly, a preliminary decree for separate possession by way of partition was passed

4. The Defendants preferred an appeal. The lower appellate Court after re-appraising the evidence confirmed the findings of the trial Court and dismissed the appeal. The Defendants have challenged the findings of the Courts below in this second appeal.

5. The learned Counsel for the Appellants contends that the finding returned by the Courts below on issue No. 1 to the effect that the Plaintiff is the co sharer to the extent of half share is based on inadmissible evidence and is liable to be set aside. It is contended that document marked Exhibit C-I is a partition deed which requires registration on requisite stamp paper. In the absence of the document being registered and being on the stamp paper the same cannot be read into evidence in view of Section 17 of the Indian Registration Act. The learned Counsel relied upon *Kale and Others Vs. Deputy Director of Consolidation and Others*,

6. Learned Counsel for the Plaintiff-Respondent contends that the document does not require registration inasmuch as it is a memorandum of partition. It does not create or extinguish any right in any immoveable property. It does not create any fresh title. It only recognised the right of the parties. Additionally, it is averred that the document was exhibited in the earlier suit without any objection to which Defendants Nos. 1, 2, 5 and 12 were privy. The said suit was decreed. The Defendants are bound by the said document. Apart from this, the Defendants are bound by their previous statements and cannot challenge the same.

7. Counsel for the parties have taken me through the document Exhibit C-I. On a plain reading of C 1 it is obvious that it does not either create or extinguish any right or title in the immoveable property of Rs. one hundred or more of value It only acknowledges the existing rights of the parties, that is, that all the parties are co-owners and shall use the property jointly. No one will have the right to sell the debris of the property. The document does not create the shares, it only acknowledges the shares the parties have. In view of the law laid down by their Lordships of the Supreme Court in *Kale and others*" case (supra) the document does not require any registration. It has been rightly admitted into evidence. The Courts below after appraising the oral evidence, the circumstantial evidence, as well as the judgment and decree passed in the earlier suit, came to the conclusion, as a cumulative effect, the Plaintiff proved to be the co-owner to the

extent of half share in the property in dispute. No error has been pointed out in the said finding. The finding is based after proper appreciation of evidence. The learned Counsel for the Appellants contends, the admission made by some of the Defendants cannot be used against the other Defendants, and secondly, said admissions having not been put to the Defendants who appeared as witnesses, the same cannot be used against them. Be that as it is, the Courts below have come to the conclusion independent of these admissions, to the effect that the Plaintiff is owner to the extent of half share. No error has been pointed out either of Law or reading and appreciating of evidence.

8. The counsel for the Appellants contends, the Appellants being bona fide purchasers, the sales cannot be set aside. In order to appreciate this contention, we may refer to Section 41 of the Transfer of Property Act, which protects the bona fide purchasers, which reads as under:-

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration the transfers shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

The Defendants could claim the benefit of being bona fide purchasers only if they proved, that they purchased the property in dispute after making due enquiry, the vendor/transferor had the power to make the transfer and they acted in good faith or the transferors were the ostensible owners, and they with the express or implied consent of the persons interested in the immovable property have alienated it. There is not an iota of evidence on record to show that the vendors/transferors were the ostensible owners, or they with the consent express or implied of the Plaintiff made the alienations in dispute. There is no evidence with respect to bona fide enquiries with respect to the transferors' right to transfer by the vendees. Defendants did not even care to look into municipal records wherein the Plaintiff is alleged to be recorded as owner. No enquiries required of an ordinary prudent person have been made by Defendant vendees. Thus, acting without due diligence, rather acting negligently, the Defendants cannot claim themselves to be the bona fide purchasers. Acting negligently itself leads to absence of bona fides.

9. The learned Counsel for the Appellants contends, since the Plaintiff has failed to prove that he was in possession of any part of the property in dispute, the suit for possession by partition is not maintainable, and further relied upon Messrs Ram Gopal Dula Singh Vs. Sardar Gurbux Singh Jiwan Singh and Others, . The contention is to be noticed only to be rejected. In view of the finding on issue No. I that the Plaintiff is the owner and in joint possession of property in dispute, suit is maintainable. Further Exhibit P-3 is a decree for injunction against the Defendants, which proves that the Plaintiff is in possession of the property in dispute. It is well-established that in case of vacant portion of the property, the

possession shall be deemed to be with the owner i. e. title holder. Here, admittedly, major portion of the property in dispute is in a dilapi-dated condition and is lying vacant. The possession of the same shall be referable to the Plaintiff who has a valid title to it

10. Nothing has been pointed out how the suit has not been properly valued for the purposes of court-fee and jurisdiction.

11. Last contention raised by the learned Counsel for the Appellants is that the Defendants have constructed the property in dispute, hence are entitled to compensation for the same. The Defendants are entitled to the said improvements for the simple reason, there is not an iota of evidence on the record with respect to the constructions. There is no evidence on the record with respect to the amount spent on it. Apart from this, since the Defendants have been proved not to be bona fide purchasers, they are to be treated as the spassers. Tres-passers cannot claim improvements without the same having been effected with the consent of the title-holder

12. No other point has been raised.

13. In view of my above observations, I find no force in the appeal. The same is dismissed with no order as to costs The judgment an J decree of the lower appellate Court is affirmed and the suit of the plain -tiff is decreed.