IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A. No.1143 of 1988
Decided on: 13.01.2015

Gurdev Singh . . . Appellant

Versus

Mukhtiar Singh & Ors. . . .Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.P. Kansal, Advocate
for the appellant.

Mr. S.K. Singla, Advocate
for the respondents.

*****

RAJ MOHAN SINGH, J.

This regular second appeal has been directed by the plaintiff against the judgment and decree dated 08.02.1988 passed by District Judge, Sangrur, whereby appeal was partly accepted while setting aside judgment and decree of the trial Court dated 18.07.1987.

2. Plaintiff Gurdev Singh filed a suit for declaration and permanent injunction claiming ownership being in possession of land measuring 24 kanals comprised in Khasra Nos.14 (8-0), 17 (8-0), 24(8-0) according to jamabandi for the year 1980-81 situated in the revenue estate of Village Badrukhan. The mutation No.6310 dated 27.01.1984 was also challenged. Relief of permanent injunction was also sought thereby restraining the defendants from interfering in the suit land.

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3. Plaintiff claimed that Santa Singh was owner of the aforesaid land measuring 24 kanals which was known as Jogianwala Khet. Said Santa Singh (deceased) executed an exchange deed dated 28.01.1975 transferring the said land in favour of plaintiff in lieu of 3 bighas of land of the plaintiff comprised in Khasra No.23/24/1 of superior quality in the estate known as Tehliwala Khet. In part performance of the aforesaid exchange deed, Santa Singh had delivered possession of the land to the plaintiff and also took possession of the land of 3 bighas belonging to the plaintiff and since then plaintiff claimed his continuous possession over the land so exchanged. According to aforesaid exchange deed, the same was to be registered before 15.06.1975. Plaintiff alleged failure on the part of Santa Singh and aforesaid exchange deed could not be registered.

4. Plaintiff further alleged that Santa Singh filed a suit for possession against him on 06.08.1977. Trial Court dismissed the suit on 31.03.1978 on the ground that Santa Singh was debarred from claiming any right against the plaintiff and was estopped from claiming possession of the suit land. Trial Court decided the relevant issue in favour of present plaintiff (defendant in the said suit) to retain possession in view of Section 53 (A) of the Transfer of Property Act. The said judgment dated 31.03.1978 passed by Sub Judge Ist Class, Sangrur, was upheld in appeal before District Judge, Sangrur vide judgment and decree dated 18.08.1978.

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5. The plaintiff also alleged that the defendants were bound by the said judgment and decree being heirs of Santa Singh. The suit was contested and after completion of necessary pleadings trial Court framed the following issues:

> *"1. Whether the plaintiff is the owner and in possession of the suit land by virtue of exchange deed dated 28.1.1975? OPP.*
>
> *2. Whether the mutation No.6310 dated 27.1.1984 is ineffective qua the rights of the plaintiff in respect of the suit land? OPP.*
>
> *3. Whether the plaintiff is entitled to the injunction prayed for? OPP.*
>
> *4. Whether the suit is time barred? OPD.*
>
> *5. Whether this Court has no jurisdiction to try this suit? OPD.*
>
> *5(a). Whether the defendants are bound by decree dated 31.03.1978 and 18.08.1978? OPP.*
>
> *6. Relief."*

6. The trial Court decided under Issues No.1 and 5(a) that the land in question was subject matter of exchange deed whereby the parties exchanged possession of their respective land. The matter was earlier agitated by the predecessor in interest of the defendants in a suit for possession which was dismissed (Ex.P-10) and the said judgment was upheld in appeal (Ex.P-11). In the present suit the claim of the plaintiff was that by virtue of exchange deed dated 28.01.1975 (Ex.P-1) plaintiff had become absolute owner of the land in question. The execution of exchange deed Ex.P-1 stood already proved in the earlier suit also under Issue No.2. The record of earlier suit was duly exhibited in the present

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case as Ex.P-2, Ex.P-3, Ex.P-4, Ex.P-8 to Ex.P-12. Trial Court, on the basis of evidence on record, decreed the suit for declaration that the plaintiff had become owner of suit land and the mutation No.6310 dated 27.01.1984 regarding the estate of Santa Singh in favour of defendants was illegal and ineffective qua the rights of the plaintiff. Restraint order was also passed restraining the defendants from dispossessing the plaintiff from the suit land.

7. In the appeal, District Judge, Sangrur reversed the findings primarily under Issues No.1 and 5(a) on the ground that there was an agreement of exchange which was subject matter of earlier litigation as Ex.D-1. The execution of said document was proved by PW1 Gurnam Singh, who was Sarpanch in the year 1975 and he scribed the document. It was attested by Mukhtiar Singh, Arjan Singh, Bhag Singh and Gurnam Singh, who were Members of the Panchayat. In the earlier litigation i.e. judgment Ex.P-10, it was held that Santa Singh had agreed to exchange the land with the plaintiff and the possession of the land was delivered to the plaintiff. Santa Singh was debarred from claiming possession from the plaintiff and the said judgment was affirmed in appeal vide judgment Ex.P-11. Lower Appellate Court treated the land to be exchanged. Lower Appellate Court held that plaintiff did not become owner unless and until there is specific enforcement of agreement of exchange. Since the agreement of exchange was to be registered before 15.06.1975 and plaintiff never sought specific performance of the same, therefore, plaintiff could protect his

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possession on the basis of said agreement and could not be declared as owner of the land. The plaintiff was only entitled to protect his possession against any challenge made by the transferee contrary to the terms of contract i.e. the part performance being a weapon of defence. Lower Appellate Court partly accepted the appeal on the aforesaid analogy thereby protecting the possession of the plaintiff under Section 53 (A) of the Transfer of Property Act and did not accept ownership of the plaintiff on the basis of exchange in question.

8. Heard the arguments of both sides. In order to appreciate the controversy in its correct perspective, it is necessary to take note of language used in exchange deed (according to plaintiff) and agreement of exchange (according to defendants). The contents of Ex.P-1 in vernacular read as under:-

"Zameen Da Tabadla

Main Gurdev Singh S/o Gujjar Singh Ne Apni zameen 3 Vighe Taali Wali zameen di Ivaj Santa Singh S/o Prem Singh Ne Jihri Mukhtiar Singh div vand wali Jogeane tin kille zameen da tabadla kar lia hai agar sade vichon koi mukre ta ek hazaar rupaye harjana paya javega 15 June ton pehla registry kra lainge jihra mukre ek hazaar rupaye harjana paya javega ate dohan dhiran nu apna kabzaa kra ditta hai ihe likht Gram Panchayat Badrukha vich kitti gai.

Sd/-

Sarpanch
Gram Panchayat Badrukhan"

The aforesaid recital makes it clear that it was an exchange of land in which Gurdev Singh son of Gujjar Singh exchanged his land with

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the land of Santa Singh. There was penal clause that in the event of refusal by any of the party from getting it registered before 15th June, then penalty of ₹1000/- was to be imposed. Both the parties delivered possession of their respective land. The writing of the exchange was done in front of the Gram Panchayat and Sarpanch of the Gram Panchayat endorsed the same.

9. Earlier a civil suit No.150 of 1977 was filed by Santa Singh against the plaintiff for possession. In the said suit Issue No.1 was framed in the following manner:-

> *"Whether the plaintiff is owner of the land in suit? O.P.P".*

The trial Court recorded the findings on the said issue in the following manner:-

> *"It was for the plaintiff to prove whether he is owner of the land in dispute. In order to prove this issue the plaintiff has placed his reliance on Jambandi for the year 1975-76 of Village Badrukhan which is Ex.PD wherein the plaintiff has been shown owner of the land in dispute. In order to rebut this claim of ownership of the plaintiff the counsel for the defendant has argued that the plaintiffs have been shown owner in the revenue record only due to the fact that the exchange deed has not been got registered as was agreed to between the parties, and hence the plaintiff has no right to claim himself as owner of the land in dispute in the event when the land in dispute fell to the share of the defendant as per document Ex.D1 in part performance of the contract. Counsel for the defendant has placed his reliance on Section 53(a) of Transfer of Property Act from the perusal of which it is clear beyond doubt that*

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if the transferee had got possession of the property in part performance of the contract the transferor or any person claiming under him is debarred from forcing his claim against such transferee. In the instant case the defendant got possession of land from the plaintiff in part performance of the contract and hence the plaintiff is debarred from claiming his right against the defendant meaning thereby the plaintiff is estopped from claiming ownership and possession of the land in dispute from the defendant and hence this issue is decided against the plaintiff."

Similarly, issue No.2 was framed in the following manner:-

"Whether the suit property was transferred in favour of the defendant by way of exchange on 28.1.75, if so, to what effect? O.P.D."

The trial Court recorded the findings on the said issue in the following manner:-

"In order to prove whether the land in dispute was transferred in favour of the defendant by way of exchange on 28.1.75 the defendant has examined Gurnam Singh Panch of Village Panchayat Badrukhan as DW3, Arjan Singh Panch of Village Panchayat Badrukha as DW4 and Gurnam Singh Sarpanch of Village Badrukhan as DW6. Gurnam Singh Sarpanch of the village Badrukhan who has been examined as DW6 has deposed that the agreement of exchange of property Ex.D1 was scribed by him on the request of the parties. The same was read over to the parties and the parties thumb marked the same in the presence of Bhag Singh, Gurnam Singh, Arjan Singh all members of Panchayat. He further deposed that Ex.D1 was also thumb marked by Mukhtiar Singh S/o Santa Singh. DW

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Gurnam Singh and Arjan Singh who stood witnesses to exchange deed Ex.D1 have categorically deposed that the document Ex.D1 was scribed by the Sarpanch of the village. The parties after admitting the contents of the document thumb marked the same and copies of the document were supplied to the parties. All these witnesses have categorically deposed that on the basis of this document Ex.D1 the parties exchanged their land with each other. Defendant gave his land measuring 3 Bighas named "Tahliwala Khet" to the plaintiff and in lieu of it got possession of 3 Killas of land named "Jogayanwala Khet". The execution of this document has not been denied by the plaintiff himself. He has admitted that the document Ex.D1 was executed between the parties. From the above discussion I hold that the defendant has proved the execution of document Ex.D1 and he has also proved that the land in dispute was transferred in favour of the defendant by the plaintiff by way of exchange on 28.1.75 and in part performance of the contract between the parties and hence in view of section 53 (A) of the Transfer of Property Act the transferer i.e. Santa Singh is debarred from inforcing his right against the transferee Gurdev Singh in respect of the property of which the defendant is in possession and I hold that the defendant is entitled to retain possession in view of provisions of section 53(A) of the Transfer of Property Act and hence this issue is decided in favour of the defendant."

Issues No.3 and 6 were framed in the following manner:-

Issue No.3

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"Whether the plaintiff has no locus-standi to file this suit? O.P.D.

Issue No.6

Whether the plaintiff is estopped from filing the present suit and from alleging himself as the owner of the suit land as alleged in para No.5 of the Addl. Objection of the W/s? O.P.D."

Issues No.3 and 6 were jointly discussed and the trial Court recorded its findings in the following manner:-

"These issues are inter-connected and therefore, I would like to discuss these issues in one stroke. The defendant has alleged that the plaintiff has no locus-standi to file the instant suit and he is estopped from alleging himself as the owner of the suit land in dispute. The execution of document Ex.D1 on the basis of which land in dispute was transferred to the defendant, has been proved by the defendant by examining Gurnam Singh member village Panchayat Badrukhan as DW3, Arjan Singh member Panchayat Badrukhan as DW4 and Gurnam Singh Sarpanch of Village Badrukhan as DW6. All these witnesses have categorically deposed that the document Ex.D1 was executed between the parties and the land in dispute measuring 3 Killas was transferred to the defendant by the plaintiff and in lieu thereof the defendant got possession of land measuring 3 Bighas relating to the defendant. So much so the execution of exchange deed Ex.D1 has not denied by the plaintiff himself while standing in the witness box. The plaintiff has hon'bly admitted the execution of Ex.D1. Even from the statement of the parties it is an admitted fact that Ex.D1 was executed between the parties and the parties on the basis of this document took possession of their respective land. The counsel

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for the defendant argued that he he has taken possession of the land in dispute in part performance of the contract and hence the plaintiff is estopped from filing this suit and claiming himself to be the owner of the land in dispute is irrespective of the fact that the transfer deed has not been got registered as required by law of Registration. He has placed his reliance on section 53(a) of the Transfer of property Act which reads as under:-

"Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

> *and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract and has done some act in furtherance of the contract,*
> *and the transferee has performed or is willing to perform his part of the contract,*
> *than, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
> *Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.*

The perusal of section 53(a) of transfer of Property Act make it crystal clear that when parties

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have made a contract to transfer an immoveable property for consideration and the transferee has taken possession of the property in part performance of the contract and is in possession of thereof in part performance of the contract and has done some act in furtherance of the contract, the transferor or any person claimed under him is debarred from claiming any right for such property against the transferee irrespective of the fact that the transfer deed has not been registered and the transfer is complete in the manner prescribed thereofor by any law by the time being in force. In the instant case as evident from the evidence put forth on record document Ex.D1 was executed between the parties and in pursuance of Ex.D1 defendant gave possession of his land measuring 3 Bighas which is known as "Tahliwala Khet" to the plaintiff and in lieu thereof as agreed to, have taken possession of 3 killas of land of the plaintiff known as "Jagayanawala"Khet". All this shows that the defendant got possession of the land in dispute in part performance of the contract and in view of section 53(a) of the Transfer Property Act he is entitled to retain possession of the land in dispute to irrespective of the fact that the exchange deed has not been registered as required by law and the transfer has not been completed in the manner prescribed therefor by the law for the time being in force and the plaintiff is estopped from claiming any right against the defendant in the prevailing circumstances and the plaintiff by his act and conduct is debarred from filing the instant suit against the defendant. It will not be out of place to mention here that as per Jamabandi Ex.PD for the year 1975-76 of village Badrukhan the plaintiff is shown owner of the land in dispute. His ownership in the revenue records maintained the status quo due to the

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fact that the transfer is still in complete for want of registration. Had the parties fulfilled the contractual obligations i.e. they have got the transfer deed registered, then the question of ownership of the plaintiff would have gone to the dogs. As per section 53(a) of Transfer of Property Act despite the fact that the transfer is incomplete in the eyes of law for want of registration even then the defendant is entitled to taken benefit of the provision of section referred to above and the plaintiff is debarred from claiming any right against the defendant meaning thereby that the plaintiff is estopped from filing the instant suit and alleging himself as owner of the land in dispute. In view of my above discussion both these issues are decided in favour of the defendant."

10. Apparently, from the issue No.1 of the earlier litigation, factum of Santa Singh being owner of the land was declined and he was debarred from claiming his right against the present plaintiff and was estopped from claiming ownership and possession from the present plaintiff. On issue No.2, existence of exchange deed dated 28.01.1975 was established and the present plaintiff (defendant in the earlier suit) was held entitled to retain the possession of the property in view of Section 53 (A) of the Transfer of Property Act. Again, the findings given under Issues No.3 and 6 were in consonance with the findings recorded under Issue No.1 and Santa Singh was estopped from claiming himself to be owner of the property. The earlier judgment and decree dated 31.03.1978 passed by the trial Court and dated 18.08.1978 passed by the District Judge, Sangrur had already attained finality.

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11. Prior to amendment of Section 100 CPC, a second appeal could have been filed before this Court on the grounds set out in clauses (a) to (c) of Section 100 (1) CPC i.e. (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law and (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.

Now the interference in the second appeal could only be made if substantial question of law arises in the case. Therefore, the interference cannot be only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim *'interest reipublicae ut sit finis litium'*. The underlined purpose was to bring finality to the issues/litigation at some point of time.

Learned counsel for the appellant has formulated the following substantial question of law:-

i) Whether the Lower Appellate Court has misread evidence on record?

ii) Whether the respondents are estopped from claiming themselves as the owners of the suit land?

iii) Whether the judgment dated 31.03.1978 of Sub Judge IIIrd Class, Sangrur and judgment dated 18.08.1978 of District Judge, Sangrur are of overriding effect in the present case and are binding on the respondents?

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iv) Whether the judgment of the Lower Appellate Court amounts to nullifying the above said judgments?

v) Whether the respondents can go against the exchange deed dated 28.01.1975 executed between predecessor of the respondents and the appellant which has been acted upon by the parties?

vi) Whether the ownership of the appellant over the suit land is substantiated from the exchange deed dated 28.01.1975 which has been held to be lawfully executed between the parties in judgments dated 31.03.1978 and 18.08.1978 and the same having been acted upon by the parties?

12. First of all, it is to be distinguished whether transaction of exchange deed dated 28.01.1975 is simplicitor agreement of exchange or it is really an exchange deed with a further recital to get it registered at subsequent stage. According to the findings recorded in the earlier suit, the transaction in question was found to be an exchange deed. The execution of which was proved with reference to evidence on record. After the execution of aforesaid exchange deed, nothing was required to make it legally enforceable as according to Section 118 of the Transport of Property Act, instrument is not legally required to be registered as the provisions of Transfer of Property Act are not applicable in the State of Punjab. Even oral exchange is permissible. Since the possession of the land was handed over to the respective parties, on the basis of exchange deed, therefore, recital to this effect in the exchange deed is of no consonance and nothing remained to be executed at a later stage and the exchange deed in question was a

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complete instrument in itself and its execution was proved on record. Learned counsel for the appellant relied upon ***1973 PLJ 329*** titled ***'Hardit Singh versus Gulzara Singh and another'***, ***2011 (2) RCR (Civil) 246*** titled ***'Randhir Singh versus Ranjit Singh'***, ***2011 (4) PLR 422*** titled ***'Pirthi Singh versus Lakhpat and another'***, ***2004 (4) RCR (Civil) 742*** titled ***'Paramjit Singh versus Ratti Ram'*** and ***1973 PLJ 641*** titled ***'Chhanka Ram versus Reham'***.

13. So far as the argument of learned counsel in reference to plea of part performance being a sword and not only a shield is concerned, the same cannot be appreciated as much water has already flown down thereafter. Since the execution of exchange has been proved and in the earlier litigation Santa Singh predecessor in interest of the defendants was restrained from claiming ownership of the property, therefore, the transaction dated 28.01.1975 cannot be held to be an agreement of exchange, thereby confining the entitlement of the present plaintiff only to the extent of protection under Section 53 (A) of the Transfer of Property Act. Exchange deed dated 28.01.1975 is proved on record. The recital therein to the extent of its proposed course of action in getting the same registered had no telling effect on the lawful execution of exchange deed. In the absence of notification regarding applicability of Section 118 of the Transfer of Property Act in Punjab, the requirement of the exchange to be registered is of no consequence and the transaction would be deemed to be a

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completed transaction. Even the oral exchange is permissible. No document is required to be executed and registered. The respective properties stood already exchanged and possession was delivered between the parties pursuant to the exchange in question and thereafter the document in question was executed which at the most could have been treated as a memorandum of exchange already taken place coupled with exchange of possession. Therefore, Section 118 of the Transfer of Property Act cannot be pressed into service in the State of Punjab. In the light of aforesaid cited judgments it cannot be held that the exchange could be effected only through a registered document. Once the exchange is proved on record, its validity flows from the document in question which is coupled with delivery of possession of exchanged property. Therefore, the plea of the defendant that the transaction was only an agreement of exchange can not form any basis for treating the instrument to be not legally enforceable.

14. Question No.1 of the formulation is accordingly answered in favour of the appellant to hold that the judgment and decree passed by the lower appellate Court suffers from misreading of evidence. Secondly, in view of findings recorded in the earlier litigation (Ex.P-10 and Ex.P-11), respondents are estopped from claiming themselves to be owner of the property in question. Question No.2 is accordingly answered. Question No.3 is also held in affirmative. The findings recorded in the earlier judgment and decree dated 31.03.1978 passed by the trial Court

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and judgment and decree dated 18.08.1978 passed by the District Judge, Sangrur are conclusive in nature and have become final. The said decisions have overriding effect in the present context and are binding upon the respondents as such. Question No.4 is also answered accordingly that the impugned judgment and decree of the lower appellate Court cannot nullify the effect of judgment and decrees dated 31.03.1978 passed by the trial Court and dated 18.08.1978 passed by the lower appellate Court in the earlier litigation. Question No.5 has its answer in the cumulative reading of questions and discussions made there-under. Question No.6 is also answered in favour of the appellant to hold that the exchange deed dated 28.01.1975 is fully proved in terms of its execution and since the provisions of Section 118 of the Transfer of Property Act are not applicable in the State of Punjab, therefore, there was no requirement of getting is registered. Therefore, the exchange being fully proved and was followed by delivery of possession, the transaction of exchange is proved to be legal and both the parties derived their titles accordingly and the findings recorded under the previous litigation have binding effect upon the respondents. Accordingly, the questions as formulated by the appellants are answered in favour of the plaintiff-appellant.

15. The findings recorded by the lower appellate Court to the extent of treating the exchange to be an agreement are contrary to law. The possession of the plaintiff is not only protected under Section 53 (A) of the Transfer of Property Act, but the same

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has ripened into ownership on the basis of findings recorded in the earlier suit. Accordingly the appeal is allowed and judgment and decree dated 08.02.1988 passed by District Judge, Sangrur is hereby set aside, decreeing the suit with costs throughout while restoring the judgment and decree of trial court dated 18.07.1987.

[Raj Mohan Singh]
Judge

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