IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No.17 of 1991
Date of Decision: 30.01.2015

Rajinder Singh

..... APPELLANT

VERSUS

Balbir Singh and others

..... RESPONDENTS

PRESENT: - Mr. C.B. Goel, Advocate with
Mr. Manoj Sharma, Advocate
for the appellant.

Mr. Alok Jain, Advocate
for the respondents.

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

1) Whether Reporters of the local papers may be allowed to see the judgment?

2) To be referred to the Reporters or not?

3) Whether the judgment should be reported in the Digest?

SHEKHER DHAWAN, J.

This Regular Second Appeal is directed against judgment and decree dated 05.10.1990 passed by the Court of learned Additional District Judge, Karnal whereby appeal filed against the judgment and decree dated 23.04.1988 passed by the learned Sub Judge, Ist Class, Panipat was accepted and suit of the plaintiff for possession of suit land on the basis of pre-emption right was dismissed.

For convenience sake, hereinafter, reference to the parties is being made as per their status in the Civil Suit.

The detailed facts are already recapitulated in the judgments of the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that plaintiff-appellant Rajinder Singh had filed suit for possession by way of pre-emption on the ground that suit land measuring 28 kanals 06 marla being 1/5 share of agricultural land measuring 141 Kanals 9 Marlas comprising in Khewat No.154, Khatoni No.200, Khewat No.155, Khatoni No.201 to 204, rect. No.156, killa No.21/1/0-17, rect. No.170, killa No.23/2-4 rect. No.171, killa No.4/8-0, 5/8-0, 6/8-0, 7/8-0, 13/7-7, 14/8-0, 15/8-0, 16/8-0, 17/8-0, 18/8-0, rect. No.172, killa No.1/2/7-12, 2/2/3-9, 9/9-0, 10/8-0, 11/8-0, 12/8-0, 19/8-0, 20/8-0, situated within the area of village Idyana Tehsil Panipat vide jamabandi for the year 1981-82 on payment of ₹25,000/-.

As per plaintiff, Kishan Chand son of Mange Ram was owner in possession of 1/5th share of the suit land detailed above and he had sold his share to the plaintiff for a consideration of ₹25,000/- vide sale deed dated

05.06.1985 and registered on 08.08.1985 but the possession of the land was given thereafter. The plaintiff had claimed the right of pre-emption on the basis of co-sharership alleging himself to be co-sharer at the time of sale and that still he is co-sharer in possession of the joint khewat. As per plaintiff, prior to the sale, no notice was given to him and prayed that the suit for possession on the basis of right of pre-emption being co-sharer be decreed.

The respondents-defendants contested the suit thereby taking the plea that suit land bearing killa No.10 of rect. No.172 does not lie as the same was *Banjar Kadim* at the time of sale and the same was re-claimed by defendant No.1. The plaintiff himself had taken part in the impugned sale so he is estopped by his own act and conduct from filing the present suit. He has got no right of pre-emption; plea of limitation was also taken as possession was handed over to the defendants when the sale was executed i.e. on 05.06.1985. Plea was also taken that the suit is bad for partial pre-emption. The plaintiff was not co-sharer at the time of sale and at the time of filing of the suit and decision of the suit. More so, the defendants spent a sum of ₹3,000/- on improvement over the suit land and also incurred the expenses on registration. In case the suit is decreed, the defendants are entitled to the sale consideration, stamp charges, registration charges and improvement charges to the tune of ₹3,000/-. However, the defendants prayed for dismissal of the suit.

Learned trial Court settled the following issues and the parties were put to trial:

1. Whether the plaintiff has superior right to pre-empt the sale in question? OPP
2. Whether the sale consideration was fixed in good faith or was actually paid to the vendor. If so, to what effect? OPD
3. If issue No.2 is proved then what was the market value of the suit land at the time of sale? If so, at what amount? OPP
4. Whether the suit of plaintiff is not within time? OPD
5. Whether the suit is bad for partial pre-emption? OPD
6. Whether the plaintiff has not deposited the 1/5th pre-emption money? OPD
7. Whether there is no cause of action against the defendants? If so, to what effect? OPD
8. Whether the suit has not been properly valued for the purposes of Court fee and jurisdiction? OPD
9. Whether the killa No.10 of rect. No.172 of the suit land was *banjar* at the time of sale and has been re-claimed by the answering defendants, if so, to what effect? OPD
10. Whether the plaintiff is not a co-sharer in the suit land, if so, to what effect? OPD

11.Relief.

Additional Issue

1(a) Whether the sale in question has been got executed at the instance and active participation of the plaintiff, if so, to what effect? OPD

The learned Court of First Instance after considering the material and evidence available on file decided Issue No.1 in favour of the plaintiff. However, Issue No.2 was decided against the plaintiff. Issues No.5,6,7,8 and Issue No.1(a),4,9 were decided in favour of the plaintiff. The findings were returned that defendant No.3 had become redundant and consequently the suit of the plaintiff was decreed.

Being aggrieved of passing of said judgment and decree and the findings having been returned by the learned Court of First Instance on various issues, the defendants-appellants preferred an appeal.

Learned Court of First Appeal accepted the plea and judgment and decree dated 23.04.1988 were set aside mainly on the ground that the suit was not filed by the plaintiff within the period of limitation.

Being aggrieved of passing of said judgment and decree dated 05.10.1990 by learned Court of First appeal, the plaintiff-appellant has filed the present Regular Second Appeal.

When the appeal was admitted, no substantial questions of law were framed. However, substantial questions of law have been placed on record by the appellant on 22.11.2006 during the pendency of appeal for consideration by this Court, which are as under:

> "1.Whether in the facts and circumstances of the instant case, sale of a share out of joint land provisions of Section 97 of the Limitation Act, 1963 would apply or the matter would be governed by second part of Article 97 of Limitation Act?
>
> ii)Whether a co-sharer in a joint khewat is capable of delivering actual physical possession without any evidence of his being in actual physical possession of specific khasra numbers?
>
> iii)Whether land comprised in specific khasra numbers out of joint land would be a sale of share out of joint land in view of the law laid down by Full Bench of this Hon'ble Court in case reported as 1981 PLJ page 204?
>
> iv)Whether in view of the contradictory stand taken by the respondents the suit of the appellant could be dismissed on the ground of limitation?
>
> v)Whether in the facts and circumstances of the instant case the learned lower appellate court has failed to appreciate

the material documentary as well as oral evidence on record?"

Submissions made by learned counsel for the parties have been considered and the record of the case file perused.

The dispute between the parties mainly revolves around the controversy whether the appellant had got right of pre-emption on the basis of co-sharer. Both the Courts below have given findings of fact that plaintiff/appellant has got superior right to pre-empt the sale in question on the ground of co-sharer. The said findings do not call for any interference and the same are hereby affirmed.

The main contention of the parties which requires determination and decision by this Court is whether the suit was filed within period of limitation because the period of limitation provided for filing such a suit for pre-emption is one year as per provisions of Article 97 of Limitation Act. Further, it is required to be decided whether possession could be delivered by the vendor at the time of execution of sale deed. In that case the period of limitation shall be one year from the date of execution of sale deed and if the possession could be delivered on the date of execution of sale deed, then the period of limitation is to start to run from the date when the possession is capable of being delivery.

Mr. C.B. Goel, Advocate, learned counsel for the appellant took the plea that certain facts are not disputed that sale deed was scribed on 05.06.1985 and the same was registered on 08.08.1985. As per sale deed Ex.D1, possession of 1/4th share was delivered. The present suit was filed on the plea of pre-emption on 07.08.1986 to decide the preferential right of pre-emption as co-sharer on the basis of sale deed scribed on 05.06.1985 and registered on 08.08.1985. The controversy requires to be decided in this case is whether possession was capable of delivery and whether the possession could actually be delivered on or before 05.06.1985. That way, it shall have to be decided whether vendor was in position to further deliver the possession on or before 05.06.1985.

Hon'ble Division Bench judgment of this Court in case of **Sardar Singh Vs. Smt. Dalip Kaur and others, AIR 1981 Punjab & Haryana 340** expressed the opinion that as per provisions of Article 97 of Limitation Act and in such like suit for pre-emption, the limitation period commences on the date of delivery of possession and on the date of execution of sale deed because limitation commences from the date of execution of deed and not registration thereof. However, the starting point of limitation under the first part of Article 97 is from the date of taking of possession of whole or part thereof. The object to provide two different limitations for two different sets of facts is the same, namely, notice of the sale to the pre-emptor. If whole of the sold property is already in possession of a tenant, mortgagee or a person other than the owner under some title and that person continues in possession in spite of a sale by the owner, the only way to provide knowledge to a pre-emptor would be by a registered document because under the law the moment a document is entered in the register of the Registrar, the sale is notice to the general public and the registration of such a sale would give the starting point of limitation for filing a suit for pre-emption. But, where a property sold or part of it was in possession of the vendor, the moment somebody else comes in possession of that property, there is immediate notice of change of possession from the owner to a third person, giving notice to the pre-emptor to find out as to in what capacity the third person has come in possession of the same.

While referring to evidentiary value of recital in sale deed regarding plea of possession, learned counsel for the appellant took the plea that recital in sale deed in itself is not sufficient to prove delivery of physical possession against pre-emptor.

The physical possession contemplated by Article 97 does not consist of formal statements by third parties but of physical control visible to other people which gives notice of a change. In case of **Mohan Singh Vs. Nirmal Singh and others, 1971 P.L.J. 27** such a view was expressed by this Court.

While arguing on this point, Mr. Alok Jain, Advocate, learned counsel for the respondents submitted that in Civil Suits, pleadings are the foundation of the case. Similarly, in the case in hand, the plaintiff-appellant had filed the suit on the basis of plaint. In para No.1 of the plaint, plea was taken that Kishan Chand son of Mange Ram was owner of 28 kanal 6 marla of land which is 1/5th share of the land measuring 141 kanal 9 marla. In the corresponding para No.1 of written statement, this part of the pleading was admitted that Kishan Chand was owner in possession of 1/5th share of the land detailed in the head note of the plaint. The possession of these killa numbers was given to the answering defendants by the vendor Kishan Chand and since then the defendants are in possession of the same.

In Civil Suit, admission is always the best evidence and even the case when decided on the basis of admission itself, the parties are not allowed to withdraw the admission having been made in favour of other party in the pleadings itself. A party to Civil litigation cannot run away and wriggle out of pleadings. More so, the findings of fact have already been recorded on this point by the Courts below and the same cannot be disturbed.

Learned counsel for the respondents also took the plea that it is not disputed that possession of joint land can be delivered by a co-sharer to the extent of his share.

The main point which requires determination and decision by this Court is whether the possession could be delivered on the date of execution of sale deed i.e. 05.06.1985 or not. In the case in hand, Rajinder Singh has been shown to be co-sharer and this fact find recorded in the revenue record also. The corresponding entry was also recorded vide Mutation Ex.P-4 showing status of Rajinder Singh to be a co-sharer.

In the present case, it is to be seen whether the land was capable of physical possession of the whole or part of the property, then first part of the Article 97 would be applicable. Similarly, if the physical possession was not capable of delivery, the provisions of Article 97 second part would be applicable. Such a view was expressed by this Court in case of C**hhaju and Teka Vs. Mst. Bharpai @**

Bharpo 1983 PLR39 that the sale deed was executed and attested on May 21, 1969 but was entered in the registration book on June 05, 1969. The suit having been filed on May 27, 1970, recital in the sale deed is that possession had been delivered to the vendees under the sale. Apart from that even the plaintiff admitted that possession was delivered on the date of execution of the sale deed. In such a case, the first part of the third column of Article 97 Limitation Act would be applicable and not the second part. It would be wholly immaterial whether possession was taken before the sale deed was written or while it was being written or after it was completed and signed by the parties.

Pleadings in this case on the point of delivery of possession are specific and admissions are specific. Kishan Chand had sold the suit land for the sale consideration of ₹25,000/- on the basis of registered sale deed, executed on 05.06.1985. The said sale deed was registered on 08.08.1985 and the possession of rectangle No.172, killa Nos.10, 12 and 19, rectangle No.172 killa No.5 was handed over. Admission has been made in the pleadings and the plaintiff is legally bound by the same.

Learned Court of First Appeal has rightly recorded those findings and also came to the conclusion that as per jamabandi Ex.P-2 for the year 1981-82, vendor Kishan Chand was in possession of a part of the sold land comprised of rectangle No.171, killa No.16. Therefore, the land was capable of possession and, as such, the first part of Article 97 of the Limitation Act would be applicable. The period prescribed by way of limitation is one year from the date when the purchaser takes the physical possession of the whole or part of the property sold. Even if the possession is delivered of a part of the property sold, the limitation would start when the purchaser takes the physical possession under the sale.

Learned Court of First Instance had also rightly placed reliance upon oral evidence that possession in this case was taken before the execution of the sale deed and at the time of payment of earnest money. Recitals in the sale deed Ex.P-1/Ex.D-1 also establish the fact that the possession has already been delivered to the purchasers.

Learned Court of First Appeal was justified in arriving at the conclusion that at the time of execution of sale deed dated 05.06.1985, it had been acknowledged that possession had already been delivered. Hence, the sale was complete. The registered sale deed relates back to the date of its execution.

Learned Court of First appeal had also rightly observed that vendee was not bound to prove definite date with regard to delivery of possession. It has rightly come to the conclusion that claim of the plaintiff being based on superior right pre-emption which has always been considered to be as relic of feudalism as the same creates clog on right of owner to alienate his property to a person of his own choice. In such cases, if two interpretations of a document are possible, the one which defeats the right of the pre-emptor is to be accepted. In such cases, the vendor can by all legitimate means defeat the right of the pre-emptor. Such law was laid down by Hon'ble Full Bench of this Court in case of **Than Singh Vs. Nandu and others** 1977 PLJ 479.

In view of the above, the present Regular Second Appeal is without any merit and the same stands dismissed.

(SHEKHER DHAWAN)
JUDGE

January 30, 2015
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