

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA N0.4176 of 2010 (O&M)
Date of Decision: 21.05.2015

Jaswinder Kaur and others

... Appellants

Versus

Karnail Singh and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. D.S. Malwai, Advocate,
for the appellants.

Mrs. Gagandeep Grewal, Advocate,
for R-1.

Ms. Meena Bansal, Advocate,
for R-2 & 3.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes.**

RAJIV NARAIN RAINA, J.

1. This is defendants second appeal having lost concurrently in both the courts below in a lawsuit involving shifting of an electric motor connection from land sold to land retained by agriculturist owner in whose name the connection still stands in the records of supplier of energy, i.e., the defendant Punjab State Electricity Board (for short the 'Board').

2. Heard learned counsel for the parties at length. No substantial question of law arises in this appeal for the recorded reasons following the narration of facts.

3. Briefly stated, Karnail Singh-plaintiff, presently respondent, was owner of agricultural land falling in the revenue estate of village

Gobindpura, Tehsil Dhuri, District Sangrur. He had an electric connection No.AP-20 with load of 12.5 B.H.P. to run an electric motor to lift water from his Tube-well sunk in Khasra No.438/6-5 within his ownership. The parcel of land in which the Tube-well was installed was driven by the suit electric connection in his name sanctioned by the respondent-Board, defendant was sold comprising 43 Bighas of land to four vendees namely, Gurjant Singh, Dhan Kaur, Joginder Singh and Baldev Singh and the mutations stood sanctioned in their names as owners of newly acquired property. The plaintiff was left with another piece of land measuring 19 Bighas 12 Biswas situated in the same village but far apart. His problem was that he had no source to irrigate his fields which remained in his ownership and possession. He applied to the Board to shift his electric connection from the land sold to third parties to his own land because it was his case that he had not sold the electric Tube-well connection and had sold only land and things embedded in the land. The electric Tube-well connection was not a thing embedded in the land. In other words, he sold the land but not the electric Tube-well connection which he claimed shifting by the Board. His request to the Board of shifting of electric connection from Khasra No.438 [land sold] to Khasra No.919 [land retained] was stonewalled when the Board did not oblige him even though it stood in his name on the date of filing of the suit for mandatory injunction. The plaintiff brought a suit against the Board in which the subsequent buyers of his land applied under Order 1 Rule 10 of the CPC for impleading them as defendants. That application was allowed and the subsequent vendees were made parties. It is not disputed that at the time of institution of the suit the

electric Tube-well connection stood in the name of Karnail Singh-plaintiff on the record of the Board. While plaintiff asked for shifting of the connection, Gurjant Singh, his vendee, prayed that the connection be transferred in his name being a purchaser of the property along with electric Tube-well connection. It happened that Gurjant Singh and others further sold the subject land to Harcharan Singh.

4. The suit was contested by both the Board and the added respondents. To know what was actually sold vide registered sale deed No.1303 dated October 06, 2005 and the further sale deed No.1905 dated January 04, 2006 the sale deeds assumed importance.

5. The short controversy in the suit was whether the electric Tube-well connection had been sold along with the land or not. However, one thing is certain that Gurjant Singh and company when resold the land, sold the Tube-well connection as well in the new instrument. There is nothing in the sale deed between the original vendor and vendees with respect to the electric Tube-well connection or that it was sold with the land.

6. Gurjant Singh, the first purchaser, relied on an affidavit to contend that plaintiff had given this affidavit in his favour admitting sale of electric Tube-well connection and on the basis of this affidavit, Gurjant Singh said that he further sold land to defendant-Harcharan Singh etc. The trial court recorded as a finding of fact after reading the sale deed Mark B that there is nothing in it mentioning the electric connection. The only defence of Gurjant Singh in retention of the electric connection as one fixed to the Tube-well and thus part and parcel of the land sold was the affidavit but the original of the affidavit was not produced on the record. It was only

a photocopy of the affidavit presented to the Board seeking change of name in favour of vendees. If the affidavit was not proved as evidence there was little the court could do to read its copy as legally tendered evidence. To confound the issue, defendant-Jaswinder Kaur etc., who are appellants in the present appeal and had purchased land through the vendee of plaintiff-Karnail Singh, had also filed a separate being Civil Suit No.210 dated May 06, 2006 against Karnail Singh-plaintiff and the Board wherein they pleaded that they were owners in possession of the electric Tube-well connection on the basis of registered sale deeds. The civil suit was dismissed with a finding that there was failure of Jaswinder Kaur to show that Karnail Singh actually transferred the electric connection to defendant-1, the first purchaser from where Jaswinder Kaur claimed her rights. The dispute qua Jaswinder Kaur etc. was res judicata.

7. The trial court concluded that plaintiff still remained the consumer of the Board which fact was admitted by DW-1 Amarjit Singh in his deposition when he appeared on behalf of the Board as an official witness. Thus, the plaintiff had constructive possession of the electric connection being the sanctioned owner/user/customer from the Board. Since the plaintiff was ready to deposit transfer charges to the Board there was hardly any difficulty in not shifting the connection physically for his own use from the land sold to the land retained by the plaintiff in the same village. The suit was decreed by the Additional Civil Judge (Sr. Divn.) Dhuri by judgment and decree dated November 19, 2009. The decree for mandatory injunction was accordingly issued and drawn and it was ordered that the connection will be shifted on deposit of necessary charges within

one month and the actual shifting taking place within the next two months.

8. Aggrieved by the decree, Jaswinder Kaur and five others appealed to the learned District Judge, Sangrur praying for acceptance of the appeal and setting aside of the decree. In the appeal, the Board was made proforma respondent. The facts were no longer disputed in appeal resting on the legal question as to whether right, title and interest in the electric Tube-well connection passed from plaintiff to his vendees and still further to the present appellants.

9. It was argued by the losing appellants that the learned trial court had overlooked the evidence available on record and instead had passed its judgment on conjectures and surmises. The appellants contended that they had purchased land from Gurjant Singh and three others by two sale deeds executed in 2005 and 2006. Gurjant Singh had sold rights in the electric connection to his vendees because they bought the land from Joginder Singh etc. They became owners in possession of the connection and the plaintiff/contesting respondent-Karnail Singh had no interest left as he had executed an affidavit dated May 20, 1991 in favour of Gurjant Singh for sale of electricity connection in his favour and, therefore, plaintiff was divested of his rights to retrieve the connection or retain it in his name.

10. It was argued before the learned District Judge, Sangrur by the appellants that the evidence of Amarjit Singh, Lower Division Clerk, PSEB appearing as DW-1 demolishes the case of the plaintiff beyond redemption because the affidavit Ex.D-5 contains a recital that Karnail Singh-plaintiff sold the connection to Gurjant Singh. On the other hand, the plaintiff argued that the affidavit relied upon by the appellants has not been proved as per

law of evidence and has been rightly refused to be relied or acted upon by the learned trial court while the sale deeds relied upon by the appellants do not support their contention that the connection in dispute was sold by the contesting respondent/plaintiff in favour of Gurjant Singh along with the land under reference and Civil Suit No.210 of May 06, 2006 brought by the present appellants to stake their claim on the connection in disputed property has been dismissed holding them not entitled to declaration and injunction in respect of the electric connection. Albeit, there may have been a term of admission in the affidavit of the plaintiff but the original affidavit was not produced and only its photocopy was and, therefore, the document could not be read in photocopy without any steps taken to lead secondary evidence of the document by the propounding party.

11. To make things somewhat easier to appreciate, the learned District Judge, Sangrur framed the real issue arising for adjudication which was whether Karnail Singh was entitled to shifting of connection from its present place of installation to the place requested by him before the Board and now before the Court. The answer could only be whether Karnail Singh had sold the connection in favour of Gurjant Singh and an affidavit dated May 20, 1991 was executed in that respect. The learned District Judge, Sangrur answered that the only possible finding which could be returned had to be in the negative.

12. The learned District Judge, Sangrur held that when third party purchasers had set up a plea based on an affidavit they were obliged to prove the affidavit as per procedure known to law. When its original was kept back from the court and its photocopy placed on record as Ex.D-5,

without obtaining leave of the court to prove the document by way of secondary evidence and without satisfying requirements of section 65 of the Indian Evidence Act regarding proof of execution and loss of original affidavit, the appeal was bound to fail in absence of best evidence produced on the file, which would qualify as legally admissible evidence and to be trusted.

13. There was still further trouble in store for the appellants when the court of first appeal found that the sale deeds were not proved on record to know what its terms were and this was a serious impediment in the way of relief to the defending vendees and which this court also feels should be read against the appellants and in favour of the plaintiff who based his claim on the connection standing in his name till the filing of the suit, which fact has not been controverted by Exb. D-1 and D-2 produced by defendant Board where the assertion of the plaintiff stands proved and remains unrebutted by the contesting defendants.

14. The learned District Judge, Sangrur compared the issues framed in Civil Suit No.210 of May 06, 2006 with the present one and the supporting evidence and held there was no escape that they were substantially one and the same thing and this was an insurmountable hurdle in the way of Jaswinder Kaur etc. which they could hardly cross. On the remaining issues with respect to the cause of action and lack of service of notice under section 80 of the CPC on the Board in advance before the action was brought have been rightly decided in favour of the plaintiff. There was no such legal requirement. The Board had clearly stated in its written statement in paragraphs 3 and 4 that the Board had expressed its inability to shift the

connection as per the request of the plaintiff but at the same time were also satisfied that as per record, the connection stood in the name of the plaintiff. This admission, according to the lower appellate court, was sufficient indicator of the cause of action having arisen in favour of the plaintiff to institute suit.

15. The appeal was dismissed on October 06, 2010 against which the present appeal has been filed which also merits dismissal for the reasons: (#1) The connection still stands in the name of Karnail Singh in the record of defendant PSEB; (#2) He did not sell the electric connection when he executed sale deed in favour of Gurjant Singh etc.; (#3) The sale deed between Karnail Singh and Gurjant Singh was not produced on record to read its terms; (#4) No application was filed for permission to lead secondary evidence of the sale deed either by Gurjant Singh or Jaswinder Kaur etc. to support their case; (#5) If Gurjant Singh sold the electric connection in 2005 and 2006 in favour of his vendees Jaswinder Kaur etc. he did not own it via Karnail Singh by virtue of sale; (#6) What Gurjant Singh did not own he could not sell and if he did it would not be binding on the rights of Karnail Singh; (#7) The affidavit allegedly given by Karnail Singh to Gurjant Singh in 1991 was not produced in original but in photocopy nor was an application filed by contesting defendants to lead secondary evidence of it, therefore, the courts *a quo* did not commit any error in not relying on or reading the photocopy as evidence of sale of suit electric connection; (#8) In any case, an affidavit is not an instrument of sale in writing with ownership changing hands; (#9) In absence of best evidence produced by the defendants-subsequent vendees to rebut the stand

of the plaintiff Karnail Singh claiming ownership of the electric connection, plaintiff's suit must succeed and the defendants have to suffer defeat; (#10) The suit filed by Jaswinder Kaur against Karnail Singh was dismissed and there was no further appeal; (#11) The Tube-well is embedded in the earth and it is generally accepted in law that what is permanently embedded or rooted to the earth goes with the land. But this may not be true of a fixture easily removable and not fastened to the earth or attached to a thing embedded or affixed like an electric motor connection is, which is movable property which can be readily carried by hand or cart and attached elsewhere on different electric supply lines. Things attached to the earth are defined in section 3 of the Transfer of Property Act, 1882 but a case was not set up in defence of suit or in the grounds of appeal by the subsequent vendees Jaswinder Kaur etc. under definition section 3 (c) of the Act was an attachment to what was embedded for the permanent beneficial enjoyment of that to which it is attached. To elaborate, "things attached to the earth" is defined as follows:-

"attached to the earth" means-

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached;"

16. It would be interesting to delve into case law on the subject to understand the import of section 3 (c) above. In India the maxim *quicquid plantatur solo, solo cedit* ["whatever is affixed to the soil becomes part of the soil"] has been held to have only a limited application, cf. **Narayan Das**

v. Jatindra Nath, AIR 1927 PC 135; **Vallabdas Narainji v. Development Officer, Bandra**, AIR 1929 PC 163 [holding: 'What is affixed to the soil belongs to the soil' is not a maxim of general jurisprudence and there is authority to hold that it does not represent the law of India."].

17. In **S.P.K.N. Subramanian Firm v. M. Chidambaram Servai**, AIR 1940 Madras 527, Wadsworth, J. considered an appeal in which was raised the question whether a security bond pledging an oil engine installed as part of a cinema can be deemed to be a transaction relating to immovable property so as to attract the provisions of Expl. 1 to Section 3, Transfer of Property Act, 1882. The Court held that the "security bond was, as it purports to be, a transaction relating to moveable property and the mere fact that the property in question was firmly but not permanently attached to the premises and also the fact that the registration department for its own purposes requires such a transaction to be treated as a transaction relating to immovable property, will not affect the true nature of the transaction which was one regarding a chattel." The engine though was for the beneficial use of the property but was not immovable property. The Court further held: "Nor is it an absolute rule in India that whatever is fixed to the soil belongs to the owner of the soil though this is a rule which applies in many cases." The Court noticed the words of Lord Halsbury in dealing with this proposition, pointing out that one should consider not only the manner of annexation but also its purpose, in order to find out whether there was an intention to treat the thing attached as a permanent fixture or whether it was merely attached for its beneficial enjoyment as a chattel. Put succinctly, the test of immovability is whether or not the thing rests by its own weight on

earth and whether it can or cannot change place and be removed from one place to another, cf. ILR (1952) Hyd 495 (DB).

18. In **Thakoor Chunder Poramanick v. Ramdhone Bhattacharjee**, 6 Suth WR 228 (FB), Sir Barnes Peacock, CJ., Calcutta High Court observed:-

"We have not been able to find in the laws or customs of this country any traces or the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

19. To my mind "beneficial enjoyment" in section 3 (c) has to be read with the word "permanent" and "attached" preceding the words. The thing must be both permanent and attached to what is embedded in the earth. An electric connection is not a permanent attachment in the sense the Tube-well is part of soil and . Though, without an electric connection a Tube-well may not be possible to use and carry out its purposes. But that does not mean it is not removable from place to place. If supplier of electricity granted connection to particular land and Tube-well and not a person the position may have been different. But that is not so since the connection is in the name of Karnail Singh. To no more about the position of a consumer of electricity it would be advantageous to refer to the definition of consumer in the Indian Electricity Act, 1910 and the Electricity Act, 2003. The definition in the 1910 Act in section 2 is:-

2 (c) "Consumer" means any person who is supplied with energy by a licensee or the Government or by any other person engaged in the business of supplying energy to the public under this Act or any other law for the time being in force, and includes any person whose premises are for the time being connected for the purpose of receiving energy with the works of a licensee, the Government or such other person,

as the case may be;"

20. While in the 2003 Act, which is meant for a different purpose, that is, to accommodate private enterprise, [which is not the case here] the definition of consumer in the 1910 Act has been adapted in section 2 (15) *mutatis mutandis* and reads as follows:-

2 (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"

21. Karnail Singh remains consumer of electricity and continues to retain valuable right in the suit electric motor connection. It follows sequitur that the connection can be only to "any person" whose "premises are for the time being connected." There is no permanency in this arrangement and none can be gathered or spelled out. The "person" evidently would be Karnail Singh, the plaintiff, in whose name the connection stands till presently and would constructively be liable to tariff and responsible for upkeep of the connection in accordance with the rules but not to the extent of payment of Bills discharged or to be discharged by actual user of energy and to that extent he is not liable. The only way to divest him of the right to continued connection could only be by surrender of right of user and supply of energy back to the Board or by consent for transfer to some other name for which formalities would have to be met, if permissible, and as and if prescribed. Karnail Singh has clearly a case for retention of the disputed connection and transfer of energy connection from

its present site, subject to compliances required by law to be met. On the other hand, the contesting defendants would have a right to apply for an independent connection to run their Tube-well on the terms and conditions for supply of energy to their own motor to lift water to irrigate their fields. However, to understand the rights of parties one would have to go back to the sale deeds to see what was infact sold by the plaintiff to the defendant Gurjant Singh and what was the intention of the parties in 1991 when the first sale was effected and what were the recitals of the sale deed to determine if there was transfer of right to chattel or tangible movable personal property being the electric connection No.AP-20 with load of 12.5 BHP. Karnail Singh, in any case, is not bound by the terms of the further sale of land by Gurjant Singh, his vendee, to third party defendants, the present appellants, not being privy to the transaction. He is not bound by overselling beyond the plaintiff's shoes in which Gurjant Singh stepped in.

22. However, one last submission of Mr. Malwai deserves to be noticed and dealt with since the learned counsel has pressed it at the hearing. He points to the interim order dated April 08, 2011 passed by this court in the present appeal with respect to interim stay granted earlier which was ordered to continue during the pendency of the appeal. He argues that this Court by an interim arrangement restrained transfer of connection from the present position and thus the interim stay be made absolute by allowing the appeal. The learned counsel refers to the evidence of PW-1 Karnail Singh-plaintiff himself in his cross-examination where he is said to admit that after he sold the land in 1991 [in which the electric Tube-well connection was installed] he never went back there to assert his rights

although he resided in the same village. Therefore, he must be taken to have acquiesced in the arrangement and deserves to be estopped by conduct from asserting his right, if any, to suit property. Witness further admitted in cross-examination that he did not know as to which person was in possession of the land where the electric Tube-well connection was affixed. The land was sold to Joginder Singh etc, one of the four buyers from the plaintiff. Thereafter, Joginder Singh etc. had sold the land to the appellants in the year 2005-06 and, therefore, it is urged that from 1991 to 2005 the connection was used by Joginder Singh etc. and from 2005 till date it has remained in the use of the present appellants Jaswinder Kaur etc. Thus, it is argued that the present appellants have been in settled possession for 10 years and that should be long enough reason not to disturb their possession of the connection at this distance of time, the suit notwithstanding. It is canvassed that both the courts below have ignored this important piece of evidence as to the statement of Karnail Singh.

23. I would not go along with Mr. Malwai on this since there are no limitations against the true owners of things not sold. They remain free to dispel clouds cast on their ownership rights, as in this case, the Board acting in characteristic apathy while admitting that the supply of electric energy stood in the name of original owner of land. Karnail Singh's deposition I think cannot be read out of context and blown out of proportion to his personal rights and accrual his cause/s of action. None of what is pointed out by learned counsel amounts to a fatal admission of material facts upon which the case could turn in favour of the appellants. If Karnail Singh did not visit the land where the disputed connection remained alive and in use it

was his personal choice. He may not have had any social dealings with the present vendees although he resided in the same village. The argument appears to labour on a misconception that Karnail Singh ought to have kept pressing his rights physically by periodic visits to the spot agitating his rights with the vendees. It is not disputed that Karnail Singh's remaining land was not in the immediate vicinity of the suit property. The affidavit of the plaintiff dated May 20, 1991 is also not to be read in evidence and in isolation, even if it were evidence. The plaintiff approached the court for relief in 2006 and has sought recourse to legal remedy which was available to him. It is not in the domain of the court to create ownership rights in an electric connection to run a Tube-well. It can only declare them in accordance with law.

24. Mr. Malwai then relies on a recent decision of the Supreme Court in **Easwari vs. Parvathi and others**, AIR 2014 Supreme Court 2912 expanding, as he says, the scope of second appeal under section 100 of the Code of Civil Procedure where it has been ruled that the High Court cannot be precluded from reversing the order and judgment of the lower appellate court if there is perversity in the decision due to misappreciation of evidence and there is no absolute ban on the High Court in second appeal to interfere with facts, even when strictly speaking no substantial question of law arises when a finding is not properly supported by evidence, then interdiction is possible in a given case. This judgment to my mind would apply if there has been failure to apply the mind by the appellate court or dereliction in not addressing itself to the relevant evidence or other important material available on record and consequent failure of the

appellate court to discharge its judicial obligation to appreciate the evidence properly, then such failure can raise a question of law having a substantial impact on the rights of the parties and qualify as a substantial question of law. Therefore, a substantial question of law can be considered sine qua non in exercise of jurisdiction which has substantial impact on the rights of parties.

25. For this proposition, the Supreme Court drew from its past dicta in **Rattan Dev vs. Pasam Devi**, (2002) 7 SCC 441 where it was held that another ground for interference undoubtedly is perversity in the decision due to misappreciation of evidence even where both the trial court and the lower appellate court have returned concurrent findings but which are not sustainable in law then interference under section 100 of the Civil Procedure Code may be called for. These principles are well known and well accepted and applied by this court on a day-to-day basis within the present jurisdiction. The Court never shirks from its duty to interfere when and where intervention is absolutely called for. And to do so keeping in view the special jurisdiction conferred by the straitjacket of section 100 of the Code of Civil Procedure while hearing appeals against appellate decrees. Of this there can be no gainsaying.

26. But be that as it may, in the present case, the judicial obligations have been suitably discharged by both the courts below and nothing remains to be re-looked within the findings of fact recorded after appreciating the evidence, both oral and documentary on the file. There is no question of law or of fact which has not been decided in the proper perspective by the courts below and the findings returned appear to be fair and proper as do not suffer

from any irrationality or could indeed result in a substantial adverse impact not contemplated by either of the parties. To my mind the findings are fairly in accordance with law. Neither is there present any element of perversity in the findings apparent on the face of record which may call for interference in terms of the ratio in *Rattan Dev* case (supra)

27. No question of law, much less a substantial one, arises in this appeal for consideration in the second appeal side of this court.

28. The appeal is without any life and is dismissed but without any order as to costs.

(RAJIV NARAIN RAINA)
JUDGE

21.05.2015
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