IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Regular Second Appeal No.2389 of 2015 (O&M)
Date of decision:28.5.2015

Dharmender @ Dumpti and others

... Appellants

Versus

Ganga Sharan through LRs and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Aman Pal, Advocate,
for the appellants.
*****

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.(Oral)

1. This is defendants' second appeal in a suit for declaration brought by the plaintiffs claiming that the suit property belongs to them through registered sale deed dated 23rd August, 2004 executed by Mrs Atri in their favour before the Sub Registrar, Palwal, Haryana.

2. The defendants were proceeded against *ex parte* in the suit tried by the learned trial Judge at Palwal after the cross-examination of the witnesses of the plaintiffs was recorded. The appellants, thereafter, abandoned the suit by surrendering their right to defend the action by leading defence evidence and woke up only in the first appeal stage under Section 96 of the Code of Civil Procedure before the learned Additional District Judge, Palwal against the suit decree to plead and pray in an

application presented under Order 41 Rule 27 of the Code that some documents are material for the consideration of the Court to establish their title over the suit property, being a release deed dated 1st July, 2004 executed in turn on the basis of an old general power of attorney given Mrs Atri in favour of appellant # 3 on 30th March, 1983 authorizing him to deal with her property including the power to alienate. Came first the release deed and then the sale deed close at heels with one common factor i.e Mrs Atri.

3. However, the release deed executed by Mrs Atri in favour of the defendants was not one in favour of a member of her family and, therefore, the document could not be treated legally as a release deed, which deed permits transfer of property only amongst family members. Otherwise the transaction would tantamount to sale and be amenable to payment of stamp duty etc. on the instrument purporting to be transfer of immovable property. The transaction was in fact an ostensible sale transaction and when stamp duty was not paid on the instrument it would partake the character of evasion of stamp duty and would have no legal or binding effect on the seller or be of any evidentiary value in a court of law since, firstly, any transfer of immovable property valued at more than Rs 100/- requires compulsory registration under Section 17 of the Registration Act, 1908 and Secondly, Mrs Atri could not release the suit property in favour of an outsider who was not a member of her family.

4. The Government of Haryana permits transfers of property through registered release deeds only among the family members alone. This has been enabled by way of an amendment made in the Indian Stamp Act, 1899 to relieve burden of payment of stamp duty in cases of change of

ownership within the family members and, therefore, the release deed executed by Mrs Atri in favour of the defendants was nothing but an abuse of the process of law and was a sham transaction which confers on the appellants no title to the suit property and the deed would remain unenforceable in a court of law.

5. Therefore, Mrs Atri was free to deal with her property the way she liked and to execute a registered sale deed, shortly after the release deed was transacted, in favour of persons who were non-family, third parties. Whereafter, she could neither be compelled to act under the release deed in favour of the appellants nor could the document be read as evidence of sale or even as a legally enforceable agreement to sell, to state the best case possible, if the defendants alleged it to found an action in a court of law by way of a lawsuit for specific performance of an agreement since there was no intention in law or in fact in Mrs Atri to sell her property for valuable consideration in favour of the holders of the release deed. The way of making release deeds is common knowledge in the community which the defendants are presumed to know. And it is trite that ignorance of the law excuses no one.

6. The other documents, other than the release deed, sought to be led as additional evidence and relied upon in the application preferred under Order 41 Rule 27 CPC were a mutation entry effected as a consequence of the release deed based on the general power of attorney executed bu Mrs Atri in the year 1983 in favour of one of the defendants. A mutation sanctioned on the basis of an illegal instrument has no value in the eyes of law and is ignorable. In any case, a mutation is not determinative of title and

a claim of ownership cannot be based only on a mutation entry in revenue papers. If the mutation was sanctioned it will be assumed to be under mistake of law and fact since the release deed itself was not a transfer of property since it was undisputedly not a conveyance from one family member to another. The release deed holders and Mrs Atri were not related to each other by blood. An instrument intending to be a transfer of immovable property, such as the present release deed is, made by misusing the special concession afforded by the State to a special class and category of persons is a sham transaction aimed at avoiding payment of stamp duty intended to defraud the State exchequer and hoodwink it.

7. So far as the general power of attorney is concerned, there is no gainsaying that it is always open to the principal to act directly and independently and *de hors* the agency of the general power of attorney even without notice to holder and Mrs Atri did just that and then could not be compelled by a court of law to act only through her General Power of Attorney holder while dealing with her property or to compel performance via the GPA deed executed by her way back in the year 1983 and that too without evidence that it was ever used before. Therefore, the presence of the GPA is also of no binding consequence on the rights of the parties and Mrs Atri cannot be caused wrongful loss being the true owner of the property brought in dispute.

8. I would, therefore, not agree to accede to the prayer and argument of Mr.Aman Pal, the learned counsel appearing for the appellants that the appellate court judgment and decree deserves to be faulted only on account of the fact the application under Order 41 Rule 27 CPC has not

been considered while disposing of the main appeal finally, especially having regard to the nature and character of the three documents relied on in first appeal as of hardly any material consequence in the adjudication of the *lis*.

9. Though there is ample authority supporting that the appellate courts are expected to decide applications under Order 41 Rule 27 CPC either before or with the main appeal but when they are not so done it does not provide an automatic ground for interference and the court in second appeal will still have to see prima facie the nature of the documents sought to be produced by way of additional evidence and whether non-production in the trial court by the propounders satisfies the tests of due diligence etc. prescribed in Order 41 Rule 27 of the CPC and judgment passed without them. Still further, court would have to see whether the documents have any probative value as evidence in proof of facts in issue and decided by the process of adjudication.

10. Mere production of a document in appeal stage is not enough to compel the first appellate court to opine whether it was relevant to the pronouncement of judgment and without which a decree could not be rendered or its introduction was necessitated in order to avoid a miscarriage of justice. There must be strong nexus between the documents and the case set up for the parties to meet on the issues framed and the weight to be attached to them. Be that as it may, it appears from a perusal of the appeal papers that no serious effort was made to press the application under Order 41 Rule 27 of the CPC. Can it be said that the counsel as well as the Court lost sight of it altogether? If yes, then who must pay the price, surely not the

opposite party? What is not pressed timely and by taking appropriate steps and means when taken as a plea in second appeal deserves to be construed as given up. For this reason also, I would not like to intervene or consider a plea of sending the case back in remand or to seek a report from the court below on the documents which are irrelevant.

11. In my view, none of the three documents, in any event, are relevant to pronounce judgment by the first appellate court and non-consideration of such material, in the facts of this case, is also not a valid reason or of sufficient relevancy to accede to a remand of the case for passing fresh orders, as suggested by the learned counsel, which would only prolong the litigation to achieve no useful purpose, bearing in mind the legal position, that the release deed had no legal value to begin with. Moreover, absence of due diligence and non-production of the documents in the trial court by remaining ex parte, is another sound and sufficient reason not to entertain their consideration in second appeal. Besides, neither do these documents add up to anything and are of any evidentiary worth in deciding the case based on a sale-deed versus release-deed situation, one being legal and valid, the other *non est*. Besides, the producing party was ex parte before the learned trial court after recording of cross-examination and thus the conduct of the party in inviting trouble for itself is a dissuading factor for this Court to interfere even if, assuming arguendo, an iota of interference was called for, which is not the case.

12. I also find no merit in the last submission of Mr Aman Pal that his clients are still prepared to make good the stamp duty as assessed by the competent authority at the market price prevalent on the date of release

deed, that is, in the year 2004 or even at current market prices so that the release deed can still be treated as a sale deed and given effect to. I am afraid; this is an argument of desperation which is not acceptable or tenable and is only worthy of being noticed and disallowed. After all, valuable third party rights have settled down on the buyers since 23rd August, 2004 under a duly registered sale deed which is not open to be cancelled or disturbed by interdiction in an appeal from an appellate decree. It may always be borne in mind that both parties to the release deed were non-family members and suffered the disabilities of the exception carved out by way of a concession by the Government of Haryana amendment carried in the Act, 1899 in permitting transfers freely of immovable property within the family fold alone on payment of stamp duty at fixed nominal rates of Rs 15/- presently. Thus, the release deed must inevitably give way to the sale deed and give absolute right of ownership to the buyers in fee simple.

13. For the reasons recorded above, I find this appeal to be hopelessly without merit and the same, therefore, deserves to be dismissed. No substantial question of law arises for consideration on the second appeal side of this court on the facts of this case and in the face of concurrent findings of fact which are found well reasoned in their conclusions and properly recorded by the courts *a quo* after appreciating the pleadings and the oral and documentary evidence adduced by the parties and available on record. No interference is called for in this case and the appeal is accordingly dismissed in limine as not warranting admission for regular hearing which would waste further time of this court.

14. Since the main case has been decided, therefore, no orders are required to be passed in the miscellaneous applications which stand subsumed.

(RAJIV NARAIN RAINA)
JUDGE

May 28, 2015
Paritosh Kumar