

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**RSA No.2504 of 2014 (O&M)
Date of decision: 23.01.2015**

Ved Parkash

... Appellant

Vs.

Ram Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashish Aggarwal, Senior Advocate with
Mr. Ankit Aggarwal, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

This regular second appeal is directed at the instance of appellant-defendant No.2 against the concurrent finding of fact rendered by the Courts below whereby the suit of respondents-plaintiffs had been decreed. Respondents-plaintiffs on 12.05.2005 had filed a suit challenging the sale deed dated 05.05.2005 executed by defendant No.1 in favour of defendant No.2, during the pendency of the civil suit No.136 of 20.01.1998.

The case set up by the respondents/plaintiffs was that plaintiff-Dharam Chand purchased land by virtue of sale deed dated 08.02.1971 from defendant No.1, his name was incorporated in the revenue record and during the pendency of the earlier suit, defendant No.1 who had already sold the property to the plaintiffs in the year

1971, again sold the property to defendant No.2, vide sale deed dated 05.05.2005.

It is a matter of record that during the pendency of the suit of 2005, earlier suit of 1995 was decreed vide judgment dated 19.05.2009 Ex.P3/Ex.D6.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Ankit Aggarwal, Advocate has raised two fold arguments that *doctrine of lis pendens* would not apply and the suit *ex facie* was barred by the provisions under Order 2 Rule 2 of the CPC. Mr. Aggarwal, learned Senior counsel further argued that the simpliciter suit for declaration and permanent injunction without claiming relief of possession was also not maintainable.

I am afraid aforementioned arguments of the learned Senior counsel for the appellant sans merit in view of law laid down by the Division Bench of this Court in **Yogeshwar Education Trust vs. Gurmeet Kaur and others 2009(2) CivCC 345**, wherein the Hon'ble Division Bench after framing points of determination held the doctrine of *lis pendens* shall apply. The principles enunciated in the aforesaid judgment are reproduced herein below:-

“(i) Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is up to the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability or merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the SC may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the SC within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the SC which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of

judicial discipline, the SC being the Apex Court of the country. But, this does not amount to saying that the order of the Court, tribunal or authority below has stood merged in the order of the SC rejecting special leave petition or that the order of the SC is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of SC has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before SC the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

As regard the plea of provisions under Order 2 Rule 2 of the CPC, the same provisions would not apply as admittedly the sale deed was executed on 05.05.2005 and the earlier suit had been instituted in the year 1998. Though the suit No.136/1998 was dismissed in default but subsequently was restored. It is settled law that the restoration would relate back to the date of presentation of the plaint. Therefore, the present sale deed dated 05.05.2005 would be hit by the principles of lis pendens and it could not be said that the respondents-plaintiffs had a cause of action to challenge the sale deed at the time when the earlier suit had been filed. The sale deed had been executed on 05.05.2005 and the suit had already filed in the year 1998 and at that time, no cause of action had arisen for respondents-plaintiffs to challenge sale deed dated 05.05.2005.

Both the Courts below have rendered a finding of fact and law based on appreciation of both oral and documentary evidence. There is no illegality much less perversity in the finding of the Courts below.

Be that as it may, appellant/defendant No.2 would be at liberty to raise a plea as to whether the respondents/plaintiffs were in possession or not, if any, at an appropriate stage.

No substantial question of law arises for adjudication of this appeal.

Accordingly, the appeal is dismissed.

(AMIT RAWAL)
JUDGE

January 23, 2015
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