IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Regular Second Appeal No.899 of 2015 (O&M)
Date of decision: 28.07.2015

Dharam Pal

.....Appellant

Versus

Rakesh Kumar and others

.....Respondents

CORAM:HON'BLE MS. JUSTICE RITU BAHRI

Present: Ms. Pratibha Yadav, Advocate,
for the appellant.

Ritu Bahri, J.

CM No.2654-C of 2015

For the reasons mentioned in the application, same is allowed and delay of 174 days in re-filing the appeal is condoned.

RSA No.899 of 2015

Plaintiff-appellant has come up in regular second appeal against the judgment dated 17.04.2014 passed by the Additional District Judge, Rewari, dismissing his appeal against the judgment and decree dated 30.07.2011 passed by the Civil Judge (Junior Division), Rewari, whereby his suit has been partly decreed.

Dharampal-plaintiff (appellant herein) filed a suit for declaration and permanent injunction while claiming himself to be owner in possession of the suit property to the extent of 1/9th share. The plaintiff was aged about 80 years and on 04.06.2003, he had gone along with defendant Nos. 3 and 4 for executing a release deed in favour of defendant Nos. 1 and 2 with regard

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to the suit land bearing Khewat No.392, Khatoni No.481, Rect. No.59, Killa No.12/2 (1-16), Rect. No.76, Killa No.3 (8-0), measuring 16 Kanals out of his 1/8th share i.e. 2 Kanal, situated in the revenue estate of village Mayan. However, defendant Nos. 1 and 2, in collusion with defendant Nos. 3 and 4 got his thumb marked on a gift deed qua 1/9th share of the plaintiff in the suit land by fraud and misrepresentation. As per plaintiff, the said gift deed was never read over to him and the attesting witnesses of the same were from other village i.e. village Khori and not from village Mayan, in which the land was situated. The plaintiff had given his half share on *batai* to defendant Nos.1 and 2 and had installed a tubewell in the year 1988-89. Electricity connection of the said tubewell was in the name of the plaintiff. In the month of August, 2006, when he demanded half *batai* from defendant Nos. 1 and 2, they flatly refused by claiming themselves to be owners of the suit land. Consequently, the plaintiff-appellant filed this suit seeking gift deed bearing Vasika No.783 dated 04.06.2003 in favour of defendant Nos. 1 and 2 along with mutation No.1651 dated 28.08.2003 as illegal, null and void as the same were the result of fraud and misrepresentation. As per plaintiff, his thumb marks were obtained on the pretext of executing the sale deed bearing No.784 dated 04.06.2003.

Upon notice, defendants-respondent Nos. 1 and 2 filed written statement and denied the allegations of fraud and collusion in execution of gift deed bearing Vasika No.783 dated 04.06.2003. It was submitted that the plaintiff was an educated person, who had retired from the post of Deputy Director, Rajasthan Government Vetrinary Doctor. He had thumb marked the gift deed in question after understanding the contents of the same out of his free will and without any pressure. Defendant Nos. 1 and 2 were the real nephews of the plaintiff and had performed all the ceremonies

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in respect of their cousin sisters namely Madhu, Malti, Sushma and Neena, who were daughters of the plaintiff. Due to this reason, the gift deed and release deed had been executed by the plaintiff out of love and affection in the presence of Kalyan Singh Rathore, who was real brother-in-law of the plaintiff.

From the pleadings of the parties, following issues were framed by the trial Court:-

1. Whether the gift deed Vasika No.783 dated 04.06.2003 and mutation No.1614 sanctioned on 28.08.2003 are illegal, wrong, null and void as claimed? OPP
2. Whether the plaintiff is owner in possession of the suit property as claimed? OPP
3. Whether the plaintiff is entitled for decree of injunction as prayed for? OPP
4. Whether the plaintiff has no locus standi to file the present suit? OPD
5. Whether the suit of the plaintiff is not maintainable in the present form? OPD
6. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD
7. Whether the ad valorem court fee has not been affixed? OPD
8. Whether the plaintiff has concealed the true and material facts from the court? OPD
9. Relief.

Trial Court, after going through the evidence led by the parties, came to a conclusion that the gift deed bearing Vasika No.783 dated 04.06.2003 as well as the release deed bearing Vasika No.784 dated

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04.06.2003 had been executed on the same dated in favour of defendant Nos. 1 and 2 purportedly by the plaintiff. The plaintiff had admitted the factum of release deed bearing Vasika No.784 dated 04.06.2003, Ex.P2/Ex.DW2/A, in favour of defendant No. 1 and, which was executed on account of his free will. Defendant-Mukesh (DW-5) and Kalyan Singh (DW-4) had admitted that the plaintiff had been residing with his daughter in Jaipur. As per deposition of Ajit (DW-2) and Balbir (DW-3), there was a dispute between Dharampal and Surajpal due to which, they had been residing separately. In the backdrop of strained relations between Dharampal and Surajpal, the factum of collusion of defendant Nos. 1 and 2 with defendant Nos. 3 and 4-Shripal and Surajpal becomes evident. As per Section 111 of the Indian Evidence Act, 1872, the defendants-respondents were required to show that they have not taken the advantage of good faith of the plaintiff, which he had inspired in them. Defendant Nos. 1 and 2 were real nephews of the plaintiff, in whose favour, he had voluntarily executed the release deed. The gift deed, which was executed on the same date, was surrounded by suspicious circumstances. Kalyan Singh (DW-4), was alleged to be a witness to the gift deed, Ex.DW1/A. However, the said gift deed did not bear his signatures as a witness. Neither the name of the scribe had been mentioned on the gift deed as well as the release deed nor he had been examined before the Court. Further, no attesting witness of the gift deed had been examined by the defendants-respondents to show that the same had been executed by the plaintiff-appellant after understanding the contents of the same. Molhar, Lamberdar, who had been stated to be of village Mayan, was actually a resident of village Khori. The defendants-respondents did not examine any attesting witness in support of their contentions. As per Section 68 of the Indian Evidence Act, 1872, at least one attesting witness

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was required to be examined in order to prove execution of the gift deed. Moreover, as per the deposition of Kalyan Singh (DW-4), the plaintiff was not able to see as well as hear properly due to old age. Hence, as per the deposition of the witnesses of the defendants, the health of the plaintiff was deteriorating and the defendants had got the gift deed executed at the same time when he had consented to execute the release deed. No evidence was led by the defendants to show that the plaintiff was apprised of the fact that he was also going to execute a gift deed along with the release deed. However, the defendants were held to be in possession of the property in dispute. With these observations, the suit was partly decreed and the gift deed bearing No.783 and mutation No.1614 were declared as illegal and the plaintiff being owner of the suit property was held entitled to the relief of permanent injunction. The defendants were restrained from alienating or encumbering the suit property to any other person.

Aggrieved by this judgment, plaintiff as well as defendant Nos. 1 and 2 filed their separate appeals, whereupon the lower appellate Court reversed the findings of the trial Court and held that the gift deed and mutation in questions were executed in accordance with the evidence Act. Release deed No.784 dated 04.06.2003 was executed with regard to the land measuring 2 Kanals in favour of defendant Nos.1 and 2 in the presence of attesting witness of the disputed gift deed, which was recorded by the same scribe. The release deed was executed not only by the plaintiff, but by Shreepal and Surajpal other brothers of the plaintiff in favour of defendant Nos. 1 and 2. Molhad Ram, Lamberdar of village Mayan, was one of the attesting witnesses of the gift deed and the other attesting witness namely Om Parkash son of Nihal Singh was resident of village Khori. Hence, one of the witnesses to the gift deed was of the same

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village i.e. village Mayan, where the land was situated. Plaintiff and defendants also belonged to the said village.

The lower appellate Court proceeded to examine as to 'whether defendant Nos. 1 and 2 in collusion with defendant Nos. 3 and 4 got the signatures/thumb mark(s) of the plaintiff on the gift deed without disclosing anything about the same, whereas the plaintiff had gone there to execute and register a release deed of 2 Kanals of land in their favour.'

Dharampal-plaintiff himself appeared as PW-1 and tendered his sworn affidavit, Ex.PW1/A. In his cross-examination, the plaintiff-appellant had admitted that he had retired from the post of Deputy Director, Department of Animal Husbandry, Rajasthan. He knew how to read and write in English and Hindi. He had identified his photographs and endorsement, Ex.D1 on the disputed gift deed, Ex.DW1/A. He had also admitted his photographs on release deed No.784 and endorsement, Ex.D2. He further admitted that the release deed was rightly executed by him and he never challenged the same before any authority. He had admitted that he did not know the name of other attesting witnesses of the release deed. He also admitted that he had no house in village Mayan. Sushma, daughter of the plaintiff, was examined as PW-2, who stated that her mother had died in the year 1984 and his father was residing with her in Jaipur. She stated that defendant Nos. 1 to 4 by playing fraud and misrepresentation got executed and registered the gift deed bearing Vasika No.783 dated 04.06.2003 without the consent and knowledge of her father-Dharampal. No other witness was examined by the plaintiff to prove as to how the alleged fraud had been played upon him by defendant Nos. 1 and 2 in collusion with defendant Nos. 3 and 4.

The defendants, on the other hand, had examined Mr. V.B.

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Kashwap, Handwriting and Fingerprints Expert as DW-1, who compared the disputed thumb impression of the plaintiff-appellant on the gift deed, Ex.D1/A with the admitted impression. As per his report, Ex.DW1/B, the disputed thumb impressions were identical with the admitted thumb impression. The plaintiff-appellant had not denied his thumb impressions or signatures on the gift deed in dispute.

Kalyan Singh Rathore (DW-4), who is husband of the daughter of plaintiff-appellant, had categorically stated that defendant Nos. 1 and 2 used to take care of plaintiff-appellant, Dharampal and perform all social obligation/customs in respect of his daughter(s). He had further stated that the plaintiff-appellant had agreed to gift away the suit land in favour of defendant Nos. 1 and 2. He (plaintiff) had narrated this fact to him after executing the gift deed. He further stated that defendant Nos. 1 and 2 were cultivating the suit land as owners in possession from the date of execution of the gift deed in their favour. In cross-examination, he had admitted that the wife of Dharampal-plaintiff had expired 20-22 years ago and thereafter, he was residing with his daughter at Jaipur. Due to old age, he was hard of hearing and seeing. Defendant Nos. 1 and 2 were also cultivating the land of Surajpal, brother of the plaintiff. From the statement of Kalyan Singh Rathore (DW-4), it came out that the plaintiff-appellant, who was his father-in-law, had told him that he had executed a gift deed qua his land in favour of defendant Nos. 1 and 2. Since Kalyan Singh Rathore (DW-4), was son-in-law of the plaintiff, there was no occasion for him to depose against the plaintiff-appellant.

Ajit Singh (DW-2) and Balbir Singh (DW-3), whose agricultural land was adjoining the suit land, had stated that the suit land was being cultivated by defendant Nos. 1 and 2 as owners in possession since 2003 and

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after the execution of gift deed, they had not seen plaintiff to be cultivating the same. One of the attesting witness of the gift deed namely Molhad Ram was resident of village Mayan. But, the plaintiff-appellant did not care to examine this witness in support of his case.

Another fact, which has been taken into consideration by the lower appellate Court is that in the release deed No.784 (Ex.P3), which had been admitted by the plaintiff-appellant, the name of the scribe had not been mentioned. Therefore, non mentioning of the name of scribe in the gift deed, Ex.D1/A, will not render the same as surrounded by suspicion. Further, as per the deposition of Kalyan Singh Rathore (DW-4), the physical and mental condition of Dharampal was not so deteriorated at the time of execution of the gift deed on 04.06.2003, as he was unable to understand his good and bad. DW-4 had made his statement in Court after 8 years of execution of the gift deed in question.

While dismissing the suit of the plaintiff-appellant, the lower Appellate has observed that Mutation No. 1651 dated 04.08.2013 (Ex.P2) was entered as *jalsa aam* i.e. in general body meeting of the village and Satenderpal, Special Power of Attorney of the plaintiff, had appeared before the revenue authorities to enter and sanction the mutation in favour of defendant Nos. 1 and 2. Said Satenderpal was none else, but the son of Surajpal Singh (brother of plaintiff). In these circumstances, the lower appellate Court came to a conclusion that it cannot be said that the plaintiff-appellant had no knowledge of the execution of gift deed in question in favour of defendant Nos. 1 and 2. The plaintiff-appellant had given his power of attorney to Satenderpal, who had appeared before the revenue authorities for sanctioning the mutation in favour of defendant Nos. 1 and 2. Since the plaintiff had himself given his power of attorney for

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execution/sanction of the mutation, his plea that he came to know about the gift deed in August, 2006 when he asked the defendants to give him *batai*, was no longer available to him. He had the due knowledge of execution of the gift deed in question in the year 2003 when he gave his Special Power of Attorney to Satenderpal. Hence, the present suit which was filed on 12.10.2006, was held tobe time barred.

Before the lower appellate Court, respondents had filed an application under Order 41 Rule 27 CPC for placing on record certified copy of statement dated 03.03.2011 of Mr. Ashok Yadav, Advocate, another attesting witness of the gift deed, statement of Dharampal son of Badan Singh dated 03.03.2014, statement dated 03.03.2014 made by Sushma daughter of Dharampal and certified copy of order dated 03.03.2014 passed in criminal complaint filed by the plaintiff-appellant against the respondents. The said application was allowed and the aforesaid documents were taken on record. The complainant was not examined in the criminal case. In the absence of deposition of complainant, the criminal complaint was duly dismissed. Ultimately, the suit of the plaintiff was dismissed and the appeal filed by the defendants-respondents was accepted. It was held that the gift deed in question was well within the knowledge of Dharampal-plaintiff.

After going through the judgments passed by both the Courts below, the gift deed in question is found to have been executed by the plaintiff-appellant voluntarily in the year 2003 and there was no collusion between defendant Nos. 1 to 4. This fact is very much evident from the deposition of Kalyan Singh Rathore (DW-4). Furthermore, a perusal of Mutation No.1651 (Ex.P2) which was entered and sanctioned on 04.08.2013, shows that Satenderpal, Special Power of Attorney of the plaintiff-appellant had appeared before the revenue authorities in order to

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enter and sanction the said mutation. The effect of non examination of the attesting witness of gift deed in question also goes against the plaintiff-appellant. Moreover, the present suit was filed in the month of October, 2006, whereas the gift deed in question was executed on 04.06.2003, therefore, the suit was clearly barred by limitation.

After going through the impugned judgment passed by the lower appellate Court, this Court is of the view that suit of the plaintiff-appellant has been rightly dismissed and no illegality, much less perversity has been found in the therein, warranting interference by this Court.

No substantial question of law arises for consideration.

Dismissed.

(RITU BAHRI)
JUDGE

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