

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 642 of 1987

Date of decision: 26.2.2016

Pala

.....Appellant

Versus

Vipan Kumar

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Vijay Singh Kajla , Advocate,
for the appellant.

Mr.Lokesh Sinhal, Advocate
for the respondent.

- 1. Whether Reporters of 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?*

Raj Mohan Singh, J.

1. Plaintiff Pala is in regular second appeal against the judgment and decree dated 9.10.1986 passed by Additional District Judge, Karnal, whereby appeal against judgment and decree dated 13.2.1985 passed by Sub Judge, Ist Class, Panipat was accepted and suit of the plaintiff was dismissed.

2. Plaintiff filed a suit for possession of agricultural land measuring 9 kanals 12 marlas as per jamabandi for the year 1973-74 situated in revenue estate of village Ujha, Tehsil Panipat, District Karnal. Plaintiff alleged that he was a co-sharer in possession to the extent of ½ share in 19 kanals 4 marlas of

land along with Manga, Jasrath and Bhopal, minor sons of Sultan, who were co-sharers in remaining $\frac{1}{2}$ share of the total land. Plaintiff was also minor and was under care and custody of his father. Father of the defendant, namely, Hari Singh had purchased $\frac{1}{2}$ share of land as mentioned in the suit for a consideration of ₹ 6,000/- vide registered sale deed dated 23.6.1972 from Manga etc. through their mother Bharpai against which a suit for pre-emption was filed against father of the defendant and the same was decreed in favour of the plaintiff and against father of the defendant on 30.10.1976. Plaintiff further alleged that during pendency of aforesaid suit, Hari Singh, father of defendant, got a fictitious mutation No.2237 dated 3.2.1975 sanctioned on the basis of exchange of $\frac{1}{2}$ share of the plaintiff with Bharpai, mother of Manga etc. with her land comprised in khewat No.414 situated in village Ujha. The aforesaid act was done just to defeat the right of pre-emption of the plaintiff. Aforesaid mutation was held to be fictitious by the Civil Court. It was held by the Civil Court that the plaintiff had purchased separate land of Bharpai for a consideration of ₹ 12,000/- and question of exchange did not arise.

3. Just after the aforesaid fictitious exchange, defendant had purchased the suit land from Bharpai vide registered sale deed dated 9.12.1975 for a consideration of ₹ 8,000/-. Mutation was also sanctioned on 26.4.1976. Plaintiff further alleged that

the alleged exchange of suit land by the plaintiff in favour of Bharpai and further sale by Bharpai in favour of defendant and mutation No.2268 are fictitious, null and void.

4. The decree of pre-emption obtained by the plaintiff was set aside in a separate civil suit filed by Manga, Jasrath and Bhopal, wherein, it was held that Bharpai was not competent to sell the suit land. The judgment of the trial Court was upheld in appeal and thereafter, no regular second appeal was filed. The decree for pre-emption dated 30.10.1976 was maintained up to the Hon'ble Apex Court. Minors Manga and others were successful in getting the same set aside by way of declaratory suit and the said decree was declared to be null and void and that had also attained finality.

5. Defendant contested the suit on all counts taking plea of limitation, valuation, jurisdiction and non-joinder of necessary parties. Defendant alleged that there is no mention in the plaint about the minority of the defendant and appointment of his guardian. Defendant further alleged that the suit as framed, cannot proceed because plaintiff has not sought any relief to set aside the proceedings which are impediments for the grant of relief of possession. Defendant also alleged that plaintiff had exchanged his $\frac{1}{2}$ share of total land measuring 19 kanals 4 marla with Bharpai i.e. 12 Kanals 2 marla and exchange was genuine and possession was exchanged at the time of

proceedings. Mutation was genuine and defendant was not bound by the decision given in pre-emption suit. Plaintiff was in possession of 12 kanals 3 marlas of land which he took in exchange of land from Bharpai. Bharpai, after the exchange on 9.12.1975, sold $\frac{1}{2}$ share of 19 kanals 4 marla of land, which she took in exchange from the plaintiff and also delivered possession to the vendee. Defendant further alleged that he was not party to the pre-emption suit and the observations made in the decision has no effect on his rights because that judgment was set aside in a subsequent suit. Plaintiff never purchased any land from Bharpai for a consideration of ₹ 12,000/- as the sale of agricultural land for more than ₹ 100/- could not have been effected without registered sale deed. The defendant claimed himself to be bona fide purchaser for consideration and sale was protected under the provisions of Transfer of Property Act. The mutation sanctioned thereafter was a valid mutation and exchange was claimed to be perfectly valid.

6. After filing of replication, parties went to trial on following issues:-

- “1. Whether the plaintiff is entitled to the possession of the suit land as alleged ? OPP
2. Whether the suit is not within time ? OPD
3. Whether the suit has not been properly valued for the purposes of Court fee and jurisdiction ? OPD

4. Whether the suit is bad for non-joinder of necessary parties ? OPD
5. Whether the plaint is liable to be rejected as alleged in P.O.4 of the written statement ? OPD
6. Whether the suit as framed cannot proceed in view of preliminary objections No.5 and 6 ? OPD
7. Whether the plaintiff is estopped from filing the present suit ? OPD
8. Whether the defendant is a bonafide purchaser for consideration. If so, its effect ? OPD
9. Relief.”

7. Trial Court decreed the suit vide judgment and decree dated 13.2.1985 on the ground that the plaintiff was co-sharer to the extent of $\frac{1}{2}$ share in the total land as per jamabandi for the year 1973-74 and was in possession of particular khasra numbers 21/14/7-4 and 21/15 min/2-8, therefore, trial Court held the plaintiff to be entitled to take possession of these khasra numbers. Trial Court held that the plaintiff was in possession before the alleged exchange deed dated 3.2.1975, therefore, he was entitled to take possession back. Suit was held to be within limitation and on other issues also the stand of the defendant was negated and he was not held to be bona fide purchaser under issue No.8.

8. In appeal filed by the defendant, judgment and decree

passed by the trial Court was set aside by the lower Appellate Court vide judgment and decree dated 9.10.1986. Hence, the present appeal by plaintiff.

9. I have heard learned counsel for the parties and have perused the record.

10. Learned counsel for the appellant framed the following substantial questions of law:-

“1. Whether the question that the alleged exchange was a bogus exchange being null and void has already attained finality vide judgment and decree dated 30.10.1976 passed by the learned trial Court and which finding has been upheld upto the Hon'ble Supreme Court ?

2. Whether the above finding regarding exchange which has been upheld upto the Hon'ble Supreme Court is binding upon the present defendant-respondent, who is none other, but the son of Hari Singh Nalwa, who was defendant in the above suit ?

3. Whether the alleged exchange and mutation of the sale deed in pursuance thereof is fictitious and mala fide with a view to defeat the right of the appellant to pre-empt the sale out of the joint khewat in favour of Hari Singh Nalwa, then MLA of

the Haryana Vidhan Sabha and who had manoeuvred the above documents ?

4. Whether the alleged exchange entered into during the pendency of the previous suit for pre-emption and the sale deed as well as mutation in favour of the defendant-respondent are hit by the doctrine of lis-pendence ?
5. Whether the finding of the learned lower appellate Court reversing the findings under issue No.1 of the learned trial Court are illegal and liable to be set aside ?
6. Whether in a case of suit for possession based on title, there is no limitation for filing the suit unless the other party proved adverse possession in view of the provisions of Article 63 of the Limitation Act ?
7. Whether in view of the provisions of Section 11 of the Code of Civil Procedure, the dispute qua exchange and sale deed in pursuance thereof cannot be raised in the subsequent suit and are barred by resjudicata in view of the earlier decree dated 30.10.1976, which has been upheld upto the Hon'ble Supreme Court ?
8. Whether the learned court could give a finding on issue No.6 when the same was neither pressed nor

any arguments were raised in respect thereof ?

9. Whether the onus to prove that the plaintiff-appellant was a major on 3.2.1975 was upon the defendant-respondent as the plea had been raised by him ?

10. Whether proper issues have not been framed in the present case ?”

11. Evidently, plaintiff was co-sharer to the extent of $\frac{1}{2}$ share i.e. 9 kanals 12 marlas of land out of total 19 kanals 4 marlas in khewat No.184 situated in village Ujha along with Manga, Jasrath and Bhopal, minor sons of Sultan. Bharpai, mother of Manga, Jasrath and Bhopal, sold her share in the above land to Hari Singh for a consideration of ₹ 6,000/- vide registered sale deed dated 23.6.1972. Plaintiff filed a suit for pre-emption against Hari Singh and the same was decreed on 30.10.1976 in civil suit No.147 of 1973, Ex.P-1. The said judgment had attained finality. Aforesaid Manga, Jasrath and Bhopal, minors, filed a civil suit challenging the sale deed dated 23.6.1972 executed by their mother on their behalf on the ground that she was not authorised to act as guardian in the presence of their father, therefore, the sale deed executed by her was illegal and not binding upon them.

12. Pre-emption decree dated 30.10.1976, Ex.P-1, was also challenged by Manga and others in the said suit on the

ground that once the sale deed dated 23.6.1972 was illegal, null and void, the decree for pre-emption was also null and void and not binding qua them. The said civil suit No.97 of 1977 filed by Manga and others was decreed by the trial Court on 11.12.1978, Ex.P-4. Under issue No.4 of said suit, it was specifically held that the Civil Court decree passed in civil suit No.147 of 1973 was null and void and was not binding upon the rights of the plaintiff. Hari Singh was also impleaded as defendant No.1 in the suit filed by Manga and others, who was vendee of sale deed dated 23.6.1972. Plaintiff Pala Singh was impleaded as defendant No.2.

13. Against the aforesaid judgment and decree dated 11.12.1978, three appeals were filed. Manga and others filed appeal challenging the order of the trial Court to the extent of ordering payment of ₹ 6,000/- by them. Pala filed appeal on the ground that payment of ₹ 6,000/- was to be paid to him on account of improvement made by him on the land. Lower Appellate Court, vide judgment and decree dated 29.7.1979, dismissed the appeals filed by Pala and Hari Singh and accepted the appeal of Manga and others and granted them the decree for possession in their favour without payment of any money.

14. During pendency of pre-emption suit, Pala exchanged his $\frac{1}{2}$ share of total land measuring 19 kanals 4 marla with 12

kanals 2 marla land of Bharpai in khewat No.414. Mutation No.2237 (Ex.P-7) was sanctioned on 3.2.1975, by virtue of which Pala became owner of 12 kanals 2 marla earlier owned by Bharpai in khewat No.414, whereas, Bharpai became owner of 9 kanals 12 marlas i.e. $\frac{1}{2}$ share of Pala in the land in question. Bharpai sold land measuring 9 kanals 12 marlas which she obtained in exchange from Pala to the defendant vide sale deed dated 9.12.1975 (Ex.D-1). Mutation No.2268 (Ex.P-9) was sanctioned in favour of defendant on 26.4.1976.

15. Plaintiff sought possession of land measuring 9 kanals 12 marlas in khewat No.184 on the ground that there was no exchange between him and Bharpai and mutation No.2237 dated 3.2.1975 was fictitious, null and void. Sale deed dated 9.12.1975, executed by Bharpai in favour of defendant, was also alleged to be illegal, null and void. Plaintiff projected that he had purchased the land measuring 12 kanals 2 marla owned by Bharpai in khewat No.414 for a consideration of ₹ 12,000/-. Some malafide was attributed to the father of the defendant, who was M.L.A. at that time.

16. Plaintiff alleged that exchange was declared to be illegal in the suit for pre-emption on 30.10.1976, Ex.P-1. Since exchange was declared to be fictitious in the said judgment and decree, therefore, those findings should be appreciated at a subsequent stage.

17. Apparently, in a suit for pre-emption No. 147 of 1973, defendant was not party. Though, it was recited by the plaintiff in the plaint that the father of the defendant was party in his own capacity being vendee of sale deed dated 23.6.1972 executed by Bharpai in respect of $\frac{1}{2}$ share of her minor sons out of total 19 kanals 4 marla of land. Defendant asserted that he had claimed his independent right on the basis of sale deed dated 9.12.1975 executed by Bharpai in his favour with regard to the land received by her in the exchange.

18. Lower Appellate Court, vide order dated 24.10.1985, had framed the following four additional issues and sought report from the trial Court:-

“8-A. Whether plaintiff purchased land from Smt.Bharpai on or about 3.2.1975 for a sum of ₹ 12,000/- as alleged ? OPP.

8-B. Whether the plaintiff was minor on 3.2.1975 as alleged ? OPP

8-C. Whether the impugned mutation of exchange of suit land with Smt.Bharpai was wrong, illegal and void and not binding upon the plaintiff as alleged ? OPP

8-D. What improvement the defendant has brought about over the land in suit land upon what expenses and to what effect ? OPD.”

19. In the report dated 19.5.1986 submitted by the trial

Court, additional issues No.8-A and 8-C were decided against the plaintiff, holding that in the earlier suit for pre-emption, the exchange was not binding upon the defendant as he was not party to earlier suit and had purchased the land in his own right on 9.12.1975. It was also held that the plaintiff had not purchased the land from Bharpai for a consideration of ₹ 12,000/- as claimed by him. It was actually an exchange between the plaintiff and Bharpai and under issue No.8-b, it was held that the plaintiff was not minor on 3.2.1975. On that premise, lower Appellate Court reversed the findings recorded by the trial Court and suit filed by the plaintiff was dismissed.

20. Learned counsel for the appellant relied upon the findings recorded qua exchange in pre-emption suit and reiterated the stand that once the findings of exchange had attained finality in a suit for pre-emption, those findings could not have been diluted in subsequent proceedings. I have noticed that in the suit of pre-emption, defendant was not a party and he asserted his claim independently on the basis of sale deed dated 9.12.1975, therefore the said finding recorded in pre-emption suit was not binding upon the defendant. Hari Singh, father of defendant, was party to the said suit. The findings recorded in the said suit against Hari Singh were against him in his own capacity as he was claiming his right on the basis of sale deed dated 23.6.1972 executed by Bharpai as guardian of

her minor sons with regard to ½ share in the property. Defendant was claiming his independent right on the basis of sale deed dated 9.12.1975, Ex.D-1. The evidence adduced by the witness in a judicial proceedings is relevant in a subsequent proceedings to prove the truth only when the said witness is incapacitated on account of death or otherwise. The presence of said witness could not be secured. It was not the case of the plaintiff that Bharpai was not in a position to come to the Court to give her evidence . Even, if, witness was not in a position to come to the Court, the evidence given by the witness in earlier proceedings can be read in subsequent proceedings, if proceedings were between the same parties.

21. Section 33 of the Evidence Act would make it clear that the proposition was squarely applicable to the present case. Defendant was not a party in earlier suit for pre-emption . No constructive res judicata was applicable. Judgment and decree dated 30.10.1976 passed in pre-emption suit was held to be illegal, null and void in a subsequent suit filed by Manga and others vide judgment and decree dated 11.12.1978 (Ex.P-4).

22. In view of aforesaid facts, it was rightly concluded that the factum of exchange between Pala and Bharpai in the context of its being genuine or otherwise was required to be adjudicated upon afresh on the basis of evidence of the parties and, therefore, no observation made in respect of exchange in

previous suit should be appreciated. Question No.1 as framed by the appellant has to be negated on the basis of aforesaid proposition. Questions No.2 to 4 are also based on such findings, therefore, these questions do not arise.

23. Lower Appellate Court has rightly decided that the mutation of exchange No.2237 (Ex.P-7) was entered on 1.12.1975 by the patwari and was sanctioned by the competent officer on 3.2.1975 at Panipat. Statement of Prit Singh was relied in the said context when the witness deposed as DW-12 to the effect that the mutation was sanctioned in the presence of the parties and factum of oral exchange was recited therein. The mutation was sanctioned in public hearing in the presence of both the parties wherein Pala as well as Bharpai were duly identified by Mam Chand, Lambardar of the village. Oral exchange is valid and permissible. Only Sections 54, 103 and 123 of the Transfer of Property Act in respect of sale, lease and gift were made applicable to erstwhile State of Punjab. The subject matter of Section 118 of the Transfer of Property Act was not extended and therefore, exchange related to immovable property does not require compulsory registration. The manner in which plaintiff got possession of the land measuring 12 kanals 2 marlas owned by Bharpai in khewat No.414 on the basis of un-registered sale deed rather made the story of the plaintiff to be unacceptable and it gave only inference of valid exchange

between the parties. Receipt Ex.PW-5/A produced by the plaintiff cannot provide any evidence of valid purchase. The receipt was for a sum of ₹ 12,000/- and in view of Section 54 of the Transfer of Property Act read with Section 17 of the Registration Act, the sale of immovable property for more than ₹ 100/- can only be executed by registered instrument and not otherwise. Even the recital of PW-5/A would show that there was no mention about the land so exchanged between the parties. The land measuring 12 kanals 2 marlas which the plaintiff Pala had taken in exchange of land was in possession of Pala. Plaintiff wants to keep that land and at the same time wants to avoid exchange and wants possession of the land given by him in exchange.

24. Lower Appellate Court has rightly concluded that in sum and substance, the scope of the suit is to get the transaction of exchange declared as well as mutation and sale as null and void. The relief is revolving around seeking recovery of possession. Unless and until mutation of exchange and sale deed executed by Bharpai in favour of defendant are not declared null and void, the limitation provided for filing suit for declaration is only three years and the suit itself is barred by limitation. Cloud on the title was not challenged by way of declaratory suit, therefore only suit for possession was not maintainable. In **Anathula Sudhakar vs. P. Buchi Reddy**

(dead) by LRs and others 2008 (4) SCC 594, it was held that where cloud is raised over the title of the plaintiff and the plaintiff was not in possession, a suit for declaration and possession with or without consequential injunction is the remedy. Where the title of the plaintiff is not in dispute, but he is out of possession, then he has to file suit for possession with consequential relief of injunction. In the instant case, title of the plaintiff is in dispute, remedy of the plaintiff was to file suit for declaration and possession for which limitation is three years.

25. Previous litigations with Hari Singh, Manga and others made the subsequent suit to be bad for non-joinder of the necessary parties. Hari Singh and Bharpai were the necessary parties for complete adjudication of the present lis. Plaintiff has assailed the exchange between Bharpai and himself, but has miserably failed to implead Bharpai as defendant in the suit. The question of bona fide purchase by the defendant has to be answered in favour of the defendant as he had purchased the property from Bharpai vide registered sale deed dated 9.12.1975, Ex.D-1, after satisfying himself with regard to her ownership from the revenue record. Mutation No. 2237 was sanctioned in favour of Bharpai in respect of land which she had taken in exchange from the plaintiff in the sale deed Ex.D-1. There was a recital about mutation No.2237, therefore sale deed in favour of the defendant was for valuable consideration and

was bona fide in nature.

26. In the light of aforesaid facts, questions No.5 to 9 are to be answered against the appellant. It is a settled principle of law that once the particulars of fraud have not been pleaded in the plaint and not proved by evidence, no presumption can be drawn with regard to transaction having suffered with instinct of fraud. No question as formulated by the appellant arises in the present case. The reliance placed by learned counsel for the appellant on Ex.P-3 i.e. judgment and decree dated 5.2.1977 has to be answered in the light of over all material on record.

27. Having considered the rival contentions of the parties, this Court is of the considered opinion that the arguments raised by learned counsel for the appellant on the ground of exchange and mutation of exchange being bogus and was handiwork of Hari Singh in collusion with Bharpai in order to defeat right of pre-emption cannot be appreciated in the light of consideration as made above. The plea of suit being not barred in terms of Section 65 of the Limitation Act also cannot be appreciated in view of particulars of plaint filed by the plaintiff. The cloud on the title was not challenged by the plaintiff by way of declaratory suit and, therefore, simpliciter suit for possession was not maintainable. The land, subject matter of pre-emption, was separate land, therefore, there was no *lis pendens* and the sale in favour of the defendant was rightly held to be bona fide by the

lower Appellate Court. The exchange was not hit by doctrine of *lis pendens* under Section 52 of the Transfer of Property Act. Since the particulars of fraud have not been pleaded and proved, therefore, no such finding could have been recorded by the Courts below.

28. In view of aforesaid, this Court does not find any substance in the present appeal and the same is accordingly, dismissed.

(RAJ MOHAN SINGH)
JUDGE

February 26, 2016
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