IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1311 of 1988 (O&M)

Date of Decision-25.02.2016

Lakhmi Chand and ors ... Appellants

Versus

Mahipal ... Respondent

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. C.B. Goel, Advocate for the appellants.
Mr. Amit Kumar Jain, Advocate for the respondent.
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RAJ MOHAN SINGH, J.

[1]. Defendants are in second appeal against the judgments and decrees passed by the Courts below in a suit for possession by way of pre-emption.

[2]. Plaintiff-respondent filed suit for possession by way of pre-emption on the ground that Shanti Devi, vendor was owner of half share in 40 kanals of land being sister of Dayawanti. Shanti Devi sold her half share to defendants No.1 to 4 for a consideration of Rs.49,000/- vide registered sale deed dated 25.01.1983. Defendant No.5 was shown to be lessee of Shanti Devi vide registered lease deed dated 24.01.1983. Plaintiff alleged that in order to defeat the right of the plaintiff a sham transaction in the form of lease deed was executed. Defendant No.5 is none-

else but father of defendants No.1 to 4. The lease deed was executed for a period of 99 years in lieu of sum of Rs.21,000/-. The lease deed was executed a day prior to the execution of registration of sale deed. Plaintiff further alleged that creation of mortgage was a sham transaction to defeat the right of pre-emption and to save part of the stamp duty and registration fees. He asserted his right of pre-emption over the suit property as co-sharer on the date of sale and also agreed to pay the total sale consideration of Rs.70,000/- i.e. Rs.49,000/- as sale consideration in the sale deed and Rs.21,000/- as lease money.

[3]. Suit was contested by the defendants claiming that both the transactions were genuine and dependent on each other. They denied that the sale had taken place for a consideration of Rs.70,000/- out of which Rs.21,000/- was paid towards lease money which was part and parcel of the sale consideration. They denied that the plaintiff was having superior right of pre-emption and claimed that the sale was effected with the consent and knowledge of the plaintiff. Suit was collusive and benami between vendor and the plaintiff. Vendor Shanti Devi has acquired the property through her father Sube Singh by way of acceleration of succession and therefore, the provisions of Section 15(1) of the Punjab Pre-emption Act was not applicable as the sale was effected by female.

[4]. After completion of the pleadings, both the parties went on trial on the following issues:-

> *"1. Whether the plaintiff has got superior right of pre-emption in respect of the sale in dispute? OPP*
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> *2. Whether the sale consideration of Rs.17,000/- was fixed in good faith and actually paid to the vendor? OPD*
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> *3. If, issue No.2 is not proved, what was the market value of the suit land on the date of sale? OP parities*
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> *4. Whether the suit is not within time? OPD*
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> *5. Whether the plaintiffs are estopped from filing the present suit? OPD*
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> *6. Whether the suit is collusive and benami as alleged, if so ifs effect? OPD*
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> *7. Whether the suit is barred, as alleged in preliminary objection No.5 of the written statement? OPD*
>
> *8. Whether the suit is not maintainable in the present form? OPD*
>
> *9. Whether the defendants are entitled for stamp and registration charges, if so, what amount? OPD*
>
> *10. Relief."*

[5]. Parties led their respective evidence to prove their case. Trial Court took issues No.1 and 7 together and held that the plaintiff was having statutory right of pre-emption and the suit was barred as alleged by the defendants. Under issues No.2 and 3, figure of Rs.17,000/- was corrected as Rs.70,000/-. The sale deed recorded the sale consideration of Rs.49,000/-. Lease deed

recorded the consideration of Rs.21,000/-. Lease deed executed on 24.01.1983 i.e. a day earlier to the execution of sale deed. The lessee is none-else the father of defendants No.1 and 2 i.e vendees. Trial Court held the transactions of lease to be sham transaction and decided the issues No.2 and 3 in favour of plaintiff. By observing that the sale had taken for a sum of Rs.70,000/- out of which Rs.49,000/- was made subject matter of sale deed and the sum of Rs.21,000/- was shown as lease amount, in fact the fabrication done in order to avoid pre-emption. Market value of the property was found to be Rs.70,000/- at the time of sale deed, therefore, registration of lease deed was held to be sham and bogus transaction.

[6]. After holding the suit within limitation, trial Court decreed the suit vide judgment and decree dated 22.07.1987. The judgment and decree of the trial Court was affirmed by the Lower Appellate Court vide judgment and decree dated 03.05.1988.

[7]. In view of Full Bench judgment of this Court in ***Ganpat vs. Smt. Ram Devi and others 1977, PLR Page I,*** framing of question of law was having no effect on the maintainability of the appeal. However, in view of amendment of Section 100 CPC, framing of substantial question of law is *sine qua non* for maintaining regular second appeal in this Court. Prior to amendment, the appeal could have been filed on the ground set out in clauses (a) to (c) of

Section 100(1) CPC. Now second appeal requires substantial question of law to be framed. The interference cannot be made only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim "*interest reipublicae ut sit finis litium*".

[8]. No substantial question of law has been formulated by the appellant but still this Court proceeded to consider following questions for determination in this appeal:-

> *"1. Whether sale made by female could not have been pre-empted in terms of Section 15 (2) of the Punjab Pre-emption Act 1913 as applicable to State of Haryana?*
> *2. Whether right of pre-emption being a piratical right could have been averted by way of lawful means.*
>
> *3. Whether execution of lease deed a day prior to execution of sale deed was a lawful exercise to avoid pre-emption and was not an Act of circumventing the provision of law?"*

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

[10]. Learned counsel for the appellants has contended that lease deed being a registered document has to be accepted in its totality as the same was never challenged by the plaintiff in the suit. No issue was framed by the Courts on the validity of lease deed and therefore, a registered lease deed cannot be avoided.

Learned counsel further asserted that even, if, the plaintiff has been successful in the suit for pre-emption, possession of the defendants can be protected till expiry of lease period for which necessary order of mesne profit has already been passed by the Court at interim stage.

[11]. On the other hand, learned counsel for the respondent has argued that in view of ***Atam Parkash Vs. State of Haryana, 1986 PLJ 191 Supreme Court*** whole of Section 15 (2) of the Punjab Pre-emption Act, 1913 was declared ultra vires the Constitution. In view of observations made by the Hon'ble Apex Court, the judgment was having binding character on the pending appeals which were to be disposed of in terms of declaration granted by the Court. Relevant paras of the judgment are reproduced as under:-

> *"13. We are thus unable to find any justification for the classification contained in Section 15 of the Punjab Pre-emption Act of the Kinsfolk entitled to pre-emption. The right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the Constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to pre-emption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and clauses 'First', 'Secondly' and 'Thirdly' of Section 15 (1) (a),*

‘First’, Secondly’ and ‘Thirdly’ of Section 15(1)(b). Clauses First’, ‘Secondly’ and ‘Thirdly’ of Section 15(1) (c) and the whole of Section 15(2) are, Therefore, declared ultra vires the Constitution.

14. We are told that in some cases suits are pending in various courts and, where decrees have been passed, appeals are pending in appellate Courts. Such suits and appeals will now be disposed of in accordance with the declaration granted by us. We are told that there are a few cases where suits have been decreed and the decrees, have become final, no appeals having been filed against those decrees. The decrees will be binding inter parties and the declaration granted by us will be of no avail to the parties thereto.”

[12]. In view of aforesaid, the arguments as regard the sale made by female being protected in terms of Section 15(2) of Punjab Pre-emption Act cannot be appreciated. In this way, substantial question of law No.1 stands answered. Questions No.2 and 3 are to be appreciated conjunctively. Perusal of Ex.P-5 sale deed dated 25.01.1983 has the recital of Rs.49,000/- as total sale consideration. The contents of the sale deed are indicative of the fact that factum of lease deed was recorded in the sale transaction and it was written that the vendees would be bound by the rights of the lessee. A symbolic possession was shown to have been delivered. The entire sale consideration received in front of Sub Registrar in a way shows that the sale deed was executed without obtaining actual physical possession of the suit land. Vendees made themselves bound by the rights of the lessee. The lessee

was none-else their father. The sale deed has specific recital "*Kharidaran Patta Giranda Ke Hakuk ke Paband Rahege*". The contents of the lease deed revealed that it was executed on 24.01.1983. The recital of lease deed shows that the possession was delivered to the lessee during the subsistence of lease period, lessee would remain in possession. The lease was executed for a period of 99 years. The lessee is the father of the defendants. The lease amount was Rs.21,000/-. Both the documents are required to be appreciated jointly. If possession was not to be delivered to the vendees after the sale deed, the question arises whether vendees were to remain contended with only symbolic possession. If lease deed was not executed, in all probability vendees could have been delivered possession at the time of execution of sale deed. A day earlier to execution of sale deed, the vendees thought it appropriate to clog the right of pre-emption by way of getting lease deed executed in favour of their father. This fact can be appreciated from another angle as well.

[13]. Apparently price of the land was Rs.70,000/-. The said amount was bifurcated into two parts. An amount of Rs.49,000/- was credited towards sale consideration and remaining amount of Rs.21,000/- was apportioned towards lease amount. Both the transaction acted in league with each other so as to oust the claim of the pre-emptor. It is true that right of pre-emption is a piratical right and this right can be done away with a lawful exercise by the defendants. The execution of lease deed in collusion as sham

transaction cannot be held to be a lawful exercise, rather it is an exercise intended to circumvent the provision of law which is not admissible in law. Therefore, execution of lease deed has to be held as a sham transaction which was intended to create cloud on the right of the pre-emptor. As regards non-framing of issue of lease deed in the light of lease deed being registered document is concerned, the same has to be answered as inconsequential in view of the fact that both the parties knew about each other case and therefore, there was no necessity of framing any such issue at trial. The execution of lease deed was not necessary at all because vendees were to get possession on execution of sale deed. Vendees were not given possession under the garb of lease deed having been executed a day prior to execution of sale deed in favour of their father. The possession was delivered to the father of the vendees by way of execution of lease deed on 24.01.1983 and symbolic possession was given to the vendees/defendants No.1 to 4 by way of sale deed on 25.01.1983. The aforesaid facts only gave irresistible conclusion that the vendees and the lessee acted intendum in order to frustrate the right of pre-emptor.

[14]. In view of aforesaid, there was no necessity of deliberating upon the issues on the basis of lease deed as parties were aware about the case of opponent. The aforesaid exercise cannot be termed as a lawful exercise to defeat the right of the pre-emptor, rather the exercise is intended to circumvent the

provision of law which is simply not tenable. In view of aforesaid discussions, questions No.2 and 3 are to be answered against the appellants.

[15]. Having given thoughtful consideration, I am of the view that the lease deed dated 24.01.1983 was a sham transaction and was intended to circumvent the provision of law by way of creating clog of redemption, hence, the same was rightly concluded as a sham transaction by the Courts below. In view of findings recorded as above, I am of the view that there is no substance in the appeal and the same is accordingly dismissed.

(RAJ MOHAN SINGH)

25.02.2016 **JUDGE**

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