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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Date of decision : 07.12.2016

1.

RSA-1261-1989

Daljit and others

... Appellants

Versus

Rakho (deceased through LRs) and others

... Respondents

2.

RSA-1294-1989

Bhajno

... Appellant

Versus

Rakho (deceased through LRs) and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Hardeep Singh, Advocate
for the appellant(s).

Mr. Satbir Rathore, Advocate
for the respondent(s).

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two appeals one bearing **RSA No.1261 of 1989** titled as **“Daljit and others V/s Rakho (deceased through LRs) and others”** at the instance of defendant Nos.2 to 5/subsequent vendees and the other appeal bearing **RSA No.1294 of 1989** titled as **“Bhajno V/s Rakho (deceased through LRs) and others”**. at the instance of defendant No.1 in a Civil Suit No.143 of 1985 titled as “Rakho

V/s Bhajno and others”, whereby the suit at the instance of the plaintiff, namely, Rakho, partly allowed by the trial Court, has been decreed by the lower Appellate Court *in toto*.

Mr. Hardeep Singh, learned counsel appearing on behalf of the appellant(s)-defendant Nos.2 to 5 submits that the suit aforementioned was filed on 08.04.1985 challenging the gift deed dated 16.05.1960 and two sale deeds of 1984 & 1985 executed by defendant No.1 in favour of defendant Nos.2 to 5 in respect of land measuring 2 kanals 7 marals. The gift deed was in respect of the land measuring 44 kanals 19 marals. The suit was highly belated being barred by law of limitation. The jamabandi did not reflect the possession of the respondent(s)-plaintiff(s). Even the ingredients of Order 6 Rule 4 CPC have not been complied with. The trial Court protected the interest and title of defendant Nos.2 to 5 by taking the aid of the provisions of Section 41 of the Transfer of Property Act, but the lower Appellate Court without therebeing any appeal at the instance of the plaintiff(s) erroneously exercised the jurisdiction as per the provisions of Order 41 Rule 33 CPC, decreed the suit *in toto*, in essence, the sale deeds executed in favour of defendant Nos.2 to 5 in respect of the aforementioned land have been set aside. The appellant(s)-defendant Nos.2 to 5 are the *bona fide* purchasers for a valuable consideration as before buying the property made a reasonable enquiry and found that the vendor-defendant No.1 was the actual owner and thereafter, had put into possession, thus, there is a gross illegality and perversity and prays for setting aside the judgment and decree under challenge.

As regards the other appeal at the instance of defendant No.1,

namely, Bhajno, it has been alleged in the memorandum of appeal that it was Bhajno, who after the execution of the gift deed put into possession. The gift deed had been executed by Rakho, during her life-time and at that time, she was mentally fit as was 50 years' old. No explanation has come forth in filing the suit so belatedly. The possession was also of defendant(s) and therefore, the suit was hit by law of limitation and could not have been brought within the rigours of Article 59 of the Limitation Act.

Mr. Satbir Rathore, learned counsel appearing on behalf of the respondent(s)-plaintiff(s) submits that the Courts below have consistently found that the plaintiff(s) had been in possession of the property and therefore, did not non-suit on the ground of limitation as cause of action accrued on the date when she came to know about the sale deeds and the suit, resultantly, was filed on 08.04.1985. The ingredients of fraud and misrepresentation have been proved to the hilt through the testimony of the witnesses and as well as the revenue record. The defendant(s) have failed to prove any documentary evidence qua possession, much less, they cannot be said to be *bona fide* purchasers i.e. defendant Nos.2 to 5, thus, urges this Court for affirming the judgments and decrees under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a force and merit in the submissions of Mr. Hardeep Singh, representing the appellant(s)-defendant Nos.2 to 5 in RSA-1261-1989, for, their interest and title acquired by virtue of two sale deeds, aforementioned, of an area measuring 2 kanals 7 marals is protected by the provisions of Section 41 of the Transfer of Property Act. Before the purchasing the property, it has come on record that they had

made a reasonable enquiry and found that defendant No.1 was the actual owner. They cannot be said to be in collusion or the party to the alleged fraud committed by defendant No.1, who is none-else, but the daughter of respondent(s)-plaintiff(s). In fact, the appellant(s)-defendant(s) have been sandwiched between the fight amongst the mother and the daughter. The lower Appellate Court ought not to have, in such circumstances, exercised the power under Order 41 Rule 33 CPC in the absence of specific plea raised on behalf of the respondent(s)-plaintiff(s). Even otherwise, it was a small chunk of land i.e. 2 kanals 7 marlas out of 44 kanals 19 marals, thus, in my view, the findings of the lower Appellate Court are not sustainable in the eyes of law.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **“Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213”**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **“Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others” 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in “Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29]”

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent

Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the facts and circumstances of the case, the judgment and decree of the lower Appellate Court qua setting aside the sale deeds of 1984 & 1985 in favour of defendant Nos.2 to 5 is hereby set aside.

However, against defendant No.1 is hereby maintained, for, defendant No.1 had not been able to prove any documentary evidence i.e. khasra girdawari or other attenuating circumstances to show her possession, in my view, the suit was said to be within the period of limitation. A cause of action had accrued only on the date when the sale deed was executed by defendant No.1 in favour of defendant Nos.2 to 5 and therefore, the suit filed on 08.04.1985 cannot be said to be hit by the rigours of Article 59 of the Limitation Act.

With the aforesaid observations, the appeal bearing **RSA No.1261 of 1989** is allowed and the other appeal bearing **RSA No.1294 of 1989** is dismissed.

07.12.2016
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned Yes/ No

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Whether Reportable Yes/ No