

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No. 1190 of 2009
Date of decision : May 28th , 2016

Satinder Pal Singh Patheja and others

..... Appellants

Versus

Gobinderpal Singh Patheja and others

..... Respondents

RSA No. 1191 of 2009

Lt. Col.(Retd.) Satinder Pal Singh Patheja and another

..... Appellants

Versus

Gobinderpal Singh Patheja

..... Respondents

RSA No. 1192 of 2009

Preet Inder Pal Singh Patheja

..... Appellant

Versus

Gobinderpal Singh Patheja and others

..... Respondents

RSA No. 1193 of 2009

Preet Inder Pal Singh Patheja

..... Appellant

Versus

Gobinderpal Singh Patheja and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Amar Vivek, Advocate
for the appellants in RSA Nos. 1190 &1191 of 2009.

Mr. K. S. Sidhu, Senior Advocate with

Mr. G. S. Benipal, Advocate &
Mr. Kanwal Goyal, Advocate
for the appellants in RSA Nos.1192 &1193 of 2009.

Mr. A. K. Chopra, Senior Advocate with
Mr. G. S. Bhandal, Advocate
for respondent No.1 in all the cases.

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?

Amit Rawal, J.

This order of mine shall dispose of four Regular Second Appeals bearing RSA Nos.1190,1191,1192 and 1193 of 2009.

Three suits came to be filed before the trial court bearing Civil Suit No.271-A of 2001 titled as Preetinder Pal Singh (hereinafter called as PPS) Vs. Gobinderpal Singh Patheja and others claiming decree to the effect that suit property bearing H.No. 211 Sector 33-A, Chandigarh to be joint property of the parties and PPS along with defendant Nos. 1 to 3 filed the suit claiming it to be in joint possession with consequential relief of permanent injunction restraining defendants from alienating the suit property (hereinafter called suit No.1), Second suit bearing No. 213 of 2003 titled as Lt. Col. Gobinderpal Singh Patheja (hereinafter called as GPS) Vs. Satinder Pal Singh Patheja and others is with regard to claiming mandatory injunction directing the defendants to hand over the possession of drawing room, dining room, two bed rooms with attached bathroom and garage on the ground floor of the house in

question and also for recovery of damages/mesne profits for @ ₹17,000/- per month i.e. w.e.f.19.5.2001 amounting to ₹49,950/- and future damages along with interest @ 18% (hereinafter called 'the second suit) and third suit bearing No. 175 of 2003 titled as Satinder Pal Singh Patheja (hereinafter called SPS) and Ravinder Pal Singh Patheja (hereinafter called RPS) Vs. Gobinder Pal Singh Patheja and others seeking decree for permanent injunction restraining the defendants from demolishing, damaging removing aluminum partition in any of the portion shown in the site plan as XYZ and also restraining his family members, and/or their agents, servants, maids from tress passing into the ground floor portion occupied by the plaintiffs, except the main approach drive where stair case is located.

All the three suits were consolidated by the trial court. It would be apt to give preface of the matter before adverting to the rival contentions of the learned counsel representing the appellants and respondents.

PPS instituted a suit No. 1 claiming aforementioned relief on the premise that he is joint co-owner of the suit property i.e. H.No.211 along with defendants in equal shares since 1967. The joint family comprising of father, Harbans Singh Patehja, mother and four brothers have been staying together as one family unit. Defendant Nos 1 and 2 were serving in Army. Since the family was in need of the house both the sons i.e defendant Nos. 1 and 2 applied for an allotment of plot under defence quota. The plot bearing No.211 and 212 in Sector 33-A was got allotted in the name of defendant No.1 i.e. GPS and that of defendant No.2 i.e. SPS

respectively. The installments of the plots were paid by members of the joint family. Defendant No.1 hardly contributed anything and the installments were paid by the father of the parties and defendant No.2. The father of the parties retired in the year 1969 and contributed his entire pensionary benefits for the construction of the suit property whereas defendant No.1 contributed only a sum of ₹70,000/- which was taken as loan. Even mother of the parties sold away her jewellery and all the savings in the family were spent on construction work of the aforementioned house. SPS also contributed in a similar fashion. It has further been pleaded that owing to shortage of funds, plot No. 108P Phase III-B1, situated in Urban Estate Mohali and another plot bearing No. 212 situated in Sector 33-A belonging to Joint Family were sold and the funds so generated were also pooled in the construction of the suit property.

It was further pleaded that an oral family settlement was arrived at between the family members which was reduced in writing by way of an affidavit dated 10.9.1974 Ex. P-69 reiterated by GPS vide affidavit dated 29.5.1975 Ex.P-1. In 1984 after the construction of the first floor of the suit property was raised as SPS retired from the Army and major portion of his pension was allegedly invested in the construction of first floor whereas PPS-plaintiff in suit No.1 had been running Cement agency with RPS-plaintiff No.2 (in suit No.3) during the year 1982-84, therefore the entire cement for construction of the first floor was supplied from the said agency. In August 1992, GPS retired from army and came back to Chandigarh along with his family. Consequently, RPS, who was earlier staying at

first floor along with PPS shifted to ground floor to join his father and his brother SPS and it was agreed among the members of the family that ground floor would belong to both brothers SPS and RPS while first floor owned and occupied by PPS and GPS jointly.

It was further pleaded that due to some adjustment problem faced by both the families on first floor PPS plaintiff had taken a rented accommodation in Sector 46, Sector 10 in the year 1993-94 and later in Sector 11. Till the death of the father in the year 1998 everything went smooth and well. Prior to the death of father, mother died in the year 1988. The father left behind a registered Will dated 29.6.1995 wherein affidavit aforementioned, were re-iterated and thus, the cause of action to seek vindication accrued when GPS (defendant No.1 in suit No.1) started giving advertisement in the local newspaper "The Tribune" regarding sale of the suit property.

The suit No.2, aforementioned, has been filed by GPS seeking mandatory injunction as noticed above branding SPS and RPS as licensees in respect of the premises described above on the ground that they are in occupation of the premises as licensees. After allotment the plaintiff therein with the help of loan of ₹70,000/- and as well as savings of commissioned army service raised the construction of the plot in the year 1973. Since he was posted away from Chandigarh and his parents were living in Chandigarh and were looking after the house and SPS and RPS started living in the house as licensees. Thereafter the construction of the first floor was raised with the savings of his wife who was working as a govt. lecturer and by taking out contribution to his DSOP fund, almost every year had

been making additions in first floor of the house. Before the death of his father, who was almost bed ridden due to hip joint replacement., there was no male member in the family to look after, it is in these circumstances, he granted permission to his brothers to live in the house. After his retirement he started living in the first floor. His wife had withdrawn Rs. 90,000/- from GPF for renovation work of the house in 1984 and again in 1995 took a loan of ₹2 lacs from HDFC Bank for alteration and renovation.

The third suit i.e Civil Suit No.175 of 2003 has been instituted seeking injunction at the instance of SPS and RPS restraining GPS and his family members or their agents, servants etc.from tress passing in first floor occupied by plaintiffs and not to remove the aluminum partition as shown in the site plan filed by SPS. All the aforementioned suits, as noticed above were consolidated.

The plaintiffs in suit No.1 and 3 examined the following witnesses:-

PW-1, Gurmukh Singh, Registration Clerk, office of Sub Registrar, UT, Chandigarh regarding the Will of Harbans Singh Patheja, PW-2 Amar Chand Chaudhary, Advocate who proved on record affidavit Ex.P1 and entry of register at serial number 524 as Ex.P2, PW-3 Devinder Prasad, handwriting and documents expert who submitted his report as Ex.P-3, eight negatives, Ex.P-4 to P-11, enlarged photographs Ex.P-12 to P-19 and transparencies Ex.P-20 to P-27. PW-4, Maj. Mohal Singh who proved the Will Ex.P-28 and negatives Ex.PW4/B1 to PW4/B14. PW-5 Harvinder Singh who tendered his affidavit as Ex.PW5/A and proved on record bill as Ex.P-

29, entries Ex.P-30 and P-31, construction bill Ex.P-32, account of building construction Ex.P-33 to P-35-A, PW-6 Dr. B. R. Sharma, document expert who has proved his report as P-36, photo charge as Ex.P-3/A, photographs Ex.P-37 to P-66. PW-7 Rajinder Malhotra, Jr. Assistant office of Estate office, Chandigarh who proved on record the transfer letter dated 6.6.1980 as Ex. P-67 & Ex.P-68 PW-8 Jassi Anand, document expert who has proved on oath her report Ex.PW8/1, photographs Ex.PW8/2 to PW8/21, photo chart Ex. PW8/22 to Ex. PW8/41, PW-9, PPS-plaintiff in suit No.1 and tendered his affidavit Ex.PW9/A and proved on record affidavit dated 10.9.1974 Ex.P69 by GPS, site plan Ex.P-70, PW-10 Karnail Singh, Sr. Asstt., office of Estate office, Urban Estate, Punjab who deposed on oath that plot No.108 P, Phase III-B1, Mohali was allotted to Harbans Singh Patheja r/o H.No. 3066 Sector 21-D, Chandigarh on 6.1.1972, for a sum of ₹13,500/- plus ₹1350/- and had executed a power of attorney in respect of this plot in favour of Jawala Prashad Vashisht, PW-11 Ram Saran Dass, Advocate who deposed on oath that the affidavit dated 10.9.1974 was attested by him.

On the other hand, following witnesses were examined: DW1 SPS tendered his affidavit in evidence as Ex. DA proved on record the communication sent to Manager Cement Marketing Division, Jeevan Deep, Parliament St.New Delhi as Ex.DA/1,copy of draft for ₹15,000/- as Ex.DA/2, receipts of payment of installments as Ex.DA/3, copy of notice dated 25.1.1971 Ex.DA/4, receipt Ex.DA/5, communication dated 9.3.1978 as Ex.DA/6, site plan Ex.DA/7, communication dated 3.2.1970 vide which possession

of plots No.211 and 212 was handed over to Harbans Singh Patheja, Ex.DA/8 and DA/9, communication dated 26.12.1972 vide which the water connection was granted as Ex.DA/11 and General Power of Attorney as Ex.DA/12.

DW-2- Lt.Col.Gobinder Singh Patheja plaintiff in Suit No.2 and defendant No.1 in Suit No.1 tendered his affidavit in evidence as Ex.DW2/A and proved on record allotment letter, Ex.DW2/1 of suit property. Possession of suit property which was given on 5.2.1970 vide letter Ex.DW2/2 approved copy of site plan Ex.DW2/3, application form obtaining loan Ex. DW2/4, NEC dated 20.6.1972 as Ex. DW2/5, Copy of recommendation of formation commander Ex.DW2/6, Principal Mortgage Deed as Ex. DW2/7, Copy of supplementary mortgage deed Ex. DW2/8, letter dated 18.10.1973 vide which the sewerage connection was granted as Ex. DDW2/9, copy of affidavit as Ex. DW2/10, copy of re-conveyance deed Ex. DW2/11 and copy of notice Ex. DW2/12.

DW3 Vina Rani, Sr. Assistant office of Estate Office, PUDA Mohali deposed on oath that H.No.2715 Sector 70, Mohali as on 10.8.1998 stood in the name of SPS which was sold to Jasbir Singh Bains on 10.10.2006. She proved the affidavit Ex. DW2/10.

DW4 Avtar Kaur, Sr. Assistant office of GMADA, Mohali who has proved the certified copy of the possession letter as Ex.DW4/A.

DW5 Rajnish Sharma, Record Keeper, office of SDO (Printing)UT Chandigarh who has proved the grant for

sewerage connection as Ex.DW2/9.

DW6 Vibhushan, Junior Assistant, Estate Office, Chandigarh proved on record the allotment letter as Ex.DW6/A. He further deposed that the plot was sold to Tarlok Singh in 1980 for a sale consideration of ₹48,000/- vide Ex.DW6/8.

DW7 Harkirat Sethi stated on oath, that the monthly rent of complete house upto first floor in Sector 33-A, Chandigarh will be ₹50,000/- and minimum rent for the ground floor portion will be ₹35,000/-. The ground floor house situated in Sector 18 is rented out to ₹40,000/-.

The defendants also tendered into evidence affidavits as Ex.D1 and D2, receipts as Ex.D3 to D6, attested copy of house plan as Ex.D7, possession letters as Ex.D8 and D9, estimate of construction as Ex.D10, notice as Ex.D11, allotment letter as Ex.D12, copies of letters as Ex.D13 to D15, appointment letter as Ex.D16, copy of partnership deed as Ex.D17, appointment letter as stockist as Ex.D18, acknowledgment as Ex.D19, copy of license as Ex.D20, copy of appointment letter as Ex.D21, certificates as Ex.D22 and D23, letter Ex.D24 letter of distributorship as Ex.D25, certificates as Ex.D26 and D27, letter as Ex.D28, original letters as Ex.D29 and D30, photograph as Ex.D31, letters as Ex.DA/1 to DA/13, erection of P. Fixture Ex.DA/14, complaints as Ex.DA/15 to D18, receipts as Ex.DA/20, sample chart as Ex.DA/21, photographs as Ex.DA/22 to DA/34, memo as Ex.DW2/1, possession of plot Ex.DW2/2, Site plan as Ex.DW2/3, application form Ex.DW2/4, certificates as Ex.DW2/5 and DW2/6, copy of document Ex.DW2/7, supplementary mortgage

Ex.DW2/8, form of re-conveyance Ex.DW2/11, legal notice Ex.DW2/12, letters Ex.DWx/1 to DWx/3.

The trial court on the basis of evidence brought on record, much less taking into consideration statement of defendant's counsel partly decreed civil suit No.1 i.e. Civil suit No. 271-A of 13.12.2001 by granting decree to the effect that suit property is joint property of (plaintiff) PPS along with (defendant Nos. 1,2,3) other brothers. The parties, as co-owners in the suit property have been held entitled to their respective shares. For the purpose of recovery of possession of their share parties were given liberty to seek partition. The trial court further enjoined the defendants therein from alienating the suit property in any manner i.e. by creating any encumbrance etc. The civil suit No.2 i.e. civil suit No. 213 of 22.8.2001 has been dismissed. Civil suit No. 175 of 22.8.2003 has been partly decreed by granting permanent injunction restraining the defendants and his family members and/or agents from tress passing into the ground floor portion except the main approach drive way where staircase is located. The defendants have also been restrained from removing aluminum partition in any of the portion as shown in the site plan filed by SPS.

Aggrieved against the aforementioned findings Gobinder Pal Singh filed Civil appeal No.285 of 2007, 286 of 2007 and 287 of 2007 on 21.9.2007, PPS also filed appeal No. 338 of 2007 (cross objection) on 12.11.2007. The lower appellate court dismissed suit No.1 and 3 and decreed civil suit No.2 granting mandatory injunction and mesne profit to GPS, holding that allotment

of the suit properties stood in his name. The cross objections vide C.A.No.338 of 2007 was also dismissed by holding that no evidence has been brought on record to show that any contributions had been made for construction and purchase of plot and not by relying upon the alleged affidavit executed by GPS Ex.P-1 and P-69. It is in these circumstances the aforementioned four Regular Second Appeals have been filed.

Mr. K. S. Sidhu, learned Senior Counsel assisted by Mr. G. S. Benipal, Advocate and Mr. Kanwal Goyal, Advocate appearing on behalf of the appellants in RSA No. 1192 & 1193 of 2009 in support of their grounds of appeal submitted multi fold arguments:-

i) Affidavit dated 10.9.1974, Ex. P-69, executed by GPS plaintiff in civil suit No.2 i.e. Civil Suit NO. 213 of 2003 on oath leaves no manner of doubt that house in question, though, stood in his name but was constructed with the help of his father Harbans Singh Patheja, who contributed financially in which his father, SPS, PPS and RPS are equal share holders, whereas in the affidavit dated 29.5.1975 it has been stated that the suit property was purchased and constructed with the help of his father and mother and three brothers had contributed financially and all are having equal share,thus he is not the absolute owner.

(ii) The affidavit Ex. P69 had been proved before the courts below, whereas and plaintiff GPS in the replication denied any affidavit having executed by him at any stage and further stated that in case there was any other affidavit, the same was forged and

fabricated and his signatures might have been forged thereon.

iii) The trial court had given a very detailed and elaborative finding by relying upon provisions of Section 73 of the Indian Evidence Act, 1872 by forming an opinion that signatures on other affidavits are of GPS. Such observations have never been touched by the lower appellate court, thus such finding had been rendered in a most mechanical and fallacious manner, therefore, there is illegality and perversity.

iv) He further submitted that father of the parties had sold the house i.e. Plot No. 108P Phase III-B1, situated in Urban Estate Mohali on 30.5.1974 and an oral family settlement in the shape of affidavit dated 10.9.1974 Ex. P-69 was arrived at between the family members. Thereafter plot No. 212 Sector 33-A, Chandigarh was sold on 7.11.1974. The second affidavit dated 29.5.1975 acknowledges the contribution of parents and as well as three brothers, but the lower appellate court had compared both the affidavits in a most perfunctory and erroneous manner.

v) The Will dated 29.6.1995 Ex.P-28 executed by father has been duly proved, thus, there was no doubt with regard to its authenticity or genuineness. The father of appellants-respondents expired in the year 1998, nearly after three years of the execution of the Will. In cross-examination, GPS admitted that he was not aware that his father had executed a Will but volunteered that he was a law graduate and honest person. He further submits that as per provisions of Section 32 (6) of the Indian Evidence Act, 1872, the Will falls within the parameters of aforementioned provisions. The Will

also mentioned about the affidavits of GPS.

vi) The suit for mandatory injunction was barred by law of limitation i.e. by 27 years. At the best, it could have been filed within three years, in case the appellants remained in licensee of the suit property, since 1973-74.

vii) The second suit was barred by law of estoppel as per provisions of Section 115 of the Indian Evidence Act, 1872.

viii) The statement of account, i.e. dairies Ex. P-71, P-33-A and P-34 maintained by father of the parties amount to acknowledgment. Respondent No.1 (GPS) in cross-examination stated that he had seen Ex.P-71, which was in the hand writing of his father but later on admitted, that at many places the register be having his father's hand writing. It leaves no manner of doubt that entire money was contributed and spent by father and the same is admissible in evidence under Section 32(2) of Indian Evidence Act, 1872.

ix) Sale proceeds of two plots were utilized for raising construction of the suit property bearing plot No.212 Sector 33-A as plot No. 108P Phase III-B1, situated in Urban Estate Mohali was sold on 9.11.1974 and 11.6.1994, which fact is reflected in the account book/register Ex. P-71. Minor contradictions in the statements would not entail into dismissal of the suit. The lower appellate court has fallen in error in not appreciating the fact that the suit property of GPS was blended into joint family property. The lower appellate court has gone into arena of conjectures and surmises, thus there has been mis-reading and mis-appreciation of

documentary evidence, inasmuch as that the trial court had relied upon two letters Ex.DA1/12 and Mark A dated 3.7.1967 written by the father of the parties to the estate officer for allotment of two adjacent plots which showed intention of the family. Installements of the house were deposited by the father of the parties to the Estate Officer, U.T.Chandigarh. All the activities of the suit property were in the hand of the father of the parties. Even possession was also received by him. The father had raised the construction on the suit property and maintained accounts in his own hand writing. It was he who availed the services of the contractor, mason etc. Plaintiff (in suit No.2) has failed to lead any evidence to the contrary. Mere entry in the record of rights would not clothe status of absolute owner as it was a benami transaction. It is permissible to convert the self acquired property in joint property by blending the same and in this regard Mr. Sidhu relied upon the judgment of **Duggraia Sadasiva Vittal Vs. Bolla AIR 1958 A.P.145.**

Mr. Amar Vivek, learned counsel appearing on behalf of the appellants in RSA No. 1190 and 1191 of 2009 has relied upon the judgment in **Marcel Martins Vs. M. Printer and others AIR 2012 SC 1987** to contend that plea of benami as per the provisions of Section 4 of Benami Transactions Act, (45 of 1988) the property held by a person in fiduciary capacity, is permissible being closely related family members.

He further submitted that affidavits Ex.P-69 and P-1 aforementioned cannot be ignored for want of registration. He further submitted that trial court after examining the evidence on record

partly decreed the suit No.1 and 3 but the appellate court contumaciously, fallaciously, much less in perverse manner reversed the findings of trial court. The aforesaid appeal thus, requires consideration, and urges this Court to formulate following substantial questions of law:-

1. *Whether the observations in the impugned judgment of lower appellate court are totally perverse and suffer from vice and arbitrariness as the lower appellate court has failed to consider the documentary and oral evidence, material and contentions raised by the appellants and upheld by trial court, rather on the other hand, it has taken the oral word of opposite party as the gospel of truth in reversing the well reasoned and cogent findings in the judgment of the trial court?*
2. *Whether a serious error in the eyes of law has been committed by the lower appellate court in discarding the two affidavits Ex.P-1 and P-69, duly executed by respondent No.1 on mere conjectures and surmises, particularly when the same had duly been proved, even by calling the oath commissioners in evidence, who had attested the same in the year 1974-75 and through credible evidence?*
3. *Whether lower appellate court fell into a patent error in the eyes of law, in not even discussing or appreciating finding of fact recorded by trial court that registered will dated 29.6.1995 Ex. P-28 (relied even by lower Appellate Court) executed by late father of the*

parties much prior to breaking of dispute, was a statement on family affairs and a relevant fact, falling within ambit of S.32(6) of Indian Evidence Act, 1872?

4. *Whether categorical finding of fact recorded by trial court that suit for mandatory injunction filed by respondent No.1 was barred and it was not at all maintainable, there being neither any challenge to the said finding of fact in grounds of appeal nor even during oral arguments, it was incumbent upon lower appellate court to dismiss the appeals filed by respondent No.1 only on this ground.?*

5. *Whether the law of blending one's individual property in joint family hotchpotch being crystal clear and well recognized, the learned trial court having clearly found the blending of suit property by respondent No.1 in joint pool, the lower appellate court fell into a patent error in the eyes of law in deriving conclusions of its own, about the property being self acquired of respondent No.1, de hors the over-whelming & clinching material on record?*

On the other hand, Mr. Ashwani Kumar Chopra, learned Senior Advocate assisted by Mr.G. S. Bhandal, Advocate appearing on behalf of respondent No.1 submitted that from the reading of the averments in Suit No.1 and 3, an irresistible conclusion is drawn that plaintiffs have invoked provisions of Section 4 of Benami Act 45 of 1988. According to them in case, Harbans Singh Patheja father was the actual owner, whereas GPS plaintiff in civil suit No.2 was merely a name lender then following things were required to be done and also raised following multi fold arguments:

i) The diary maintained by the father was not of his bank record or of any other three members of the family proved to have actually contributed towards the constructions of the said house. The sale proceeds of house i.e. H.No.212 Sector 33-A and 108P Phase III-B1, Mohali has not been proved on record. Though there is always an element A and B part of the money neither any Income Tax record has been placed on record to show that the sale proceeds received from aforementioned plots were deposited in a particular account, nor, any corroborative evidence, therefore were withdrawn for the purpose of raising construction much less payment of instalments of suit property.

ii) He further submitted that the price of construction in those days was not more than ₹50,000/- to ₹60,000/- and concededly/admittedly GPS plaintiff in civil suit No.2 had obtained a loan by mortgaging the suit property as he was serving in the Indian Army.

iii) The affidavit of 1974-75 Ex.P-69 and P-1 cannot be looked into for the purpose that they were never acted upon, much less if at all they have to be looked into, it tantamounts to relinquishment of right of GPS, which, required registration. The lower appellate court being the last court of fact and law examined the entire evidence threadbare oral and documentary and rather compared two affidavits and found starking discrepancies which have been noticed from paragraph 78 to 96.

iv) He further submitted that SPS in cross-examination admitted that family was joint but the property was not purchased in joint name of the family nor any business was in the joint name, thus plaintiffs in suit No.1 and 3 miserably failed to prove averments qua jointness and even PPS also admitted that in the year 1973 he had not contributed in terms of money for construction of the house/suit property aforementioned. The aforementioned cross-examination spilled the beans that entire evidence of the suit was based upon falsehood, therefore the question of blending of self acquired property into joint property did not arise at all.

v) The license of SPS and RPS was revoked and on revocation of the same, proved through service of notice, the suit for mandatory injunction was filed, which as per provisions of Section 52 of Easement Act, 1882 is maintainable. In this regard, referred to the judgments rendered by Hon'ble Supreme Court in **Sant Lal Jain Vs. Avtar Singh 1985 AIR (SC) 857** and judgment rendered by **J&K High Court in Th. Milka Singh and others Vs. Th.Diana & others(Jammu & Kashmir 1964 AIR (J&K) 99.**

vi) He further submitted that it is a settled law that for seeking possession from a licensee the suit for mandatory injunction as per provisions of Section 39 of the Specific Relief Act, 1963 is maintainable, as licensee is granted permissive possession and on revocation and there is breach of obligation thus, cause of action arose to file the suit. Both SPS and PPs

have purchased their separate houses and have an evil eye on the property in dispute and the claim of joint ness is nothing but an act of greed/aggrandization.

vii) He further submits that rent of the ground floor is more than ₹30,000/- to ₹40,000/- and therefore mesne profits @ of ₹17,000/- is just and reasonable.

viii) In order to set up a plea of benami the plaintiff in civil suit No.1 was required to prove the “source”. In the absence of same, plea of benami has not been proved, thus urges this Court for affirming the judgment and decree rendered by the lower appellate court.

I have heard learned counsel for the parties, appraised the paper books and case law cited at bar and of the view that the appeals sans merit for the following reasons:-

i) On juxta position of the evidence, I am of the view that the lower appellate court found starking contradictions as in the affidavit of the year 1975 Ex.P-1 dated 29.5.1975 and Ex.P-69 dated 10.9.1974 it apparently appears that GPS plaintiff in civil suit No.2 had relinquished his right in the aforementioned suit property and such relinquishment cannot be recognized in law for want of registration.

ii) No doubt the brothers are in fiduciary capacity but while proving the same they were required to lead evidence, for, in benami transaction the actual owner claiming ownership of fund and property stands in the name of other person who is branded as “Name Lender”.

iii) No income tax return of father or of any of the plaintiffs in suit Nos. 1 and 2 has been placed or proved on record to show alleged contributions.

iv) Plot No. 212 Sector 33-A, Chandigarh was alleged to have been sold away for ₹80,000/- through Power of Attorney which does not reveal receipt of any earnest money.

v) No bank statement or pass book has been proved on record to show withdrawal of any money with regard to raising of the construction.

vi) No steps have been taken to move the competent authority to transfer in the name of all the brothers. Had there been any truth/force in the affidavits heavily relied, the same could have been done.

vii) Maintaining of the account by a father is unilateral act which is not proved by any corroborative evidence i.e. whether entries were being maintained in the record of banks, income tax department etc.

viii) Assuming for an argument sake that there was any jointness, as noticed above, concededly SPS and PPS have purchased separate houses and had it been so, the alleged house would have also deemed to have been purchased jointly and to be treated of joint family.

ix) On the other hand, conduct of GPS was fair enough as he sought no claim with regard to the ownership aforesaid, however as per record of estate office, he is allottee of the plot and has also proved on record the construction.

x) The receipts produced by the plaintiffs are in the name of GPS.

xi) Since GPS was working in Army, his father was located in Chandigarh and normally father extends the help in seeking possession and raising constructions which is very common thing amongst the families in India.

xii) Had there been an actual blending, self acquired property of GPS ought to have been reflected in income tax return filed in the capacity of HUF.

xiii) For the purpose of claiming a right in the ancestral or co-parcenary property a person has to prove character and nature of property having inherited from third generation being fourth generation.

xiv) The suit for mandatory injunction for seeking possession from a licensee is maintainable in view of the ratio decidendi culled out in the judgment cited above. The suit had been filed immediately on revocation of the license, thus rightly so the said objections qua maintainability have been over ruled by the lower court.

xv) Even the mesne profits amounting of ₹17,000/- in my view is not phenomenal amount as it has been proved on record that rental of ground floor was between ₹20,000/- to ₹50,000/-. It depends upon the extent of construction.

xvi) The admission of the PPS and SPS *ibid*, irresistibly proves that the claim in suit was based on falsehood, rather proves that they did not contribute single money for the construction. Mr. Sidhu and Mr. Amar Vivek, assiduously and with vehemence attempted to support the view expressed by the trial court but in view of the reasoning assigned herein above had not been able to cut ice.

xvii) Execution of the Will in respect of the suit property i.e. bearing H.No.211, Sector 33-A, Chandigarh by father cannot be treated to be a joint family property, for, the suit property stands in the name of GPS. It is settled law that who the person who is not owner nor having any title cannot pass on the same, either through testamentary instrument or any other mode and manner.

The lower appellate court being the last court of fact and law after examining the evidence thread bare, in my view, has arrived at a correct finding in setting aside the judgment of the trial court. In my view the appellant-plaintiff in civil suit Nos 1 and 3 have miserably failed to prove the averments made in the plaint. Accordingly, for the foregoing reasons, there is no illegality and perversity in the judgment of the lower appellate court, thus, the questions of law framed above are answered in favour of the respondents and against the appellants. The judgment and decree of the lower appellate court is upheld, resultantly, the appeals are dismissed.

At this stage Mr. Amar Vivek submits that he may be

granted leave to appeal before this Court.

The same is hereby declined.

(AMIT RAWAL)
JUDGE

May 28th, 2016
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