IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

X Obj No.38-C of 2012 and
RSA No.2843 of 2009
Date of Decision.18.11.2016

Samunder Singh ....Appellant

Vs

Ram Kanwar and others ....Respondents

Present: Mr. Arun Jain, Senior Advocate with
Mr. Varun Parkash, Advocate
for the appellant.

Mr. Sachin Mittal, Advocate
for respondent Nos.1 to 6.

Mr. Rajesh Sethi and Mr. Prince Ravesh, Advocates
for respondent No.7.

Mr. Gaurav Mohunta, Advocate
for respondent No.8.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

This order of mine shall dispose of regular second appeal bearing No.2843 of 2009 and cross objection bearing No.38-C of 2012 filed in the same. The appellant-plaintiff is in regular second appeal against the concurrent finding of fact whereby the suit seeking specific performance of agreement dated 7.6.1994, has been dismissed and the cross objection bearing No.38-C of 2012 is at the instance of subsequent vendee-defendant No.8 who purchased the land in dispute vide six sale deeds bearing Wasika Nos.17306 dated 23.1.1996, 17308 dated 19.1.1996/23.1.1996, 17310 dated 23.1.1996, 17313 dated 19.1.1996/23.1.1996, 17315 dated 19.1.1996/23.1.1996, 17318 dated 19.1.1996/23.1.1996.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. Varun Parkash, Advocate appearing for the appellant-plaintiff submits that the suit aforementioned was filed on 03.04.1997 seeking specific performance of the agreement to sell in respect of the suit property on the premise that defendant Nos.1 to 6 had entered into agreement to sell dated 7.6.1994 @₹2,50,000/- per acre. An amount of ₹9 lacs was paid by the plaintiff to the defendants as part payment of sale consideration. A separate receipt in this regard was also executed. The balance sale consideration was settled to be paid at the time of execution and registration of the sale deed i.e. on or before 31.12.1994. As per clause (v) of the agreement to sell, the defendants were to obtain No Objection Certificate from the Income Tax Department and in case, they failed to do so before the appointed date, the time of execution of the sale deed shall stand extended, therefore, filing of the suit in April, 1997 cannot be said to be wanting compliance of the provisions of Section 16(1)(c) of the Specific Relief Act, 1963. The plaintiff had always been ready and willing to perform his part of the contract and was ready with money for payment to defendant Nos.1 to 6 but they did not bother to apply No Objection Certificate from the Income Tax Department. The plaintiff served defendant Nos.1 to 6 with legal notice dated 15.12.1994. However, the plaintiff acquired knowledge that the sale deeds aforementioned have been executed by defendant Nos.1 to 6 in favour of defendant No.8. The aforementioned sale deeds were executed on GPA i.e. alleged GPA given to defendant No.7, which was illegal, void and without consideration and as result of fraud and misrepresentation. In fact, defendant Nos.1 to 6 never authorized defendant No.7 to create any charge or enter into any further sale deed as the possession of the suit land was delivered to the plaintiff at the time of execution of the agreement. The defendants No.1 to 6 admitted in the written statement that they were co-owners in the land, who came out with plea that they never executed sale deeds and the sale deeds were nullity. In fact, the transaction between defendant Nos.7 and 8 was benami.

The appellant-plaintiff examined, Jagat Ram, Astt. Registration Clerk from the office of Sub Registrar, Gurgaon as PW1, Balwan Singh as PW2 and Samunder Singh as PW3 and Fakira Singh as PW4. The defendants Ram Kanwar DW1 and DW2 Ramesh Kumar deposed in favour of the plaintiff. Service of legal notice Ex.PW4/A through UPC has been proved through testimony of Fateh Singh Raghav, Advocate, PW4 as per receipt PW4/B.

The trial Court dismissed the suit which was affirmed by the lower Appellate Court on conjectures and surmises, for, it was not the case of either of the parties that the vendor defendant Nos.1 to 6 were not owners of the property. No evidence has been led in this regard. The finding of the lower Appellate Court holding that the agreement to sell is illegal, is neither here nor there.

He further submitted that the cross appeal filed by defendant No.8-Harbans Singh against the finding rendered by the trial Court whereby the trial Court had set aside the sale deeds, is liable to be dismissed as in the present case, regular second appeal should have been filed. The Court cannot mould the relief by treating the cross objection as a regular second appeal and therefore, the cross objection is not maintainable.

Per contra, Mr. Sachin Mittal, learned counsel appearing for respondent Nos.1 to 6 submitted that he would support the case of the plaintiff and had no objection in case the suit be decreed.

Mr. Gaurav Mohunta, learned counsel appearing for cross-objector-respondent No.8 submits that there is apparent collusion between the plaintiff and defendant Nos.1 to 6-vendors, who have already sold the land vide sale deeds aforementioned. Defendant No.8 -cross objector is aggrieved only with regard to the finding of the trial Court setting aside the sale deeds and therefore, the court fee is not required to be paid in view of the ratio decidendi culled out by Division Bench of this Court in ***Niranjan Kaur Vs. Nirbigan Kaur 1982 Vol.LXXXIV PLR 127*** and as well as judgment of Hon'ble Supreme Court in ***Suhrid Singh @ Sardool Singh Vs. Randhir Singh and others 2010(12) SCC 112*** and this Court in ***Balwinder Singh and another Vs. Sheela Rani and others 2016(2) PLR 362***.

In support of his contention regarding maintainability of cross objection, Mr. Mohunta relied upon judgments of Hon'ble Supreme Court in ***Superintending Engineer and others Vs. B. Subba Reddy (1999) 4 SCC 423*** and ***Banarsi and others Vs. Ram Phal (2003) 9 SCC 606.***

Even the payment of ₹9 lacs has not been proved in accordance with law. The readiness and willingness on the part of the plaintiff is conspicuously absent as no explanation has come forth to show that even after the expiry of the target date, plaintiff was always ready to perform his part of the contract. There is no averment that he had been approaching the vendors for obtaining the NOC and in these circumstances, was not left with any other option than filing the suit. Even possession in favour of the appellant-plaintiff has not been proved.

He further submitted that the cross-objection would be maintainable in view of the ratio decidendi culled out by single Bench of this Court in ***<u>Shanti Devi Vs. Nand Kishore etc. 2003(4) RCR (Civil) 648</u>*** to contend that where the trial Court has accepted the decree completely in favour of the respondents, he can support the decree in his favour passed by the trial Court on any of the grounds or the issue decided against him or the issue decided against him without filing any cross-objection but if the decree is passed against the respondent then he cannot challenge the same in appeal without filing cross objection. Even otherwise, this Court can under Order 41 Rule 33 CPC give or refuse relief to the appellant by allowing or dismissing the appeal, much less, any other such relief which this Court deem it appropriate, thus, urges this Court for setting aside the finding rendered by the lower Appellate Court viz-a-viz the sale deeds.

He further submitted that even the plaintiff admitted that the defendant No.8 had no knowledge regarding the execution of the agreement and therefore, inference of bona fide purchase is liable to be rendered in favour of his client.

Mr. Sethi, learned counsel appearing for respondent No.7, attorney holder, submitted that the plaintiff has miserably failed to prove the ingredients of Order 6 Rule 4 CPC. Even the attorney before filing of the suit remained cancelled. Legal notice has not been proved as it was sent through UPC. The vendor had denied the signatures of defendant Nos.1 to 6 on receipt of ₹9 lacs, in essence, the agreement to sell, much less, receipt has not been proved, rightly so, the Courts below have denied the discretionary relief by dismissing the suit.

In rebuttal, Mr. Arun Jain, learned senior counsel has relied upon the judgment of coordinate Bench of this Court in ***<u>Parmod Bhushan Pal Vs. Bachan Singh 2006(2) RCR (Civil) 381</u>*** to contend that once there is nothing on record to doubt the bona fides, statement of the plaintiff on oath that he was always ready and willing to perform his part of the agreement and the averment in the plaint as a whole indicate readiness and willingness, thus, discretionary relief is required to be granted in favour of the vendee.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is no force and merit in the submission of Mr. Arun Jain, in essence, the readiness and willingness was conspicuously absent as the legal notice is dated 15.12.1994 whereas the target date was 31.12.1994. Nothing prevented the plaintiff to call upon defendant Nos.1 to 6 to obtain the so-called NOC from the Income Tax Department. Even till filing of the suit on 03.04.1997, No Objection Certificate had not been taken. Once it was a breach, nothing prevented the plaintiff to espouse his grievance by filing the suit immediately. Even the plaintiff has not been able to prove his presence before the office of Sub Registrar on 31.12.1994. The receipt of ₹9 lacs has been denied by defendant Nos.1 to 6 which has not been rebutted by direct, cogent, much less, corroborative evidence. In the absence of the same, the Courts below have rightly discarded the contract, having not been proved, rightly so, refused to grant discretionary relief, much less, the suit was dismissed without any alternative relief.

As regards of the contention of Mr. Jain regarding the maintainability of the cross objection against the decree, I am of the view that the same is totally not applicable and hereby rejected in view of the ratio decidendi culled out in ***Shanti Devi's case*** (supra) wherein this Court in paragraphs 8 and 9 held as under:-

"8. The other argument that the learned Appellate Court could not have

reversed the finding recorded by the trial Court dismissing the counter claim of the defendant-respondents would also not call for any detailed examination in view of the provisions made in Order 41 Rule 22 of the Code wherein provision has been made giving right to the defendant-respondents to raise objection to the decree as if they had preferred separate appeal. The provisions of Order 41 Rule 22 are reproduced below for facility of a ready reference.

"22. Upon hearing respondent may object to decree as if he preferred a separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour and may also take any cross-objection to the decree which he could have taken by way of appeal.

Provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate court may see fit to allow.

Explanation.- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree or in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part in favour of that respondent.

(2) From of objection and provisions applicable thereto - Such cross objection shall be in the form of a memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable apply to an objection under this rule."

9. A perusal of Rule 22 of Order 41 of the Code shows that a provision has been made granting two distinct rights to the respondents in appeal filed against the original decree. The first right to make submission in support of the decree of the trial court on any of the grounds on which that Court has decided against the respondents. The second right is the right of filing cross-objections to the decree. In cases where the trial Court has accepted the decree completely in favour of the respondent he can support the decree in his favour passed by the trial Court on any of the grounds or the issue decided against him without filing any cross objection. But if the decree is passed against the respondent then he cannot challenge the same in appeal without filing cross objection."

The Court can always mould relief as per the provisions of Order 41 Rule 33 CPC. The person who is seeking cancellation of document, who is not party, does not require to pay the Court fee. It can always be considered from the relief sought in the plaint i.e. averment made in the plaint where the suit is for declaratory decree with consequential relief with reference to any property. In fact, the relief sought in the appeal was for setting aside the finding rendered by the Court below where the Court had without any material on record, set aside the sale deeds in favour of defendant No.8. It is the aforementioned finding which was challenged and therefore, in my view, the court fee was not required to be paid as the cross objector is the defendant and not the plaintiff.

The lower Appellate Court ought not to have exceeded its jurisdiction by forming an opinion that defendant Nos.1 to 6 were not owners of the property. No such issue pressed, much less, any relief sought qua the same. In my view, the finding rendered by the lower Appellate Court regarding the title of defendant Nos.1 to 6 is without any evidence, wholly misconceived and devoid of merit and hereby rendered as "obiter".

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 Vs. 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 Vs. 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]*"
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> "*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.

In view of the aforementioned, the finding rendered by both the Courts below regarding setting aside of the sale deeds is hereby set aside. The sale deeds are upheld. Resultantly, the regular second appeal is dismissed and the cross objection is allowed.

(AMIT RAWAL)
JUDGE

November 18, 2016
Pankaj*