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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-4404-2010 (O&M)
Date of decision : 22.11.2016

Brij Mohan

... Appellant

Versus

Sita Ram and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sudhanshu Makkar, Advocate
for the appellant.

Mr. Sumit Sangwan, Advocate
for the respondent Nos.1, 3, 5 to 8 and
LRs of respondent Nos.2 and 4.

Mr. Alok Jain, Advocate
for respondent No.9.

AMIT RAWAL, J. (ORAL)

The appellant-plaintiff is aggrieved of the concurrent findings of fact, whereby the suit seeking following relief has been dismissed by both the Courts below.

“Suit for declaration to the effect that the sale deed dated 19.09.2001 registered in the office of Sub-Registrar, Bhiwani executed by defendant No.1 as a general attorney of defendants No.2 to 6 in favour of defendant Nos.7 and 8 in respect of shop having 31 sq. yds area situated in Gali Dacotan, near Bichla Bazar Bhiwai is illegal without right, wrong, void and not binding upon the rights of plaintiff, the Sale deed is a waste paper and not crated any right in favour of defendants No.7 and 8 as the property mentioned in the sale deed is owned and possessed by the plaintiff with

consequential relief of restraining the defendants to transfer any part of the suit property and the possession of this suit property be also delivered to the plaintiff and decree for the possession be also passed in favour of plaintiff on the basis of evidence and oral and documentary.”

Mr. Sudhanshu Makkar, learned counsel appearing on behalf of the appellant-plaintiff submits that there is no dispute to the fact the property i.e. Haveli at the hands of Onkarmal was ancestral. The property at the hands of Hardwari Mal was ancestral and the documents of the sale deed in favour of Hardwari Mal has been proved as Ex.P-3 and Ex.P-4. No doubt the pedigree table has not been placed on record, but there is no denial to the parentage of the plaintiff viz-a-viz his father Ram Chander, grandfather Shadi Ram and great grandfather Hardwari Mal. Dungarsi Dass claimed to have acquired the right in the property by virtue of a decree dated 05.01.1933 and thereafter, had sold the land to Kishan Lal vide sale deed dated 05.10.1945 on the basis of sale certificate dated 13.05.1935. The Courts below have categorically arrived at a finding that filing of the suit by Dungarsi Dass creating a mortgage of 1927 was fraudulent one and therefore, the finding, declaring Kishan Lal predecessor-in-interest of defendant Nos.2 to 6 as *bona fide* purchaser, is totally misplaced particularly once the mortgage deed has been held to be a sham transaction. The cause of action accrued to the appellant-plaintiff to file the suit in 2002, when successor-in-interest of Kishan Lal, through power of attorney, sold the land to defendant Nos.7 & 8 and further to defendant No.9. The entire matter was dugout and realized that there is no mortgage in the eyes of law, thus, the Courts below have committed illegality and perversity. The record of Municipal Corporation brought on record reveals the ownership of the

property, thus, the Courts below should have decreed the suit and urges this Court for setting aside the concurrent findings of fact as there is gross illegality and perversity.

Per contra, Mr. Sumit Sangwan, learned counsel appearing on behalf of respondent Nos.1, 3, 5 to 8 & LRs of respondent Nos.2 & 4 and Mr. Alok Jain, learned counsel appearing on behalf of respondent No.9, submits that mere admission qua the nature and character of the property would not exempt the plaintiff from proving its character in view of the *ratio decidendi* culled out by the Hon'ble Supreme Court in **“Valliammal Achi V/s Nagappa Chettiar and another” AIR 1967 SC 1153**. There is no challenge to the sale deed of 1935 in favour of Kishan Lal, much less, decree dated 05.10.1945. The filing of the suit in 2002 was nothing, but an act of greed. The appellant-plaintiff has miserably failed to prove the nature and character of the property being ancestral as semblance of the same has not been proved through any documentary evidence. Both the Courts below have rightly dismissed the suit. The concurrent findings of fact cannot be interfered until and unless there is gross illegality and perversity.

I have heard the learned counsel for the parties and appraised the paper book and of the view that it was incumbent upon the appellant-plaintiff to prove the nature and character of the property as co-parcenary/ancestral. Even if the Courts below have arrived at a finding that the mortgage deed of 1927 to be a sham transaction, but in view of that decree of 1933, the property exchanged hand on 05.10.1945 in favour of Kishan Lal vide which he has already held to be a *bona fide* purchaser. The aforementioned sale deed has not been challenged and in the absence of the same, the suit was not maintainable as the subsequent sale deeds would be

inconsequential. Until and unless the original sale deed is not challenged, the plaintiff has no right to challenge the subsequent sale deeds tendered by successor-in-interest of Kishan Lal in favour of defendant Nos.7 & 8 and further to defendant No.9. In my view the suit was hopelessly not maintainable and was misconceived in view of the inherent defect as noticed above.

There is no dispute to the *ratio decidendi* culled out by the Hon'ble Supreme Court in “Valliammal Achi's case (supra), wherein it has been held that the character and nature of the property has to be proved by direct, cogent and corroborative evidence. For the sake of brevity, the relevant paragraph bearing No.10 of the judgment reads thus:-

“But even assuming that there was some kind of election by Pallaniappa we cannot see how the nature of the property left by Pallaniappa's father would change merely because Pallaniappa's father made a will giving the residue absolutely to Pallaniappa and Pallaniappa took out probate of the will. The property being joint family property Pallaniappa's father was not entitled to will it away and his making a will would make no difference to the nature of the property when it came into the hands of Pallaniappa. A father cannot turn joint family property into absolute property of his son by merely making a will thus depriving sons of the son who might be born thereafter of their right in the joint family property. It is well settled that the share which a co-sharer obtains on partition of ancestral property is ancestral property as regards his male issues. They take an interest in it by birth whether they are in existence at the time of partition or are born subsequently; (see Hindu Law by Mulla, Thirteenth Edition, p.249. Para 223 (2) (4). If that is so and the character of the ancestral property does not change so far as sons are concerned even after

partition, we fail to see how that character can change merely because the father makes a will by which he gives the residue of the joint family property (after making certain bequests) to the son. A father in a Mitakshara family has a very limited right to make a will and Pallaniappa's father could not make the will disposing of the entire joint family property, though he gave the residue to his son. We are, therefore, of opinion that merely because Pallaniappa's father made the will and Pallaniappa probably as a dutiful son took out probate and carried out the wishes of his father, the nature of the property could not change and it will be joint family property in the hands of Pallaniappa so far as his male issues are concerned."

I am of the view that the appellant-plaintiff has miserably failed to discharge the onus viz-a-viz claim in the suit.

For the foregoing reasons, I do not find any illegality and perversity in the judgments and decrees passed by the Courts below as the same are based upon correct appreciation of documentary as well as oral evidence, much less, no substantial question of law arises for consideration. The second appeal is dismissed.

22.11.2016
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned Yes/ No

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Whether Reportable Yes/ No