

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 2034 of 2011 (O&M)

Date of Decision : 01.09.2016

Punjab Financial Corporation, Sangrur

....Appellant

Versus

Sardaran Bano and others

....Respondents

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Vikas Mohan Gupta, Advocate
for the appellant.

Mr. S.K. Pipat, Senior Advocate with
Mr. Manoj Pundhir, Advocate
for respondents no. 1 and 2.

Mr. Mohd. Imran, Advocate
for Mr. Ghulam Nabi Malik, Advocate
for respondent no. 10.

Surinder Gupta, J.

Sardaran Bano and Gulzaran Begum filed this suit seeking relief of declaration to the effect that they are joint owner in possession of disputed property which comprises of two houses situated in Mohalla Araian, Sirhandi Gate, Malerkotla with defendants no. 1 to 6 and for permanent injunction restraining defendants no. 1 to 6 from selling, mortgaging or alienating in any manner specific portion more than their shares out of two houses. They also sought relief of permanent injunction restraining defendant no. 7 from selling more than 4/12th share of defendants no. 1 and 2 out of suit property.

2. Admittedly, Choudhary Shahabud Din was owner of suit property and he died on 31.12.1979, leaving behind four sons and four daughters including plaintiffs. By way of natural succession, plaintiffs inherited share in the property of their father, which Ist Appellate Court has

described as 1/12th share each. Defendants no. 1 and 2, who are brothers of plaintiffs mortgaged suit property with appellant-Punjab Financial Corporation to secure the loan advanced to defendant no. 8-M/s Farooqi Wires (P) Ltd. as collateral security.

3. As per appellant (defendant no. 7), defendants no. 1 and 2 became owner of suit property on the basis of family settlement and writing dated 25.11.1995. Plaintiffs were aware of the mortgage but never raised any objection and the appellant has right to sell the suit property to recover its dues.

4. Suit of plaintiffs was dismissed by Additional Civil Judge (Senior Division), Malerkotla but Ist Appellate Court decreed the suit for declaration that plaintiffs have 1/12th share each in suit property, which remain unaffected by mortgage deed dated 17.05.1996, executed by defendants no. 1 and 2 in favour of appellant.

5. Learned counsel for the appellant has challenged judgment and decree passed by Ist Appellate Court on four grounds, as follows:-

- (i) that father of plaintiffs died in the year 1979 and till mortgage of suit property in the year 1996, plaintiffs never claimed their share in suit property;
- (ii) that defendants have claimed their title over suit property on the basis of memorandum of partition dated 25.11.1995 and plaintiffs have never challenged the same;
- (iii) that suit filed by plaintiffs is barred by limitation;
- (iv) that appellant is *bona fide* mortgagee of suit property after verifying facts from the record of Municipal

committee and also from memorandum of partition;

6. Above submissions of learned counsel for the appellant were looked into by Ist Appellate Court and it was rightly observed that plaintiffs were neither executant of memorandum of family partition nor have signed the same as witness, as such, it has no effect on their right. On appraisal of evidence, Ist Appellate Court has rightly observed in para 15 of the judgment as follows:-

“15. For the simple reason that the plaintiffs no. 1 and 2 were not party to any family partition and not even to memorandum of family partition, their share in the suit property, inherited by them by operation of law could have not been taken away in the manner claimed by defendants no. 1 and 2 or by defendant no. 7. Requisites of a valid family settlement postulates all of the co-owners of a property sitting together in the family and then deciding the mode and manner in which a particular property was to be given to a particular member of the family. These ingredients are woefully missing in the case in hand and as such it is held that plaintiffs continue to be co-owners in joint possession of suit property and their rights in the suit property remain unaffected by deed of family partition Ex. DY and deed of mortgage Ex. DX. Execution of deed of mortgage Ex. DX would bind only defendants no. 1 to 4 and not the plaintiffs and as such shares of the plaintiffs in the houses in suit cannot be put to sale by the 7th defendant

to enforce recovery of unpaid amount of loan availed by defendant no. 8.”

7. Plaintiffs are claiming their share in the property left by their father. Claim of plaintiffs is not barred till they are held as divested of their title because of adverse title set up against them. Learned counsel for the appellant could not cite any provision of law under which this suit is barred by limitation. So far as status of appellant as mortgagee of suit property is concerned, the same is not under challenge. The only challenge to mortgage is as to how much share in suit property could be mortgaged by defendants no. 1 to 4. They have presented a memorandum of partition before the appellant. It would have been appropriate for the appellant at the time of accepting that memorandum of partition to enquire as to whether plaintiffs have relinquished their share in suit property. This enquiry was called for in view of the fact that plaintiffs are not signatory to memorandum of partition. There is no evidence that plaintiffs have made any presentation before the appellant to make them believe that mortgagor were exclusive owners of suit property, as such, this plea of learned counsel for the appellant that appellant is *bona fide* mortgagee of the share of plaintiffs in suit property has no merit. If appellant has been duped, misled or misrepresented the fact, as is evident, by mortgagors and fraud was played by them, all kind of civil and criminal remedies are available to the appellant.

8. In view of my above discussion, there is no merit in this appeal so far as it relates to observation of Ist Appellate Court regarding share of appellant in suit property. However, Ist Appellate Court while declaring 1/12th share each of plaintiffs in suit property, has passed a restraint order against defendants no. 1 to 4 from alienating any specific portion out of suit

property without getting it partitioned by metes and bounds and defendant no. 7-appellant was restrained from putting more than shares of defendants no. 1 to 4 in suit property to auction to enforce unpaid loan amount advanced to defendant no. 8. A substantial question of law, which arises for consideration is, as to whether such a direction could be issued by Ist Appellate Court particularly when no such relief was sought?

9. A party in possession of joint property can always alienate specific portion of property in its possession subject to right of other co-owner to be settled at the time of partition. Even otherwise, plaintiffs have not sought the relief of injunction as awarded by Ist Appellate Court. To seek partition of joint property is a legal right vested in a joint owner but other co-owners cannot be deprived of their right to alienate their share in joint holding and also specific portion in their possession. The substantial question of law is answered against plaintiffs-respondents.

10. As a sequel of my discussion above, this appeal is partly accepted only to the extent that order of injunction passed against defendants no. 1 to 4 is modified to the extent that any co-owner of suit property can alienate its specific portion in his/their possession, however, such alienation shall be subject to right of other co-sharer to be determined at the time of partition. Other observations made by Ist Appellate Court are affirmed.

September 01, 2016
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/Reasoned

Yes/No

Whether Reportable

Yes/No