

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA No.4763 of 2011 (O&M)
Date of Decision: 20.07.2016**

Rajinder Pal Singh and others Appellants

Vs

Amar Singh and another Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Vinod Khunger, Advocate
for the appellants.

Mr. Gurpal Singh, Advocate
for the respondents.

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?*

RAJ MOHAN SINGH, J.

[1]. This Regular Second Appeal has been preferred by the plaintiff-appellants against the judgment and decree dated 20.07.2011 passed by District Judge, Ferozepur whereby judgment and decree dated 06.08.2010 passed by Civil Judge (Jr. Divn.) Ferozepur was upheld.

[2]. Brief facts as gathered from the record are that the plaintiff through his legal representatives filed suit for declaration to the effect that sale deed dated 12.11.2001 executed by

defendant No.1 in favour of defendant No.2 in respect of specific *Killa* numbers bearing Rectangle No.36, *Killa* No.18/2 (4-0), 19 min shark (1-15), *Killa* No.19 Min Gard (2-0), 21 Min (0-5) measuring 8 *Kanals* situated in village Mohkam Bhatti was null and void and the same was not binding upon the rights of the plaintiff being result of fraud played by the defendants. A decree for permanent injunction was also sought as a consequential relief, restraining the defendants from alienating the suit land and also from interfering in the peaceful possession of the plaintiff.

[3]. Plaintiff-Malkiat Singh and defendant No.1 were real brothers. Plaintiff died leaving behind the legal representatives as depicted in the memorandum of parties in the impugned judgment of trial Court. It was alleged that plaintiff and defendant No.1 had exchanged their land with each other. Defendant No.1 gave 40 *Kanals* of *Banjar Qadim* land in village Mohkam Bhatti to the plaintiff and got very good land measuring 12 *Kanals* in village Firozeshah. It was alleged that a document of transfer in the form of affidavit was prepared at Ferozeshah on a stamp paper of Rs.3/- on 31.12.1982. The said document was written by the Deed Writer in the presence of witnesses namely Tarlochan Singh and Hazara Singh. The land of defendant No.1 was *Banjar Qadim* at the time of exchange.

After the exchange the plaintiff incurred huge expenses for improving the condition of the land, whereas the land given to the defendant No.1 in village Ferozeshah was in very good condition. After the exchange of the land, the defendant No.1 had no right, title or interest in the property. Plaintiff-Malkiat Singh made the land worth cultivation after removing wild growth of *booties* and *sarkandas* from the land. Plaintiff incurred huge expenses in levelling the land and also installed electric meter in it. The possession of the plaintiff over the land so exchanged remained peaceful throughout which bore Rect. No.36 *Killa* 18/2(4-0), 19 min shark (1-15), *Killa* 19 min Garb (2-0), 21 min (0-5) i.e. the suit land.

[4]. Plaintiff further alleged that the defendant No.1 in order to cheat and defraud him, sold the suit land without consideration to the defendant No.2 in a fraudulent manner. Defendant No.2 procured this illegal sale deed on 12.11.2001 in connivance with revenue officials, who made false entry in the revenue record without issuing notice to the plaintiff. A criminal case was got registered by the plaintiff against defendant Nos.1 and 2 and the *Patwari*. The land in question was given to the plaintiff as per written document by the defendant and the defendant No.1 had no right, title or interest over the suit land after the exchange.

[5]. Defendants contested the suit on all counts. Defendant No.1 contested the claim of the plaintiff by alleging that the he was owner of 15 *Kanals* of land which came to 293/1690 shares out of the land measuring 84 *Kanals* 10 *Marlas*. Defendant No.1 only sold 8 *Kanals* to the defendant No.2 vide registered sale deed dated 12.11.2001 which was within his shares. Plaintiff also filed a suit for permanent injunction seeking restraint order against the defendant No.1 from interfering in his cultivating possession along with other land and also sought restraint *qua* alienation of the suit land measuring 84 *Kanals* 10 *Marlas* in any manner. The application for temporary relief was dismissed by the trial Judge vide order dated 05.11.2001. The said suit was statedly pending before the trial Court. Defendants also alleged that though plaintiff and defendant No.1 were real brothers, but they did not exchange their land in the aforesaid village i.e. Mohkam Bhatti and Ferozeshah. No land was exchanged by the plaintiff with the defendant No.1. The land in dispute and other land were still joint, as no partition had taken place, rather partition proceedings were pending before the Revenue Authorities.

[6]. Defendants further denied that defendant No.1 gave land measuring 40 *Kanals* of *Banjar Qadim* of village Mohkam Bhatti to the plaintiff after getting land measuring 12 *Kanals* in a

very good condition in village Ferozeshah. Defendant No.1 claimed that he was still co-sharer with the plaintiff in the land in both the villages which were still joint for which partition proceedings were pending before the Revenue Authorities. Defendants also denied that the affidavit/*Tabadlanama* dated 31.12.1982 was prepared in the presence of witnesses. The said affidavit was claimed to be forged and fabricated document. No exchange of land took place between the plaintiff and defendant No.1. Defendant No.1 was the owner of land measuring 15 *Kanals* to the extent of 293/1690 share out of land measuring 84 *Kanals* 10 *Marlas*. Out of this land, he sold 8 *Kanals* of land to the defendant No.2 with reference to *khasra* numbers as mentioned in the preceding part of the judgment. The area so sold was lawful entitlement of the defendant No.1 and was within his entitlement in terms of his shares.

[7]. After filing replication, both the parties went to trial on the following issues:-

- “1. *Whether the plaintiff is entitled to the declaration as prayed for? OPP*
2. *Whether the plaintiff is entitled to the decree of permanent injunction as prayed? OPP*
3. *Whether the suit of plaintiff is not maintainable in view of the pendency of*

earlier suit of permanent injunction as alleged in para No.2 of the Preliminary Objections? OPD

4. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction?OPD*

5. *Relief.”*

[8]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[9]. After appraisal of the evidence, trial Court dismissed the suit vide judgment and decree dated 06.08.2010, after finding that the expert evidence of Sanjeev Sharma, Finger Print and Hand Writing Expert showed lot of discrepancies in the alleged exchange deed and those discrepancies cannot be held to be due to natural variations. Secondly, when the alleged exchange was by way of writing, then it required compulsory registration. Thirdly, no *khasra* numbers of the land were mentioned in the exchange deed. Mentioning of land in terms of villages was vague enough to satisfy the factum of alleged exchange. Fourthly, the validity of sale deed was held to be genuine inasmuch as that the plaintiff and defendant No.1 were proved to be co-sharers in the land in both the villages. Partition proceedings were pending between the parties. The sale made by one of the co-sharer, even by specific *Killa* number out of

joint land would be a sale of share and that would be subject to final partition between the parties.

[10]. On the strength of **Bhartu Ram vs. Ram Sarup, 1981 PLJ Page 204** (Full Bench), it was held that possession of one of the co-sharer in joint property would be a possession on behalf of all the co-sharers and all the co-sharers would be deemed to be in possession of the land unless and until the land is partitioned by metes and bounds. On the aforementioned analogy, it was held that the land was joint of which partition proceedings were pending. Even if, sale was made by one of the co-sharer in respect of specific *Killa* number out of joint land, it would be a sale of share. The judgment passed by the trial Court was even upheld in appeal by the lower Appellate Court vide judgment and decree dated 20.07.2011. That is how the present appeal came to be filed before this Court.

[11]. In the present appeal, learned counsel for the appellants has framed the following substantial questions of law:-

- “i). Whether the exchange/Tabadlanama Ex.PW-2/C has been proved according to law and is admissible in evidence.*
- ii) Whether the exchange/Tabadlanama being in the form of memorandum and it relates to prior*

in time when it was written, does not require registration?

- iii) Whether the sale deed dated 12.11.2001 being of specific khasra numbers and portion of the land being admitted, the sale deed is liable to be set aside?*
- iv) Whether the appellants being in possession of the land are entitled to injunction restraining the respondents from interfering in their possession?*
- v) Whether the evidence in the case has been misread by the courts below and thus the impugned judgments and decrees are liable to be set aside?*

[12]. Substantial question of law No.(i) can be answered on the basis of nature of document allegedly executed for demonstrating the alleged fact of exchange. The alleged exchange was projected by way of affidavit dated 31.12.1982 for which scribe and attesting witnesses were examined. Before advertng to the legal position, it would be relevant to see the expert opinion on the alleged document of exchange. The expert while appearing as PW-1 has testified in so many words that there were variations in the writing. Lot of discrepancies crept in the alleged exchange deed which did not bear signatures of Amar Singh. The cross-examination of witnesses

brought out that there were difference in pictorial appearance of right stroke of 'A' in disputed signatures. There was a pen lift after letter 'S' in the word 'Singh' of disputed signatures. The letters Nand G.H. were written with pen lift. After finding numerous discrepancies, PW-1 sought to depose that all these happened due to natural variations. The trial Court did not accept the discrepancies to be on account of natural variations, rather found that no reliance could be placed on such alleged exchange deed which was written in the form of affidavit. If, all the discrepancies were to be treated due to natural variations, then the science on handwriting and finger print would become nugatory inasmuch as that no forgery could be detected in the event of finding material variations to be natural variations. Since material difference was found in the disputed and standard signatures of Amar Singh on the alleged exchange deed and the report of the Finger Print Expert was found to be doubtful, therefore, the controversy when read in conjunction with contents of the alleged exchange deed, where no *khasra* numbers were shown and non-registration of the alleged exchange deed which was in writing, made the alleged exchange deed totally inadmissible in law.

[13]. In view of **Hardit Singh vs. Gulzara Singh and another, 1973 PLJ 329;** **Randhir Singh vs. Ranjit Singh,**

2011 (2) RCR (Civil) 246; Pirthi Singh vs. Lakhpat and another, 2011 (4) PLR 422; Paramjit Singh vs. Ratti Ram, 2004 (4) RCR (Civil) 742 and Kulwant Singh vs. Kharaiti Lal and others 2009(2) RCR (Civil) 254. the exchange of immovable property of value of more than 100 can be effected without registered document. Even, the oral exchange of properties does not require any document to be executed and registered. Since the provision of Transfer of Property Act (for short 'the Act') relating to exchange are not applicable in State of Haryana, therefore, oral exchange is legal and permissible.

[14]. The law as discussed in above precedents were in the context where exchange was oral and was given effect in the revenue record and possession was also handed over on the basis of oral exchange. Since no new right or title was to be conveyed later on, therefore, subsequent writing in recognition of previous oral exchange was held to be not requiring any registration as the same has to fall under the category of memo of earlier oral exchange deed which was duly implemented.

[15]. In the instant case, there was no oral exchange previous to the affidavit dated 31.12.1982, nor the factum of alleged oral exchange was given effect in the revenue record and there was no delivery of possession pursuant to the alleged exchange. In the revenue record, both the parties were shown

joint and co-sharer, therefore, the alleged exchange cannot be construed to be a form of memorandum of recognising alleged fact of any oral exchange in the past. The substantial questions of law No.(i) and (ii) in specific have to be negated.

[16]. Substantial questions of law Nos.(iii) and (iv) have to be answered on the basis of concept of co-sharership. Since both the parties were shown to be co-sharers, the land in both the villages was not partition, rather partition proceedings were pending. In a suit for injunction, temporary injunction was declined to the plaintiff. None of the parties were in exclusive possession of the land in question as per revenue record. In a case of co-sharership, possession of one of the co-sharer would be deemed to be in possession on behalf of all the co-sharers over each and every inch of land, till the land is partitioned by metes and bounds. A Co-sharer can oust other co-sharer in case his possession is found to be open, hostile and exclusive till the land is partitioned by the competent authority. Even, in the instance of sale made by one of the co-sharer out of joint land, the same would be the sale of share. Even if, specific *killa* numbers are sold out of joint land that would be also fall under the category of sale of share in view of dictum laid down in **Bhartu Ram**'s case (supra).

[17]. From the aforesaid legal position, it cannot be held that

the sale of specific *khasra* number has to be set aside and injunction could have been granted to the plaintiff. Section 118 of the Act cannot be pressed into service in State of Punjab as the exchange could be effected orally also, but it has to be proved on record. The oral exchange is one of the recognised mode of transfer, if the same is given effect in the revenue record and is otherwise proved by way of unimpeachable evidence. The facts and circumstances of the case pointed out a case of co-sharership of the parties in land of two villages for which partition proceedings were pending. In the absence of evidence of oral exchange the alleged Affidavit did not fall under the category of memorandum. Though oral exchange is valid and permissible in Punjab, as only Sections 54, 103 and 125 of the Act in respect of sale, lease and gift were made applicable to the Erstwhile State of Punjab.

[18]. In the instant case deed/affidavit dated 31.12.1982 projected by the plaintiff as a document of exchange thereby creating right in respect of exchanged land for the first time by dint of this document which was firstly not proved as per material discrepancies pointed out by the expert witness PW-1. Secondly, the parties to the litigation were co-sharers in the joint land in both the villages and partition proceedings were statedly pending, therefore, sale of specific *Killa* number out of joint land

would be a sale of share and, therefore, it cannot be held that the impugned judgments and decrees are the result of any misreading of evidence and suffered from any perversity.

[19]. After giving thoughtful consideration to the submission made by either side, I am of the view that no interference is called for in the appeal and same is accordingly dismissed.

July 20, 2016

Atik

(RAJ MOHAN SINGH)
JUDGE