

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

RSA No.120 of 2016 (O&M)

Date of decision: 13.5.2016

Vijay Kumar

... Appellant

versus

Piara Lal

... Respondent

CORAM: HON'BLE MR.JUSTICE AMOL RATTAN SINGH

Present: Mr.Mandeep Singh Sachdev, Advocate,
for the appellant

...

1. To be referred to the Reporters or not? yes

2. Whether the judgment should be reported in the Digest? yes

...

AMOL RATTAN SINGH, J. (Oral)

CM No. 5443-C-2016

By this application. The applicant-appellant seeks stay of the execution/operation of the impugned judgments and decree of the learned Courts below as during the pendency of this appeal, as the warrants of attachment are stated to have been issued by the Executing Court.

It is seen that notice in the main appeal has also to be still issued.

Consequently, by consent of learned counsel, the appeal itself is taken up for hearing, as in any case, it would be required to be taken up if any question of stay is involved at the preliminary stage itself.

RSA No. 120 of 2016

1. This regular second appeal has been filed by the defendant in a suit filed by the respondent-plaintiff (herein after referred to as the plaintiff), after the suit was decreed by the learned Civil Judge (Junior

Division), Phillaur, in his favour and the first appeal filed by the present appellant was also dismissed by the learned lower appellate Court.

The plaintiff, Piara Lal, had filed a suit for possession, claiming to be owner of a residential house measuring about 2 marlas 4 sarsahi, (16x41 feet), marked as ABCD in the site plan annexed with the suit and described in detail in the plaint.

2. The said suit property is stated to be situated within the municipal limits of Nurmahal and is stated to be a part of a larger property bearing No.B-II/123-A.

The plaintiff is stated to have purchased the suit property from the father of the appellant-defendant, one Gurdial Singh, vide sale deed dated 24.5.2010, which was witnessed by one Jagan Nath, Nambardar, and was also got registered on the same date.

Thereafter, the plaintiff stated that he had also made renovation in the suit premises, even though possession thereof was not otherwise handed over to him.

At the time of execution of the sale deed, the defendant is stated to have agreed to vacate the house, and also to deliver possession to the plaintiff within six months. However, despite the said undertaking, the defendant refused to deliver the possession, despite also the fact that even in the municipal records, i.e. in the House Tax Assessment Register, the property stands in the name of the plaintiff. Thus, it was contended in the plaint, that the defendant thereafter became a trespasser in the suit property, in illegal possession thereof, who refused to vacate the same, leading to the filing of the suit.

3. Upon notice issued to him, the appellant-defendant appeared and filed a written statement, raising the usual preliminary objections of locus standi, maintainability etc.. On merits, it was stated that the suit property was situated within municipal limits and was owned by Gurdial son of Shama, father of the defendant. It was further stated that Gurdial had 'allocated' the house to the defendant, who had thereafter been living continuously in it and the electricity meter on the premises was also in the name of the defendant, with other documents pertaining to the house also being in his possession.

4. A replication was filed by the plaintiff, after which the following issues were framed by the learned Civil Judge:-

- “1. Whether the plaintiff is entitled for possession as prayed for? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiff has got no locus standi to file the present suit? OPD
4. Relief.”

5. The plaintiff examined himself as PW1, Sham Sunder as PW2, the attesting witness to the sale deed, Jagan Nath, as PW3, and one Jaswinder Singh as PW4. One Satnam Singh was also examined as PW5.

The defendant himself testified as DW1 and further examined his father, Gurdial, as DW2 and one Narinder Kumar as DW3.

Both the parties also led certain documents by way of evidence.

6. Upon appraisal of the evidence, the learned Civil Judge found

that the previous ownership of the suit property being that of the defendants' father Gurdial was not disputed, and that the only question that arose was whether Gurdial had sold the property to the plaintiff, or it was mortgaged with him as alleged by the defendant (though no such pleading has been referred to in the judgment of the learned Court).

The scribe to the sale deed, PW2 Sham Sunder, Deed Writer, testified that the sale deed (Ex.P3) was executed in the presence of marginal witnesses, i.e. the defendant himself and Jagan Nath. Jagan Nath, PW3, also testified to the same effect and further stated that after the execution of the sale deed, they appeared before the Sub Registrar, where the document was read over to the parties, after which they signed and thumb marked it, admitting the contents thereof to be correct. Before the Sub Registrar also, this witness (PW3) and Vijay Kumar, defendant, signed as marginal witnesses, in proof of which the endorsement on the sale deed (Ex.PW3/A) was referred to by this witness.

On further appraisal, it was found by the learned Civil Judge that the Assessment Register of the Municipal Committee was in the name of the plaintiff and still further, DW3 Gurdial, father of the defendant, also identified his signatures on the sale deed (Ex.P3) and his photographs (Exs.D14 to D19).

Hence, it was concluded by that learned Court, that no inference could be drawn that the intention was to simply mortgage the property to the plaintiff.

Consequently, on the above findings, the suit of the plaintiff was decreed in his favour.

7. In the first appeal filed before the learned District Judge, Jalandhar, that learned Court, after appraisal of the evidence, found that the sale deed was got scribed at the instance of Gurdial, accompanied by his son, defendant Vijay Kumar, which was thereafter read over to them, after which Gurdial put his signatures and thumb mark, with the defendant having attested the same. No intention of the suit property having been intended to be mortgaged to the plaintiff, from the language of the sale deed, could be discerned even by the learned first appellate Court. Factually also, it was found by that Court too, that the defendant and his father Gurdial, while appearing as DW1 and DW2 respectively, had admitted their signatures on the sale deed. Hence, the onus of establishing any fraud or misrepresentation shifted upon them, which they failed to discharge.

Further, it was held that Gurdial never challenged the sale deed and the defendant not being the owner thereof, in any case had no right to do so.

It was further found by the first appellate Court, that Gurdial was the exclusive owner of the plot measuring 11 marlas at the time of execution of the sale deed and had constructed one room thereupon. The remaining portion of the property of Gurdial was abutting the suit property on the western side. Thus, Gurdial had sold a portion of his property, 16 feet x 41 feet, to the plaintiff, vide the sale deed in question.

8. As regards possession, though the fact that the defendant was residing in the house was found to be correct by the learned first appellate Court, (it in any case having been admitted by the plaintiff), the claim for possession by the plaintiff was also found to be valid, he having been

proved to be the owner of the property. The Court also recorded that the parties to the lis were first cousins to each other and as such, the defendant may be taken to be a licensee on the property, even after the sale deed was executed, with the consent of the plaintiff, till such licence was revoked.

Consequently, finding no merit in the appeal filed before it, the learned first appellate Court dismissed the same, thereby upholding the judgment and decree of the learned Civil Judge.

9. Before this Court, learned counsel for the appellant submits that the suit property was actually not intended to be sold by the father of the appellant-defendant, as possession thereof was not handed over to the respondent-plaintiff and it was only actually by way of a mortgage/security that the sale deed was executed, upon which consideration was received, but possession was not handed over and was actually never to be handed over, with only the consideration (loan as contented) to be returned by the appellant-defendant, after which the sale deed was to be cancelled.

10. Mr. Sachdev further contends that as a matter of fact the appellant being in possession of the suit property, which is a residential house, a partition was necessary before any possession could be handed over.

On specific query, learned counsel has not been able to refute the fact that neither was any plea taken that the suit property was ancestral in nature, nor was there any another co-sharer to the property, other than the father of the appellant, i.e. Gurdial. Hence, as to with whom any partition was to take effect, the said Gurdial being the sole owner of the property, is not understood.

11. Learned counsel next relies upon a judgment of the Madhya

Pradesh High Court in Mahadev Prasad Umadutt vs. Munnibai 2001 (2) R.C.R., (Civil) 127, to submit that whether the sale deed was intended to be one, or was actually only intended to be a mortgage deed, was an issue that should have been first framed by the learned Civil Judge and only after recording a finding on that issue, could the suit have been decreed in favour of the plaintiff, or otherwise.

Learned counsel further relies upon a judgment of a co-ordinate Bench of this Court in Jai Pal Singh vs. Ram Parshad 2010 (1) PLR 689.

However, in the said judgment it was found as follows:-

“The argument raised by the learned counsel for the appellants is without any substance. While remanding the case this Court in RSA No. 1838 of 1995, had set aside the judgment and decree of the lower Appellate Court and had directed to decide the matter afresh. It has been authoritatively laid down by the Hon'ble Supreme Court that the sale of a specific portion of the land described by particular khasra number by co-owner out of a joint khewat is pre-emptible. It was further laid down that if partition has not taken place in between the parties and the khewat is joint, then vendee become a co-sharer even if a specific khasra number out of specific khewat is sold.”

Obviously, in that case there was an issue of co-ownership of the parties to the lis, whereas in the present case, there is no whisper of any co-ownership between the appellant and his father in the suit property, which admittedly was in the exclusive ownership of the father, as already noticed.

12. Having considered the above arguments, I find no force in the contention, in view of the fact that if the property was indeed transferred by way of a security, there was no bar on it being mortgaged to secure the loan allegedly taken by the appellant/his father, from the respondent-defendant, even if they are close relatives. In fact, if the relationship was that close, a sale deed need not have been executed at all, and a mortgage deed would have sufficed.

The learned Courts below, after having appraised the evidence, found that there was no recital in the sale deed to the effect, that the consideration money was only a loan, upon return of which the sale deed would be cancelled. The oral evidence led in that respect, was only by the appellant and his father, who was the previous owner and vendor of the property. It was also held that the father of the appellant, who was admittedly the owner of the suit property, had never challenged the aforesaid sale deed dated 24.05.2010.

Hence, in view of the above, there being no substantial question of law involved and no perversity whatsoever in the judgments of the Courts below, the appeal is dismissed in limine, but with no order as to costs.

13.5.2016
nitin/pk

(AMOL RATTAN SINGH)
JUDGE