

Date of Decision : 05.07.2017

CORAM : HON'BLE MR. JUSTICE DEEPAK SIBAL.

Whether the judgment should be reported in the digest ?

Ms. Jashanpreet Kaur, Advocate,
for Mr. Parvez Akhtar, Advocate, for respondent no. 4.

CM-12585-C-2012

CM-12706-C-2014

Learned counsel for the applicants/appellants submits that since appellant No.1-Balbir Singh has compromised the matter with the respondents, he seeks to withdraw the present appeal qua him. However, he presses the present appeal qua appellant No.2-Raghbir Singh.

Allowed as prayed for.

RSA-4502-2012

The predecessor-in-interest of the appellants namely Gurdev Singh instituted a suit, through which he sought possession from the respondents of land measuring 20 kanals 13 marlas in Village Jaitu-III, Tehsil Jaitu, District Faridkot as detailed by him in the head note of the plaint. Consequential relief of permanent injunction restraining the respondents from alienating/transferring the suit land by way of mortgage/sale/gift etc. was also sought.

It was the case of the plaintiff that he was owner of 161 kanals 16 marlas of land, which included the land in dispute; that his three sons namely Jaswant Singh, Raghbir Singh and Balbir Singh, in connivance with each other, had obtained a fraudulent decree dated 16.09.1995, through which they had got decreed his land to them in equal share; the plaintiff filed a suit to challenge therein the decree dated 16.09.1995; that suit was decreed on 04.09.2004; appeal against decree dated 04.09.2004 which was preferred by one of his sons namely Jaswant Singh was dismissed by the Additional District Judge, Faridkot and as no further appeal was preferred, the same became final; during the pendency of the afore-referred civil suit which he had preferred to challenge the decree dated 16.09.1995, one of his sons namely Jaswant Singh executed sale deeds dated 24.02.2000 and 02.05.2000 qua the land in question in favour of the respondents; possession of the land was also given to them; since such transfer by Jaswant Singh was based on the decree dated 16.09.1995, which had been declared null and void, he not being the owner, could neither confer any title of the property in dispute upon the respondents nor put them in possession thereof and that since respondents no. 1 and 2 were aware of the above litigation between the plaintiff and his son Jaswant Singh, transfer of the property in dispute in their favour by Jaswant Singh alongwith possession thereof was not a bona fide transfer.

Opposing the case set up by the plaintiff, respondents no. 1 and 2

filed a joint written statement, whereas respondent no. 3 put forward a separate

written defence.

Respondents no. 1 and 2 stated that the plaintiff had transferred his land in favour of his sons, which included Jaswant Singh, who in turn, had executed a sale deed of the land, which fell within his share, in favour of respondents no. 1 and 2; such transfer was got effected by Jaswant Singh on the basis of decree dated 16.09.1995 through which Gurdev Singh had transferred his land to three of his sons including Jaswant Singh; only with the sole purpose of getting the above sale deed annulled, Gurdev Singh, through a friendly contest between him and his son Jaswant Singh, in the shape of a suit filed by him, got declared the decree dated 16.09.1995 as null and void; this was clear from the fact that after the passing of the decree dated 04.09.2004, the plaintiff, in the year 2006, again voluntarily transferred 33 kanals 06 marlas land to Jaswant Singh; that the present proceedings were clearly hit by the provisions of Section 43 of the Transfer of Property Act, 1882 and the present suit was liable to be dismissed for non-joinder of Jaswant Singh as a party to the same.

Respondent no. 3 filed a separate written statement as also a counter claim. It was submitted that a declaratory suit was not maintainable since the plaintiff was not in possession of the suit property as also that the suit was barred under Order 2 Rule 2 of the Code of Civil Procedure (for short – the Code) for the reason that at the time of filing of the previous suit seeking annulment of the decree dated 04.09.2004, it had come to Gurdev Singh's knowledge that Jaswant Singh had transferred possession of the suit land to respondents no. 1 and 2, but in that suit he never sought possession. Dismissal of the suit was also sought being time barred as the sale deed had been executed by Jaswant Singh on 02.05.2000, on the basis of which, mutation was also sanctioned on 14.06.2000, whereas the suit was filed only on 10.03.2006.

On the basis of above facts pleaded by the parties, the trial court framed the following issues :-

- “1. Whether the plaintiff is entitled for possession of the suit land as mentioned in the head note of the plaint ? OPP
2. Whether the plaintiff is entitled for permanent injunction as prayed for ? OPP
3. Whether the suit is not maintainable ? OPD
4. Whether Jaswant Singh is a necessary party ? OPD
5. Whether the suit is bad for mis-joinder of necessary parties ? OPD
6. Whether the Judgment and decree dated 4.9.2004 passed by Sh. Vijay Kumar, PCS, Civil Judge (Junior Division), Faridkot in a suit titled “Gurdev Singh Versus Jaswant Singh and others” is null and void, result of collusion and mis-representation ? If so its effect ? OPD-3 (counter claimant).
7. Whether the present suit is barred by the provisions of Order 2 Rule 2 CPC ? OPD-3 (counter claimant).
8. Whether the suit is not within limitation ? OPD-3 (counter claimant).
9. Whether defendant no. 3 is a bonafide purchaser for valuable consideration ? OPD
10. Whether proper Court Fees has not been affixed on the plaint ? OPD-3 (counter claimant).
11. Whether defendant No. 3 is entitled for counter claim as prayed for ? OPD-3 (counter claimant).”

Out of the afore-quoted issues, issues No.6, 7, 8, 10 and 11 were on the basis of the counter-claim of respondent No.3.

The issue whether the present suit was barred under Order 2 Rule 2 of the Code was taken up first by the trial court and after referring to the pleadings of the plaintiff-Gurdev Singh it came to the conclusion that at the time of filing of the previous suit he was aware that possession of the suit property had been transferred by his son Jaswant Singh in favour of respondents No.1 and 2 but he took no steps in that suit to seek possession. Thus, the present suit was found to be not maintainable under Order 2 Rule 2 of the Code.

The judgment and decree dated 04.09.2004 which formed the sole basis for filing of the present suit was declared null and void by the trial court as it

Gurdev Singh and his son Jaswant Singh. It was further found that such collusion was only to defeat the rights of the respondents. The relevant findings of the trial court in this regard read as under: -

“It is very strange, why the thumb impressions of the plaintiff were not obtained in the Court for comparison. Neither specimen thumb impression were obtained in the Court nor the defendants of that suit i.e. the sons of the plaintiff ever objected to the alleged specimen thumb impressions of the plaintiff on the Power of Attorney. It is possible that the plaintiff in connivance with his sons and Avtar Singh affixed the thumb impressions on the attorney of someone else alleging him as Gurdev Singh plaintiff. It shows that the plaintiff had hand and gloves with his sons and the judgment and decree is procured only to defraud defendants Nos.1 and 2, who had got the previous agreement of sale in their favour. It is clear from the above said judgment that the defendants of that suit i.e. the sons of the plaintiff have not produced any evidence except the statement of Jaswant Singh. The entire judgment is based on the report of Sh. Anil Kumar Gupta, Handwriting and Finger Print Expert, Fazilka, but as is observed by me that the specimen thumb impressions were not obtained in the Court. Non raising of any objection by the defendants proves that the plaintiff has colluded with his son and only friendly contest was made to defraud the defendants, moreover, the subsequent facts also proves the malafide intention of the plaintiff and his sons. The defendants have placed on the file copy of transfer deed Ex. D3 dated 11.01.2006 and thus transfer deed proves that the plaintiff has given land measuring 107 kanals 16 marlas being 2/3 share of land measuring 161 kanals 16 marlas to his sons namely Balbir Singh and Raghbir Singh. This is the same land which was taken back by the plaintiff vide judgment and decree Ex. D3 and Ex. D4. The defendants also proved on the file another transfer deed Ex.D4 dated 24.04.2006 in which the plaintiff has given the land measuring 33 kanals 06 marlas being 666/2823 share. The land owned by Gurdev Singh was 161 kanals and 16 marlas and he kept with him only the land which was sold by Jaswant Singh to the defendants and transferred entire other land to his sons. These transfer deeds also proves the malafide intention of the plaintiff and his sons. The land in dispute is kept by the plaintiff with him only to take the possession of this land from the defendants. Otherwise, there was no reason for the plaintiff to keep the land with him, which his son Jaswant Singh has already sold to the defendants. So, all these facts shows that the plaintiff has colluded with his sons and the judgment and decree passed in the previous suit is the result of fraud and collusion and as such, it is held that the same is illegal, null and nullity. So, this issue is decided in favour of the defendants and against the plaintiff.”

The issue whether the suit was time barred was also decided against the plaintiff.

The trial court further concluded that the respondents were bonafide purchasers for valuable consideration.

Gurdev Singh (since deceased) through his LRs namely Balbir Singh, Jasbir Kaur, Jaswant Singh and Raghbir Singh appealed against the judgment and decree passed by the trial court which was rejected giving them a cause to approach this Court through the present second appeal.

Learned counsel for appellant submits that the judgment and decree dated 04.09.2004 had not been obtained by Gurdev Singh in collusion with Jaswant Singh since the suit had been filed by him in the year 1999 which was prior to the execution of the sale deed dated 24.02.2000 executed by Jaswant Singh in favour of respondents No.1 and 2.

The above contention is required to be considered only to be rejected as it has come on record, a fact which is not disputed even by learned counsel for the appellant, that the agreement to sell the land in dispute was entered between Jaswant Singh and respondents No.1 and 2 on 17.12.1998. Such agreement was entered into by Jaswant Singh on the strength of the decree dated 16.09.1995. Jaswant Singh had also parted with the possession of the suit land prior to the filing of the previous suit by Gurdev Singh, a fact which he had acknowledged in his plaint filed in that suit. Both the courts have concurrently found that Gurdev Singh, being aware of the above facts should have challenged the same in the previous suit.

A reading of the judgment dated 04.09.2004 leaves no room for doubt that the same was a result of a friendly contest between Gurdev Singh on one hand and his sons on the other, which included Jaswant Singh. In order to prove that the decree dated 06.09.1995, which was challenged in that suit, had not been consented to by Gurdev Singh, his thumb impressions on a Special Power of Attorney allegedly given by him in favour of one Avtar Singh son of Balbir Singh were compared with the thumb impressions on the written statement filed by Gurdev Singh consenting to the transfer of his land in favour of his sons on the basis of which decree dated 06.09.1995 was passed. The same were not got compared with the specimen thumb impressions of his given in court. Had this procedure been adopted, the truth would have been revealed. Surprisingly, to the adoption of above procedure, the sons of Gurdev Singh, who were the defendants in the suit, never objected to. They also did not insist on comparison of the

plaintiff's thumb impressions with the specimen thumb impressions obtained in court. No evidence was produced by the defendants in that suit i.e. the sons of Gurdev Singh except the statement of Jaswant Singh. Report of the Handwriting and Finger Print Expert forms the basis of the judgment dated 04.09.2004. Such report of the Expert was on the basis of comparison of thumb impressions of Gurdev Singh which had not been obtained in the Court. As noticed above, his sons, who were the defendants therein, conveniently turned a blind eye to the adoption of such a procedure. After the judgment and decree dated 04.09.2004, it is not disputed that in the year 2006, Gurdev Singh voluntarily transferred 33 kanals 06 marlas of land to Jaswant Singh. Other land of his was transferred by him to his other sons. He only retained with him the land which Jaswant Singh had sold to the respondents. These facts further show that the previous suit had been filed by Gurdev Singh with malafide intentions and only to negate the rights of respondents.

Even otherwise, the reliefs sought in the present suit are barred under Order 2 Rule 2 of the Code as it could not be disputed by learned counsel for the appellants that at the time of filing of the previous suit Gurdev Singh was aware that Jaswant Singh had parted with the possession of the suit property. This fact was acknowledged by him in the plaint filed by him. In spite of the same, no relief qua possession was claimed by him in that suit. That being so, in the present suit filed subsequently relief for possession qua the same land would be barred under Order 2 Rule 2 of the Code.

A perusal of the judgment and decree of the trial court shows that Gurdev Singh was also non-suited on the ground that the cause pleaded by him in the present suit was barred by limitation; no challenge in the same had been made to the sale deeds executed by Jaswant Singh in favour of the respondents and for non-joinder of necessary parties as Jaswant Singh had not been impleaded as a defendant. On appeal, the appellate authority had affirmed the above findings. No

challenge to the above findings was made before this Court by learned counsel for the appellants.

In view of the above, no merit is found in the present appeal.

Dismissed.

No costs.

05.07.2017
monika/shamsher

[DEEPAK SIBAL]
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No