

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

**RSA No. 4590 of 2014 (O&M)
Date of Decision: January 17, 2017**

Tarsem Lal

..Appellant(s)

Versus

Surinder Kumar and another

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Present: Mr. Narinder Kumar, Advocate
for the appellant.**

ANITA CHAUDHRY, J.

This is the defendant's second appeal who is aggrieved by the judgment rendered by both the Courts below.

Surinder Kumar-plaintiff instituted a suit in January, 2000 seeking declaration that he was the owner of the disputed property, shown in red colour in the site plan annexed with the plaint. It formed part of Khasra No.4R/2/2. The property was bounded on three sides by the property of Tarsem Lal – defendant no.1 and the main road on the Western side. The property had been purchased from defendant no.1 vide registered sale deed dated 12.04.1991 and possession was delivered to him and mutation had been sanctioned in his favour. His case was that defendant no.1 collusively and fraudulently sold the suit

land to defendant no.2 on 08.05.1991 and the subsequent sale was null and void and collusive and inoperative. It was pleaded that the plaintiff apprehending dispossession from defendant no.2 and her husband had filed a suit in 1991, which was decided on 17.03.1997 and his appeal was also dismissed. It was pleaded that defendants no.1 & 2 on the basis of the sale deed in favour of defendant no.2 had taken possession of the plot when he was ill and was admitted at Amritsar.

A joint written statement was filed by the defendants and it was pleaded that the suit was barred under Order 2 Rule 2 CPC and the plaintiff had filed a suit regarding this property which was dismissed and the earlier suit was decided on merits and he could have taken all the pleas in that suit and this suit was barred by the constructive *res judicata* and provisions of Section 11 CPC were clearly applicable. It was also pleaded that the sale deed in favour of the plaintiff was a result of collusion and fraud and was null and void and no sale has been made by defendant no.1. It was pleaded that defendant no.1 vide agreement dated 31.01.1999 had agreed to sell two marlas of land out of this Khasra numbers to defendant no.2 and actual possession was handed over to her and at that time negotiations for sale of the plot with Tarsem Lal were going on and defendant no.2 was requesting defendant no.1 to raise the level and it was for this reason that the stamp papers were purchased in October, 1990 but the agreement was executed in January, 1991 and the level was raised and thereafter, construction was raised and Pakka walls were constructed and a gate was installed and

defendant no.2 was tethering her cattle. It was pleaded that main residential house of defendant no.2 was across the road. It was averred that the sale deed had been registered in favour of defendant no.2 on 08.05.1991 and defendant no.2 was the owner. A counter claim was also filed by the defendants.

The plaintiff had filed a reply to the counter claim. Both the parties were put to trial on the following issues:-

1. Whether the plaintiff is entitled to Declaration? OPP
2. Whether the plaintiff is entitled to possession after removal of the malba if any? OPP
3. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP
4. Whether the counter claimants are entitled to declaration as prayed for? OPC/CC (vide order dated:10.8.2011)
5. Whether the suit of the plaintiff is barred U/o 2 Rule 2 CPC? OPD
6. Whether the plaintiff has concealed the material facts from the Court? OPD
7. Whether the defendant no.2 is a bonafide purchaser for valuable consideration? OPD
8. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
9. Relief.

A categoric finding was recorded by the Court that the plaintiff was a co-sharer and had become the owner on the basis of the sale deed dated 12.04.1991. The relief regarding possession was

declined. The counter claim was dismissed. It was held that the remedy available to the plaintiff was to seek possession and the suit for possession and permanent injunction was not maintainable as the sale was of a share and the appropriate remedy was partition and not declaration. It was held that Tarsem Lal had enough land in this Khasra number and could accommodate the area sold to defendant no.2 and the sale deed Ex.D1 was a valid sale deed.

Aggrieved by the judgment, Tarsem Lal alone filed an appeal which came to be dismissed.

Still not satisfied, Tarsem Lal – defendant no.1 has filed the second appeal.

The contention made before me is that the suit was barred under Order 2 Rule 2 CPC. The counsel had referred to Annexure A-1. The submission was that the plaintiff could have claimed all the relief in the earlier litigation and could not have filed a subsequent suit.

It is necessary to notice that a piece of land was sold by Tarsem Lal from this Khasra number to Kailasho Devi. She did not prefer an appeal before the District Judge nor a second regular appeal. The judgment as against her has become final.

The trial Court noted that Tarsem Lal had large chunk of land of which 2 marlas had been sold to the plaintiff and few months later some area was sold to Kailasho Devi out of the same Khasra number. The trial Court held both the sales to be valid but declined the relief of possession to the plaintiff as he was a co-sharer and he had to avail the remedy of possession by partition.

The trial Court on consideration of the evidence that was led before it had given a finding that the sale deed had been executed and defendant no.1 had given an affidavit that he had also delivered possession but the plaintiff had taken a plea that he had fallen sick and was hospitalized and in his absence defendant no.2 had taken possession and had raised some structure. The plaintiff was held to be a co-sharer in Khasra no.4R/2/2 on the basis of the sale deed but the relief of possession was dismissed. It was held that the remedy available to the plaintiff was to seek partition and the suit for possession and permanent injunction was not maintainable while relying upon a decision of this Court in *Ved Parkash Vs. Sunder & Ors. 2009(1) CCC 114*. The trial Court had found that defendant no.2 had also purchased some portion from defendant no.1 and Tarsem Lal had some share left in the Khasra number and it could accommodate the sale made in favour of defendant no.2.

The appellate Court affirmed the findings of the trial Court that sale was effected in favour of the plaintiff. It also affirmed the findings with respect to the sale made in favour of defendant no.2 and the findings were upheld and the appeal was dismissed. The appellant had failed to prove that the sale deed had been procured by the plaintiff by fraud. He did not even press for an issue nor led any evidence. It is settled that when the plea of fraud is set up then the onus is heavily upon the party who pleads fraud.

On going through the judgments of the trial Court, I find that issue no.5 was not pressed by the defendants. The lower Court held that previous litigation was only a suit for permanent injunction. The suit had been filed against Kailasho and her husband. The previous suit was for injunction against the other vendee. The appellant was not a party in that suit and he cannot take this plea. The threat was from the appellant. In order to succeed in a plea under Order 2 Rule 2 CPC, the defendant had to make out a case and he had to primarily establish. The plea is technical which had to be proved satisfactorily and cannot be presumed merely on the basis of inferential reasoning. I find no infirmity in the findings recorded by the Courts below. The findings are affirmed and the appeal is dismissed.

(ANITA CHAUDHRY)
JUDGE

January 17, 2017
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No