

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

RSA No.3286 of 2003
Date of Decision:12.07.2018

Gian Singh and others

...Appellants

Versus

Krishana Devi and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.A.K.Chopra, Sr. Advocate with
Mr.Akshit Chowdhry, Advocate for the appellants.
Mr.Amit Jain, Advocate for respondents No.1 to 3.
Mr.Arun Abrol, Advocate for respondents No.5, 7 and 8.

ANIL KSHETARPAL, J. (ORAL)

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below.

In the considered opinion of this Court, following substantial questions of law arise for consideration:-

- (i)Before drawing adverse inference against a party for non-appearance in the witness box whether it is obligatory for the court to examine the evidence already available and determine that it is sufficient or not?
- (ii)Whether proceedings/ordered passed by the executing court can be challenged by the judgment debtor in a separate suit?
- (iii)Whether an application for restoration/revival of execution petition is liable to be treated as a fresh execution petition or not?

Learned senior counsel for the appellants at the time of motion

hearing had also proposed following substantial questions of law:-

(iv) Whether the sale-deed having been executed in faavour of the appellants and consequently they having become owners, the decree by redemption of mortgagee rights could be legally passed against them?"

(v) Whether in absence of any challenge to the sale deed Ex.D2, the courts could legally ignore the same?

Facts

Baldev Singh was original owner of the property measuring 41 kanals and 9 marlas. He mortgaged the property on 08.12.1967 in favour of defendant No.1 Gian Singh and certain other persons for a sum of Rs.28,000/. Thereafter Baldev Singh entered into an agreement to sell for the sale of the property in favour of mortgagees. The mortgagees filed a suit for specific performance of the agreement to sell which was decreed on 24.2.1975.

It will be significant to note that in the meantime Baldev Singh had sold the property in favour of the plaintiffs Krishna Devi etc. They were party to the suit for possession by way of specific performance of the agreement to sell was passed in favour of Gain Singh etc. appellants.

Regular First Appeal filed by Krishna Devi and others against the judgment of the trial court was dismissed on 6.12.1983. During the pendency of the first appeal, execution of the decree was stayed. In the present suit, the plea of the plaintiffs, who were defendants in the previous suit, that they bonafide purchasers negated by the court.

Gian Singh etc.-appellants herein, who were decree holders in a decree for possession by way of specific performance of the agreement to

sell, filed execution petition on 4.1.1985. The amount as required under the decree was deposited on 22.07.1986. Unfortunately the execution petition was dismissed in default on 16.8.1986.

Application for restoration was filed by the decree holders on 6.6.1994. In the application, it was specifically stated that the entire amount has already been deposited as required under the decree and even Local Commissioner was appointed by the court to execute the sale deed. However, the sale-deed could not be executed as decree holder in the meantime migrated due to terrorism in the State of Punjab and on their return they have noticed that the sale-deed has not been executed. Even this application was dismissed vide order dated 4.12.1995 under Order 9 Rule 2 of the Code of Civil Procedure (for short `CPC'). Decree holder once again filed an application under Section 151 CPC for taking up the previous file to execute and registration of the sale-deed. Prayer made by the appellants is extracted as under:-

“It is therefore prayed that the previous file of the case may kindly be taken up and the sale deed may kindly be executed and got registered in favour of the applicants/DHs through local commissioner, in the interest of justice.”

On the basis of this application, order came to be passed by the learned trial court, copy whereof is not on the file but it is apparent from the reading of the order (Ex.P12) passed by this Court in the revision petition that on 5.8.2000, the court after noticing that the amount has already been deposited and Sucha Singh, Reader of the Court, who was appointed Local Commissioner to execute the sale-deed, had retired, appointed another Local Commissioner for execution of the sale-deed. Sh.Suvir Mahajan was appointed as Local Commissioner to execute the sale-deed. It is admitted

on the record that on 7.8.2000 sale-deed was executed in favour of the appellants i.e. Gian Singh etc.

Plaintiffs Smt.Krishna Devi etc. filed objection petition dated 10.8.2000 allegedly filed on 11.8.2000 in which it was specifically noted that the sale-deed in favour of the appellants has already been executed, although date of sale-deed was given as 9.8.2000, whereas sale-deed was executed on 7.8.2000. Relevant extract of the ex parte order dated 2.2.2001 (Ex.P13) of the High Court in Civil Revision filed by the judgment debtors-objectors reads as under:-

“Disposed of with the observations and directions to the executing court that if the objections of the petitioners are pending, those should be disposed of at the first instance according to law before the execution of the sale-deed. If the objections are not pending, this revision shall be deemed to have been dismissed.”

The plaintiffs filed a suit for possession by way of redemption of the mortgage on 31.3.2003. In this suit, the plaintiffs pleaded that the defendants have failed to file execution petition within limitation. The defendants-appellants filed reply. As noticed above, the learned trial court as well as learned first appellate court decreed the suit after recording a finding that second execution petition was filed on 14.3.1086 and therefore, it was barred by time. The courts have further held that adverse inference is to be drawn against the defendants-appellants, as they did not appear in the witness box. The first appellate court has wrongly noted that the plaintiffs were not party to the suit for possession by way of specific performance of the agreement to sell.

Now the stage is set for answering the questions of law.

Question No.(i)

Whether before drawing adverse inference against a party for non-appearance in evidence, it is obligatory for the court to examine whether the evidence already available is sufficient or not?

In the considered opinion of this Court, it is obligatory for the court to examine the evidence which is already available on the file before taking a decision to draw adverse inference against a party for non-appearance in evidence.

This issue has been examined by the court in ***RSA No.2306 of 2008 (Navneet Kaur Vs. St.Soldier Properties and Industrial Ltd. and another)*** and culled out various checks and balances to be applied by the court before drawing adverse inference. The checks and balances are as under:-

- i) Whether other evidence available on the record is sufficient to establish the case set up by the party?
- ii) Whether some facts were in knowledge of the party exclusively and his/her non-appearance has resulted in withholding the aforesaid personal information from the Court?
- iii) Whether the General Power of Attorney or any representatives who has appeared for the party was in a position to answer all the questions put up by the opposite party and facts required to be proved were in his knowledge?
- iv) Whether any prejudice has been caused to the other party on account of non-appearance of the party in evidence?

In view thereof, this Court is of the opinion that the defendants-

appellants had led sufficient evidence available on the file and therefore, no adverse inference could be drawn. The entire case of the defendants was based upon the documents which had been filed by the defendants. Mere non-appearance of the defendants in the court for orally deposing in the witness box in the facts of the case is not sufficient to draw adverse inference against the appellants.

Question No.(ii)

Whether proceedings/ordered passed by the executing court can be challenged by the judgment debtor in a separate suit.

With regard to question No.2, it will be noted that as per Section 47 of the Code of Civil Procedure ('CPC' for short), all questions arising between the parties to the suit in which the decree was passed or their representative relating to the execution, discharged or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit. Hence, in the considered opinion of this Court, no separate suit was maintainable. Section 47 of CPC is extracted as under:-

47. Questions to be determined by the Court executing decree.-

(1) All question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

*(2) *** (Omitted)*

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.---- *For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.*

Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

Learned counsel for the respondents has submitted that the suit filed by the plaintiffs was only for redemption of the mortgage and, therefore, bar to the maintainability of separate suit under Section 47 of CPC, would not be apply. However, on careful examination of the judgments passed by the courts below, it is apparent that both the courts have recorded a finding that a second execution application allegedly filed on 14.3.1996 was barred by time. Obviously the validity of the proceedings in the execution petition have been examined and held to be barred by time. In the considered opinion of this Court, such question could only be raised in the execution petition before executing court and not by a separate suit.

It is not in dispute that the plaintiffs Krishna Devi etc were party to the suit. It was Krishna Devi etc. who had filed the first appeal against the judgment and decree passed by the trial court on 24.2.1975 and appeal filed by Krishna Devi etc. i.e. plaintiffs in the present suit, was dismissed on 6.12.1983, wherein it was recorded that plaintiffs Krishna Devi etc. were not bonafide purchasers.

Learned counsel for the respondents-plaintiffs has submitted that in the execution petition, plaintiffs were not added as party.

No doubt from the reading of the orders passed by the executing court and various applications, the argument of the learned

counsel for the respondents is correct, however, contention of the learned counsel for the plaintiffs-respondents cannot be accepted for two reasons. Firstly under Section 47 of CPC, the words used by the court are questions arising between the parties to the suit. Admittedly the plaintiffs were party to the suit. Still further, the plaintiffs themselves, who were judgment debtors filed an objection petition before the executing court on 11.8.2000. Once they filed objections, they should have prosecuted those objections and taken into its logical end particularly when they filed revision petition in the High Court and got directions issued to decide the objections. Now at this stage, the plaintiffs cannot take the benefit that they were not added as judgment debtors in the execution petition. This issue can be further examined by another angle. The plaintiffs claimed to have stepped into the shoes of Baldev Singh, who was the original owner. Baldev Singh was very much party in the suit as well as in the execution proceedings. Section 47 of CPC provides that all questions between the parties to the suit in which decree was passed or their representative shall be decided by the executing court and not by a separate suit. The plaintiffs are representatives of Baldev Singh who have stepped into his shoes particularly when they are claiming redemption of the mortgage, which was executed by Baldev Singh and they claim to have purchased the property for Baldev Singh. Hence, question No.2 is also answered in favour of the appellants.

Question No.(iii)

Whether an application for restoration/revival of execution petition is liable to be treated as a fresh execution petition or not?

In the considered opinion of this Court, the learned courts

below have erred in treating the application dated 14.3.1996 to be a fresh

execution petition. The execution petition was dismissed for non-prosecution. Thereafter the application was filed under Section 151 CPC for taking up the previous file. The previous file was taken up and execution of the sale deed was ordered vide order dated 5.5.2000. The plaintiffs did not produce on file any evidence to prove that the execution petition was either not revived or any fresh execution petition was filed by the defendants-appellants. The evidence available on the file establishes that the first execution petition was restored and registration of the sale deed was ordered through appointment of a new local commissioner. It is significant to note that the entire decretal amount was deposited on 22.7.1986. Thereafter decree holder was not required to do any substantive act and it was for the executing court to get the sale-deed executed in favour of the appellants through the court commissioner who was also appointed. Hence question No.3 is also answered in favour of the appellants.

Questions No.(iv) and (v)

Whether the sale-deed having been executed in favour of the appellants and consequently they having become owners, the decree by redemption of mortgagee rights could be legally passed against them?

Whether in absence of any challenge to the sale deed Ex.D2, the courts could legally ignore the same?

As noticed in the previous part of the judgment, once the sale-deed has been executed in favour of the appellants pursuant to decree for possession by way of specific performance of the agreement to sell, the mortgage created by Baldev Singh in favour of mortgagees had come to an end. Appellants were absolute owners of the property in possession, therefore, without challenging the sale-deed executed by the court in favour of the appellants, the suit filed by the plaintiffs was not maintainable.

Hence, questions no.4 and 5 are also answered in favour of the appellants.

No other argument was raised.

In view of aforesaid detailed discussion, the judgments and decrees passed by the courts below are set aside. The Regular Second Appeal is allowed. The suit filed by the plaintiffs is dismissed with no costs.

12.07.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No