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

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Date of decision : 12.10.2018

Joginder Singh (deceased) through LRs and others

... Appellants

Versus

Bhag Singh (deceased) through LRs and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Avnish Mittal, Advocate
for the appellants.

Mr. Ashok Singla, Advocate and
Mr. Aakash Singla, Advocate
for the respondents.

AMIT RAWAL, J.

The appellants-defendants are in the present regular second appeal against the judgment and decree of the lower Appellate Court, whereby the suit of the respondents-plaintiffs, dismissed by the trial Court, has been decreed.

The respondents-plaintiffs instituted the suit for possession of land measuring 76 kanals 8 marals comprising in khasra Nos.48//16 (8-0), 17(8-0), 18 (2-12), 23(7-7), 24 (8-0), 25 (8-0), 49//20 plus 2 (4-5), 21/1 (4-8), 267//15-min(4-0), 268//10 (2-18), 11/1 (1-7), 267//15min (3-18), 6 (8-0) 268//10 (5-15) situated in Village Nathana, Tehsil and District Bathinda, on the premise that Chand Singh son of Bishan Singh (real uncle of the plaintiffs) alienated the land measuring 102 kanals 6 marals out of land measuring 267 kanals 14 marlas comprised in khasra Nos.1895, 1899, 1922,

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3092, 3112, 3250, 3251, 3347, 2135, 3197, 2937, 3281, 3380, 3950/3798, 3951/3798, 3952/3798, 3953/3798, 3108, 3039 situated within the revenue limits of Village Nathana, to one Sardara Singh son of Gurmukh Singh on 08.02.1939, mutation bearing No.4171 was sanctioned. The aforementioned alienation was without consideration or any legal necessity. The Civil Court vide judgment and decree dated 04.12.1947 set aside the sale, in question, by holding to be null and void against the plaintiffs except being a charge to the extent of ₹770/-, in essence, reversionary rights of the plaintiffs were protected till lifetime of Chand Singh. Sardara Singh died leaving behind the defendants as his legal heirs. Chand Singh died on 24.03.1986 and the plaintiffs being only legal heirs of Chand Singh offered a sum of ₹770/- to Sardara Singh, but refused to accept the same, thus, a cause of action arose to seek the possession.

The suit, aforementioned, was contested by the defendant Nos.1 to 5, on the premise that the plaintiffs had already alienated the said land by way of registered sale deed dated 30.01.1959 and the defendants are the *bona fide* purchasers for a valuable consideration after verifying the title. The suit was barred by law of limitation as the sale deed could have been challenged within the period of limitation. The factum of decree dated 04.12.1947, as alleged in para 4 of the plaint, was not denied, much less, death of Chand Singh and ultimately sought dismissal of the suit.

Replication was filed, wherein the plaintiffs denied that they had not alienated the suit land as they were not legally entitled to alienate the same and if at all, they had alienated though not admitted, then the same was being null and void. Possession had been sought immediately after demise of Chand Singh and cannot be said to be barred by law of limitation.

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Since the parties were at variance, the trial Court framed the following issues:-

1. *Whether the plaintiffs are entitled to possession of the suit property from the defendants on payment of ₹770/- ? OPP*
2. *Whether the plaintiffs have alienated the suit land to the defendants on 30.01.1959 and they thus are estopped from filing the suit by their acts and conduct? OPD ?*
3. *Whether the suit is not maintainable in the present form? OPD*
4. *Whether the defendants are bona fide purchasers and for consideration? OPD*
5. *Whether the suit is barred by limitation?*
6. *Relief.*

The plaintiff-Bhag Singh examined himself as PW1, whereas the defendants examined Shri Sadhu Singh DW-1, Bhagat Singh DW2, Daya Krishan DW3 and Jangir Singh as DW4, Shri Satwant Puri, Handwriting Expert as DW-5.

On the basis of the aforementioned evidence, the trial Court held that the sale deed dated 30.01.1959 was proved and the defendants had taken transfer in good faith represented to them and dismissed the suit. The lower Appellate Court, as noticed above, in an appeal taken by the plaintiffs, decreed the suit.

Mr. Avnish Mittal, learned counsel appearing on behalf of the appellants-defendants submitted that the defendants are entitled to take benefit of the provisions of Section 43 of the Transfer of Property Act, 1882 (in short 'the 1882 Act'), which protects the transfer by unauthorized persons, who subsequently acquire the interest in the property transferred. By virtue of a decree of 1947, though reversionary rights of the plaintiff

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were protected on creation of charge of ₹770/-, but during the lifetime of Chand Singh and subsistence of the decree, the plaintiffs vide sale deed dated 30.01.1959, sold the parcel of the suit land to the defendants, therefore, they cannot be allowed to wriggle out of the aforementioned sale deed by taking the benefit of decree of 1947 on the demise of Chand Singh. It is a clear case of fraud and aggrandizement, which was rightly discarded by the trial Court. The lower Appellate Court had not taken into consideration the provisions of Section 43 of the 1882 Act. The entire genesis of the judgment was that the plaintiffs did not have the possession of the title. The defendants cannot be non-suited on the premise that they had the knowledge of the decree of 1947, rather act and conduct of the plaintiffs proved the fact that the possession was with the defendants. The lower Appellate Court despite the fact that the sale deed (Ex.D2) had been proved, decreed the suit. No challenge was laid to the sale deed of 30.01.1959 as there is no limitation for claiming right and title. A registered document has to be cancelled within a period of three years. The effectiveness of decree of 1947 eroded by virtue of the sale deed of 1959, thus, urges this Court for setting aside the judgment and decree, under challenge.

Attention of this Court was also drawn to the order dated 07.08.1992, whereby this Court, while admitting the appeal in the presence of the counsel, ordered the interim stay with a direction to the appellants to furnish security regarding *mesne* profit to the satisfaction of the Court.

Per contra, Mr. Ashok Singla and Mr. Aakash Singla, learned counsel appearing on behalf of the respondents-plaintiffs submitted that the lower Appellate Court has rightly recorded the finding that the appellants-

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defendants were aware of the declaratory decree of 1947, therefore, could not be accorded benefit of Section 43 of the 1882 Act. The sale deed dated 30.01.1959 (Ex.D2) had not been proved and rightly been ignored. The plaintiffs specifically denied the execution of the sale deed. Decree of 1947 had attained finality and therefore, was binding upon the appellants-defendants, thus, they could not frustrate the decree by setting up the alleged sale deed of 1959 that to in the year 1986, when the suit for possession was filed. In a suit for possession, relief of declaration is inherent, which was sought on the basis of the right already crystallized in 1947, thus, urges this Court for upholding the judgment and decree, under challenge.

In rebuttal, Mr. Avnish Mittal, had cited a judgment of Madras High High Court in **"Mrs. Bhawari Bai V/s B.C. Sudhakar" 2017 (3) MLJ 300**, to contend that transfer made by the plaintiffs in the year 1959 would be saved as per Section 43 of the 1882 Act.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that there is force and merit in the submissions of Mr. Avnish Mittal, for, both the Courts below have arrived at a conclusion that the sale deed had been executed, therefore, it would not be in the fitness of things to refer to the testimony of attesting witness as well as statement of the handwriting expert.

On the touchstone of the fact that the sale deed dated 30.01.1959 had been executed after decree of 1947, a question arisen whether the rights enured upon the plaintiffs till lifetime of Chand Singh, have operated or not. The answer is in 'negative'. The plaintiffs lost the

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right to claim the possession by voluntary act of parting with the property in the year 1959. During all this period, the plaintiffs did not challenge the aforementioned sale deed, but instituted the suit only in the year 1986 when Chand Singh died. Fully knowing the well that the sale deed could not be challenged, they could have faced the criminal action, intentionally did not seek declaration though there is no limitation to claim title. Section 43 of the 1882 Act protects the sale by unauthorized person, who acquires the title subsequently. For the sake of brevity, Section 43 of the 1882 Act reads as under:-

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.— Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

The aforementioned provisions came to be debated by this Court in **"Gurmej Singh V/s Makhan Singh and others" 1986 PLJ 615** and on noticing the fact that the vendor on the date of sale was not authorised, but acquired the right and title later on held the sale of half share to be good. For the sake of brevity, finding rendered in paragraph 5 of the judgment reads as under:-

"5. Turning to the half share of Charno, he had made the sale before the judgment Exhibit P.2 was rendered, vide sale deed Exhibit D.1. In that sale, he joined three other persons in

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whose favour mutation of inheritance was sanctioned to the extent of 1/6th share each. Charno and three other vendors were not clear about their title regarding the extent of their share. However, the sale was for more than half of the land left by Gurdit Singh. Each one of the vendors would be responsible to make good the sale to the extent it would be permissible in view of Section 43 of the Transfer of Property Act. Since by judgment Exhibit P.2, it was declared that Charno had half share, the sale deed Exhibit D1 would be considered good on behalf of Charno to the extent of half share. Therefore, sale deed Exhibit D.1 would be read to be on behalf of Charno in respect to his half share and the sale for the balance, i.e., in excess of half share, would not affect the rights of Harnama or his heirs."

Similar is to the fact in Mrs. Bhawari Bai's case (supra).

Lower Appellate Court, in my view, abdicated in not referring to the aforementioned provisions, but had gone in arena of surmises and conjectures by strictly laying focus on the fact that the plaintiffs did not have the title of the property owing to the decree of 1947, rather death of Chand Singh had validated the sale deed of 1959 and they had chance to challenge the same, but only claim possession.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **"Pankajakshi (dead) through LRs and others V/s. Chandrika and others AIR 2016 SC 1213"**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be

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without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **"Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others" 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in **"Pankajakshi 's case** (supra) reads thus:-

*"Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled." [at paras 27 - 29]"*

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the

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Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

As an upshot of my observations, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and the same is hereby set aside and that of the trial Court is restored. The present regular second appeal is, accordingly, allowed.

12.10.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**