

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.3473 of 1998 (O&M)

Date of Decision: 17.05.2018

Amrik Singh etc.

..... Appellants

Versus

Gian Singh etc.

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. K.S. Cheema, Advocate
for the appellants.

Mr. Lokesh Sharma, Advocate
for the respondents.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the judgment passed by the learned First Appellate Court decreeing the suit for possession by way of specific performance of the agreement to sell while reversing the judgment and decree passed by the learned trial Court.

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

1. Whether a suit for specific performance filed within the limitation, is liable to be dismissed being barred by time as one of the legal heirs of the prospective vendor (seller) is impleaded under Order 1 Rule 10, CPC after the expiry of the limitation for filing a suit for specific performance of the agreement to sell?
2. Whether High Court while hearing the regular second

appeal is entitled to correct mistake in the interim order passed by the learned trial Court in exercise of powers under Order 41 Rule 33 read with Order 43 Rule 1-A of the Code of Civil Procedure.

Late Sh. Bhag Singh was the original owner. Bhag Singh is alleged to have entered into an agreement to sell with the plaintiff-Gian Singh. As per the agreement to sell, out of total sale consideration of Rs.35,000/-, Rs.25,000/- was paid as an earnest money and the sale deed was to be executed and registered on 15.08.1988. He and Bhag Singh were co-owners along with certain others in the joint land. It was further pleaded that rather than honouring the agreement to sell, the land was transferred in favour of defendants No.2 and 3 in breach of the agreement to sell on 20.08.1987. It is pleaded that defendants No.2 and 3 were having knowledge of the agreement to sell. Before filing of the suit, Bhag Singh had died. The suit was filed against defendant No.1-Kulwinder Kaur and subsequent purchasers defendants No.2 and 3. Defendant No.1 filed her written statement denying the execution of the agreement and pleaded that late Sh. Bhag Singh was a dead drunkard man and therefore, the plaintiff might have obtained his signatures on the agreement to sell. Defendant No.2 also filed a written statement dated 01.08.1990 pleading same thing. Defendants No.2 and 3 also pleaded that they have no knowledge of the prior agreement to sell.

During the pendency of the suit, mutation of inheritance of Bhag Singh was sanctioned on 20.11.1989. The mutation sanctioned was in the name of two daughters i.e. defendant No.1 and one Surinder Kaur. The plaintiff filed another suit on 05.04.1990 impleading both the daughters

as party-defendants. Defendant No.2 filed amended written statement dated 30.07.1993 wherein for the first time objection was taken that Smt. Surinder Kaur i.e. the other daughter, is a necessary party and therefore, the suit is liable to be dismissed. The plaintiff immediately moved an application on 06.08.1993 to implead Smt. Surinder Kaur as party defendant. The application was allowed by the Court vide order dated 02.09.1993.

Smt. Surinder Kaur did not choose to appear and contest the suit. She has neither appeared before the learned trial Court nor before the learned First Appellate Court and before this Court.

Learned trial Court while recording a finding that the execution of the agreement to sell by late Sh. Bhag Singh is proved, further recorded that the plaintiff was not proved to be ready and willing to perform his part of the contract as the plaintiff did not issue any notice before filing the suit to the defendants. The trial Court further held that defendants No.2 and 3 are bona fide purchasers. In view of the aforesaid, the suit was dismissed.

The plaintiff filed the first appeal and the learned First Appellate Court has reversed the judgment passed by the learned trial Court and decreed the suit for possession by way of specific performance of the agreement to sell.

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

Learned counsel for the appellants while referring to Section 21 of the Limitation Act has submitted that the suit filed against Surinder Kaur would be deemed to have been instituted on the date the application under Order 1 Rule 10 to implead her as a party defendant was allowed. He further referred to provisions of Order 1 Rule 10(5) of the Code of Civil Procedure to contend that the suit against newly added party would be

deemed to have been instituted on the date Surinder Kaur was served with the summons of the suit. Hence, he submitted that the suit filed by the plaintiff is barred by time. Section 21 of the Limitation Act, 1963 is extracted as under:-

“21. Effect of substituting or adding new plaintiff or defendant.

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

A careful reading of the aforesaid provision, it is apparent that the Court has the discretion to order that the suit would be deemed to have been instituted on any earlier date if the Court is satisfied that the omission to include a party was due to a mistake made in good faith. This is clear from the reading of the proviso to Section 21 of the Limitation Act, 1963. Learned counsel for the appellants drew attention of the Court to the order dated 02.09.1993 to contend that the learned trial Court did not pass any such order. Hence, he submitted that the main provision in Section 21 would operate and as such, the suit was time barred.

No doubt, the order dated 02.09.1993 does not record reasons to treat the suit to have been instituted on 05.06.1989. However, a careful reading of the judgment passed by the learned First Appellate Court establishes that this aspect has been dealt with by the learned First Appellate

Court and the Court has recorded valid and cogent reasons for considering the suit to have been instituted on 05.06.1989 i.e. the original date of the institution. The reasons as given by the learned First Appellate Court on examination of evidence which were also found by this Court to be cogent are as under:-

1. Bhag Singh had married twice. From one wife, original defendant No.1-Kulwinder Kaur was born whereas from the second wife, Surinder Kaur is alleged to have been born. Surinder Kaur was not residing with Bhag Singh at the time of his death. Mutation of inheritance of Bhag Singh have not been sanctioned till the date of filing of the present suit i.e. 15.06.1989. Mutation of inheritance was sanctioned only on 20.11.1989.
2. When defendant No.1 filed written statement dated 11.08.1990 to the suit, no objection in this regard was taken. For the first time, the objection was taken by defendant No.2 when amended written statement filed on 30.07.1993. Defendant No.2 also did not take this plea in the written statement dated 01.08.1990 to the un-amended plaint.
3. Surinder Kaur has not chosen to contest the suit.
4. Surinder Kaur has never objected to the decree for specific performance of the agreement to sell.

For the aforesaid reasons, the order dated 02.09.1993 is deemed to have been modified and it is ordered that the suit against Surinder Kaur would be deemed to have been instituted on the date of filing of the suit i.e. 05.06.1989.

Learned counsel for the appellants has further drawn attention of the Court to the judgment passed in separate suit filed by Tej Kaur etc. on 05.04.1990 in which the plaintiff was also one of the plaintiff. He submits that on 05.04.1990, both the daughters of Bhag Singh were impleaded as defendants. He submitted that therefore, the application filed by the plaintiff in the present suit on 06.08.1993 cannot be treated as a bona fide application. As noticed earlier, the present suit was instituted on 05.06.1989 whereas mutation of inheritance was sanctioned on 20.11.1989, and the subsequent suit was filed in April 1990. The defendants did not raise any objection in this regard in the present suit before July, 1993. Hence, on that count alone, the plaintiffs cannot be non suited.

The aforesaid questions of law as framed earlier, are hence, answered in favour of the plaintiffs-respondents.

Learned First Appellate Court has noticed certain wrong facts while deciding the appeal which needs to be corrected. Learned First Appellate Court has held that the sale in favour of defendants No.2 and 3 is during the pendency of the suit and therefore, hit by the rule of lis pendence. That fact is factually incorrect as sale was executed in favour of defendants No.2 and 3 on 20.08.1987 whereas the suit was instituted on 05.06.1989. However, the learned First Appellate Court after appreciating the evidence has recorded a finding that defendants No.2 and 3 were in knowledge of the agreement to sell and therefore, not bona fide purchasers. Learned counsel for the appellants has not disputed correctness of the aforesaid finding.

Learned First Appellate Court has also incorrectly recorded that readiness and willingness has not been pleaded, however, the evidence has been produced. A careful reading of the plaint establishes that in para 4 and

5 of the plaint, the plaintiffs had pleaded that the plaintiffs was always ready and willing to perform his part of the contract and get the sale deed executed.

In view of the discussion made above, this Court does not find any good ground to interfere with the judgment passed by the learned First Appellate Court.

Appeal is dismissed.

17.05.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned	Yes / No
Whether Reportable	Yes / No