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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-3699-2011 (O&M)
Date of decision : 15.02.2018

Brij Kant

... Appellant(s)

Versus

Gopal Chand Gupta

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. M.S. Sachdev, Advocate
for the appellant.

Mr. H.K. Aurora, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The appellant-defendant is in regular second appeal against the concurrent findings of fact, whereby the suit filed by the respondent-plaintiff for mandatory injunction of handing over the vacant possession of portion of House No.E.A. 56, Mohalla Quilla, Jalandhar measuring 3-3/4 marlas in occupation, as per description given in the plaint, has been decreed by both the Courts below.

It would be apt to give preface of the matter before adverting to the rival contention of learned counsel for the parties.

The respondent-plaintiff instituted the aforementioned suit on 07.02.2005 on the basis of having acquired the title/share in the aforementioned property on 09.08.2001, whereas the entire property is 7 marlas. It was averred that the previous vendor had inducted the appellant-

defendant as a licensee and therefore, the license was transferable and filing of the suit itself, according to the plaintiff, was a notice of revocation of the license. The aforementioned suit was contested on the premise that the appellant had become owner by way of adverse possession as he had been living with his family without any objection, demure and interruption since 1986. The trial Court on the basis of preponderance of evidence decreed the suit and the appeal taken before the lower Appellate Court also met with the same fate.

Mr. M.S. Sachdev, learned counsel appearing on behalf of the appellant-defendant submits that both the Courts below have abdicated in not appreciating the following legal submissions:

- i) Assuming for the sake of argument that the license was transferable, which in law cannot be transferred as it is a personal grant between the grantor and grantee and the suit for mandatory injunction was not maintainable.
- ii) The respondent-plaintiff had acquired the ownership to the extent of 3- $\frac{3}{4}$ out of total land measuring 7 marals, vide sale deed dated 09.08.2001, whereas the suit was filed on 07.02.2005, therefore, the suit simpliciter for mandatory injunction was not maintainable in view of the *ratio decidendi* culled out by the Hon'ble Supreme Court in "Sant Lal Jain V/s Avtar Singh" 1985 AIR (SC) 857 as well as in "Joseph Severance & others V/s Benny Mathew and others" 2005(2) Apex Court Judgments 572 (SC), "Th Milka Singh and others V/s Th. Diana and others" 1964 AIR J&K 99 and by

this Court in **“Surjit Kaur V/s Balwinder Kaur” 2006(1) Civil Court Cases 118 (P&H).**

He further submits that even the respondent-plaintiff cannot be permitted to pay the Court fee by converting the suit into mandatory injunction as he had not become full owner of the entire house, as indicated above. He has to seek a separate possession by claiming partition amongst the other co-owners and only after determination of right, he can seek the ejectment, in case the area under alleged license is fell to his share.

Mr. H.K. Aurora, learned counsel for the respondent-plaintiff submits that the suit, aforementioned, was maintainable. The filing of the suit itself was a notice and therefore, they cannot be said to be a delay for seeking the revocation of the license, but did not deny the factum of acquiring the ownership of the property to the extent of 3-3/4 share out of 7 marlas' land, vide sale deed dated 09.08.2001. The concurrent findings of fact cannot be interfered until and unless there is a grave illegality and perversity, thus, urges this Court for dismissal of the present appeal.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a force and merit in the submissions of Mr. Sachdev, for, concededly the suit was filed on 07.02.2005. In the judgments laid down by the Hon'ble Supreme Court rendered in **“Sant Lal Jain's case** (supra), it has been held that where on revocation of a license immediately, the suit for mandatory injunction asking the licensee to hand over the possession, would be maintainable, but it is filed after some time, then the remedy is to file the suit for possession.

On the similar lines is the judgments cited supra. The plaintiff after the sale

deed has become co-sharer with the co-owner and the remedy for him is to seek the separate possession by way of partition, till then, he cannot seek the ejectment of the appellant-defendant by branding him to be a licensee, though, the defendant has a right to take up the plea of non-transferability of the license. Be that as it may, the fact of the matter is that the suit was not maintainable, thus, he cannot call upon to pay the court fee owing to the factum of having acquired co-ownership, I am of the view that the remedy lies elsewhere.

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 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 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.

All these facts have not been taken into consideration by the Courts below, thus, there is a illegality and perversity in the judgments and decrees rendered by the Courts below, accordingly, the same are set aside.

The present appeal stands allowed.

15.02.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**