

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

RSA No.3620 of 2013(O&M)

Date of decision: 20.11.2018

SarojAppellant

VERSUS

Matu Ram and othersRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. Amit Jain, Advocate for the appellant.

Mr. R.A. Sheoran, Advocate for respondent No.1.

Mr. Anil Ghanghas, Advocate for respondent No.5.

REKHA MITTAL, J.

The present appeal directs challenge against judgment and decree dated 23.08.2013 passed by the Additional District Judge (I), Bhiwani whereby appeal preferred by the plaintiff/respondent against judgment and decree dated 05.10.2010 passed by the Additional Civil Judge (Senior Division), Loharu (hereinafter to be referred as the trial Court) has been allowed, judgment and decree dated 05.10.2010 were set aside and suit filed by the respondent/plaintiff was decreed.

In brief, case of the respondent/plaintiff is that he is owner in possession to the extent of 320/5513 share i.e. 16 kanals on the basis of sale deed dated 27.04.1989 executed by Banwari – defendant No.2 (since deceased) through LRs i.e. respondent No.2 to 6. Judgment and decree dated 14.08.1987 passed in civil suit No.303 of 1987 titled Smt. Saroj Vs. Banwari, Mutation No.2830 dated 19.08.1989 sanctioned on the basis

thereof and revenue records prepared on its basis are illegal, null and void and not binding on rights of the plaintiff and liable to be set aside. He prayed for consequential relief of permanent injunction restraining defendant No.1/appellant from alienating the suit land on the basis of judgment and decree dated 14.08.1987. It is averred that Banwari was owner in possession to the extent of 1/4th share in land measuring 275 kanal 13 marlas and he sold 16 kanals of land to the plaintiff and possession thereof was delivered at the spot. He made bona fide inquiries before purchasing the suit land. After registration of the sale deed, he handed over copies of the same to Halqa Patwari for sanction of mutation and he gave assurance to enter and register mutation in the name of plaintiff.

About 5-6 months ago, defendant No.1 desired to sell the suit land and then the plaintiff came to know that defendant No.2 before selling the suit land to the plaintiff transferred the same in favour of defendant No.1 by suffering decree dated 14.08.1987 and mutation No.2830 was also sanctioned in favour of defendant No.1. The decree dated 14.08.1987 is liable to be set aside on the grounds inter alia that no family settlement took place between the defendants; defendant No.1 had no pre-existing right in the suit land; the alleged judgment and decree is the result of fraud and cannot be taken into consideration for want of registration.

The appellant/defendant No.1 along with her co-defendant filed a joint written statement and raised preliminary objections inter alia non-maintainability of the suit; locus standi, cause of action, jurisdiction, non-joinder and misjoinder of parties and plaintiff being guilty of approaching the Court with unclean hands and by suppressing the true and

material facts. It was admitted that defendant No.2 was owner of suit land but the same was got transferred in favour of defendant No.1 vide decree dated 14.08.1987. Defendant No.2 never executed the alleged sale deed in favour of the plaintiff. He was not owner of the suit land at that time. Possession of suit land was delivered to defendant No.1 on the basis of decree dated 14.08.1987.

The plaintiff filed replication reiterating his stand taken in the plaint and controverted allegations of the written statement. The controversy between the parties led to framing of following issues:-

1. Whether the plaintiff is owner in possession vide impugned sale deed dated 27.04.1987 passed in Civil Suit No.303 of 1987 and mutation No.2830 sanctioned on the basis of said judgment and decree, are illegal, null and void and liable to be set aside as alleged in the plaint? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Relief.

Matu Ram – plaintiff examined himself and Saroj – defendant No.1 appeared as her own witness.

Having heard counsel for the parties in the light of materials on record, learned trial Court answered issue No.1 against the plaintiff but issue No.2 was decided in his favour though eventually the suit was dismissed in view of findings on issue No.1. Feeling aggrieved against the judgment and decree passed by the trial Court, Matu Ram – plaintiff preferred the appeal that came to be allowed by the first Appellate Court

whereby judgment and decree of the trial Court were set aside and suit filed by the plaintiff/respondent was decreed.

Counsel for the appellant would argue that the respondent/plaintiff staked his claim of ownership qua suit land measuring 16 kanals on the basis of sale deed dated 27.04.1989 by raising averments that he is a bona fide purchaser. It is argued that Section 41 of the Transfer of Property Act, 1882 (in short 'TPA') has two parts namely (1) an ostensible owner had express or implied consent, of the persons interested in immovable property to transfer the same, (2) the transferee had taken due care and acted in good faith while ascertaining the power of the transferor to transfer the said property. It is further argued that in para 3 of the plaint wherein the plaintiff has raised allegations of bona fide purchaser, no such plea has been raised that Banwari – defendant No.2 had express or implied consent of Saroj defendant No.1/appellant authorizing him to sell the suit property. Further argued that averments with regard to bona fide inquiries allegedly made before purchase of suit land neither satisfy requirements of bona fide purchaser nor the allegations are specific as to the revenue authority from whom such inquiry was allegedly made by the plaintiff. It is further argued that neither in the plaint nor in his testimony on oath, the respondent/plaintiff has disclosed the name of Halqa Patwari to whom the plaintiff approached for examining the records nor any such revenue officer has been examined during the course of evidence. It is argued with vehemence that neither pleadings in para 3 of the plaint nor evidence adduced by the respondent/plaintiff is sufficient to establish his plea that he is a bona fide purchaser of suit land which admittedly stood transferred by defendant No.2 in favour of appellant/defendant No.1 vide

decree dated 14.08.1987 passed in civil suit No.303 of 1987. In support of his contention, he has relied upon judgments of this Court **Mohinder Singh (died) through his LRs vs. Banta Singh and others along with connected case, 2013(1) RCR (Civil) 68, Ram Pal Kanwal and others Vs. Swetamber Sthanic Jain Sabha, Faridkot (Regd.) and others, 1987(2) PLR 621, Amrit Singh Vs. Tarlok Singh and others, 2004(3) RCR (Civil) 447, Gurcharan Singh and others Vs. Surjit Kaur and others, 2005(3) RCR (Civil) 628, Daya Nand Dahiya Vs. Subhash Chand and others, 2007(1) PLJ 200.**

To assail judgment of the Appellate Court that decree dated 14.08.1987 suffered by defendant No.2 in favour of defendant No.1 is the result of collusion, it is argued that the respondent/plaintiff is not entitled to challenge the consent decree as even it could not be challenged by defendant No.2 except on the ground that the same is vitiated by fraud, misrepresentation, misunderstanding etc. In support of his contention, he has referred to judgment of Hon'ble the Supreme Court **Som Dev and others Vs. Rati Ram and another, 2006(4) RCR (Civil), 303** to contend that decree dated 14.08.1987 does not require registration. Further reference has been made to judgments of this Court **Gurdev Kaur and another Vs. Mehar Singh and others, 1990(1) PLR 334 (D.B.), Jagdish Vs. Ram Karan, 2003(1) RCR (Civil) 657, Parveen Kumar Vs. Shiv Ram @ Sheo Ram, 2000(1) RCR (Civil) 122.**

Counsel representing the respondent/plaintiff has supported the judgment and decree passed by the Court in appeal with the submission that a specific plea has been raised by the plaintiff that he made bona fide inquiries from revenue authorities and examined revenue records before

purchasing suit land from Banwari. It is argued that collusive decree in civil suit No.303 of 1987 was passed on 14.08.1987 but mutation on the basis of decree was sanctioned on 19.08.1989 after the sale deed dated 27.04.1989 was executed by defendant No.2 in favour of the plaintiff. Not only this, in January 1989, defendant No.2 sold land measuring 8 kanal 2 marlas out of land subject matter of decree dated 14.08.1987 in favour of the plaintiff and another and the said sale deed dated 31.01.1989 has not been challenged by the appellant till date and mutation on the basis of said sale deed was sanctioned in March 1989. It is further argued that as the decree dated 14.08.1987 does not find reference in the revenue records until the mutation sanctioned in August 1989 and there is nothing on record suggestive of the fact that the respondent/plaintiff was aware of the aforesaid judgment and decree prior to execution of sale deed dated 27.04.1989, no error much less perversity can be noticed in the findings recorded by the Appellate Court upholding plea of the respondent/plaintiff that he is a bona fide purchaser for consideration without notice.

Another submission made by counsel is that decree dated 14.08.1987 is the result of collusion between the defendants. It is argued that the appellant/defendant No.1 is the sister's daughter of defendant-Banwari, therefore, there was no question of any family settlement having been arrived at inter se the defendants on the basis whereof, suit No.303 of 1987 could be maintained by the appellant. Further submitted that even after passing of the decree dated 14.08.1987, Banwari had executed the first sale deed dated 31.01.1989 qua land measuring 8 kanal 2 marlas and the second sale deed dated 27.04.1989 (sale deed in dispute) in favour of the plaintiff. The suit filed by the plaintiff was jointly contested by the

defendants as they filed a joint written statement though later Banwari did not appear in the witness box and intentionally withheld himself and denied an opportunity of cross examination to the plaintiff. It is vehemently argued that taking into consideration conduct of the defendants, the Appellate Court has rightly held that decree dated 14.08.1987 is the result of collusion between the defendants with an intent to cause loss to the plaintiff who is a bona fide purchaser of the suit land. For this purpose, counsel has made reference to Section 53(2) of TPA.

I have heard counsel for the parties, perused the paper-book and records.

Before advertng to the submissions made by counsel for the parties, it is appropriate to recapitulate Section 41 of the TPA, extracted hereunder:-

“41. Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

According to aforesaid provision, a person would be ostensible owner if he had express or implied consent of the persons interested in immovable property and such transfer shall not be held to be voidable on the ground that transferor had no authority to make it, provided that the transferee had taken due care and acted in good faith

while ascertaining the power of the transferor to transfer the said property. Counsel for the appellant has failed to cite any judgment that the transferee in good faith is also required to plead and prove that the ostensible owner had express or implied consent of the persons interested in immovable property. The fact of express consent may be pleaded and proved, if that is the case but the implied consent can only be inferred from the facts and evidence on record. This is not the plea of the respondent that the appellant had given express consent for transfer of suit property by defendant No.2.

The question that calls for consideration is whether the pleadings and evidence are sufficient to establish claim of the respondent/plaintiff that he had taken due care and acted in good faith while ascertaining power of the transferor to transfer the suit property. The respondent has alleged in para 3 that he made bona fide inquiry and examined the revenue records from Halqa Patwari before purchasing the suit land in the year 1989. He appeared in the witness box and reiterated his plea by way of duly sworn affidavit PW1. In para 6 of the affidavit, there is reference to documents Ex.P1 to P12 which were tendered without any objection from the contesting party. Matu Ram was subject to cross examination but there is no challenge to his testimony with regard to his having made inquiry from Halqa Patwari and revenue record before purchasing the suit land. There is also no challenge to his plea that he came to know about the decree dated 14.08.1987 just five months before filing of the suit when the appellant talked in the village for sale of land by claiming her to be owner in possession thereof on the basis whereof the plaintiff made inquiry from Halqa Patwari and came to know that decree

dated 14.08.1987 has been obtained from the Court of Mr. K.R. Goel by way of collusion between defendants. As per the settled position in law, statement of a witness on a particular point that remains unchallenged in cross examination amounts to admission on the part of contesting party. The respondent was not asked the name of Halqa Patwari from whom he made necessary inquiries and got examined revenue record before purchasing the suit land. Even otherwise, it may not be possible for the respondent to remember the name of said Halqa Patwari after a period of two decades since purchase of suit land. This apart, Saroj – defendant No.1 appeared in the witness box and tendered into evidence her affidavit dated 15.09.2010. Her testimony is conspicuously silent that the plaintiff was aware of decree dated 14.08.1987 before purchase of suit land or to say that plaintiff purchased suit land despite knowledge of decree dated 14.08.1987. That being so, it can safely be held that the respondent/plaintiff has successfully established his claim with regard to his having made bona fide inquiries prior to purchase of suit land and he was not aware of decree dated 14.08.1987 at any point of time except few months before institution of the present suit filed in the year 2007. In the given circumstances, the appellant cannot derive any advantage to her contention from the referred authorities, rendered in view of peculiar facts and circumstances involved therein.

In **Mohinder Singh's case** (supra), **Ram Pal Kanwal and others case** (supra) and **Amrit Singh's case** (supra), there was already registered sale deed in existence prior to property in question was sold and in those circumstances, the Court held that the subsequent vendees cannot seek protection of Section 41 TPA with the observations that subsequent

vendee is resident of the same village and such transactions of sale are generally known to inhabitants of the village. In none of the judgments relied upon by counsel for the appellant, it has been held that a collusive decree passed in the circumstances of the present case would also be known to inhabitants of the village even if there is no entry in the revenue records with regard to decree.

The decree in the present case has been suffered by Banwari in favour of Saroj who is daughter of sister of Banwari, therefore, Smt. Saroj was not a member of family of said Banwari. In the given scenario, it is difficult to accept that had plaintiff made inquiries from local people, it would have been of consequence to know about such a decree, in order to negate his plea that he made bona fide inquiries before purchase of land.

This apart, there is another significant aspect of the matter that prior to sale deed in question executed on 27.04.1989, Banwari executed another sale deed dated 31.01.1989 in respect of part of land, subject matter of decree dated 14.08.1987 and mutation on the basis of said sale deed was sanctioned in March 1989. The mutation on the basis of decree dated 14.08.1987 was sanctioned in favour of Saroj in August 1989. The present suit was instituted by the plaintiff in the year 2007. Saroj had never challenged the sale deed dated 31.01.1989 either before institution of the present suit or subsequent thereto. In view of given facts and circumstances, it is difficult to accept contention of the appellant that judgment and decree passed by the Appellate Court accepting plea of the plaintiff of bona fide purchaser of suit land either suffer from illegality or perversity, warranting intervention. Accordingly, findings of the Appellate

Court accepting plea of the plaintiff to be bona fide purchaser of suit land are liable to be affirmed and ordered accordingly.

Another aspect of the matter is challenge to the judgment and decree dated 14.08.1987 passed in Civil Suit No.303 of 1987. It is pertinent to mention at the outset that in view of findings recorded hereinbefore, the said judgment and decree has no adverse affect qua right of the respondent/plaintiff in respect of land measuring 16 kanals purchased vide sale deed dated 27.04.1989.

Counsel for the respondent, by invoking Section 53(2) of TPA, has sought to avoid that decree on the plea that the same is the result of fraud. The Appellate Court has held that decree is the result of collusion between the appellant and her co-defendant and the same is a paper transaction.

In the instant case, the respondent/plaintiff has not claimed any right in the suit land being successor in interest of Banwari or an independent pre-existing right before the judgment and decree dated 14.08.1987 was passed. The respondent/appellant, at best, can impugn the decree to the extent rights have been created in his favour qua land measuring 16 kanals on the basis of sale deed dated 27.04.1989.

Undisputedly, Smt. Saroj is the daughter of sister of Banwari and transfer in her favour is on the basis of decree obtained from the Court. There is no consideration for transfer of property by Banwari in favour of Saroj. No mutation on the basis of decree dated 14.08.1987 was entered or sanctioned prior to August 1989. It has been proved on record that on 31.01.1989, Banwari executed a sale deed in respect of land measuring 8 kanal 2 marlas comprising khasra No.972/1 which is also a part of decree

passed in favour of Saroj. . Mutation on the basis of said sale deed was sanctioned in March 1989. Despite the plaintiff having initiated litigation qua the aforesaid decree in the year 2007 by filing the instant suit, appellant has not challenged the sale deed dated 31.01.1989 till date. Not only this, Saroj and Banwari filed a joint written statement to contest claim of the respondent/plaintiff, meaning thereby that they have colluded together in order to cause wrongful loss to the respondent who purchased land measuring 16 kanals after making bona fide inquiries qua title of Sh. Banwari. In this view of the matter, it can safely be held that decree dated 14.08.1987 would be of no consequence so far as title of the respondent/plaintiff qua land measuring 16 kanals on the basis of sale deed dated 27.04.1989 is concerned. As such, findings of the Appellate Court that the aforesaid decree is a paper transaction are modified in the aforesaid terms.

In view of what has been discussed hereinabove, finding no merit, the appeal stands dismissed but subject to the observations made hereinbefore. No order as to costs.

NOVEMBER 20, 2018

‘D. Gulati’

Whether speaking/reasoned :

Whether reportable :

(REKHA MITTAL)

JUDGE

yes/no

yes/no