

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

XOBJC No.29-C of 2016 (O&M) in/and
RSA No.1431 of 2016 (O&M)
Date of decision : 25.10.2018

Prem (deceased) through his LRs and others

...Appellants

Versus

Smt. Umavati and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. S.K. Garg Narwana, Sr. Advocate with
Mr. Nitin Sachdeva, Advocate for the appellants.

Mr. Sanjiv Kumar Aggarwal, Advocate
for the Cross-Objectors/respondents.

ANIL KSHETARPAL, J. (ORAL)

By this judgment, Regular Second Appeal as well as Cross-
Objection filed therein shall stand disposed of.

This appeal has been filed by defendant No.1-Prem through his
legal heirs. For convenience, the parties would be referred by their name.
Prem executed a registered sale deed with respect to land measuring 17
kanals 11 marlas in favour of Smt. Umavati wife of Zile Singh. There was
some typographical error in the aforesaid registered sale deed and hence
supplementary deed was executed by Prem on 11.12.1981 acknowledging
the first sale deed and giving details of corrected khasra numbers. Subhash
son of Prem-defendant No.1, filed a suit for possession by way of superior

right of pre-emption. Prem was impleaded as a party-defendant. Prem, defendant-appellant, of course now dead, admitted the execution of the sale deed. The suit filed by Subhash is Ex.PW10/B whereas written statement filed by Prem is Ex.PA/9. However, unfortunately the sale was not incorporated in the revenue record or the revenue record was not updated in accordance with the sale of land, which resulted into this litigation. Prem while taking the advantage of wrong entry, transferred the property in favour of his sons i.e. defendant Nos.2 to 6 by release deed dated 03.01.2003 and defendant Nos.2 to 6 further mortgaged the property in favour of defendant No.7 on the basis of the aforesaid wrong entries. The plaintiff-Umavati, the purchaser through a registered sale deed filed a suit seeking declaration that she is owner in possession of the property purchased i.e. 17 kanals and 11 marlas and the release deed as well as mortgage deed executed by defendant No.1 in favour of defendant Nos.2 to 6 are not binding on her rights. The plaintiff also prayed for decree of permanent injunction.

Defendant Nos.1 to 6 filed their joint written statement and apart from taking usual objections, contested the suit and pleaded that the sale is result of fraud as Prem wanted only to mortgage the land.

After leading the evidence, learned trial Court dismissed the suit by giving strange reasons. However, First Appellate Court after re-appreciating the evidence, has decreed the suit declaring the plaintiff to be owner. However, the First Appellate Court has also returned a contradictory finding inasmuch as, after declaring that the plaintiff is owner in possession of the suit land on the basis of the sale deed and has only partly decreed the

suit which has forced the plaintiff to file cross-objection.

Learned counsel for the appellant submitted that as per the revenue record, defendant No.1 is recorded as owner in possession of the property. He submitted that no evidence has been led by the plaintiff to prove her possession. Hence, her suit is barred as per proviso to Section 34 of the Specific Relief Act. He further drew attention of the Court to the finding of the First Appellate Court wherein the question of possession of the property in dispute has been held in his favour. He further submitted that since the plaintiff has not appeared in the witness-box, therefore, adverse inference should be drawn against her. He further submitted that Special Power of Attorney was executed by the plaintiff in favour of her husband, there is no authorization to appear in evidence on her behalf and hence, there is no oral evidence on behalf of the plaintiff. He further submitted that in the Special Power of Attorney, the factum of the plaintiff being not in possession is admitted. He further submitted that the suit filed by the plaintiff challenging the release deed dated 03.01.2003 is barred by time and, therefore, the appeal should be accepted.

On the other hand, learned counsel appearing on behalf of respondents-Cross Objectors has submitted that in the sale deed dated 05.06.1974, the possession of the property was delivered and this fact is specifically recorded and signed by Prem Singh. He further drew attention of the Court to the fact that when Subhash filed a suit for possession by way of superior right of pre-emption, the possession of the plaintiff-respondent-Cross Objector was admitted and Prem did not dispute that fact in the aforesaid litigation. He further submitted that Prem Singh has not appeared

in evidence, therefore, adverse inference is to be drawn against him.

This Court has considered the detailed submissions made by the learned counsel for the parties and with their able assistance gone through the judgments passed by both the Courts below.

As regards the first submission of the learned counsel with respect to possession, it may be noted that the grievance of the plaintiff is to the effect that since revenue record has not been corrected as per the registered sale deed, therefore, the dispute has arisen. Still further, the entries in the revenue record have a presumption of truth which are rebuttable. In the present case, the aforesaid presumption stands rebutted in view of the factum of delivery of possession having been recorded in the sale deed dated 05.06.1974 and also from admission of possession by Prem Singh in the previous litigation filed by Subhash. Still further, Prem has not appeared in evidence to face cross-examination. Hence, the plaintiff is found to be in possession. The defendant-Prem has not led any reliable evidence to prove that he is in possession, apart from producing the copies of the revenue record.

As regards the argument of the learned counsel that in the Special Power of Attorney-Ex.PW9/B executed by plaintiff in favour of her husband, he has been authorized to take possession and, therefore, the Court must assume that the plaintiff is not in possession, is also without substance because while appointing her husband as Special Power of Attorney, she has given various powers to her Special Power of Attorney including authorization to take the possession. Such word in the Special Power of Attorney cannot be taken as an admission of the plaintiff that defendant

No.1 is in possession.

As regards the argument of the learned counsel that the plaintiff has not appeared in evidence and husband was not in knowledge of the facts, it may be noted that in the Special Power of Attorney, she has stated that she is an old lady and not in a position to come and appear herself in witness-box. She has appointed her husband as Special Power of Attorney who has not only faced the cross-examination but has bravely withstood the cross-examination. Learned counsel for the appellants did not draw the attention of the Court to any part of the evidence where Zile Singh, husband of the plaintiff has failed to answer the question put by the counsel for defendant No.1.

This Court has dealt with the aforesaid issue of drawing of adverse inference in detail in the judgment of **Navneet Kaur Vs. St. Soldier Properties and Industrial Limited and another, 2018(3) Punjab Law Reporter 158**. It has been held after relying upon the various judgment of Hon'ble the Supreme Court that adverse inference cannot be drawn unless the Court comes to the conclusion that sufficient evidence is not available.

Next argument of the learned counsel for the appellants is to the effect that in the Special Power of Attorney, the plaintiff has not authorized Zile Singh, her husband to appear in evidence on her behalf. In the considered view of this Court, the argument is factually incorrect because the plaintiff in the Special Power of Attorney has specifically written that she being old lady is unable to appear in evidence and, therefore, she is appointing her husband as Special Power of attorney.

Last argument of the learned counsel that suit filed by the

plaintiff is barred by time as release deed was executed on 03.01.2003 whereas the suit was filed on 29.09.2007, is also to be noticed and rejected because the plaintiff was not required to challenge the release deed. The plaintiff has prayed that the release deed is not binding on her rights by a person who was having no title. Hence, even if there is a prayer for cancellation of the release deed that is surplus because the plaintiff was not required to file a suit for cancellation of the release deed in terms of Section 31 of the Specific Relief Act. She rightly prayed for a decree for declaration that she is owner in possession and the release deed is not binding on her rights. Such suit cannot be held to be barred by time.

In view of the aforesaid detailed discussion, the appeal filed by defendant No.1-appellant, is dismissed whereas Cross-objections filed by the plaintiff are allowed and a decree for declaration is passed in favour of the plaintiff that she is owner in possession of the property and release deed as well as mortgage deed are not binding on her rights.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

25.10.2018

Pawan

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned:- **Yes/No**

Whether reportable:- **Yes/No**