

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.562 of 2013 (O&M)
Date of Order: 28.08.2018

Jarnail Singh and others

..Appellants

Versus

Angrez Kaur and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. K.S.Boparai, Advocate,
for the appellants.

Mr. S.S.Swaich, Advocate,
for the respondents.

ANIL KSHETARPAL, J(Oral)

C.M.No.1612-C-2013

Allowed as prayed for.

C.M.No.1613-C-2013

Prayer in this application is for condonation of delay of 110 days in re-filing the appeal.

For reasons mentioned in the application, which is supported by an affidavit, the delay of 110 days in re-filing the appeal is condoned.

Application is allowed.

MAIN

Plaintiffs-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below.

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

- (i) Whether mutation of a registered sale deed is necessary before the title in the immovable property vests in the purchaser?
- (ii) Whether a registered testament, thumb marked by the testator and the attesting witnesses in absence of attesting witnesses can be proved in accordance with Section 69 of the Evidence Act?
- (iii) Whether on the death of legatee(beneficiary) under a Will before the death of the testator, the bequest would lapse, unless from reading the testament contradictory intention is provided for?

There are two sets of properties involved in the suit, one is measuring 2 bighas 10 biswas, which was owned by Smt. Angrej Kaur and Smt. Gurmail Kaur, defendants no.1 and 2 whereas the second part of suit land is 1 bigha and 12 biswas which was originally owned by Smt. Punjab Kaur, their mother.

Smt. Angrej Kaur and Smt. Gurmail Kaur, defendants no.1 and 2 sold their 2 bighas and 10 biswas of land in favour of the plaintiffs vide sale deed dated 22.08.1978, Ex.P1. Unfortunately, mutation of the aforesaid land was not entered and sanctioned by the revenue authorities and Smt. Angrej Kaur and Smt. Gurmail Kaur thereafter sold the property in favour of defendants no.3 to 6 vide sale deed dated 15.06.1995.

With regard to second part of property, Smt. Punjab Kaur is alleged to have executed a registered Will (testament) in favour of his only son late Sh. Maghar Singh on 02.09.1974, registered on 03.09.1974. Sh. Maghar Singh pre-deceased Smt. Punjab Kaur.

Revenue authorities ignoring all Class-I heirs, sanctioned the mutation in favour of only daughters i.e. Smt. Angrej Kaur and Smt. Gurmail Kaur, namely, daughters of Smt. Punjab Kaur, widow and children of late Sh. Maghar Singh (the son) were ignored.

Smt. Angrej Kaur and Smt. Gurmail Kaur have sold the aforesaid land measuring 1 bigha and 12 biswas in favour of defendants no.3 to 6 vide separate sale deed dated 15.06.1995. It is further the case of the plaintiffs that since they are children of late Sh. Maghar Singh being two sons and a widow, therefore, they are entitled to the property of Smt. Pritam Kaur as per Section 109 of the Indian Succession Act.

Defendants no.3 to 6 contested the suit, whereas defendants no.1 and 2 remained ex-parte. Defendants no.3 to 6 pleaded that the sale deed dated 22.08.1978 has not seen the light of the day, nor Will dated 02.09.1974 has been produced.

Learned trial court dismissed the suit filed by the plaintiffs on the ground that since the sale deed dated 22.08.1978 executed by Smt. Angrej Kaur and Smt. Gurmail Kaur, defendant nos.1 and 2 in favour of defendant nos.3 to 6 has not been entered in the revenue record, therefore, no title passed. With regard to the registered Will, it was opined that since no attesting witness has been examined, therefore, the Will has not been proved in accordance with Section 68 of the Indian Evidence Act.

Learned first appellate court also affirmed the findings of the learned trial court.

Now the stage is set for answering the questions of law:-

QUESTION NO.(i)

Whether mutation of a registered sale deed is necessary before the title in the immovable property vests in the

purchaser?

It is well settled that the title passes in favour of the purchaser on execution of the sale deed. On cumulative reading of Section 8 and Section 54 of the Transfer of Property Act, it is apparent that title would pass in favour of the purchaser on execution of the sale deed. In the case of delayed registration of the sale deed title passes with effect from the date of execution of the sale deed. Mutation of the property in the revenue record or in the municipal record is only for updating the record and for recovery of land revenue or house tax, whichever may be applicable. Mutation neither confers any title nor is a document of title. Hence, findings of both the courts that since mutation of the land pursuant to the sale deed dated 22.08.1978 has not been sanctioned, therefore, vendors i.e. Defendant nos.3 to 6 did not become owners are erroneous. The title passed on 22.08.1978.

Learned counsel for the respondents-defendants pleaded that payment of the sale consideration has not been proved to have been passed on. Merely because payment of the sale consideration has not been proved, sale deed cannot be held to be void. As per Section 55(4)(b), the seller has only right to recover the amount unless there is a clause in the sale deed to the contrary, which makes a provision for treating the contract of to be void or the sale of the immovable property would deemed to have been cancelled. However, in normal circumstances on execution of the sale deed, the title in the property passes to the transferee as has been provided in Section 8 of the Transfer of Property Act.

Hence, question no.(i) is answered in favour of the plaintiffs-appellants.

QUESTION NO.(ii)

Whether a registered testament thumb marked by the testator and the attesting witnesses in absence of attesting witnesses can be proved in accordance with Section 69 of the Evidence Act?

Normally, a testament is required to be proved in accordance with Section 68 of the Evidence Act before the Court. However, provision has been made in case none of the attesting witness is found in that situation the beneficiary of the testament can prove the execution in accordance with Section 69 of the Evidence Act. Section 69 of the Evidence Act provides that if no attesting witness is found, it must be proved that the attestation of one attesting witness is at least in his hand writing and that the signatures of the person executing the document is in his hand writing.

In the present case, in order to prove the registered testament, Gurmit Singh, who was working as conductor/cleaner with attesting witness Nachhatar Singh has been examined, who has specifically stated that Nachhatar Singh had told him about the execution of the Will and attestation of the Will by him. The witness while appearing in the evidence has stated that thumb impression of Nachhatar Singh has been affixed on the testament. Still further, officials from the office of the Sub-Registrar has been examined who have proved the registration of the testament. In the considered view of this Court, once Gurmit Singh has been examined, who was working with Nachhatar Singh as cleaner/conductor, it is obvious that Gurmit Singh could identify his thumb impressions. (his superior).

Still further, learned counsel for the respondents-defendants could not dispute that even in absence of the testament executed by Smt. Punjab Kaur, the mutation of land in favour of 2 daughters was wrongly

sanctioned. The mutation had to be sanctioned in favour of all the Class-I heirs which includes the legal heirs of Sh. Maghar Singh, pre-deceased son.

Hence, question no.(ii) is answered accordingly.

QUESTION NO.(iii)

Whether on the death of legatee(beneficiary) under a Will before the death of the testator, the bequest would lapse, unless from reading the testament contradictory intention is provided for?

Section 109 of the Succession Act provides that if the legatee dies during the lifetime of the testator, the bequest would not lapse, if the bequest has been in favour of child or other lineal descendant of the testator but it would enure for the benefit of successor of the legatee. Section 109 of the Indian Succession Act, 1925 is extracted as under:-

“109. When bequest to testator’s child or lineal descendant does not lapse on his death in testator’s lifetime.—Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the Will.”

In the present case, learned counsel for the parties could not point out any clause in the testament which shows that the intention of the testator was otherwise.

Learned counsel for the respondents-defendants further tried to salvage the case of the defendants by submitting that the plaintiffs have not

appeared in the witness box and, therefore, adverse inference is to be drawn.

In the considered opinion of this Court, adverse inference can only be drawn if the evidence available on the file is not sufficient. The present case is entirely based on documentary evidence, which has been produced.

With regard to testament (Will), the plaintiffs could not have stated anything because they were not present at the time of execution of the Will. The person who could identify the thumb impression of the attesting witness, has appeared. Plaintiffs have also appeared through attorney. This court has already laid down various checks to be applied, before the court draws adverse inference. Reference in this regard can be made to the judgment passed by this Court in **Navneet Kaur v. St. Soldier Properties and Industrial Ltd and another, 2018(3) PLR, 158.**

Learned counsel for the respondents-defendants further submitted that the relief of possession has not been sought and, therefore, the suit was not maintainable.

It may be noted that as per proviso to Section 34 of the Specific Relief Act, the suit for declaration can be dismissed if the plaintiff is entitled to a further relief but omits to do so. In the present case, the plaintiffs have pleaded that pursuant to exchange, Balwant Singh is in possession of the property. It is nowhere the case of the plaintiffs that it is defendants no.3 to 6, who are in possession. None of the courts have found that defendants no.3 to 6 are in possession.

Learned counsel for the respondents-defendants further submitted that the courts below have recorded a finding that defendants no.3 to 6 are bonafide purchasers.

In the considered opinion of this court, no one can pass better title than what he himself has. The concept of bonafide purchaser is only under the Specific Relief Act, 1963 particularly when a suit for specific performance of the agreement to sell to be decided and it come to the notice of the court that property has further been transferred by the owners. The only relevant provision on this aspect is made under Section 41 of the Transfer of Property Act. It provides that if transfer by a ostensible owner. In the present case, there is neither any pleadings nor any evidence to prove that requirements of Section 41 of the Transfer of Property Act stand fulfilled.

In view, therefore, the judgments and decrees passed by the courts below are set aside. All the three questions referred to above are answered in favour of the plaintiffs-appellants.

The regular second appeal is allowed.

August 28, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No