IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3477 of 2017 (O&M)
Date of decision : 21.09.2018

Sukhdev Singh and another

...Appellants

Versus

Sarwan Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kartik Gupta, Advocate for the appellants.

****

ANIL KSHETARPAL, J. (ORAL)

Civil Misc. No.8406-C of 2017

For the reasons stated in the application, which is duly supported by an affidavit, delay of 89 days in refiling the present appeal is condoned.

Application is allowed.

RSA No.3477 of 2017 (O&M)

Defendants-appellants are in the Regular Second Appeal against the concurrent findings of the fact arrived at by both the Courts below while decreeing a suit for declaration that plaintiff is joint owner in possession in the land measuring 6 kanal and 13 marlas.

Plaintiff claims that he has purchased the property from Harjas Rai, the original owner, vide registered sale deed dated 23.08.1968. Therefore, plaintiff proclaim joint owner in possession to the extent of 1/12th

share out of total suit land. However, it is a case of the plaintiff that Revenue Authorities did not sanction the mutation which resulted into the entire dispute. Defendants-appellants claim to have purchased the land through two subsequent sale deeds.

Both the courts below after recording the evidence have found that the sale deed in favour of the defendants-appellants does not affect the rights of the plaintiff who is purchaser of prior date.

Learned counsel for the appellants submitted that the defendants-appellants are bona fide purchasers of the property. He submitted that suit filed by the plaintiff was barred by time. He further submitted that sale deed in favour of the defendants has not been challenged, therefore, suit was not maintainable.

This Court has considered the submission and with able assistance of the learned counsel for the appellants, gone through the judgments passed by the Courts below.

As far as, first argument of learned counsel is concerned, it may be noted that Transfer of Property Act, does not provide any plea of bona fide purchaser. Section 41 of the Transfer of Property Act, 1882 only provides transfer by ostensible owner. The plea of transfer by ostensible owner is fundamentally based upon plea of estoppel. In the present case, it is not pleaded or proved by the defendants that plaintiff, at any stage, made representation to the defendants that Harjas Rai or the vendors of the defendants continued to be the owner. It is well settled that no one can transfer better title what he himself has. In the present case, defendants-appellants can only claim title to extent, whatever was left with their vendor. In the present case, plea of bona fide purchaser would have no application. Hon'ble Supreme Court in the judgment: *(2007(2) SCC 404) "Hardev Singh Versus Gurmail Singh(Dead) by LRs."* had held that before a subsequent purchaser is given benefit of Section 41 of the Transfer of the Property Act, the Court has to be satisfied of the following parameters:

> *"The ingredients of Section 41 of the Act are:*
> *1) the transferor is the ostensible owner;*
> *2) he is so by the consent, express or implied, of the real owner;*
> *3) the transfer is for consideration;*
> *4) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer."*

In the present case the aforesaid facts are totally missing.

It may be noted that there was neither any issue with regard to bona fide purchaser framed by the Court nor claimed by the defendants-appellants.

As regards the plea of limitation, it may be noted that the present suit filed by the plaintiff is suit for declaration claiming that he is joint owner in possession. The cancellation of the sale deed executed in favour of the defendants-appellants has not been sought. A simpliciter suit for declaration claiming ownership would always depends upon a cause of action which arises in favour of the plaintiff. Still further, no issue on limitation was claimed by the defendants-appellants.

In the considered view of this Court, such suit filed by the plaintiff cannot be dismissed on the ground of limitation by calculating the limitation from the date the sale deed was executed by the predecessor of the defendants.

Last argument of the learned counsel is to the effect that sale deed in favour of the defendants-appellants has not been challenged. In the considered view of this Court, the argument is wholly without substance. Once, the plaintiff is not the executant of the sale deed, he is not required to file a suit for cancellation of the instrument as provided in Section 31 of The Specific Relief Act, 1963. There is a vast difference between suits filed for cancellation of an instrument and suits filed for declaration of status or right. Suits for cancellation of instrument are governed by Section 31 of The Specific Relief Act, 1963 whereas suits filed for declaration claiming status or right are filed under Section 34 of the specific Relief Act. In the present case, plaintiff being Non Executant of the document was not required to file a suit for cancellation. The plaintiff has rightly filed a suit for declaration that such sale deed executed does not affect their rights.

In view thereof, there is no ground to interfere with the concurrent findings of fact arrived at by both the Courts below.

Regular Second Appeal is dismissed.

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

21.09.2018 **(ANIL KSHETARPAL)**
NI **JUDGE**

Whether speaking/reasoned:-Yes/No

Whether reportable:-Yes/No