

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

**RSA-1449-1988 (O&M)
Date of Decision: April 01, 2019**

Bichha Ram (deceased) through LRs.

... Appellant(s)

Versus

Krishan Kumar and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. O.P. Sharma, Advocate,
for the appellant(s).

Mr. Piyush Aggarwal, Advocate,
for Mr. Saurabh Garg, Advocate,
for respondent no.1.

Amit Rawal, J. (Oral)

Present regular second appeal is directed against the judgment and decree dated 25.04.1988 of the Lower Appellate Court whereby suit of the respondent no.1-plaintiff, dismissed by the trial Court, has been decreed.

Respondent-plaintiff is none-else but son of defendant no.3 – Bhikhu Ram, in the year 1983, sought the declaration by assailing the sale deed registration No. 484, dated 02.11.1973, executed by his father-defendant no.3-Bhiku Ram in favour of defendants no. 1 and 2 to the extent of ½ share. It was alleged that the property was Joint Hindu family and plaintiff had a right by birth, he was having a bad habits, resulting into the execution of the sale deed which was without necessity. In fact, intention was to execute the lease deed for a period of one year on payment of Rs. 1000/- as lease money.

Defendant no.3 was proceeded against *ex parte*, whereas defendants no.1 and 2 contested the suit alleging no cause of action. The sale deed was said to be executed bona fide act of defendant no.3. In fact, an amount of Rs. 7000/- was paid to Om Parkash son of Molar, who was in possession of the land as mortgage. An amount of Rs. 3000/- was paid to him when it was mortgaged. An amount of Rs. 4000/- was paid to Om Parkash in lieu of cancellation of agreement to sell dated 01.10.1983, executed by defendant no.3 in favour of Om Parkash because Om Parkash had paid an amount of Rs. 4000/- to defendant no.3 as earnest money. An amount of Rs. 1000/- was paid to defendant no.3 before the Sub Registrar. The total sale consideration of the sale deed was of Rs. 8000/- for legal necessity. The factum of property governed by Hindu Law being coparcenary property was emphatically denied.

On receipt of replication, the trial Court framed the following issues:-

- “1. Whether the sale deed dated 2.11.1973, in favour of defendants no. 1 and 2 is illegal, null and void, without jurisdiction and not binding on the rights of plaintiff as based on fraud and mis-representation? OPP*
- 2. Whether the plaintiff has no locus standi to file the present suit? OPD*
- 3. Whether plaintiff has no cause of action against defendants? OPD*
- 4. Whether the suit is not maintainable in the present form? OPD*
- 5. Whether the plaintiff is estopped by his act and conduct for filing present suit? OPD*
- 6. Whether present suit is time barred? OPD*
- 7. Whether the suit has been instituted at the instance*

of defendant No.3, if so to what effect? OPD

8. *Whether the suit has not been properly valued for the purposes of court fees and jurisdiction? OPD*

9. *Whether the defendants are bona fide purchasers for consideration? OPD*

10. *Whether the defendant No.3 has sold land in dispute for legal necessity and for the act of good management? OPD*

11. *Whether defendants No.1 and 2 born the registration charges? OPD*

12. *Whether defendants No.1 and 2 have incurred Rs.4000/- for improvement of the suit land? OPD*

13. *Whether defendants are gaur brahmins by caste and they are governed by custom in the matter of alienation. Mortgage etc.? OPD*

14. *Whether the suit is not maintainable in the present form? OPD*

15. *Whether the plaint is not properly signed and verified? OPD*

16. *Whether the suit land is coparcenary property of the Hindu joint family of the plaintiffs and proforma defendants? OPP*

17. *Whether the plaintiff and proforma defendants are governed by mitakshra school of Banaras.*

18. *Relief."*

The trial Court rendered the finding on issue nos.13, 16 and 17 by holding that property being joint possession as coparcenary, since it was joint possession of father and the son but did not agree with the contention of the defendant regarding plaintiff's evidence with regard to fraudulent transaction. In appeal preferred by the plaintiff, Lower Appellate Court non-suited the appellant-defendant qua the nature and character of the property as there is no cross-objections from the side of defendant no.2 that the

property is not an ancestral property, but formed opinion that it was only paltry amount paid to Bhikhu Ram. The sale deed was neither for legal necessity as it was not meant for the celebrations of the marriage of his daughter or his son. As regards the other ½ share, the suit was decreed owing to the fact that defendant no.1 conceded the claim of the plaintiff.

Mr. O.P. Sharma, learned counsel appearing on behalf of the appellant, submitted that the Lower Appellate Court while decreeing the suit also fastened the liability of proving the property being coparcenary on the defendant, when suit was filed by the son, such a proposition is contrary to the provisions of Order 18 Rule 3 CPC. The onus was on the present appellant as no pedigree table, revenue excerpt or any document had seen the light of the day as Bhikhu Ram inherited the same from grand-father who would be great grandfather of the plaintiff. No explanation has come forth in not challenging the sale deed for the last 10 (ten) years as Bhikhu remained alive but during the pendency of the appeal, expired. Lower Appellate Court has also appreciated in not noticing the contents of the impugned sale deed which reveals that the suit property was mortgaged with Om Parkash and no contrary evidence has been brought on record.

Per contra, learned counsel, appearing on behalf of the respondent supported the judgment and decree of the Lower Appellate Court in holding the defendants in the absence of cross objections before the Lower Appellate Court, could not be permitted to challenge the nature and character of the property or the assistance of the provisions of Order 41 Rule 33 of CPC. Bhikhu Ram – defendant no.3 was a drunken and not in a position to judge the right or wrong act and never intended to part with the title except for execution of the lease deed.

I have heard learned counsel for the parties, appraised the paper-book, records of the Court below and of the view that the following Substantial Questions of Law arise for determination:-

1. *Whether the onus as per the finding of the Lower Appellate Court to prove the nature and character of the property as ancestral is upon the defendants?*

2. *Whether the judgment and decree of the Lower Appellate Court amounts to misreading of the contents of the sale deed dated 02.11.1973?*

The contents of the sale deed, read out during the course of the hearing, reveals that the property was under mortgage with Om Parkash. For the purpose of redemption paid redemption money after adjustment of balance amount to defendant. Be that as it may, Lower Appellate Court remained oblivious of fact that Bhikhu Ram intentionally did not cancel the sale deed as he was proceeded ex parte. I need not delve further, for, the finding placing the onus upon the defendant is totally fallacious in law. The persons who asserts the right in the property by birth is required to prove the nature and character of the property at the hands of his father holding three generations, in lineage as per the explanation given in paragraph 221 of the Mulla's Hindu Law, 21st Edition. In my view. the appellants have, erroneously, been non-suited of not filing the cross objections as Lower Appellate Court being ignorant of provisions under order 41 Rules 33 CPC. In order to prevent of miscarriage of justice and strike equity taking away the valuable rights for the purpose of lease, I am of the view that the matter requires to be re-visited to the Lower Appellate Court and Lower Appellate Court to decide the controversy in view of the findings qua onus with regard to the nature of the property. The Substantial Questions of Law, framed

above, in my view, are answered in favour of the defendant. Judgment and decree of the Lower Appellate Court is set aside. Matter is remitted back to the Lower Appellate Court. Parties through their counsel are directed to appear before the Lower Appellate Court on 30.05.2019. Lower Appellate Court shall decide the appeal within a reasonable period for 10 (ten) months. Requisitioned record be sent back. Liberty is granted to the appellant to move an appropriate application before the Lower Appellate Court for impleading the legal representatives of defendant no.4 as this fact was brought to this Court during the course of hearing.

April 01, 2019
vkd

(Amit Rawal)
Judge

Whether speaking / reasoned : Yes

Whether reportable : No