

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

**Cross Objection No.43-CII-2005 in/and
RSA-1118-2005(O&M)
Date of Order:24.01.2019**

DHARAMBIR AND OTHERS

..Appellants

Versus

ZILE SINGH AND OTHERS

..Respondents

CR No.4310 of 2006 (O&M)

DHARAMBIR AND OTHERS

...Petitioners

Versus

ZILE SINGH AND OTHERS

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. D.V.Sharma, Senior Advocate, with
Ms. Shivani Sharma, Advocate,
for the appellants/petitioners.

Mr. Vikram Punia, Advocate,
for the respondents/Cross-objectors.

ANIL KSHETARPAL, J (Oral)

By this judgment, RSA No.1118 of 2005, Cross-objection No.43-CII-2005 and Civil Revision No.4310 of 2006 and shall stand disposed of. Learned counsel for the parties are ad-idem that all these cases can be disposed of by a common judgment.

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below while decreeing the suit filed by the plaintiffs for declaration that they are owners

in possession of land to the extent of their respective shares as mentioned in the prayer clause of the suit.

Fundamental dispute between the parties is to the effect that on 14.10.1986, an ex-parte decree was passed against 5 defendants including late Smt. Giano and Smt. Niadri apart from Pehlada, Dewana and Smt. Ompati. Application for setting aside the aforesaid ex-parte decree was filed and counsel appearing for the plaintiffs suffered a statement that he has no objection if the decree dated 14.10.1986 is set aside. This is so recorded in the order dated 12.10.1993. Through the aforesaid order, suit was once again disposed of on the basis of compromise in writing and the statement of the parties. Smt. Giano and Smt. Niadri were not party to the compromise, thus, there could not be any decree against them. Still further late Smt. Giano and Smt. Niadri had died before the decree was passed. The compromise between the parties is a contract between the parties with the seal of the court. Once late Smt. Giano and Smt. Niadri were not party to the compromise, therefore, any decree passed by the court on the basis of compromise is not binding on them. It is for this reason when the court framed a decree which is Ex.P18 on the file. Late Smt. Giano and Smt. Niadri were not shown as defendants in the suit.

However, treating the decree dated 12.10.1993 which was on the basis of compromise, certain further alienations were made which forced the plaintiffs who are heirs of late Smt. Giano and Smt. Niadri to file the present suit.

Both the courts on appreciation of the evidence as noticed above have decreed the suit by granting declaration as prayed for.

Learned senior counsel appearing for the appellants has made

the following submissions:-

- (i) Defendants are bonafide purchasers for value and consideration and therefore sale in favour of the defendants-appellants cannot be adversely effected.
- (ii) The application for setting aside an ex-parte decree was never filed by late Smt. Giano and Smt. Niadri and, therefore, the decree qua late Smt. Giano and Smt. Niadri was never set aside.
- (iii) A separate application for setting aside an ex-parte decree filed on behalf of late Smt. Giano and Smt. Niadri was dismissed for non-prosecution.
- (iv) While deciding application for temporary injunction, first appellate court has recorded a finding that the decree qua late Smt. Giano and Smt. Niadri was never set aside.
- (v) Plaintiffs have not appeared in the evidence and therefore, adverse inference should have been drawn by the courts below.

This court has considered the submissions of learned counsel for the parties and with their able assistance gone through the judgments passed by the courts below and the record.

As regards first argument that the defendants-appellants are bonafide purchasers, it may be noticed that the vendors of the defendants-appellants were not owner of the entire land. In the absence of ownership, the vendors could not transfer better title than what they themselves had.

Hon'ble Supreme Court in the case of Hardev Singh v. Gurmail Singh (Dead) by LRs, (2007) 2 SCC 404 while interpreting Section 41 of the

Transfer of Property Act has dissected Section 41 and lay down that there are 4 requirements, which are as follows:-

- (i) the transferor is the ostensible owner;
- (ii) he is so by the consent, express or implied, of the real owner;
- (iii) the transfer is for consideration;
- (iv) the transferee has acted in good faith, taking reasonable care to ascertain that the transferor had power to transfer.

Admittedly, requirement no.(ii) has not been fulfilled because neither there is any pleading nor any evidence that heirs of late Smt. Giano and Smt. Niadri had ever given consent, expressed or implied to the vendors to sell their shares. Therefore, first argument is without any substance.

Learned senior counsel for the appellants has submitted that the defendants-appellants had purchased the property after going through the revenue record and therefore their sale is to be protected.

The answer to the question lies in Section 41 of the Transfer of Property Act which mandates that the plea of bonafide purchaser is available only if it is proved that the ostensible owner had expressed or implied consent of the real owner. Hence, a person who has no right, title or interest has no right to pass better title than what he himself has.

Next argument of learned counsel is also to be noticed and rejected keeping in view the judgment passed by the court on 12.10.1993. The court has specifically noted that the decree dated 14.10.1986 is set aside. The order does not convey that the decree was set aside only qua applicants who had filed an application for setting aside the ex-parte decree.

Once the decree passed has been set aside, learned counsel for the appellants is not correct in submitting that it was set aside only qua applicants.

Next argument of learned counsel is with reference to the order dated 07.11.1994, whereby an application for setting aside was dismissed in default. This order does not improve the case of the appellants. Once the decree has already been set aside vide order dated 12.10.1993, the dismissal of application in default would not revive the decree which had already been set aside.

Next argument of learned counsel is with regard to the order passed by the first appellate court while deciding the appeal against temporary injunction application. Such findings are *prima-facie* recorded by the court only for the purpose of decision of the application for temporary injunction and such findings cannot be treated as final and binding. The *prima-facie* findings recorded by the court are only for the purpose of decision of application for temporary injunction.

Last argument of learned counsel is to the effect that since the plaintiffs have not appeared, therefore, the adverse inference should be drawn.

This court has already examined statutory provisions as well as various judgments passed by the Hon'ble Supreme Court including the judgment cited by learned counsel for the appellants and it has been concluded that the adverse inference against the party can only be drawn if there is no sufficient evidence to decide the case. In each case, it is not mandatory that the party itself must appear in evidence. Reference in this regard can be made to **Navneet Kaur vs. St. Soldier Properties and**

Industries Ltd., 2018(3) 191 PLR 158.

In view of the aforesaid, there is no substance in the appeal filed by the defendants-appellants.

Dismissed.

Cross-Objection No.43-CII-2005

learned counsel for the plaintiffs has filed cross objection by stating that the courts have not set aside the sale deeds executed by Balraj on 01.05.1992 and 14.05.1992. Admittedly, neither of the sale deed is executed by legal heirs of late Smt. Giano and Smt. Niadri. Therefore, the courts have rightly granted declaration that such sale deeds would not effect the rights of heirs of late Smt. Giano.

Civil Revision No.4310 of 2006

In the present revision, prayer is for correction of memorandum of parties before the first appellate court. The application was filed by some of the defendants who were not impleaded as parties in the appeal.

In view of the judgment passed in the appeal, the present revision petition has been rendered infructuous and therefore, dismissed as such.

**January 24, 2019
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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No