

RSA-4091-2007 (O&M)

101

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

RSA-4091-2007 (O&M)

Date of decision : 15.05.2019

Vikramjit Kaur

... Appellant

Versus

Amarjit Kaur (D) through LRs and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. N.S.Rapri, Advocate and
Mr. Ajay Aggarwal, Advocate
for the appellant.

Mr. Mohd. Yousaf, Advocate
for the respondents.

Mr. Amandeep Singh Nirmaan, Advocate
for the applicant (in C.M.No.9209-C of 2017).

AMIT RAWAL, J. (ORAL)

CM-4449-C-2019

For the reasons stated in the application, which is supported by an affidavit, the legal representatives of respondent No.1, are ordered to be brought on record for the purpose of prosecuting the appeal.

CM stands disposed of.

MAIN CASE

The present regular second appeal is, at the instance of appellant-defendant No.1, directed against the judgment and decree of the lower Appellate Court, whereby the suit of the respondent No.1/plaintiff for declaration and permanent injunction, dismissed by the trial Court, has been

RSA-4091-2007 (O&M)

decreed.

The suit revolves around the estate of Harbans Kaur. Harbans Kaur had two daughters i.e. respondent No.1/plaintiff-Amarjit Kaur and appellant/defendant No.1-Vikramjit Kaur. She had 15 kanals of land and during her life-time, executed a power of attorney dated 13.01.1996 in favour of her son-in-law-Jagmohan Singh, husband of Vikramjit Kaur. It is a matter of record that she had already executed a registered Will dated 06.08.1996, bequeathing half share each to both the daughters. Jagmohan Singh/defendant No.2, on the basis of power of attorney, sold the land, vide sale deed dated 03.09.1997, to defendant No.1-Vikramjit Kaur, his wife. Vikramjit Kaur, during the pendency of the suit, on 29.06.2007, sold the land to applicant-Gurnam Kaur, sought to be impleaded as respondent No.15, vide CM No.9209-C of 2017.

The defendants opposed the suit and raised the objection qua maintainability, *res judicata* and on merits, it was stated that Harbans Kaur, during her life-time, filed a Civil Suit, on 20.10.1997, which was dismissed in default on 17.11.1997, vide Ex.D12.

Since parties were at variance, trial Court framed following issues:-

- 1. Whether the plaintiff is entitled to a decree for declaration as prayed for? OPP*
- 2. Whether the plaintiff is entitled to a decree for permanent injunction as prayed for? OPP*
- 3. Whether plaintiff has no locus standi to file present suit? OPD*
- 4. Whether the suit is not maintainable under law? OPD*
- 5. Whether the suit of the plaintiff is barred under Order 2 Rule 2 CPC? OPD*

RSA-4091-2007 (O&M)

6. Whether the suit is barred by principle of res judicate? OPD

7. Relief.

*Additional issues framed vide order dated 04.12.2003 &
28.04.2005*

*(i) Whether Harbans Kaur executed any Will dated 6.8.96?
OPP*

*6A- Whether the sale deed dated 3.9.97 alleged to be executed
by defendant No.1 Harbans Kaur null and void and is the
result of fraud? OPD*

*6B- Whether the defendants Nos.8 and 9 are entitled to the
declaration as being prayed for as counter-claim? OPD*

Both the parties led extensive evidence in support of their
respective cases.

The trial Court noticing the fact that the previous suit of
identical nature was dismissed in default, dismissed the present suit.
However, the lower Appellate Court, reversed the findings.

Mr. N.S. Rapri, learned counsel appearing on behalf of
appellant-defendant No.1, submitted that as per the *ratio decidendi* culled
out in **“Bhagwan Dass (died) through LRs V/s Ramesh Kumar” 1999 (4)**
RCR (Civil) 640, even if the suit is dismissed under Order 17 Rule 3 of the
Code of Civil Procedure, subsequent suit would be barred by doctrine *ibid*.
The plaintiff failed to prove the ingredients of fraud and misrepresentation
played upon Harbans Kaur. Power of attorney was not cancelled and it
remained valid during all this period. The sale consideration was duly
passed on Harbans Kaur. No evidence, in this regard, has been placed on
record. She was not suffering from any disease or alleged paralytic attack.

Per contra, Mohd. Yousaf, learned counsel appearing on behalf
of respondent No.1/plaintiff submitted that dismissal of the suit in default is

RSA-4091-2007 (O&M)

not the adjudication on merits and will not create a bar by assailing the right, particularly, when *prima facie* it was a case of fraud and misrepresentation. Both the Courts below have discarded the Will, but the lower Appellate Court by setting aside the findings of the trial Court with regard to the maintainability, conferred succession by way of natural devolution. The alleged sale deed dated 29.06.2007 was an attempt to create third party rights to take away the valuable right of the defendant in a pending suit and therefore, was hit by doctrine akin to *lis pendens*. It is 15 kanals of land. The conduct of the defendant in creating third party rights is nothing, but backed by *mens rea*.

Mr. A.S. Nirmaan, learned counsel appearing on behalf of applicant in CM No.9209-C of 2017 submitted that his client is *bona fide* purchaser for a valuable consideration as not aware of the litigation, therefore, his sale deed should be protected. The findings of the lower Appellate Court are, thus, not sustainable.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that there is no force and merit in the submissions of Mr. Napri, for the simple reason that Ex.D12, reveals that previous suit of Harbans Kaur is dated 20.10.1997 and vide order dated 17.11.1997, dismissed in default. For the sake of brevity, order dated 17.11.1997 reads as under:-

"Harbans Kaur Vs Vikramjit Kaur etc.

Present:- None for plaintiff.

Counsel for Defets. No: 1 & 2.

Case called many times since morning. Plaintiff did not come present and none appeared on her behalf. It is 3.00 P.M. Case called again. But none appeared on behalf of

RSA-4091-2007 (O&M)

plaintiff. So the suit is dismissed in default under Order 9 Rule 8 CPC."

It is a matter of record that Harbans Kaur had suffered paralytic attack, on 22.08.1997 i.e. few days before the execution of the sale deed. Realizing the change in circumstances, the trust deposited in son-in-law was breached by way of sale deed, in favour of his wife. Since it cannot be sale consideration, Harbans Kaur was also deprived of the valuable right. No doubt, the onus is always on the propounder of the Will and it was the defendants who proved the same in accordance with law, being registered one, but the same was discarded only on the reason that the original deed did not see the light of the day. As a necessary corollary, succession by natural devolution was inevitable. Section 52 of the Transfer of Property Act, deals with the transaction, during the pendency of the suit, therefore, the applicant cannot be said to be *bona fide* purchaser. If at all, there was any grievance, could have filed the separate appeal i.e. third party appeal with leave, but not in the manner and mode.

The other sister has washed away from the liability by transferring the land to take away the valuable right accrued in favour of sister, by virtue of judgment and decree of the lower Appellate Court.

There is no dispute to the *ratio decidendi* culled out in the judgment cited supra, but the facts and circumstances of each case have to be seen. The order dated 17.11.1997 did not reveal any adjudication on merits, therefore, the provisions of Section 11 and the explanation therein would not apply.

Keeping in view the aforementioned facts, I do not find any illegality and perversity in the judgment and decree of the lower Appellate

RSA-4091-2007 (O&M)

Court, which is based upon the appreciation of oral and documentary evidence, much less, no substantial question of law arises for determination.

No ground for interference is made out.

Accordingly, the present regular second appeal as well as the application bearing CM No.9209-C of 2017 are dismissed.

However, this order of mine will not preclude the applicant, in CM No.9209-C of 2017, to approach the plaintiff for arriving at some settlement outside the Court.

15.05.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**