

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-2470-2014 (O&M)

Date of Decision :- 18.07.2019

Devender

...Appellant

Versus

Komal and others

...Respondents

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present:- Mr. Sumit Gupta, Advocate for the Appellant.

Mr. Deepak Balyan, Advocate for the Respondents.

SUDIP AHLUWALIA, J. (Oral)

This appeal is directed against the judgment passed by Ld. Additional District Judge, Jhajjar in Civil Appeal No.RBT 222 of 2013 dated 21.12.2013.

2. Vide the impugned judgment, the Ld. Lower Appellate Court had virtually dismissed an appeal filed on behalf of the present appellant, who was Defendant No.1 in Civil Appeal No.RBT 821 of 2006, in which the Respondents/Plaintiffs had sought a declaration to the effect that a Sale Deed executed by their mother Smt. Satbiro (Defendant No.2) in favour of Defendant No.1 was null and void inasmuch as the Plaintiffs/Respondents were equal co-sharers alongwith her, since the land in question had devolved upon all of them equally after the death of Rattan Singh, father of the Respondents and husband of their mother Satbiro.

3. The Suit was decreed in part by Ld. Trial Court. The impugned Sale Deed executed in favour of the Appellant/Defendant No.1 was

held to be illegal. Nevertheless, the relief for permanent injunction to restrain the said Defendant from interfering with the alleged possession of the Plaintiffs/Respondents was denied as the Ld. Trial Court was of the view that the evidence on record indicated that the Plaintiffs were not in actual physical possession of the disputed land, and so no injunction could be granted in their favour to protect their alleged possession.

4. The decision of the Trial Court was challenged by both the sides and the Appeal preferred by the present Appellant-Defendant No.1 was dismissed.

5. On the other hand, the Counter Appeal being RBT No.136 of 2011 preferred on behalf of the Respondents/Plaintiffs was virtually allowed and a Decree was passed in their favour to the effect that they would be entitled to recover possession of the disputed land subject to payment of ad valorem Court Fees of an amount of Rs.24,000/-.

6. It may be mentioned that during pendency of the original Suit the Plaintiffs/Respondents had initially filed an Application under Order VI Rule 17 of Civil Procedure Code, 1908 seeking to amend their original Plaint by way of inclusion of an additional prayer for recovering possession of the disputed land, since it was alleged therein that the Appellant/Defendant No.1, during the pendency of the Suit, had forcibly taken possession of the land on the 7th day of November, 2006. The Application was, however, dismissed by the Ld. Trial Court vide its order dated 06.10.2008 with the following observations:-

"The allegation of the plaintiff, at this stage is not supported by any cogent evidence and it is considered view that if the

application of the plaintiff under Order 6 rule 17 CPC is allowed, then the entire nature of the suit shall be changed and the defendant No.1 shall prejudice and will suffer irreparable loss. It is pertinent to mention here that the plaintiffs who are the daughters of defendant No.2, have challenged the sale deed executed by defendant No.2 in favour of defendant No.1 and on perusal of the sale deed dated 24.4.2006, it has transpired that the possession of the plot was handed over to defendant No.1 by the vendor. Therefore, there is no substance in the argument of learned counsel for applicant/plaintiff that possession of the plot/house was taken by defendant No.1 during the pendency of the suit. Hence, the present application under Order 6 Rule 17 CPC is hereby dismissed being devoid of any merits."

7. The Plaintiffs/Respondents did not challenge the above mentioned order dated 06.10.2008, and the trial of the suit continued. It was ultimately decreed in part more than 3 years later on 30.09.2011.

8. However, the Ld. Appellate Court despite being cognizant of the fact that the aforesaid order dated 06.10.2008 passed by Ld. Trial Court had attained finality since it had never been challenged on behalf of the Plaintiffs, nevertheless, in its impugned judgment, virtually allowed the amendment application of the year 2007 more than 5 years later alongwith the Counter Appeal of the Plaintiffs/Respondents with the following observations:-

"However, I am of the view that since plaintiffs/defendant No.2 were dispossessed during the pendency of the suit, their application under Order 6 Rule 17 of CPC was ought to be allowed by the Ld. Civil Judge for amending their pleadings. Further, as issue No.1 is already decided by the Ld. Civil Judge in favour of the plaintiffs and against the defendant

No.1 and the same was also maintained by this Appellate Court while deciding the first appeal titled as 'Devender Vs. Pappi', the sale deed dated 24.4.2006 Ex.D1 is declared as null and void. As per Section 6 of Specific Relief Act, 1969 "If any person is dispossessed without his consent of immovable property, otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in any other suit". As per sub Section 2- "no suit under this section shall be brought (a) after the expiry of six months from the date of dispossession". The suit for permanent injunction before the trial Court was filed on 06.10.2006, whereas she was stated to be dispossessed on 7.11.2006 during the pendency of the proceedings, she has right to move application for amendment of pleadings and to claim the repossession of the same. Even otherwise if it is presumed that defendant obtained the possession of the house before filing of the suit on 6.10.2006 or after commission of fraud on 24.4.2006, even then plaintiffs have right to claim possession of the house under Section 6 of Specific Relief Act, as the sale deed No.332 dated 24.4.2006 is declared as null and void. The Court cannot deny the relief of possession of the house on the technical ground that possession of the suit plot/house is not specifically claimed by the plaintiffs. Further, the relief of possession cannot be denied on the ground that ad valorem court fees is not filed by them. The Court can give the relief of possession to a claimant subject to the filing of ad valorem Court fees while deciding the suit if it feels that the possession was taken by opposite party either during the proceedings or immediately before filing of the suit. Therefore, I hereby allow the present civil appeal subject to payment of ad valorem court fees on amount of Rs.24,000/- within two months of passing this judgment. Both the parties to bear their own costs. Decree sheet be drawn accordingly."

9. In the circumstances, the points that emerge for determination before this Court can thus be mentioned as follows -

(a) Whether the Appellate Court had acted correctly in granting such relief to the Respondents/Plaintiffs, when the specific prayer for incorporation of the same in the original suit had been initially declined and the relevant order had attained finality? and,

(b) Whether there was, in any case, sufficient and convincing evidence available on the Trial Court record to indicate that the plaintiffs who claimed to have been in possession of the disputed land till they were allegedly dispossessed on 7.11.2006, to hold them entitled to the relief for recovery for possession as directed in the impugned judgment ?

10. In relation to the first question above, reliance has been placed on behalf of the respondents upon Order 41 Rule 33 of Civil Procedure Code, 1908, which for the sake of ready reference reads as follows:-

"33. Power of Court of Appeal-- *The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees as, passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees."*

11. In addition, the decision of Hon'ble the Supreme Court of India in **"S. Nazeer Ahmed Versus State Bank of Mysore and Ors."** 2007(1) RCR (Civil) 705 has been cited wherein it was held -

"8. We also see considerable force in the submission of learned counsel for the appellants that the High Court has

misconceived the object of Order 41 Rule 33 of the Code and has erred in invoking it for the purpose of granting the plaintiff Bank a decree. This is a case where the suit filed by the plaintiff Bank had been dismissed by the trial court. The plaintiff Bank had come up in appeal. It was entitled to challenge all the findings rendered against it by the trial court and seek a decree as prayed for in the plaint, from the appellate court. Once it is found entitled to a decree on the basis of the reasoning of the appellate court, the suit could be decreed by reversing the appropriate findings of the trial court on which the dismissal of the suit was based. For this, no recourse to Order 41 Rule 33 is necessary. Order 41 Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed. There is no need to have recourse to Order 41 Rule 33 of the Code, in a case where the suit of the plaintiff has been dismissed and the plaintiff has come up in appeal claiming a decree as prayed for by him in the suit. Then, it will be a question of entertaining the appeal considering the relevant questions and granting the plaintiff the relief he had sought for if he is found entitled to it. In the case on hand therefore there was no occasion for applying Order 41 Rule 33 of the Code. If the view of the High Court was that the suit was barred by Order 2 Rule 2 of the Code, it is difficult to see how it could have resorted to Order 41 Rule 33 of the Code to grant a decree to the plaintiff in such a suit. In that case, a decree has to be declined. That part of the reasoning of the High Court is therefore unsustainable.”

12. This Court is of the view that while an Appellate Court is within its power to pass any order against which no Appeal (or for that matter any other challenging Application such as a Revision) has

been filed, yet exercise of such power in the present case in favour of Plaintiffs/Respondents was not entirely justified. This is so because admittedly, the Suit as originally filed was *simpliciter* for declaration and permanent injunction. The Plaintiffs/Respondents in challenging the genuineness and validity of the Sale Deed executed by their own mother Smt. Satbiro (arraigned as Defendant No.2), had sought to restrain the Defendant/Appellant from interfering with their possession in the suit properties, thereby clearly making out a case that they were in actual physical possession of the same at the time of filing the Suit on 16.9.2006 alongwith a separate Application for permanent injunction. The Defendant/Appellant filed his Written statement on 10.1.2007. Prior to that in view of pendency of the Application for permanent injunction, the Ld. Trial Court firstly on 12.10.2006 and thereafter on 2.11.2006 directed both sides to maintain status quo in respect of the disputed properties, since the Application for permanent injunction was yet to be decided. However on 24.9.2007, the Plaintiffs/Respondents filed their Application seeking amendment of the pleadings by way of addition of new prayer for possession of the suit properties, since they claimed that the Defendant had during pendency of the proceedings illegally taken possession of the same on 7.11.2006, although the affidavit in support of such Application was dated 13.8.2007.

13. The Ld. Trial Court rejected the amendment application vide its order dated 6.10.2008, which has already been reproduced in Para 6 earlier, since it was of the view that there was no cogent material available to support the allegations of the dispossession by the

Defendant during pendency of the Suit. In any case, since an order to maintain status quo was already operative on both parties from 12.10.2006 itself, so if the Plaintiffs had been illegally dispossessed less than a month after that date on 7.11.2006 as claimed, the logical and natural course ought to have been to seek punishment of the Defendant in terms of Order 39 Rule 2-A of the Code of Civil Procedure for violation of the status quo order. But that course was not adopted and more than 10 months later the Plaintiffs filed an Application for amendment alongwith their replication on 24.9.2007. Even after dismissal of the said Application they never thought it fit and proper to challenge such dismissal order before any Forum on account of which, the same had certainly attained finality. Strangely however, much later on 27.8.2009, Plaintiff No.1 Smt. Pappi (since deceased) gave evidence and deposed as PW1 and in her evidence by way of affidavit again asserted that the Plaintiffs themselves were in possession of the disputed properties even at that time, and that therefore, they were seeking an injunction to restrain the Defendant from forcibly taking possession of the Suit House. Such a conclusion is inevitable from the following statements given by the Plaintiff-PW1 in her Examination-in-Chief -

“4. That now the defendant No.2 under the pretext of the alleged sale deed No.332 dated 24.4.2006 wants to take forcible possession of the house of the plaintiff which he has no right, title to do so and further wants to get possession of the house of the plaintiffs by way of removing the western wall of his house to get an entry in the house of the plaintiffs in a illegal manner. The defendants have no right to do so.

5. That the plaintiffs requested the defendants time and again not to do the illegal act of taking forcible possession of the house of the plaintiffs but the greed prevail over the sense of the defendant No.1 and he did not accept the requests of the plaintiffs and defendant No.2.

6. That the plaintiffs and defendant No.2 requested the defendant No.1 that since he has committed the fraud in got execution the false and frivolous sale deed so get it cancelled otherwise the plaintiffs shall take legal action against the defendants, but they flatly refused all the request of get cancelled the alleged sale deed and not to take possession of the house in question on 12.09.2006.”

14. Therefore, even by the Statements of Plaintiff No.1 in her deposition as the Principal witness of the Plaintiffs, they were in actual physical possession of the disputed Suit House/properties even as on 27.8.2009, and thus sought injunction against Defendant No.1 to restrain him from forcibly dispossess them from the suit properties. Such statements are in absolute contradiction of the Plaintiffs' own claim in their amendment application to the effect that they had been illegally dispossessed by the Defendant during pendency of the Suit earlier on 7.11.2006, although even the Ld. Trial Court taking into consideration the entire facts and circumstances alongwith the available material on record at that time itself disbelieved this assertion, and rejected the Application for amendment.

15. Even otherwise PW4 namely Jagpal, who deposed in support of Plaintiffs' case, in his cross-examination on 12.12.2009 had admitted that possession of the property had been taken by the Appellant/Defendant Devender after execution of the Sale Deed, and that he had ever since remained in such possession thereafter. In such circumstances holding that the Defendant had illegally dispossessed

the Plaintiffs/Respondents at any stage during pendency of the Suit could not have been concluded by any logic.

16. The Ld. Lower Appellate Court thereafter went on to observe that in any case if it was to be presumed that the Defendant had obtained possession of the House before filing of the Suit on 6.10.2006 or after commission of fraud on 24.4.2006, even then the Plaintiffs had a right to claim possession of the House under Section 6 of the Specific Relief Act as the Sale Deed No.332 dated 24.4.2006 was null and void. Such reasoning of the Ld. Lower Appellate Court is too far-fetched. It was never the case of Plaintiffs in the original Plaint that they had been dispossessed at any time before filing of the Suit. Therefore, *suo motto* granting them any relief in terms of Section 6 of the Specific Relief Act by the Court even when not sought for was clearly uncalled for, and the Court thus appears to have gone out of its way in granting the Decree for possession, which was never claimed in the Plaint nor included subsequently at any stage, in a situation when the Plaintiffs themselves had apparently not come with totally clean hands inasmuch as they specifically claimed to be in possession of the disputed property while filing the Suit and even in the own deposition of the Plaintiff Pappi (PW1).

17. Consequently, the decision of the Ld. Lower Appellate Court directing delivery of possession to the Respondents/Plaintiffs subject to payment of ad valorem Court Fees of Rs.24000/- is not sustainable. This is however, not to mean that the Title of the Appellant/Defendant to the disputed properties on the strength of the impugned Sale Deed (Ex.P-3) becomes perfected in any manner.

Admittedly, the Ld. Trial Court had itself held the Deed to be illegal. One aspect of this finding is that the Deed in question was obtained by practicing fraud upon Smt. Satbiro, the original Defendant No.2/Respondent No.6, for the reasoning recorded in deciding Issue No.1 in its impugned Judgment dated 30.9.2011. The other aspect is legal in nature, inasmuch as even assuming that no fraud had been practiced in getting the Sale Deed executed, still the vendor/Defendant No.2 could not have transferred more than her personal share of the suit properties, which originally belonged to her deceased husband on account of which, the Plaintiffs i.e. her three daughters certainly had a right to challenge the Sale Deed, since they jointly were owners to the extent of 3/4th share of the total properties by way of inheritance from their deceased father. Also, having found that the Plaintiffs were not in possession of the suit properties as claimed in the Plaint, the Ld. Trial Court rightly declined the relief of permanent injunction.

18. Having carefully considered the oral as well as documentary evidence led by the parties, this Court is substantially but not in complete agreement with the findings of the Ld. Trial Court. While refusal of the prayer for permanent injunction on account of Plaintiffs not being in possession of the suit property before filing of the Suit, as well as holding that the disputed Sale Deed was illegal inasmuch it purported to transfer even the independent share of the Plaintiffs, who were the three daughters of deceased Rattan Singh, are unimpeachable, still from the oral evidence given by the various witnesses, it would be unsafe to hold that execution of the said Sale

Deed itself was on account of out and out fraud. At the very outset, it may be observed that when the document in question had been registered after execution by the competent authority, it automatically carried a presumption of genuineness behind its execution, and the burden shifted upon the party, who alleges that any element of fraud or undue influence was involved in procuring such execution. The two attesting witnesses to the disputed Deed namely Om Parkash Lambardar and Rambir in their depositions as DW-4 & DW-5 have supported the version of the Appellant/Defendant regarding execution of the Deed in question. There is no tangible material to indicate that they had any such previous enmity with Defendant No.2 Satbiro, who otherwise was known to them personally, which might have induced them to intentionally depose falsely against her. On the other hand, PW-4 namely Jagpal Singh, who supported the Plaintiff case by saying that execution of the Sale Deed was got done by the Appellant Devender in 2006 by practicing fraud upon Satbiro, nevertheless in his cross-examination admitted that he was not present when the Sale Deed was executed. It is therefore, difficult to understand on what basis the witness could have claimed that the execution was got done by practicing fraud, when by his own admission, he was not present at the time of execution and the two attesting witnesses to the Deed in question have otherwise supported the Appellant's case.

19. To conclude therefore, in the opinion of the Court, the disputed Sale Deed is admittedly illegal and void to the extent that it purports to transfer the entire suit property inherited by the plaintiffs and their

mother/Defendant No.2, by way of execution only by one of such successors (Defendant No.2), but it cannot be said that any fraud or undue influence for inducing her to execute such Sale Deed itself is established against the Appellant. Considering that admittedly the three daughters of deceased Rattan Singh, were already married and ostensibly living in their matrimonial houses, it is eminently possible that their mother (Defendant No.2 Satbiro), who by the Plaint case itself, and her own deposition as DW-6, is an illiterate lady and a rustic villager, could have executed the Sale Deed under a bona fide belief that after the demise of her husband and marriage of her daughters, she alone had acquired exclusive Right, Title and Interest in the suit property. Even otherwise, as already noted, the Plaintiffs did not approach the Court with clean hands. As rightly concluded by the Ld. Trial Court and impliedly accepted by the Ld. Lower Appellate Court, the Plaintiffs were not in possession of the suit land at the time of filing the suit, but nevertheless sought for a permanent injunction instead of seeking recovery of possession after claiming the Sale Deed in favour of the Appellant to be illegal and void. The plausible reason for this omission by sheer common sense can be assumed to be a reluctance to pay the substantial amount of Court Fees, which would have been required for seeking recovery of possession. It can be said that even the Ld. Lower Appellate Court could not have been entirely unaware of this weakness in the Plaint case and therefore, in its enthusiasm went out its way to suo motto grant the relief of possession, which was never sought for in the first place, apart from directly asking the Respondents to deposit the ad

valorem Court Fees of Rs.24000/- for that purpose. These directions of the Ld. Lower Appellate Court as already noted, are altogether unsustainable.

20. The ultimate rights which in the given circumstances therefore, appear to have crystalized before this Court, are that while the original Plaintiffs are jointly found to be equal co-sharers to the extent of 3/4th share of the suit property, the remaining 1/4th share, which fell into the share of their mother (Defendant No.2), who executed the disputed Sale Deed, is to be considered as having been lawfully conveyed in favour of the Appellant. In other words, the original Plaintiffs can now be regarded as co-sharers alongwith the Appellant/Defendant in the suit property and the appropriate relief in the given circumstances, to which they would appear entitled, would be by way of seeking partition of their respective share in the said property in possession of Appellant/Defendant No.1. The Respondents are therefore, at liberty to take recourse to appropriate legal proceedings for separation of their respective shares. With these observations, the Appeal is disposed off after setting aside the Judgment of the Ld. Lower Appellate Court, and modifying the Decree originally passed by the Ld. Trial Court.

(SUDIP AHLUWALIA)
JUDGE

July 18, 2019
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|--------------------------------|--------|
| 1. Whether speaking/reasoned ? | Yes/No |
| 2. Whether reportable ? | Yes/No |