

In the High Court of Punjab and Haryana at Chandigarh

Date of Decision: 18.12.2019

RSA No. 1526 of 2018 (O&M)

Arashbir Singh and others

---Appellants

vs.

Tara Singh and others

---Respondents

RSA No. 230 of 2017 (O&M)

Karanpal Singh and others

---Appellants

vs.

Tara Singh

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. D.S.Kahlon, Advocate
for the appellants
Mr. Parambir Singh, Advocate
for respondent-Tara Singh

Rekha Mittal, J.

CM No. 4042-C of 2018

Prayer in this application is for condoning delay of 78 days in filing the appeal.

In view of averments made in the application and arguments advanced by counsel for the applicants, application is allowed and delay of 78 days in filing the appeal stands condoned.

Disposed of accordingly.

Main case(s)

This order will dispose of RSA Nos. 230 of 2017 and 1526 of 2018 as common questions of law and fact are involved for adjudication. For facility of reference, facts are taken from RSA No. 1526 of 2018.

Challenge in the present appeal has been directed against concurrent findings recorded by the courts whereby suit of the respondent-plaintiff for joint possession of 10/21 share out of land measuring 58 kanal 2 marlas, situated in village Bagrian, Tehsil and District, Tarn Taran and permanent injunction restraining the defendants from alienating the suit land to the extent of share of the respondent-plaintiff, was decreed by the trial court vide judgment and decree dated 10.3.2015 that came to be affirmed in appeal by the Additional District Judge, Tarn Taran vide decree and judgment dated 20.9.2017 whereby two appeals, one preferred by defendants No. 1 and 2 and the other by defendants No. 5 to 7, were dismissed.

The case set up by the respondent-plaintiff is that respondent along with his brothers Didar Singh and Bahal Singh is co-sharer in joint khata of land measuring 58 kanal 2 marlas, detailed in head note of the plaint. Didar Singh and Bahal Singh sold land measuring 8 kanal 6 marlas vide registered sale deed dated 12.8.2005 and handed over possession to the plaintiff at the time of execution of sale deed. Plaintiff had gone to U.P. about 10 years back and started residing at village Chowkhra Farm Tehsil Palia Kalan, District Lakhimpur Khiri. Defendants No. 1 and 2 got sanctioned mutation of exchange bearing No. 3461 in their favour regarding share of the plaintiff in collusion with revenue authorities. When

plaintiff came to know about the said mutation, he filed an appeal in the Court of Sub Divisional Magistrate at Tarn Taran which was dismissed on 29.8.2007. He filed revision petition before Additional Commissioner, Jalandhar and the same was accepted vide order dated 9.6.2009 and mutation No. 3461 was set aside. Defendants No. 1 and 2 in collusion with defendants No. 3 to 7 have transferred share of the plaintiff to defendants No. 3 to 7 during pendency of appeal and revision filed by the plaintiff. The alienation of plaintiff's share by defendants No. 1 and 2 in favour of defendants No. 3 to 7 is illegal and liable to be set aside.

Defendants No. 1 and 2 filed the written statement raising preliminary objections regarding maintainability and locus standi to file the suit. The relationship between the parties was admitted and so also the plaintiff to be co-sharer in joint khata to the extent of 1/3rd share. They denied sale of 8 kanal and 6 marlas of land to the plaintiff vide registered sale deed dated 12.8.2005 or the plaintiff to be joint owner in possession of 10/21 share out of joint khata. They also denied the allegation that mutation No. 3461 was wrongly got sanctioned in collusion with revenue authorities. The transfer of property to defendants No. 3 to 7 had been admitted.

Defendants No. 5 to 7 (appellants herein) filed their separate written statement raising usual preliminary objections. It is averred that they purchased land measuring 57 kanal 4 marlas along with share of canal water, rasta/passage, trees, connection tube well 7.5 BHP etc. from Sawarn Singh son of Kundan Singh, Bahal Singh son of Chanan Singh and Kundan Singh son of Tara Singh for sale price of Rs. 19,4000/-, vide registered sale

deed dated 18.5.2006. Mutation No. 4059 has been sanctioned in their favour and khasra girdawari entries have been recorded in their names. All material averments of the plaint with regard to challenge to mutation No. 3461 regarding exchange of land and entitlement of the respondent-plaintiff to 10/21 share in the suit land were denied.

The trial court framed the following issues for determination:-

1. Whether the plaintiff is entitled to suit for possession, as prayed for? OPP
2. Whether the suit of the plaintiff is not legally maintainable in the present form? OPD
3. Whether the plaintiff has not come to the court with clean hands and suppressed the material facts from this court? OPD
4. Whether the plaintiff has no locus standi to file the suit? OPD
5. Relief

The parties were permitted to adduce evidence in support of their respective contentions and the same finds reference in paras 8 and 9 of the judgment of trial court. As has been noticed hereinbefore, the trial court dismissed the suit. The plea of the appellants qua bona fide purchasers was rejected with the observations, reads thus:-

“The defendants no.3 to 7 have claimed to be bona fide purchaser of the suit property, on the basis of sale deed dated 18.5.06 brought on record as Ex.D4, as per which the suit property was purchased by them from defendants no.1 and 2.

But as per the cross examination of DW2 Karanpal Singh, in which it has been admitted that the plaintiff had filed an appeal in the Court of SDM, Tarn Taran regarding the mutation of exchange No.3461. He has also admitted that he has never seen any document of exchange regarding which the mutation no.3461 was sanctioned. This witness has also admitted in his cross examination that he had paid the sale consideration to the defendants no.1 and 2 regarding the sale deed Ex.D4 through a bank. But he has also admitted that he cannot produce the bank statement in the Court to prove the same. This witness has also admitted that he cannot tell the name of the parties, who were present at the time of sale deed Ex.D4. He has also admitted that the previous suit filed by him against the plaintiff was dismissed by this Court earlier. From the cross examination of DW1 it is clear that the defendant had knowledge about the appeal filed against the mutation No.3461 by the plaintiff and purchased the suit land despite the pendency of the appeal and revision against the mutation No.3461 filed by the plaintiff. Furthermore he has failed to bring on record any documentary evidence regarding payment of the sale deed Ex.D4, inspite of admitting that the transaction was made through a bank. This fact further corroborates the plaintiff's allegation that the sale deed Ex.D4 was a fraudulent document, executed by the defendants in order to defraud the right of the plaintiff in the suit property. Moreover, from the clear admission from DW1

regarding his knowledge about the pendency of appeal in the Court of SDM, Tarn Taran against mutation No.3461 it is clear that the defendants no.3 to 7 are not bonafide purchaser of the suit property, as is being claimed by the defendants. Therefore, the plaintiff having proved himself as joint owner to the extent of 10/21 share in the suit land is entitled to its joint possession to that extent. And therefore, this issue is decided in favour of the plaintiff and against the defendants.”

The appeals preferred by unsuccessful defendants No. 1 & 2 and 5 to 7 did not find favour with the Appellate Court.

Counsel for the appellants would argue that observations of the trial court that DW1 admitted knowledge of pendency of appeal against mutation No. 3461 in the Court of SDM, Tarn Taran, therefore, defendants No. 3 to 7 are not bona fide purchasers of the suit property are the result of failure to take into consideration that the said appeal was filed by the respondent-plaintiff subsequent to sale deed dated 18.5.2006 was executed in favour of the appellants, therefore, knowledge of pendency of appeal by no stretch of imagination can be construed to comment adversely against plea of bona fide purchasers raised by the appellants. It is vehemently argued that as the appellants never knew about defect in title of their vendors namely Bahal Singh, Sawarn Singh and Kundan Singh, their plea with regard to bona fide purchasers should be accepted.

Counsel has submitted that an application under Section 151 of the Code of Civil Procedure (in short “the Code”) (CM No. 8077-C of 2018) was filed for placing on record documents Annexure A-1 to A-7 and the

same was allowed vide order dated 18.5.2018. It is submitted that documents Annexures A-1 to A-7 are the copies of sale deed dated 1.5.2006 (Annexure A-1), pass books of saving bank account of appellant Karanpal Singh (Annexures A-2 and A-3), sale deed dated 18.7.2005 (Annexure A-4), sale deed dated 21.7.2005 (Annexure A-5), sale deed dated 18.7.2005 (Annexure A-6) and sale deed dated 21.7.2005 (Annexure A-7). It is further argued that vide sale deeds Annexures A-4 and A-5, Bahal Singh sold land measuring 16 kanal 13 marlas and 4 kanal 8 marlas in favour of Sawarn Singh son of Kundan Singh and on the basis of sale deeds Annexures A-6 and A-7, Didar Singh son of Chanan Singh sold land measuring 24 kanal 13 marlas, 4 kanal 8 marlas in favour of Kundan Singh son of Tara Singh. It is further submitted that land purchased by Sawarn Singh son of Kundan Singh, Kundan Singh son of Tara Singh through the aforesaid sale deeds was sold by them in favour of the appellants in addition to sale of remaining share by Bahal Singh, in favour of appellants-defendants No. 5 to 7. It is further argued that from statements of account (Annexures A-2 and A-3), it can safely be gathered that withdrawal for payment of necessary sale consideration in respect of sale deed executed in favour of the appellants on 18.5.2006 was made from the bank accounts of Sh. Karanpal Singh, therefore, plea of the appellants with regard to purchasers for valuable consideration is established.

Counsel representing the respondent-plaintiff, on the contrary, would argue that documents Annexures A-1 to A-7 were allowed to be brought on record subject to just exceptions. It is further argued that the appellants have not filed an application for additional evidence to produce

documents Annexures A-1 to A-7 by bringing their case within the ambit of Order 41 Rule 27 of the Code. In addition, it is argued that these documents are only photocopies and same can not be read in evidence. The copies of pass books have not been proved by summoning a witness from the concerned bank nor originals thereof were produced before this Court at any stage of the proceedings. It is further argued that no evidence has been adduced by the defendants to prove that the respondent-plaintiff exchanged his share in land measuring 58 kanal 2 marlas with his brothers defendants No. 1 and 2 nor there is any evidence to prove as to what land was given to the respondent-plaintiff on the basis of alleged exchange in regard whereof mutation No. 3461 was sanctioned at the back of respondent-plaintiff.

Another submission made by counsel is that there is no material on record to prove that respondent -plaintiff was aware of mutation No. 3461 at any point of time prior to filing an appeal before SDM, Tarn Taran for setting aside mutation No. 3461. It is further argued that if the respondent did not know about sanction of mutation No. 3461, there was no question of any implied consent on his part authorizing defendants No. 1 and 2 to sell the land of his share in favour of Sawarn Singh and Kundan Singh and a part thereof in favour of the appellants on the basis of sale deed executed by Bahal Singh, Sawarn Singh and Kundan Singh in respect of land measuring 57 kanal 4 marlas.

I have heard counsel for the parties, perused the paper book and records.

Indisputably, the respondent-plaintiff was co-owner to the extent of 1/3rd share in land measuring 58 kanal 2 marlas, subject matter of

the suit. The remaining $\frac{2}{3}$ rd to the extent of $\frac{1}{3}$ rd share each was co-owned by his two brothers namely Didar Singh and Bahal Singh defendants No. 1 and 2 therein. The respondent-plaintiff claimed $\frac{10}{21}$ share in land measuring 58 kanal 2 marlas on the basis of his $\frac{1}{3}$ rd share in total land plus 8 kanal 6 marlas purchased by him vide sale deed dated 12.8.2005 allegedly executed by his brothers Didar Singh and Bahal Singh. If plea of the respondent is accepted that there was no exchange of land and mutation No. 3461 with regard to exchange was wrongly got sanctioned by defendants No. 1 and 2, Didar Singh and Bahal Singh would be entitle to 19 kanal and slightly more than 7 marlas each out of land measuring 58 kanal 2 marlas, meaning thereby that they were co-owners to the extent of 38 kanal and slightly more than 15 marlas out of total land and could alienate the land only to that extent. The respondent-plaintiff has not challenged the sale deed executed by Didar Singh and Bahal Singh in favour of Sawarn Singh and Kundan Singh while claiming himself to be co-owner of $\frac{10}{21}$ share in total land. The sale deeds in favour of Sawarn Singh and Kundan Singh were executed on 18.7.2005 and 21.7.2005. Didar Singh and Bahal Singh have not challenged the sale deeds executed by them in favour of Sawarn Singh and Kundan Singh on any ground whatever.

Counsel for the respondent-plaintiff has not disputed that sale deeds executed in favour of Sawarn Singh and Kundan Singh defendants No. 1 and 2 at least to the extent of their share in the total land have not been set aside in appropriate proceedings. Perusal of documents Annexure A-4 and A-5, sale deeds executed by Bahal Singh would reveal that vide these sale deeds, he sold land measuring 21 kanal 1 marla as against his

share to the extent of 1/3rd measuring 19 kanal and slightly more than 7 marlas. As such, sale deeds executed by Bahal Singh to the extent of aforesaid share in favour of Sawarn Singh and Kundan Singh cannot be faulted with. Similarly, Didar Singh executed sale deeds Annexures A-6 and A-7 in favour of Kundan Singh son of Tara Singh in respect of land measuring 29 kanal 1 marla and those sale deeds would hold good to the extent of his share i.e. land measuring 19 kanal and slightly more than 7 marlas. Since Didar Singh and Bahal Singh had already sold their share to the extent of 1/3rd each in the suit land in favour of Sawarn Singh and Kundan Singh, they were left with no right to sell land measuring 8 kanal 6 marlas in favour of the respondent-plaintiff vide sale deed dated 12.8.2005 propounded by him. The courts have failed to consider this aspect of the matter while upholding plea of the respondent that he is owner in joint possession of suit land to the extent of 10/21 share. In this view of the matter, even if plea of the appellants with regard to bona fide purchasers is not sustained, the respondent-plaintiff shall be entitled to ownership in joint possession only to the extent of 1/3rd share in land measuring 58 kanal 2 marlas. The findings of the courts stand accordingly modified.

This brings the court to plea of the appellants that they are bona fide purchasers of land measuring 57 kanals 4 marlas vide sale deed dated 18.5.2006 executed by Bahal Singh, Sawarn Singh and Kundan Singh. On merits, in para 1 of the written statement, they have raised the plea of bonafide purchasers. A relevant extract therefrom reads as follows:-

“.....The replying defendants have purchased in a bonafide manner the above mentioned suit land

measuring 57 kanals 04 mls. alongwith share of canal water, rasta/passage, trees, connection Tubewell 7.5 BHP No. DR- 639, switch-starter, Motor-Bore and Kotha along with other belongings or infrastructures etc. from Swaran Singh son of Kundan Singh, Bahal Singh son of Chanan Singh, Kundan Singh @ Kunan Singh son of Tara Singh for valuable sale price of Rs. 19,4000/- vide registered sale deed dated 18.5.2006. Mutation No. 4059 has also been entered in this respect in the names of the replying defendants in the revenue record and khasra girdawari also sand (sic) in their names in the revenue record in respect of the suit land. The replying defendants have sown paddy and charra/fooder crops in the suit land at the spot. Plaintiff is not co-sharer and in joint possession of 1/3rd share in the above said suit land of joint khata measuring 58 kanal 2 mls.”

In para 3 of the written statement, they had admitted that plaintiff had gone to UP but denied for want of knowledge that he (plaintiff) started to reside in village Chowkhra Farm District Lakhimpur Khirri. They further denied that plaintiff had no knowledge of mutation No. 3461 or exchange.

Section 41 of the Transfer of Property Act, 1882 (hereinafter referred to as “the Act”) deals with transfer by ostensible owner. A relevant extract therefrom reads as under:-

“Where, with the consent, express or implied, of the persons

interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it.

Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

Defendants No. 1 and 2 filed the written statement contesting claim of the respondent-plaintiff. They did not adduce any evidence to prove that land to the extent of share of the respondent was exchanged by him with defendants No. 1 and 2 or that some land was given to respondent-plaintiff in the said exchange. Mutation in respect of exchange makes reference to an agreement of exchange of 1993 but the said agreement had not seen light of the day. Counsel for the appellants has failed to point out any materials on record that entry with regard to exchange was correctly made on the basis whereof mutation was sanctioned. As per the settled position in law, mutation neither creates nor extinguishes right in immovable property.

Tara Singh, the respondent-plaintiff appeared in the witness box and was cross examined by different sets of defendants separately. Counsel for the appellants has failed to point out any materials elicited in cross examination of Tara Singh to falsify and belie his plea that he was not aware of mutation with regard to exchange before filing of the appeal to challenge that mutation before the SDM, Tarn Taran in the year 2006. If Sh. Tara Singh was not aware of mutation of exchange sanctioned at his back,

there was no question of any implied consent being given by him to his brothers Didar Singh and Bahal Singh to sell the suit land even to the extent of his share measuring 19 kanal and slightly more than 7 marlas.

The proviso appended to Section 41 of the Act says that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith, only then he can save transfer of property in his favour at the behest of ostensible owner.

The question for consideration is, whether the appellants have been able to plead or prove the necessary ingredients of their having acted in good faith after taking reasonable care ascertaining that transferor had power to make the transfer.

Karanpal Singh, one of the appellants, appeared in the witness box. He tendered into evidence affidavit Ex. DW1/A whereby he reiterated version of the appellants with regard to bona fide purchasers for consideration. However, in para 1 of the affidavit, he has deposed that land was purchased for valuable sale price of Rs. 32,26,000/- as against Rs. 19,4000/- pleaded in the written statement. Nothing has been deposed by Karanpal Singh as to what reasonable care was taken by him to ascertain power of the transferors to make transfer. The appellants are claiming ownership of the suit land to the extent of 57 kanal 4 marlas on the basis of sale deed dated 18.5.2006 executed by Bahal Singh, Sawarn Singh and Kundan Singh. The sale in favour of Sawarn Singh and Kundan Singh was made by Didar Singh and Bahal Singh vide sale deeds of July 2005, a detailed reference whereof has been made in the earlier part of the judgment. The appellants did not examine Sawarn Singh and Kundan Singh

to prove that what reasonable care was taken by them for ascertaining authority of their transferor to make the transfer. In this view of the matter, it can safely be held that appellants have failed to prove one of the essential ingredients of proviso to Section 41 of the Act to assert their claim of bona fide purchasers.

This apart, in the written statement, they had raised the plea that they purchased the land for Rs, 19,4000/- or the same, at best, can be read as Rs. 19,40,000/- by taking a view that one of the zeros remained missing because of typographical error. The appellants never amended the written statement to raise a plea that they purchased disputed land for Rs. 32,26,000/-. That being so, statement of Karanpal Singh that land was purchased for Rs. 32,26,000/- is beyond pleadings. In cross examination, with regard to payment of sale consideration, Karanpal Singh had deposed to the following effect:-

“The sale consideration was paid in the presence of Sub Registrar, Tarn Taran. The sale consideration was paid through bank but I did not know the name of the bank. I cannot produce the bank statement in the court. It is wrong to suggest that no consideration has been passed. I cannot tell the names of the persons who were present at the time of alleged sale deed in question.”

Perusal of sale deed dated 18.5.2006 makes it evident that no payment was made in the presence of Joint Sub Registrar, Tarn Taran, as per endorsement made by the registering authority. The sale deed records that the entire amount of Rs. 32,26,000/- has been received in cash for

household expenditure. These facts further create suspicion in the plea of purchaser for valuable consideration.

To be fair to the appellants, counsel filed CM No. 8077-C of 2018 by invoking Section 151 of the Code for placing on record Annexure A-1 to A-7. The same was allowed vide order dated 18.5.2018 and Annexures A-1 to A-7 were taken on record, subject to just exceptions. Admittedly, Annexures A-1 to A-7 are not a part of records of the courts below. The appellants did not file application under Order 41 Rule 27 of the Code seeking permission to adduce additional evidence. In the regular second appeal, additional evidence can be adduced with permission of the Court. That being so, the appellants can not derive any advantage to their contention from the documents Annexure A-2 and A-3, copies of saving bank accounts of Karanpal Singh to prove withdrawal of amount from the said account on 18.5.2006. Even otherwise, if the appellants had to make payment of sale consideration after withdrawal from their bank account, there was no reason for them not to get prepared a bank draft or payees cheque etc. as an evidence of payment of sale consideration. In this view of the matter, it can safely be held that the appellants have even failed to substantiate their plea that transfer of land in their favour is for a valuable consideration. Analyzed from any angle, contention of the appellants with regard to bona fide purchasers of land to the extent of share of the respondent-plaintiff measuring 19 kanal and slightly more than 7 marlas can not be accepted.

Counsel for the appellants is right in his submission that observations of the trial court on the question of bona fide purchasers,

reproduced hereinbefore, are the result of misreading of evidence, thus, cannot be allowed to sustain. Nevertheless, even if findings of the trial court qua the aforesaid extent are set aside, the appellants would not be entitle to derive any advantage thereof to establish their plea of bona fide purchasers without notice and for valuable consideration, in view of discussion hereinbefore.

For the foregoing reasons, the appeals are partly allowed. Judgments and decrees passed by the courts are modified to the effect that respondent-plaintiff is owner in joint possession to the extent of 1/3rd share in land measuring 58 Kanal 2 marlas and not 10/21 share as has been allowed by the courts. In the peculiar facts and circumstances, parties are left to bear their own costs.

(Rekha Mittal)
Judge

18.12.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes