

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-7446-2011 (O&M)

Date of decision: 11.11.2022

Reserved on: 27.10.2022

Hardev Singh

....Petitioner

Versus

Surjit Kaur

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. G.S.Punia, Sr. Advocate with
Ms.Harveen Kaur, Advocate for the petitioner

Mr. M.S.Saini, Advocate for the respondent

ANIL KSHETARPAL, J

1. The petitioner before this Court is a judgment debtor. He is contesting an Execution Petition filed by the respondent (decree-holder). The Executing Court, while refusing to cull out the issues, has summarily dismissed the petitioner's objection petition filed under Section 47 and 51 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). The correctness of the same has been assailed in this revision petition.

2. Relevant facts, in brief, are required to be noticed. Sh.Ajit Singh, husband of the decree-holder, was owner of the property. He transferred his agricultural land as well as residential house in favour of his wife- Smt. Surjit Kaur (to the extent of 2/3rd share) and mother-Smt. Gurdip Kaur (to the extent of 1/3rd share) vide registered sale deed dated 10.09.1971. Thereafter, Sh.Ajit Singh executed a sale deed in favour of the petitioner on 07.12.1989. Smt. Surjit Kaur, wife of Sh.Ajit Singh

filed a suit for possession of the house, which was decreed by the trial court on 13.06.1997. During the pendency of the petitioner's first appeal against the judgment and decree dated 13.06.1997, Smt. Gurdip Kaur, mother of Sh.Ajit Singh, died intestate. The petitioner's first appeal was dismissed on 13.10.2002 and the decree passed was also affirmed in the second appeal. Smt. Surjit Kaur's Execution Petition, with a prayer to deliver physical possession, is pending. The petitioner's objection petition, as already noticed, has been dismissed by the executing court on the following grounds:-

1) The petitioner nowhere asserted that Smt. Gurdip Kaur, mother of Sh.Ajit Singh, had also purchased 1/3rd share alongwith Smt. Surjit Kaur. For the first time, in the Execution Petition, it is not permissible for the petitioner to take such an objection.

2) The petitioner has not placed on file the sale deed dated 10.09.1971 to prima facie prove that late Smt. Gurdip Kaur was owner of 1/3rd share in the suit property.

3. In view of the aforesaid, the executing court has formed an opinion that there is no need to frame any issue to decide the objections.

4. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook. On the one hand, learned counsel representing the judgment debtor (the petitioner) submits that in view of the principle enshrined in Section 43 of the Transfer of Property Act, 1882, the petitioner became co-owner of the property to the extent of 1/3rd share on account of death of Smt. Gurdip Kaur. While elaborating, he submits that Smt. Gurdip Kaur died

intestate during the pendency of the petitioner's first appeal and her share was inherited by Sh.Ajit Singh. He submits that Section 43 of the Transfer of Property Act, 1882 recognizes that if the transfer is made by an unauthorized person and he subsequently acquires interest in the property transferred, then, such transfer, at the option of the transferee, operates on any interest, which the transferor may acquire in such property, during the subsistence of the contract. It is contended that the executing court has failed to decide the issue involved.

5. On the other hand, learned counsel representing the decree-holder (respondent herein) contends that the petitioner, during the pendency of the first appeal, did not file any application for amendment of the written statement particularly when Smt. Gurdip Kaur died. He submits that in these circumstances, the petitioner cannot be permitted to take this objection, at this stage, when he has failed to take this defence in the suit. While drawing the attention of the Court to Explanation IV of Section 11 of the Code of Civil Procedure, 1908, he submits that once the petitioner has failed to take this defence in the suit, then, he is debarred from taking this objection at this stage.

6. This Court has analyzed the arguments of the learned counsel representing the parties. It may be noted here that Section 47 CPC provides that all objections arising between the parties to the suit in which the decree was passed, relating to the execution, discharge or satisfaction of the decree, shall be required to be determined by the court executing the decree and not by a separate suit.

7. At this stage, it would be appropriate to extract Section 43

of the Transfer of Property Act, 1882, as under:-

43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person 1[fraudulently or] erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.”

8. It is evident from the reading of Section 43 that if an unauthorized person, after transfer of the property, subsequently acquires an interest in the property so transferred, such transfer, at the option of the transferee, operates on any interest which the transferor may acquire in such property during the subsistence of their contract. In **Hardev Singh vs. Gurmail Singh 2007 (1) RCR (Civil) 877**, the Supreme Court held that Section 43 embodies the rule of feeding the grant by estoppel and provides that where a person (transferor) fraudulently or erroneously makes a representation to another (transferee), who acts upon such representation, then the person (transferor) so making the representation shall be estopped from avoiding the contract if he acquires an interest in the subject matter of the contract subsequently. In such a situation, the transferee shall have the option to claim the property acquired subsequently by enforcing the contract, if subsisting.

9. Thus, it was incumbent on the executing court to decide such an issue. As regards the second objection of the learned counsel that the petitioner should have amended his written statement during the

pendency of the first appeal, it may be noticed that the question as to whether the defence taken by the petitioner is barred by the principle of constructive res judicata embodied in explanation IV of Section 11 CPC, is again, a debatable issue which is required to be decided by the civil court after permitting the parties to lead evidence.

10. It may be noted here that the transfer of ownership in favour of Smt. Gurdip Kaur to the extent of 1/3rd share in the suit property is no longer in dispute because the petitioner has placed on file the sale deed dated 10.09.1971 which shows that Sh.Ajit Singh did transfer 2/3rd share in favour of his wife Smt. Surjit Kaur, whereas, 1/3rd share was transferred in favour of Smt. Gurdip Kaur. This Court has also seen the judgment passed by the First Appellate Court. Smt. Surjit Kaur (decree-holder) filed a suit for grant of decree of possession on the ground that her husband Sh.Ajit Singh was not entitled to sell the property in favour of Sh.Hardev Singh, the judgment debtor as he was left with no right, title or interest in the property. In the suit, the sale deed executed by Sh.Ajit Singh in favour of Smt. Surjit Kaur and late Smt. Gurdip Kaur, on 10.09.1971 was duly exhibited. Since Smt. Gurdip Kaur died during the pendency of the first appeal, therefore, neither any issue nor any defence to this effect was raised in the written statement by the petitioner.

11. Learned counsel representing the petitioner while relying upon the judgment passed in ***Kanamathareddi, Seetamma vs. Kanamathareddi Kotareddi and another*** AIR 1949 (Madras) 586 contends that Explanation IV of Section 11 CPC would not operate if the

judgment debtor acquires a fresh cause of action during the pendency of the suit or the first appeal.

12. In the considered opinion of this Court, the Executing Court was not correct while dismissing the objection petition without granting an opportunity to the petitioner to prove his case. Once Section 47 CPC mandates that all the questions between the parties to the suit should be decided in the execution of the decree, itself, by the executing court, then it was incumbent upon the Executing Court to cull out the relevant issues. At this stage, in the absence of evidence, it would not be appropriate to return any final finding. The arguments of the learned counsel representing the parties give rise to various debatable issues which, at the first instance, should be adjudicated by the executing court. In view of the aforesaid facts, the order dated 05.11.2011 dismissing the petitioner's objection petition is set aside and the executing court is requested to decide the following issues, after granting an opportunity to the parties to lead evidence:-

(1) Whether, in view of the equitable principle of feeding the grant by estoppel enshrined in Section 43 of the Transfer of Property Act, 1882, the judgment debtor is entitled to claim interest in the property on the basis of sale deed dated 05.12.1989 executed by Sh.Ajit Singh in his favour? OPJD

(2) Whether the judgment debtor's objection petition is hit by rule of constructive res judicata embodied in Section 11 Explanation IV? OPDH

13. Since the judgment and decree was passed by the trial court

on 13.06.2002, the executing court is requested to decide the execution petition expeditiously. The parties through their respective counsels are directed to appear before the Executing Court on 01.12.2022.

14. The revision petition stands allowed.

15. All the pending miscellaneous applications, if any, are also disposed of.

11.11.2022

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE