In the High Court of Punjab and Haryana, at Chandigarh

1. Regular Second Appeal No. 3494 of 2006 (O&M)

Nagar Singh

... Appellant(s)

Versus

Pirthi and Others

... Respondent(s)

AND

2. Regular Second Appeal No. 3495 of 2006 (O&M)

Ram Kumar

... Appellant(s)

Versus

Pirthi and Others

... Respondent(s)

DATE OF DECISION: 02.08.2022

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Rakesh Gupta, Advocate
for the appellant(s).

Mr. Rajinder Goyal, Advocate
for the respondent No.1 and 2.

<u>Anil Kshetarpal, J.</u>

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in ***Pankajakshi (Dead) through LRs v. Chandrika and Others (2016) 6 SCC 157***.

2. These two regular second appeals have arisen from a common

judgment passed by the learned trial Court as well as the First Appellate Court. Two defendants assail the concurrent findings of fact arrived at by both the Courts below by filing two separate appeals. The learned counsel for the parties are *ad idem* that these appeals can conveniently be disposed of by a common judgment.

3. The plaintiffs filed a suit for grant of decree of declaration to the effect that they are owners in the enjoyment and actual possession of the land measuring 10 kanals and 15 marlas out of the land described in para 1 of the plaint and the judgment and decree dated 28.02.1989 suffered by the predecessor of the defendant No.4 to 10 in favour of the defendant No.1 to 3 and the sale deed dated 11.10.1996 are not binding on their rights along with seeking the consequential relief of permanent injunction.

4. Sh.Deep Chand son of Sh.Bakhtawar was owner in possession of the land to the extent of 1/6th share in the joint land measuring 46 kanals and 8 marlas. He transferred the aforesaid share to the plaintiffs vide sale deed dated 11.01.1988. Similarly, Sh.Manga was also owner to the extent of 1/6 share share equivalent to 7 kanals and 15 marlas of the land. It is the case of the plaintiffs that Sh.Manga transferred his share in the joint land measuring 7 kanals and 15 marlas in exchange of 4 kanals and 15 marlas belonging to the plaintiffs. Thus, the plaintiffs became owner of the land measuring 7 kanals and 15 marlas received from Sh.Manga and also of the remaining land measuring 3 kanals after giving the land measuring 4 kanals and 15 marlas to Sh.Manga.

5. Subsequently, the aforesaid exchange was acknowledged before the Civil Court in the Civil Suit bearing No. 189 of 1989 decided on

16.05.1988. However, Sh.Manga, along with his brothers, namely Sh.Chota and Sh.Devi Chand subsequently suffered a collusive decree on 28.02.1989 in favour of the defendant No.1 to 10 in respect of the land measuring 21 kanals and 4 marlas. The brothers of Sh.Manga also sold the remaining 2 kanals and 8 marlas in favour of the defendant No.11 and 12.

6. The defendants denied the exchange between Sh.Manga and the plaintiff. Alternatively, it was pleaded that such exchange could only be executed by a registered document. The defendant No.11 claims that he is a bonafide purchaser of the land measuring 2 kanals on payment of the sale consideration of ₹25,000/-.

7. Both the Courts below, on appreciation of the evidence, have found that there was an oral exchange between Sh.Manga and the plaintiffs, which was, subsequently, acknowledged by a judgment and decree dated 16.05.1988. Therefore, the rights of the plaintiffs on the land measuring 10 kanals and 15 marlas are protected.

8. On 28.08.2009, the following substantial questions of law were culled out:-

> *"1. Whether in the absence of any entry in the revenue record reflecting the respondents as owners, the appellant's plea of bonafide purchaser could be rejected?*
>
> *2. Whether a decree reflecting an exchange requires compulsory registration?*
>
> *3. Whether an adverse order can be passed against a party (Randhir Singh), if he is given up by the plaintiff?*
>
> *4. Whether in the absence of partition of a joint khata, co-*

sharers can claim exclusive ownership of individual portions pursuant to a decree of exchange?"

9. Heard the learned counsel representing the parties, at length and with their able assistance, perused the judgments passed by both the Courts below and the record thereof, which was requisitioned.

10. The learned counsel representing the appellants submits that they are bonafide purchasers. Therefore, their rights are protected. He further contends that the transfer of the property by way of an oral exchange requires compulsory registration. He further submits that a co-sharer cannot claim exclusive possession of an individual portion pursuant to a decree of exchange. He further contends that the sale in favour of the defendant No.11 and 12 could not be set aside by both the Courts below as the plaintiffs are entitled to protect their ownership only. It has further been stated that the defendant No.12 was not produced against in the suit by the plaintiffs on 19.02.1998.

11. On the other hand, the learned counsel representing the plaintiffs contends that the appellants have failed to fulfill the necessary ingredients of Section 41 of the Transfer of Property Act, 1882 (hereinafter referred to as "the 1882 Act") and it is well settled that a person cannot transfer a better tittle than what he himself had. He further contends that the sale deed in favour of defendant No.11 and 12 is common, therefore, defendant No.12 is duly represented and can also defend the interest of defendant No.11.

12. As regards the first argument, it would be noted that Section 41 of the 1882 Act protects a bonafide purchaser of immovable property, who

has purchased the property from an ostensible owner. Basically, the concept of bonafide purchaser is only in Section 19 of the Specific Relief Act, 1963 (hereinafter referred to as "the 1963 Act"). In the 1882 Act, a bonafide transferee, who has purchased the immovable property from ostensible owner is protected, if he fulfills the ingredients of Section 41 of the 1882 Act. After analyzing Section 41 of the 1882 Act, the Supreme Court in ***Hardev Singh v. Gurmail Singh (Dead) By LRs (2007)2 SCC 404*** has culled out the following ingredients:-

> *(i) the vendor should be an ostensible owner;*
>
> *(ii) the sale is for a valuable consideration;*
>
> *(iii) the owner, by express or implied consent, has projected the ostensible owner to be the real owner;*
>
> *(iv) the transferee has taken a reasonable care to ascertain the title of his vendor.*

13. In the present case, the appellants did not claim that the plaintiffs ever impliedly or explicitly acknowledged Sh.Mangu or his brothers to be the owners or ever represented to them that the aforesaid persons are the actual owners.

14. As regards the second argument, it would be noted that exchange is governed by Section 118 of the 1882 Act. However, In ***Sona Ram and Another v. Mulakh Raj alias Lekh Raj and Another 1999(1) PLJ 165*** and ***Shiv Ram v. Smt. Bimla Devi 2000(2) Civil Court Cases 333***, it has been held that in the States of Punjab and Haryana, an oral exchange is permissible and no document is required to be executed for implementing the exchange. These judgments are based upon the fact that the relevant provisions of the 1882 Act have not been extended to the States of Punjab,

Haryana and U.T. Chandigarh.

15. The learned counsel representing the appellants relies upon the judgment passed in ***Satyawan v. Raghbir 2002(2) RCR (Civil) 669*** while contending that if exchange is reduced into writing, then, the provisions of the Registration Act, 1908, shall be applicable irrespective of the non-applicability of the relevant provisions of the 1882 Act and accordingly, the exchange deed shall be required to be registered. It would be noted here that in the present case, the plaintiffs have successfully proved that there was an oral exchange between the parties, which was, subsequently, acknowledged before the Court vide judgment and decree dated 16.05.1988. The decree has been passed acknowledging the pre-existing rights. Therefore, there is no transfer of title in the judgment and decree for the very first time.

16. As regards the next argument of the learned counsel representing appellants, it would be noted that once the parties are co-owners in the undivided khata/khewat, then every co-owner is deemed to be in possession of the other part thereof. In such circumstances, the exchange followed by the delivery of possession is permissible because a co-sharer can transfer the possession of the portion which he possesses.

17. The next argument is with regard to the effect of defendant No.12 having been given up. It would be noted here that there is a common sale deed in favour of the defendant No.11 and 12. The defendant No.1 can always protect the rights of the defendant No.12 particularly when there is no *inter se* conflict between them.

18. The last argument of the learned counsel representing the appellants has some substance. While granting the decree of declaration,

both the Courts below were not required to set aside the judgment and decree dated 28.02.1989 passed in favour of the defendants or the sale deed dated dated 11.10.1996. It is suffice to mention that there shall be a decree in favour of the plaintiffs and the judgment and decree dated 28.02.1989 and the sale deed dated 11.10.1996 shall not affect their rights and shall not be binding upon them, in any manner, whatsoever.

19. With the aforesaid modifications, both the appeals are disposed of. The miscellaneous application(s) pending, if any, in both the appeals, shall also stand disposed of.

(Anil Kshetarpal)
Judge

August 02, 2022
"DK"

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