

TARUN SAHNI
2022.12.23 13:41

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

**RSA No.6344 of 2016
Date of Decision::21.12.2022**

Gurbax Kaur and others **.....Appellants**

Vs.

Major Singh and others **.....Respondents**

CORAM:- HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Atul Jain, Advocate for the appellants.

 Mr. Satinder Khanna, Advocate for respondents No.1 and 3.

 Service of other respondents dispensed with.

DEEPAK GUPTA, J.

Plaintiffs of the case are in this appeal against the concurrent findings of the Courts below. In order to avoid confusion, the parties shall be referred as per their status before the learned trial Court.

2. According to plaintiffs (now appellants), they are owner in possession of land situated in village Wadala Kalan, Tehsil and District Kapurthala (detailed in para No.1 of the plaint) apart from some other adjoining land, which falls in Village Talwandi Bakha, Tehsil and District Kapurthala. The land owned by the plaintiffs is situated alongside the boundary wall of Village Phiali, Tehsil and District Kapurthala. In order to provide a passage to their land from the side of Village Phiali, plaintiff No.1 purchased 1/4th share i.e. half Marla in the land comprised in Khewat No.80 Khatoni No.125, Khasra No.393/223/1(0-2), which is a Gair Mumkin Rasta, situated in Village Phiali vide registered sale deed dated 21.03.2006 for consideration of ₹6,000/- from defendants No.4 to 7 (respondents No.4 to 7 in this appeal). After becoming co-sharer in the said passage to the extent of 1/4th share (*which is subject-matter of the present lis*), plaintiff No.1 along with her sons have been peacefully using the said passage for the ingress and egress to their own land. Mutation on the basis of sale deed

RSA No.6344 of 2016

dated 21.03.2006 was also sanctioned in favour of plaintiff No.1.

Further case of the plaintiffs is that defendants No.1 to 3 (now respondents No.1 to 3) moved an application dated 20.11.2006 under Order 39 Rule 2-A CPC in Civil Suit No.205 of 2005 titled as **Major Singh and others Vs. Swaran Kaur and others**, claiming to be co-sharers in the aforesaid passage i.e. Khasra No.393/223/1(0-2) and further claimed injunction vide order dated 27.02.2006 against defendants No.4 to 7 to be in their favour from alienating or transferring the said passage. Plaintiff No.1 was impleaded as respondent No.5 in the said application under Order 39 Rule 2-A CPC, who filed reply pleading therein that she did not have any knowledge of the suit No.205/2005 or any injunction order and that she was bonafide purchaser of the passage in dispute vide sale deed dated 21.03.2006 in her favour. However, the application under Order 39 Rule 2-A CPC was withdrawn by defendants No.1 to 3 on the basis of some compromise with other defendants vide order dated 28.02.2007. Plaintiff No.1 came to know that later on, defendants No.4 to 7 joined hands with defendants No.1 to 3 and in collusion with each other and in order to defeat the rights of the plaintiffs in the passage in dispute, entered into compromise by admitting the claim of defendants No.1 to 3, who were the plaintiffs in the above-said suit and on the basis of that compromise, judgment and decree dated 09.04.2007 was passed.

The abovesaid judgment and decree dated 09.04.2007 passed in suit No.205 of 2005 titled **Major Singh and others Vs. Swaran Kaur and others**, on the basis of alleged compromise between defendants No.1 to 3 on one hand and defendants No.4 to 7 on other hand, is alleged by the plaintiffs to be not binding on their rights to the extent of their share in the disputed passage, as plaintiffs were not a party to any such compromise or to the suit. Armed with the judgment and decree dated 09.04.2007 passed in the above-said suit, defendants No.1 to 3 started preventing plaintiff No.1 and her sons from using and enjoyment of passage.

With the above averments, plaintiffs prayed for a decree of declaration that plaintiff No.1 is the co-sharer in possession to the extent of 1/4th share in the disputed passage by virtue of sale deed dated 21.03.2006 and all the plaintiffs are entitled to use the same for ingress and egress to their land situated

RSA No.6344 of 2016

in Village Wadala Kalan. They further prayed for a decree of declaration that judgment and decree dated 09.04.2007 passed in suit No.205 of 2005 titled **Major Singh and others Vs. Swaran Kaur and others** by learned Additional Civil Judge (Senior Division), Kapurthala, based on compromise inter-se the defendants, was the result of collusion and in order to deprive the plaintiff No.1 of her share in the suit property and so, said judgment and decree are not binding upon her. Plaintiffs further prayed for decree of permanent injunction to restrain the defendants from preventing the plaintiffs from peaceful use and enjoyment of the passage in dispute.

3. Only defendants No.1 and 2 contested the suit. Written statement filed by them was later on adopted by defendant No.3. Defendants No.4 to 7 were proceeded ex parte.

4. In their written statement, contesting defendants raised some preliminary objections, as reflected in the issues. They denied that any alleged land owned and possessed by the plaintiffs situated in Village Wadala Kalan was situated on the boundary line of Village Phiali or that in order to approach their land from the side of Village Phiali, plaintiff No.1 had purchased any share in the disputed passage vide sale deed dated 21.03.2006 from defendants No.4 to 7.

These defendants pleaded further that in fact their real brother Bhagtu was was owner in possession of 19 kanal 16 Marlas detailed in para No.2 of the written statement situated within the revenue estate of Village Phiali being a co-sharer with others. No passage was carved out during consolidation for the said land and, therefore, Swaran Singh along with other co-sharers purchased land measuring 35 Marlas including the disputed land comprised in Khasra No.393/223/1 (0-2) vide three sale deeds i.e. dated 01.03.1985 (for 15 Marlas), dated 08.10.1984 (for 6 Marlas) and dated 08.10.1994 (for 14 Marlas) for its use as passage for their remaining land. Said 35 Marlas of land including the suit land are situated within the revenue estate of Village Phiali. The passage was complete only by joining the disputed land. Mutations were duly sanctioned in the name of vendees including Swaran Singh in the revenue record. Swaran Singh and other co-sharers started using this passage to approach their respective portion of the

RSA No.6344 of 2016

land owned by them.

Later on, Swaran Singh sold his land measuring 19 kanal 16 Marlas (detailed in para No.2 of the written statement) to defendants No.1 to 3 vide three sale deeds i.e. dated 06.01.1988 (for 6 kanals), dated 12.06.1992 (for 3 kanal 16 Marlas) and dated 22.05.1992 (for 10 kanals) respectively for valuable sale consideration, all with all rights appurtenant thereto including the disputed passage, which is part and parcel of the land measuring 35 Marlas, as there was no other passage attached to the land sold by Swaran Singh. After the death of Swaran Singh, his estate devolved upon defendants No.4 to 7. Unfortunately, after the death of Swaran Singh, land of the passage as referred above, which was recorded in the revenue record in the name of Swaran Singh along with other co-sharers, the mutation thereof was sanctioned in favour of his legal heirs, i.e. respondents No.4 to 7, on the basis of natural inheritance along with other land and taking undue advantage thereof, defendants No.4 to 7 threatened to alienate the said passage to some other person so as to deprive the defendants no.1 to 3 from using the passage to approach their land.

Forced with these circumstances, defendants No.1 to 3 filed civil suit No.205 of 2005 titled as **Major Singh and others Vs. Swaran Kaur and others** for declaration regarding the aforesaid passage and permanent injunction against defendants No.4 to 7 of this case. Vide order dated 27.02.2006, the Court of learned Additional Civil Judge (Senior Division), Kapurthala allowed the application for ad-interim injunction and restrained defendants No.4 to 7 of this case from alienating/ transferring the land of passage or obstructing the defendants No.1 to 3 from using the passage. The appeal against order dated 27.02.2006 filed by respondents No.4 to 7 was rejected on 04.08.2006. However, in the said order dated 27.02.2006, disputed khasra No.393/223/1(0-2) was inadvertently omitted, though later on, the said khasra number was allowed to be added on the application for correction. Taking advantage of the inadvertent mistake, defendants No.4 to 7 executed the sale deed dated 21.03.2006 propounded by the plaintiffs without any consideration just to defeat the rights of defendants No.1 to 3 and in order to cause obstruction in the user of the passage. Faced with it, defendants No.1 to 3 as plaintiffs in the above suit moved an application under Order 39 Rule 2-A CPC for the Contempt of Court Act against defendants No.4 to

RSA No.6344 of 2016

7, wherein plaintiff No.1 of the present case was also impleaded as a party. The application under Order 39 Rule 2-A CPC was later on withdrawn by them (defendants No.1 to 3) on the basis of compromise, inasmuch defendants No.4 to 7 admitted their right and interest in the passage in dispute by virtue of the sale deeds executed by Swaran Singh in their favour.

It is submitted by the contesting defendants that no new rights were created by way of the compromise in their favour, as only the right already vested in them was confirmed. Later on, judgment and decree dated 09.04.2007 was passed on the basis of compromise. Defendants pleaded the sale deed propounded by the plaintiffs to be null and void, which is hit by the principle of lis-pendens. Defendants denied that plaintiffs ever used the passage in dispute and submit that disputed khasra of 2 Marlas cannot be used as passage without the remaining 33 Marlas as total area of the private passage is 35 Marlas owned and possessed by defendants No.1 to 3 and other co-sharers, wherein the plaintiffs have no right or interest.

With this stand and controverting other averments of the plaint, the contesting defendants prayed for dismissal of the suit.

5. In rejoinder, the plaintiffs reiterated their case by controverting the stand of the defendants.

6. Following issues are framed by the trial Court:-

1. Whether the plaintiffs are entitled to the declaration as prayed for?OPP
2. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for?OPP
3. Whether the suit is not maintainable in the present form?OPD
4. Whether the plaintiffs have no cause of action and locus standi to file this suit?OPD
5. Whether the plaintiffs are estopped by their own act and conduct from filing this suit? OPD

RSA No.6344 of 2016

6. Whether the plaintiffs have not come to the Court with clean hands and have suppressed the material facts?OPD
7. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD
8. Whether the suit is time barred? OPD
9. Relief.”

7. After taking the evidence produced by the parties, the matter was heard by learned trial Court. On Issue No.1, it was held that sale deed dated 21.03.2006 relied by the plaintiffs was hit by the doctrine of lis-pendens and that plaintiffs were bound by the judgment and decree dated 09.04.2007 passed in Civil Suit No.205 of 2005. As such, issue was decided against the plaintiffs. In view of this finding, Issue No.2 was decided against the plaintiffs by holding that they were not entitled to any injunction. Under Issue No.3, the suit was held to be maintainable. Under Issue No.4, plaintiffs were held to have cause of action. Issues No.5 to 8 were disposed of as not pressed for. Consequent to all these findings, suit was dismissed vide judgment and decree dated 11.02.2014 by learned trial Court.

8. The appeal filed by the plaintiffs, was dismissed by the First Appellate Court vide judgment and decree dated 29.04.2016.

9. Against the above-said concurrent findings, plaintiffs are in this appeal. It is contended that there was ample evidence on record to prove that plaintiff No.1 had become co-sharer in possession to the extent of 1/4th share in the disputed passage comprised in khasra No.393/223/1(0-2) situated in Village Phiali. Learned Court below failed to take into consideration the fact that sale deeds (Ex.D1, Ex.D3, Ex.D3/1 and Ex.D5) executed by Swaran Singh pertained to different Village Talwandi Bakhu and not of the land of Village Phiali, where the suit land/ passage is situated. In the sale deeds relied by the defendants, disputed passage does not find any reference. The learned Courts below failed to take into account the fact that a declaratory decree only recognises the pre-existing

RSA No.6344 of 2016

rights of a person and does not confer any right for the first time. The judgment and decree dated 09.04.2007 (Ex.P6 and Ex.P10) passed in Suit No.205 of 2005 titled **Major Singh and others Vs. Swaran Kaur and others**, on the basis of compromise between defendants No.1 to 3 on one hand and defendants No.4 to 7 on the other hand, at the back of plaintiffs of this case, neither created any right in favour of defendants No.1 to 3 nor the same is binding upon the rights of the plaintiffs of this case. The fact has been ignored by the Courts below that compromise decree was obtained by fraud and collusion to defeat the rights of the plaintiffs, a pendente-lite transferee and so the said decree was liable to be set aside. Defendants No.1 to 3 were well aware about the rights of the plaintiffs in the suit property, as they themselves had moved an application under Order 39 Rule 2-A CPC which they later on withdrew. It is further contended that principle of lis-pendens contained in Section 52 of the Transfer of Property Act is not applicable, when the judgment and decree is result of collusion between the parties. All the defendants had complete knowledge of the sale deed dated 21.03.2006 Ex.P4 in favour of plaintiff No.1 and so, the compromise effected amongst the defendants inter-se was the result of collusion. Attention has further been drawn towards the fact that DW1 Amarjit Singh, one of the contesting defendants admitted in his cross-examination that in none of the sale deeds relied by them, the disputed passage situated in Village Phiali find mention. With all these submissions, prayer is made for setting aside the impugned judgments passed by the Courts below and to decree the suit of the plaintiffs/ appellants.

10. Refuting the aforesaid contentions, it is urged by learned counsel for the respondents that both the courts below have appreciated the evidence in right perspective on the basis of evidence on record and that the present appeal against the concurrent findings, deserve to be dismissed.

11. I have considered submissions of both the sides and have perused the record including the trial Court record carefully.

12. It is not disputed that Swaran Singh, the predecessor-in-interest of defendants No.4 to 7 was owner of land situated in Village Phiali, as well as in

RSA No.6344 of 2016

Village Wadala Kalan and Talwandi Bakhu. Boundaries of all these villages are adjacent to each other. It is also undisputed that as Swaran Singh and other co-sharers of the land situated in Village Phiali did not have any Rasta to approach their land from the side of other village, so they jointly purchased land measuring 35 Marlas, which also included the disputed land comprised in khasra No.393/223/1(0-2) of Village Phiali and, thus, Swaran Singh became co-sharer in the said land. The evidence on record also shows that said passage including the disputed land was being used by Swaran Singh and other co-sharers to approach their land. Swaran Singh, during his lifetime sold his share in land measuring 19 kanal 06 Marlas situated in the revenue estate of Village Phiali to defendants No.1 to 3 vide sale deeds Ex.D1, Ex.D3, Ex.D3/1 and Ex.D5 in the year 1988 and 1992. As per the recitals mentioned in these sale deeds, the land, i.e. subject-matter of the sale deeds was being sold to Major Singh etc., i.e. defendants No.1 to 3 of this case along with rights appurtenant thereto including share in motor tube-well connection, Rasta/passage etc. However, it is not disputed by the defendants that specific khasra numbers of the Rasta, including that of the suit land comprised in khasra No.393/223/1 (0-2), were not mentioned in the sale deeds executed in favour of defendants No.1 to 3. DW1 Amarjit Singh, one of the contesting defendants admitted during his cross-examination that in none of the sale deeds relied by them, passage in question situated in Village Phiali has been mentioned nor there is any specific reference of the said passage.

13. The contention of learned counsel for the respondents - defendants is that since the passage of 35 Marlas, which included the disputed passage comprised in khasra No.393/223/1(0-2) was the only passage to approach their land by Swaran Singh and other co-sharers, therefore, reference in the sale deeds Ex.D1, Ex.D3, Ex.D3/1 and Ex.D5 to the passage appurtenant thereto, is the reference of the disputed passage and so, defendants No.1 to 3 are deemed to have purchased the disputed passage as well. I do not find merit in this contention. It is an admitted fact that Swaran Singh along with other co-sharers had purchased 35 Marlas of land including the disputed passage of 2 Marla vide sale deeds dated 01.03.1985, 08.10.1984 and 08.10.1994, as is referred by the contesting defendants in their own written statement. Even though the said 35 Marlas of land was purchased for the purpose of using it as a passage to approach their other

RSA No.6344 of 2016

land, the fact remains that this entire 35 Marlas of land including the disputed land were purchased by way of separate sale deeds and, thus, this land has its own distinct identity. Simply because this land of 35 Marlas was being used as a passage to approach other land by Swaran Singh and other co-sharers, does not lose its identity nor become part of other land of Swaran Singh with co-sharers.

14. As observed earlier that it is admitted by DW1 Ajit and as also evident from the sale deeds Ex.D1, Ex.D3, Ex.D3/1 and Ex.D5 that defendants No.1 to 3 did not purchase the suit land i.e. 393/223/1 (0-2) nor there is any specific reference of this land in the sale deeds. Swaran Singh was having 1/4th share in the disputed land and upon his death, his estate devolved upon defendants No.4 to 7, who sold the same in favour of the plaintiff No.1 – Gurbax Kaur vide sale deed dated 21.03.2006 (Ex.P4), which is duly proved on record. As such, plaintiff No.1 acquired right in the disputed land to the extent of 1/4th share having become co-sharer therein by the dint of sale deed Ex.P4.

15. Now, the question arises as to whether the said sale deed Ex.P4 relied by the plaintiffs is hit by the doctrine of lis-pendens due to its execution during pendency of the suit between defendants No.1 to 3 on one hand and defendants No.4 to 7 on the other hand, in which none of the plaintiffs of this case were a party.

16. As per own case pleaded by the defendants No.1 to 3, legal heirs of Swaran Singh i.e. defendants No. 4 to 7, were threatening to alienate the passage of 35 Marlas including the disputed land, due to which they (defendants No.1 to 3) had filed Civil Suit No.205 of 2005 titled '**Major Singh and others Vs. Swaran Kaur and others**' against defendants No.4 to 7 of this case. Injunction application under Order 39 Rules 1 and 2 CPC was allowed on 27.02.2006 but as pleaded by defendants themselves, disputed khasra No.393/223/1(0-2) was not mentioned in the order. Later on, the application for correction moved by defendants No.1 to 3 was allowed by including the disputed khasra in the injunction order. However, by that time, defendants No.4 to 7 already sold the disputed land comprised in khasra No.393/223/1 (0-2) in favour of plaintiff No.1

RSA No.6344 of 2016

vide sale deed dated 21.03.2006 Ex.P4.

17. After this sale Ex.P4, defendants No.1 to 3 filed an application under Order 39 Rule 2-A CPC against defendants No.4 to 7 of this case and also by impleading plaintiff No.1 – Gurbax Kaur being the vendee. Reply was filed by plaintiff of this case Gurbax Kaur pleading sale in her favour. However, that application was withdrawn on account of compromise between defendants No.1 to 3 on one hand and defendants No.4 to 7 on other hand and based on the compromise amongst them, the suit was decreed on 09.04.2007. Copy of judgment and decree are Ex.P6 and Ex.P10. Ex.P7 is the copy of compromise.

18. It, thus, emerges that compromise was entered between defendants No.1 to 3 on one hand and defendants No.4 to 7 on the other hand, after plaintiff of this case Gurbax Kaur had already filed reply to the application under Order 39 Rule 2-A CPC. All the defendants were well aware of the sale deed in favour of plaintiff No.1. However, said plaintiff No.1 was not made part of the compromise. Apparently, compromise Ex.P7 and the judgment and decree dated 09.04.2007 based on the said compromise are the result of collusion between defendants No.1 to 3 on one hand and respondents No.4 to 7 on the other hand, as the compromise Ex.P7 reveals that defendants No.4 to 7 pleaded their no objection, if mutation regarding land in dispute being used as passage be sanctioned in favour of plaintiffs of that case, i.e. defendants No.1 to 3 of the present case by conceding that said land had been sold by them earlier. Said conceding of the rights by defendants No.4 to 7 was contrary to the record, because Swaran Singh, the predecessor-in-interest of defendants No.4 to 7 had not executed any sale deed regarding the passage including the disputed khasra numbers. Since defendants No.4 to 7, prior to entering into this compromise dated 28.02.2007 (Ex.P7) had already executed sale deed dated 21.03.2006 Ex.P4 in favour of plaintiff No.1, therefore, the said defendants No.4 to 7 were not competent to suffer any statement or concede any rights in the passage in dispute in favour of defendants No.1 to 3.

19. As the judgment and decree dated 09.04.2007 (Ex.P6 and P10) based

on compromise Ex.P7 passed in Civil Suit No.205 of 2005 titled **Major Singh and others Vs. Swaran Kaur and others** are the result of collusion amongst the parties of that case, therefore, the principle of lis-pendens is not applicable to this case. In this regard, provision of Section 52 of Transfer of Property Act may be read which is as under:-

“52. Transfer of property pending suit relating thereto.—During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits] by the Central Government of any suit or proceedings, which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order, which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

20. It is clear from the above said provision that to make any transfer of the property directly and specifically involved in the case to be binding on a transferee pendente-lite, the proceedings of the suit should not be collusive.

21. In the instant case, the judgment and decree dated 09.04.2007 passed in Civil Suit No.205 of 2005 titled **Major Singh and others Vs. Swaran Kaur and others** are clearly the result of collusion amongst the parties of that suit i.e.

RSA No.6344 of 2016

defendants No.1 to 3 on one hand (*plaintiffs of above case*) and defendants No.4 to 7 on the other hand (*defendants of the above case*) of the present case, and, therefore, said judgment and decree are not binding on the rights of the plaintiff No.1 – Gurbax Kaur of this case nor the sale deed dated 21.03.2006 Ex.P4 is hit by the doctrine of lis-pendens.

22. Learned Courts below failed to appreciate the evidence on record in right perspective as is clear from the aforesaid discussion. Therefore, the impugned judgments and decrees passed by the Courts below are hereby set aside. Present appeal is accepted with costs. The suit of the plaintiffs – appellants is decreed as prayed for along with costs throughout.

December 21, 2022
renu

(DEEPAK GUPTA)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No