

CM No. 2140-C-2023 in/and
RSA No. 855 of 1989

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2023:PHHC:040327

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

(109)

CM No. 2140-C-2023 in/and
RSA No. 855 of 1989
Date of Decision : 16.03.2023

Ram Sarup Dass

...Appellant

Versus

Raghbir Dass

...Respondent

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. Ajay Jain, Advocate for the appellant.

Harsimran Singh Sethi J. (Oral)

CM No. 2140-C-2023

Present application has been filed for recalling the order dated 27.02.2023, by which, the present appeal was dismissed for non-prosecution.

Keeping in view the averments made in the application, which is duly supported by an affidavit, the same is allowed. The order dated 27.02.2023 is recalled and the regular second appeal is restored to its original number and status.

RSA No. 855 of 1989

Learned counsel for the appellant argues that in the present

appeal, though the judgment and decree of the trial court dated 04.03.1986 is against the appellant-plaintiff but the issue with regard to maintainability of suit qua limitation was decided in favour of the appellant-plaintiff but in an appeal filed by the appellant-plaintiff against the judgment and decree of the trial court, the said issue of maintainability has been reversed by the lower appellate court to record that the suit was not within limitation so as to be held to be maintainable.

Learned counsel for the appellant-plaintiff argues that the findings recorded by the lower appellate court on Issue No. 5 are not sustainable on two grounds.

The first argument raised is that once there is no cross appeal filed by the respondents-defendants qua the findings of the trial court on Issue No. 5, there was no occasion for the lower appellate court to decide the same issue and to return a finding contrary to the findings recorded by the trial court. In respect of the said argument, the reliance is being placed upon the judgment of the Co-ordinate Bench of this Court in RFA No. 3110 of 2011 titled as ***Bhoop Singh Vs. State of Haryana and others***, decided on 15.09.2014.

In respect of the said argument, it may be noticed that an argument on the ground of limitation was raised before the lower appellate court by the respondents-defendants though, it is a conceded fact that the said issue was decided in favour of the appellant-plaintiff by the trial court. It may be noticed here that the reason given by the trial court to record the finding in favour of the appellant-plaintiff on the aspect of limitation is that once the appellant-plaintiff remained in possession or enjoyment of the

property in suit despite adverse entry in the revenue paper, he was not obliged to sue for declaration of the title. Further finding given by the trial court on the issued of limitation is that as per the plaint, the appellant-plaintiff had mentioned that the knowledge of creation of trust came to his knowledge just prior to the filing of the suit. The reasons given by the trial court cannot be sustained for the reason that in the suit, the challenge by the appellant-plaintiff was not to a revenue entry but to a creation of trust, which fact is entirely different. The reason given by the trial court cannot be treated to be a valid reason wherein the challenge is to a formation of a trust. A challenge to an entry in a revenue record cannot be compared to a challenge to an act of formation of a trust hence, the comparison being given by the trial court so as to treat the suit within limitation cannot be accepted.

Further, the second reason given by the trial court to return a finding in favour of the appellant-plaintiff qua the issue of limitation is that the appellant-plaintiff had prayed in the civil suit that the knowledge of creation of trust had come to his knowledge recent to the filing of the suit. Nothing has been mentioned by the trial Court as to how the said knowledge was derived by the appellant-plaintiff and when the same came to his knowledge. No evidence to the said effect has been mentioned while recording a finding to the said issue in favour of the appellant-plaintiff. In the absence of any factual aspect detailed, recording a finding by the trial court that the appellant-plaintiff had gathered the knowledge of the trust recent to the filing of the suit, cannot be treated to be in accordance with evidence on record and is perverse to the evidence on record.

Further, the lower appellate court has discussed the said Issue in detail. The trust was created in the year 1964 and the same was only challenged in the year 1979. The limitation provided under the Limitation Act had already expired prior to the filing of the suit qua the challenging of the creation of the trust in the year 1979. Once, the said fact has already come on record with regard to the creation of the trust in the year 1964 and challenging the same was only in the year 1979, it cannot be said that the finding recorded by the lower appellate court on the said Issue of limitation is perverse in any manner so as to hold that suit filed by the appellant-plaintiff was time barred, needs no interference by this Court in the present regular second appeal.

Further, the argument of the learned counsel for the appellant-plaintiff that in the absence of any appeal filed by the respondents-defendants against the judgment and decree of the trial court on Issue No. 5, the lower appellate court on its own could not have reversed the findings of the trial court is to be seen in view of Section 3 of the Limitation Act, 1963. As per Section 3, the courts are competent to decide the issue of limitation even if the same has not been set up as a defence. Hence, the argument raised by learned counsel for the appellant-plaintiff is contrary to Section 3 of the Limitation Act, 1963 and cannot be accepted.

Further argument, which is being raised is that as per the judgment of the Co-ordinate Bench in ***Bhoop Singh's case (supra)***, once there was no cross appeal, the Issue of limitation could not have been decided by the lower appellate court keeping in view the findings of the trial court even if the suit was dismissed by the trial court. The said argument

also cannot be accepted. The judgment in ***Bhoop Singh's case (supra)***, only related to award of compensation to which the objection was being taken by the State in an appeal without there being any cross objection. It was only under these circumstances, the observations were made by the Co-ordinate Bench in paragraph 14 of the judgment, which are clearly distinguishable in the facts and circumstances of the present case hence, no benefit of observation of the Co-ordinate Bench in ***Bhoop Singh's case (supra)***, can be allowed in favour of the appellant-plaintiff.

Even otherwise, as per Order 41 Rule 33 of CPC, as held by the Hon'ble Supreme Court of India while deciding Civil Appeal No. 2354 of 1968 titled as ***Kok Singh Vs. Smt. Deokabai***, decided on 10.12.1975 that the power of the court in appeal to grant the relief in favour of the respondent exists despite there being no appeal from the decree. The relevant paragraphs 6 and 7 of the said judgment is as under :-

“6. In Giani Ram v. Ramji Lal. (1969) 3 SCR 944 the Court said that in Order 41 Rule 33, the expression "which ought to have been passed" means "what ought in law to have been passed" and if an appellate Court is of the view that any decree which ought in law to have been passed was in fact not passed by the Court below, it may pass or make such further or other decree or order as the justice of the case may require.

7. Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial Court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge.”

Keeping in view the above, the argument being raised by the learned counsel for the appellant-plaintiff that the lower appellate court

should not have reversed the finding on Issue No. 5 as there was no appeal preferred by the respondents-defendants against the judgment and decree of the trial court, wherein, Issue No. 5 has decided in favour of the appellant-plaintiff, cannot be accepted.

No other point was raised.

Keeping in view the above, no ground is made out for interference of this Court in the judgments and decrees of the courts below.

Dismissed.

March 16, 2023
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(HARSIMRAN SINGH SETHI)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No