



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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RSA No.1427 of 1990(O&M)
Date of Order:27.05.2024

Illiya
Versus
..Appellant

Bhurey Khan (Deceased) through LR's and others ..Respondents

RSA No.1663 of 1990(O&M)

Rahim Khan and others
Versus
..Appellants

Bhurey Khan (Deceased) through LR's and others ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jain, Sr. Advocate, with
Mr. Aryaman Thakur, Advocate
for the appellant.

Mr.Ritesh Aggarwal, Advocate
for the respondents.

ANIL KSHETARPAL, J

BRIEF FACTS OF THE CA SE:

1.1 These two connected regular second appeals have been filed by the defendants challenging the correctness of the judgment and decree passed by the First Appellate Court, that has reversed the judgment and decree passed by the trial court.

1.2 With the consent of the learned counsel representing the parties, these two connected regular second appeals, arising from separate but identical suits involving a common issue shall stand disposed of by a common judgment.



1.3 Sh. Nazar Khan son of Sh. Kunji was owner of the agricultural land located in village Chhainsa. On 06.09.1984, Sh. Bhurey Khan and Sh. Mamman sons of Sh. Nizru filed a suit for grant of decree of declaration that they being tenants on payment of 1/3rd batai are in possession of the property for the last 10 years. Sh. Nazar Khan admitted the claim of the plaintiffs resulting in a consent decree dated 19.10.1984. On 01.04.1985, Sh. Nazar Khan executed a registered sale deed of 8 kanals land comprised in khasra no.896, in favour of Sh. Kalu son of Sh. Mamman. On 04.04.1985, Sh. Nazar Khan executed a mortgage deed mortgaging 23 kanals and 9 marlas land in favour of Sh. Bashir and Sh. Rajju sons of Sh. Bhurey Khan. In the aforesaid mortgage deed, Sh. Nazar Khan while claiming to be owner in possession of the property, delivered possession in favour of Sh. Bashir and Sh. Rajju sons of Sh. Bhurey Khan. The aforesaid mortgage deed has been signed by Sh. Bhurey Khan on behalf of his two minor sons, namely, Sh. Bashir and Sh. Rajju.

1.4 On 01.05.1986, Sh. Nazar Khan executed two sale deeds in favour of the appellants, namely, Sh. Iiiyas and Sh. Rahim Khan with respect to land measuring 12 kanals and 4 marlas and 15 kanals and 9 marlas, respectively. Within 7 days of the execution of the sale deed, Sh. Bhurey Khan and Sh. Mamman filed two suits for possession by way of preemption claiming preferential rights to purchase the property being lessees/tenants.

1.5 The defendants contested the suit on the ground that the plaintiffs were never in possession of the property as tenants.

1.6 Upon appreciation of the evidence, the trial court dismissed



both the suits while holding that the plaintiffs are not proved to be leases in possession of the property.

1.7 However, the First Appellate Court reversed the judgment passed by the trial court on the ground that in a subsequent suit, the court cannot go behind the consent decree. The First Appellate Court relied upon the judgment passed in *Gurdev Kaur and others vs. Mehar Singh and others, AIR 1989 Punjab & Haryana, 324.*

2. ARGUMENTS PUT FORTH BY THE LEARNED COUNSEL REPRESENTING THE PARTIES.

2.1 This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paper book along with scanned copy of the requisitioned records of the courts below.

2.2 The learned senior counsel representing the appellants in both the appeals contends that the First Appellate Court has erred in overlooking the fact that in the mortgage deed dated 04.10.1985, Sh. Nazar Khan while mortgaging the land claimed to be owner in possession of the property in favour of Sh. Bashir and Sh. Rajju sons of Sh. Bhurey Khan. He submits that Sh. Bhurey Khan while appearing in evidence as PW1, has claimed that he has been in possession of the property as tenant for the last 30 years, whereas there is no entry in the revenue record reflecting them to be in possession. He further submits that the adverse inference is required to be drawn against the plaintiffs because the alleged receipts issued by Sh. Nazar Khan evidencing receipt of lease money have not been produced by them.

2.3 Per contra, the learned counsel representing the respondents while relying upon the judgment passed in *Gurdev Kaur's case (supra)* submits that the court cannot go behind the decree.



3. DISCUSSION BY THIS COURT:

3.1 This court has considered the submissions of the learned counsel representing the parties.

3.2 The Division Bench judgment in Gurdev Kaur's case (supra) has been passed in a different context. In that case, the consent decree passed by the court recognizing family settlements was challenged by the remaining family members on the ground that the assertions made in the suit were factually incorrect. In that context, the Division Bench held that in a subsequent suit, the court cannot go behind the consent decree. However, it was laid down that the decree can be set aside if it was obtained by fraud, misrepresentation or coercion with an additional ground in favour of the minors or persons of unsound mind, if they are able to prove that the next friend or the guardian, who acted on their behalf, was negligent in conducting the proceedings. The aforesaid judgment shall not be applicable to the facts of the present case.

3.3. From the facts noted above, it is evident that Sh. Nazar Khan on the one hand and Sh. Bhurey Khan and Sh. Mamman on the other hand have colluded in order to take away the appellants' valuable property by misusing the process of court. If a lessee is in possession for 30 years, there has to be some entry in the revenue record reflecting his possession either in the khasra girdwari or in the jamabandi. Every 6 months, the Patwari visits the land and makes an entry in the khasra girdwari to show the person in possession of the property. In this case, there is no evidence on record that the patwari of the area ever found the plaintiffs to be in possession of the property as lessees.



3.4. Furthermore, it is evident that on 04.04.1985, Sh. Nazar Khan executed a mortgage deed with respect to the land measuring 23 kanals and 9 marlas in favour of Sh. Bashir and Sh. Rajju sons of Sh. Bhurey Khan. In this mortgage deed, he claims to be owner in possession and delivered possession to the mortgagees at the time of execution of the mortgage deed. This entire land measuring 23 kanals and 9 marlas which was the subject matter of mortgage deed is part of the suit land in both the suits.

3.5. Moreover, if Sh. Bhurey Khan was in possession of the property as lessee, he would not have signed the aforesaid mortgage deed admitting delivery of possession by Sh. Nazar Khan, on 04.04.1985.

3.6. Additionally, in the civil suit, which resulted in a consent decree, Sh. Bhurey Khan and Sh. Mamman claim to be in possession of the property as lessees for 10 years, however, when Sh. Bhurey Khan appears as PW1, he claims that he is in possession of the property for the last 30 years. He admits that Sh. Nazar Khan used to issue receipts for payment of lease money, however, the same has not been produced before the Court. Hence, the best evidence was withheld.

3.7. Furthermore, collusion between Sh. Nazar Khan on one hand and Sh. Bhurey Khan and Sh. Mamman on the other hand is also proved because on 01.04.1985, Sh. Nazar Khan executed a sale deed in favour of Sh. Kalu. This sale deed is with respect to the land measuring 1 kanal comprised in khasra no.896, which was included in the decree dated 19.10.1984. In this sale deed, Sh. Nazar Khan delivers possession of the property in favour of Sh. Kalu, who is also son of Sh. Mamman and the sale deed is attested by Sh. Bhurey Khan. Once it is evident that, Sh. Nazar



Khan was not in possession of the property, as a consequence it becomes clear that he was not in a position to deliver the possession of disputed property to Sh. Kalu.

3.8. Moreover, the respondents (the plaintiffs) are required to prove that they have a superior right of preemption on the date of sale deed, the date of institution of the suit and the date of decree passed by the First Appellate Court. While filing the suit, the plaintiffs have prayed for the delivery of possession. In para 5 of the plaint, the plaintiffs have asserted that the defendants have refused to deliver possession of the suit land on payment of Rs.14,000/-. Thus, the plaintiffs have admitted in the pleadings that they are not in possession of the property. PW1-Bhurey Khan has stated in examination-in-chief that he is in possession. In the cross-examination, he has stated that the lease deed was reduced into writing, however, he did not produce the same. He admits that the khasra girdwaries were entered by the Patwari after inspecting the land. He denies that his two children are the mortgagees of the land and he has signed on their behalf. Thus, the statement of the plaintiff is inconsistent with his pleadings, and hence, is unreliable. Moreover, from the perusal of the judgment dated 19.10.1984, it is evident that Sh. Bhurey Khan and Sh. Maman on the one hand and Sh. Nazar Khan on the other hand are related to with each other as found by the Court in para 2 of the judgment passed on 19.10.1984. Thus, there are great chances of their collusion. Despite decree dated 19.10.1984, the possession of the plaintiffs was never reflected in the revenue record. For the purpose of preparation of khasra 'Girdwari' the 'Area Patwari' must have visited the suit land at least twice in the year 1985 and once in the year 1986, however,

he never found the plaintiffs to be in possession. The plaintiffs have also failed to explain that how they were not in possession of the property on the date of filing of the suit, and the date of their dispossession and the person dispossessing them. Thus, the plaintiffs have failed to prove that tenancy, if any, in their favour continued for over 30 years.

3.9 It has been repeatedly held that the right of preemption is a piratical, outmoded and weak right which is liable to be defeated on all legal grounds. In this case, the First Appellate Court has overlooked the basic facts before following the judgment passed by a Division Bench. It was expected from the First Appellate Court to have comprehended the facts in correct perspective before reversing the judgment of the trial court.

4. DECISION

4.1 Keeping in view the aforesaid facts and discussion, the result is inevitable. The judgments passed by the First Appellate Court in both the suits are set aside and that of the trial court are restored.

4.2. Both the Regular Second Appeals are allowed.

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

May 27, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned :YES/NO
Whether reportable :YES/NO