

Shiv Ram Vs. Smt. Bimla Devi and ors.

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Court : Punjab and Haryana

Decided On : Jan-21-2000

Reported in : (2000)125PLR799

Judge : R.L. Anand, J.

Acts : Code of Civil Procedure (CPC) - Order 6, Rule 10; Punjab Redemption of Mortgages Act; Limitation Act - Schedule - Article 113

Appeal No. : Regular Second Appeal No. 3756 of 1999

Appellant : Shiv Ram

Respondent : Smt. Bimla Devi and ors.

Advocate for Pet/Ap. : Arvind Singh, Adv.

Disposition : Appeal dismissed

Judgement :

R.L. Anand, J

1. Unsuccessful plaintiff Shiv Ram adopted son of Smt. Nandi has filed the present Regular Second Appeal and has been directed against the judgment and decree dated 22.5.1999 passed by Addl. District Judge, Kurukshetra, who dismissed the appeal of the appellant by affirming the judgment and decree dated 22.8.1995 passed by the trial Court which dismissed the suit of the plaintiff for declaration as

prayed for.

2. Shiv Ram plaintiff filed a suit for declaration against Parkash Lal, Sunil Kumar and Rakesh Kumar to the effect that the judgment and decree dated 18.7.1985 passed by the Court of Shri L.N. Mittal, the then Senior Sub Judge, Kurukshetra in Civil Suit No. 857 of 1985 is illegal, null and void and not binding on the rights of the plaintiff and the plaintiff continues to be in possession of the suit land. Parkash Lal died during the pendency of the suit and his L.Rs. were impleaded. During the pendency of the appeal before the first Appellate Court an application for amendment of plaint was filed by the plaintiff and the said application under Order 6 Rule 10 C.P.C. was allowed by the first Appellate Court on 15.10.1998 and the plaintiff was allowed to amend the plaint and claim possession of the suit land.

3. The case set up by the plaintiff before the trial Court was that defendants No.2 and 3 are the sons of Parkash Lal, deceased defendant No. 1 Vide mortgage deed dated 27.6.1979 and subsequent mortgage deed dated 5.8.1981 and mortgage deed dated 18.7.1982 the plaintiff mortgaged with possession his land measuring 23 kanals 16 marlas as described in para No.3 of the plaint in favour of defendant No. 1 for a consideration of Rs.29,5000/- and it was further pleaded that vide mortgage deed dated 27.12.1973 and vide subsequent mortgage deed dated 8.2.1979 the land described in para No.4 of the plaint measuring 31 kanals 16 marlas was mortgaged with possession by the plaintiff in favour of defendant No.2 and it was further pleaded that vide mortgage deed dated 8.2,1979 and subsequent mortgage deed dated 5.8.1981 plaintiff also mortgaged with possession his land measuring 16 kanals in favour of defendant No.2 as mentioned in para No.5 of the plaint for consideration of Rs. 16,000/-. These mortgage deeds were not recorded under the Punjab Redemption of Mortgages Act. Though the plaintiff has been in possession of the suit land as owner, but the defendant was able to secure the possession of the suit land, so relief of possession was also claimed. It was further alleged that the defendants asserted their ownership with possessory right over the suit land on the basis of a civil decree dated 18.7.1985 alleged to have been suffered by the present plaintiff and that decree dated 18.7.1985 passed by Shri L.N. Mittal, the then Senior Sub-Judge is illegal, wrong, void and not binding on the rights' of the plaintiff. The story

of exchange dated 15.6.1984 propounded by the defendants in the said suit on the basis of which impugned judgment and decree was passed in nothing but a waste paper. No rights were conveyed and no such transaction took place. It was pleaded that the plaintiff is an illiterate and rustic person and he was swayed by defendants No.1 and 2 that his statement is required for affirmation of mortgages. There was no question of exchange. Even otherwise the transaction did not amount to exchange. The same was sale. Defendants No.1 and 2 not only introduced defendant No.3 illegally in the alleged transaction under the cover of exchange, though legally the same could not be done.

4. The suit was contested by the defendants on the rounds of estoppel, limitation, cause of action, valuation, locus-standi, bad for mis-joinder and non-join parties. It has further been pleaded by the defendants that even after passing of the impugned decree, the plaintiff again mortgaged with possession two acres of land comprised in Rect. No. 49, Khasra Nos.8 and 9 for a consideration of Rs.40,000/- vide mortgage deed dated 15.7.1987. This land was already mortgaged with the defendants as mentioned in para No.4 of the plaint. After redemption of the land vide impugned decree plaintiff again mortgaged the same. After the passing of the impugned decree, plaintiff again got a decree of two kanals passed in favour of the answering defendants on 19.3.1986. The plaintiff has concealed material facts from the Court. He was never in possession of the suit land. The defendants were in possession of the suit land at the time of passing of impugned judgment and decree. The decree dated 18.7.1989 is good.

5. From the above pleadings of the parties, the following issues were framed by the trial Court:-

1. Whether the judgment and decree dated 18.7.1985 are wrong, null and void and not binding on the plaintiff, as alleged in the plaint? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether plaintiff is estopped from filing the present suit by his own act and conduct OPD

4. Whether the plaintiff has delivered the possession to the defendants as alleged in preliminary objection No.3 of the written statement? OPD
 5. Whether the suit is time barred? OPD
 6. Whether the plaintiff has no cause of action? OPD
 7. Relief.
6. The parties led oral and documentary evidence in support of their respective cases and on the conclusion of trial the suit was dismissed.
7. Aggrieved by the judgment and decree, the plaintiff-appellant filed the appeal before the first Appellate Court and for the reasons given in paras No.8 to 18 of the judgment dated 22.5.1999, the appeal was dismissed and aggrieved by the judgment and decree of the first Appellate Court, the present appeal.
8. I have heard Mr. Arvind Singh, Advocate on behalf of the appellant and with his assistance I have gone through the record of this case and I would like to dispose of this appeal in limine.
9. After examining the submissions raised by the learned counsel for the appellant, this Court is of the considered opinion that this appeal is without any merit and deserves to be dismissed. Before I deal with the submissions raised by the learned counsel for the appellant it will be appropriate from me to reproduce the relevant paras of reasoning given by the first Appellate Court as under:-
- '10. Learned counsel for the appellant has urged that the transaction did not amount to exchange and was in fact sale. It is also submitted that judgment and decree dated 18.7.1985 passed by Shri. L.N. Mittal, then Senior Sub Judge required registration and no right, title or interest passed to the defendants regarding the suit land measuring 12 kanals 5 marlas as described in para No.11 of the plaint. Ex.P-3 is the copy of the judgment while Ex.P-4 is the copy of the decree-sheet. Copy of plaint of that suit is Ex.P-1 and it is revealed from the written statement copy of which is Ex.P-2 that present plaintiff who was defendant in that suit has admitted the suit instituted by Parkash Lal etc. and in view of the

admission of the defendant suit was decreed, because the parties were not at issue. A perusal of the copy of plaint Ex.P-1 shows that on 15.6.1984 Shiv Ram defendant voluntarily and without any pressure, inducement or threat mutually agreed to transfer the land measuring 12 kanals 8 marlas including all the ownership rights and 1/6 share of the irrigation rights from his tube well installed by him in his nearby land, subject to the condition that payment of 1/6 share of electricity bills would be made by the plaintiff in lieu of the entire mortgage rights of the plaintiff in the said mortgage land measuring 71 kanals 12 marlas and by virtue of the exchange the plaintiff become owner in possession the land measuring 12 kanals 8 marlas. a perusal of the entire averments made in the plaint shows that equity of redemption was transferred in favour of the present plaintiff Shiv Ram and his land measuring 12 kanals 8 marlas was taken in exchange of the land which was in possession of the defendants as mortgage and possession was exchanged. The factum of redemption also stands proved from the very fact that plaintiff has also further mortgaged his land after redemption.

11. Plaintiff has not been able to prove fraud in any manner. It is nowhere the case of the plaintiff that the written statement does not bear his signatures. It is also pertinent to mention that there is also no undue advantage caused to the present defendant/respondents due to the exchange transaction, because possession of a large area which was mortgaged with possession with the defendant was returned to the plaintiff and a small area of the land was taken in exchange. It is well settled that exchange can be oral and no document is required. It may also be mentioned that if the plaintiff was not able to get the land redeemed after the expiry of period of redemption, the defendants would have become owners of the mortgaged land and in that event they were also competent to exchange their land with other land of the plaintiff. Thus it cannot be concluded that present defendants were not having any pre-existing right. The plaintiff/appellant has been relieved of the burden of payment of huge redemption money. In this case the defendants are not getting the interest in the land in question for the first time and so the impugned judgment and decree, in my considered opinion, do not require registration. Authorities *Khushal v. Nathu Ram*, 1999(1) P.L.J. 17: (1993-3)123 P.L.R. 585, *Shakuntala Yadav v. Yadvinder Singh*, 1998(2) P.L.J. 547 and *Balbir Singh v. Bant Singh*,. 1996(3) R.C.R(Civil) 351 cited by learned counsel for the plaintiff/appellant

do not apply to the present case. Equity of redemption existing in favour of the defendants has been exchanged with the other land of the plaintiff and oral exchange, in my considered opinion, was permissible. Division Bench authority *Sardara Singh v. Harbhajan Singh*, A.I.R. 1974 P&H; 345 may be looked into on this point.

12. It is well settled that a consent decree is as good as a decree as obtained after contest unless the same is set aside. It is well settled that such decree can be set aside only on the ground of fraud, misrepresentation etc. Fraud is to be proved like a criminal charge and mere suspicion cannot take the place of proof. Mere allegation of fraud cannot be held as proof of fraud. The plaintiff has not been able to make out any ground for setting aside the impugned judgment and decree passed by Shri L.N. Mittal, then Senior Sub Judge. The only grievance is regarding registration of the decree in question. As that decree was passed in exchange or settlement, the same did not require registration.

13. Now the most material question for consideration is whether the suit of the plaintiff is barred by limitation or not. Learned counsel for the plaintiff appellant has submitted that limitation for filing such suit is twelve years, because the plaintiff is claiming possession over the suit land and the amendment sought has been allowed, so the plaintiff can institute such suit within twelve years and hence it is submitted that the suit of the plaintiff is not barred by limitation. Further it is submitted that there is no limitation for setting aside the judgment or decree. It is also urged that there is no limitation for setting aside such orders. Authorities *State of Punjab v. Jagdish Parshad Dresser*, (1988-1)93 P.L.R. 496, *Mukhtiar Singh v. State of Punjab*, 1993 Civil Court Cases 572 and *Punjab Singh v. Shugan*, 1992 Civil Court Cases 735 have been cited by learned counsel for the appellant, but these authorities do not apply to the present case.

14. It is pertinent to mention that amendment incorporating relief of possession has been allowed to the plaintiff/appellant during the pendency of the appeal by my learned predecessor vide order dated 15.10.1998 and it is observed that the amendment sought will not prejudice the case of the defendants. Suit for possession after the amendment is allowed will be deemed to have been instituted

by the plaintiff from the date on which amendment was allowed and thus, the very suit of the plaintiff for possession is even otherwise barred. Authority Tarlok Singh v. Vijay Kumar Sabharwal, (1996-2)113 P.L.R. 649 (S.C.) may be looked into on this point.

15. In this case unless and until plaintiff is able to get declared the impugned judgment and decree dated 18.7.1985 as null and void, he cannot get the decree for possession, because ownership of the plaintiff over the suit land will be established only when the judgment and decree are set aside and in that event on the basis of the title plaintiff can claim his possession, but when the very claim regarding possession is hopelessly barred, in my considered opinion, the suit of the plaintiff has rightly been dismissed on the point of limitation also. Limitation for setting aside such judgment and decree is only three years as envisaged by Article 113 of the Indian Limitation Act. Authorities State of Punjab v. Babu Singh, (1995-2)110 P.L.R, 292 (S.C.) = 1996(1) C.L.J. 50, Sarupa v. Panchayati Akhara, Kala Bara Udasin, Thanesar, (1998-2)119 P.L.R. 713 = 1998(2) S.L.J. 1535, State of Haryana v. Bhan Singh, 1997(1) C.L.J. 603 and Jiwani v. Jai Lal, (1995-1)109 P.L.R. 104 = 1995 H.R.R. 11 cited by learned counsel for the defendant/respondents may be looked into.

16. It is nowhere the case of the plaintiff that he was not having any knowledge of the impugned judgment and decree. Thus, the suit of the plaintiff is hopelessly barred by limitation and so finding recorded by learned trial Court on issue No.5 is maintained as correct.

17. Plaintiff is also estopped from filing the present suit by his own act and conduct. He has kept mum since long. He has voluntarily filed written statement before the learned Senior Sub Judge in the suit instituted by the present respondents which culminated in decree dated 18.7.1985 and now only technical point of non-registration of the decree has been raised. Compromise decree does not require registration and authority Jagjit Singh v. Pritam Singh, (1994-1)106 P.L.R. 95 = 1994 P.L.J. 171 may be looked into on this point.

18. It is also desirable to mention that the conduct of the plaintiff is not fair. He has not earlier admitted the possession of the defendants over the suit land

measuring 12 kanals 5 marlas, but subsequently has admitted the possession of the defendants. For a period of about 15 years plaintiff has reaped the fruits of the mortgaged land possession of which should have been with the defendants and now after getting possession of the mortgaged land on the pretext of exchange, the plaintiff wants to back out from that settlement with some mala fide intention. He even wants to deprive the defendants from the suit land. It is nowhere the case of the plaintiff that the defendants are still continuing mortgages with possession of the suit land in pursuances of the mortgages already effected. It is also nowhere the case of the plaintiff that the mortgages have not been redeemed so far. Thus, in my considered opinion, learned trial Court has rightly recorded findings on various issues and those findings are re-affirmed as correct.'

10. There is hardly any illegality and impropriety in the impugned judgment and decree, still the learned counsel for the appellant submitted that the decree dated 18.7.1985 is null and void and is not binding upon the rights of the plaintiff. According to the plaintiff, the said decree was a sale. There was no exchange at all and the same could only be effected by a regular deed of transfer, which has not been done in this case and in this view of the matter the decree dated 18.7.1985 does not convey any right, title and interest in the defendants. The argument is misplaced. The perusal of the impugned decree show that when the suit was instituted against the plaintiff, the plaintiff made a statement voluntarily on 15.6.1984 and admitted the claim of the defendant in that suit. The said decree could only be challenged by the plaintiff on the ground of fraud or undue influence. It has not been established on the record that the earlier written statement filed by the plaintiff in the earlier suit did not bear his signatures. The possession of a large area which was mortgaged with possession with the defendants was returned to the plaintiff and a small area of the land was taken in exchange by the defendants. In Punjab or Haryana there can be an oral exchange and no document is required to be written. If it is written, it requires stamp and registration. We all know that a mortgage with possession can be redeemed by the mortgagor within 30 years from the date of mortgage. Mortgage is a transfer of interest in the immovable property. A mortgage gets interest in a mortgaged property by virtue of mortgaged deed. Thus if that interest is exchange in, lieu of an area. It will amount to an exchange. In such a situation, it can be said that a mortgage has an existing

interest in the area which has been surrendered in favour of the mortgagor and in lieu of that interest, which is an immovable property in the eyes of law, if the mortgages gets some land, it is an oral exchange and such an exchange would not require stamp or registration. The said decree could only be challenged within three years but the present suit has not been instituted within a span of three years.

11. The learned counsel for the appellant faced with this difficulty submitted that since the suit of the plaintiff was for possession based on title therefore such a suit could be instituted within 12 years from the date when a cloud is cast upon the title on the plaintiff. This argument of the learned counsel is not applicable to the facts in hand. By virtue of a decree, which is valid, title has already vested in favour of the defendants and that decree could only be challenged on the ground of fraud etc., which has not been proved in this case. Question of fraud is a question of fact which again cannot be examined in the second appeal because it is not a substantial question of law. The learned counsel for the appellant then relied upon *Khushal v. Nathu Ram*, (1999-3)123 P.L.R. 585 = 1999(1) P.L.J. 17 and submitted that the exchange decree if creates interest in suit property for the first time requires registration and that the decree dated 18.7.1985 has created interest for the first time in favour of the defendants, therefore, this decree could not be acted upon and on the basis of that decree the defendants cannot become the owners of the property. This argument is again not acceptable to this Court in view of the peculiar facts of this case. In the cited case the rights were exchanged between the parties for the first time, but here the defendants were the mortgages with possession. Equity of redemption was with the plaintiff. In lieu of equity of redemption the defendants also transferred the property in favour of the plaintiff. The law which has been relied upon by the learned counsel for the appellant has been simply reiterated in this judgment. Even in *Bhoop Singh. v. Ram Singh Major*, (1996-1)112 P.L.R. 559 (S.C.) this very proposition of law was created. The counsel for the appellant also relied upon a judgment of this Court *Balbair Singh v. Bant Singh*, 1996(3) R.C.R. (Civil) 351. In this case the son got the property from his father by Will and not by devolution and it was observed by this Court that such property in the hands of the son will be considered as non-ancestral and personal property and if by a collusive decree he transfers the title in favour of his other son

and his wife, who had no pre-existing right in the said, property such a decree requires stamp or registration. Here the position is totally different and this aspect of the case has rightly been discussed by the Courts below. I have already reproduced the reasons given by the first Appellate Court which has rightly rejected the appeal. I do not see any illegality or impropriety in the same.

12. Resultantly, I do not see any merit in this appeal and dismissed the same in limine with no order as to costs.

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