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Court : Punjab and Haryana

Decided On : Mar-02-2012

Judge : G.S. Sandhawalia

Appeal No. : RSA. NO. 2632 OF 2010(O&M)

Appellant : Gian Singh

Respondent : Parkash Ram and Others

Judgement :

G.S. Sandhawalia, J.

Civil Misc. No.2717-C of 2012

Prayer made in the application is for grant of dispending with the filing of certified copy of Annexure 'A'.

In view of the averments made in the application, the Civil Misc. Application is allowed.

Civil Misc. No.2718-C of 2012

This is an application filed under Order 22 Rule 4 read with Section 151 of the Code of Civil Procedure for impleading the legal representatives of the deceased respondent no.1, namely, Parkash Ram. The names of legal representatives have been mentioned in paragraph 5 of the application. The application is supported by affidavit of Gian Singh son of Jawala Ram.

In view of the averments mentioned in the application, which are supported by affidavit, the same is allowed subject to just exceptions. Office is directed to make necessary corrections in the Memo of Parties.

RSA No.2632 of 2010

1. The present appeal has been filed by the defendant No.1, who is aggrieved against the concurrent findings of the Courts below whereby the suit for declaration and permanent injunction has been decreed.

2. The plaintiffs, who are brothers of the appellant filed the suit for declaration that they were owners in possession of the land and decree dated 15.3.1996 obtained by defendant no.1 and Charan Dass in suit No.56 of 5.2.1996 decided on 15.3.1996 was wrong, illegal, collusive, ineffective and not operative.

3. It had been pleaded in the plaint that Jawala Ram, defendant no.7 who was father of the plaintiffs and defendant no.1, was the owner of the property in dispute and he was an old man of 90 years and was residing with Chaman Lal plaintiff no.2 at Jalandhar and his son Charan Dass was also residing at Jalandhar for the last 25 years and his legal heirs still were still residing there, while plaintiff no.1 was residing at the at the village Masitan. The allegations were that defendant no.7 gone to meet his son Gian Singh in the village and had remained there for about two months and Gian Singh connived with Charan Dass, his brother and conspired to grab the land in dispute and obtained a collusive decree which was inoperative. It was alleged that defendant no.7 had agreed to sell the land in suit vide agreement to sell dated 12.8.1993 prior to the decree being passed and had received Rs.2 lacs as earnest money and thereafter had also executed sale deed dated 30.7.1996 in favour of the plaintiffs. This agreement was in the knowledge of defendant no.1, therefore, he got a collusive decree along with Charan Singh and the defendant no.1 did not get the mutation entered to keep this collusive decree secret and the plaintiffs came to know about the decree when they got the sale deed executed from defendant no.7 and had gone to the Patwari to get the mutation sanctioned. Accordingly, the decree was challenged on the ground that it

was based on a bogus plea and not binding upon the plaintiffs and was unregistered and passed no title to defendants no.1 to 6 and the plaintiffs were bonafide purchasers. In pursuance of the agreement to sell defendant no.7 had received the sale consideration at the time of execution of the sale deed dated 30.7.1996. Accordingly, it was pleaded that the defendants were threatening to alienate the land in question.

4. Defendants No.1 to 5 filed written statement contesting the suit on various grounds raising preliminary objections like maintainability of the suit, locus standi and the suit being bad for non joinder and mis-joinder of parties. On merits, it was pleaded that defendant no.7 was having sound disposing mind and he had been residing with defendant no.1 since very beginning and had never resided with the plaintiffs at Jalandhar. Defendant no.1 used to look after him being son and was having interest in the property being a member of the joint Hindu family and had made improvements in the property. The defendant no.7 had become annoyed with defendant no.1 and certain differences had developed between them and at the instigation of the plaintiffs, defendant no.7 had gone to Jalandhar to reside with them and it was denied that the decree in question was obtained by playing fraud. Accordingly, it was asserted that there was no agreement to sell and neither the defendants were aware about the agreement to sell till the receipt of the copy of the plaint of the present suit and it was alleged that sale deed was a forged one and without consideration.

5. Defendant no.7 had filed separate written statement admitting the ownership and also admitted the case of the plaintiffs and pleaded that that he had been taken to Sultanpur Lodhi and his signature was obtained on blank papers as he was an illiterate and old person. He had put his thumb impression in good faith at the instance of defendant no.1 on the ground that he was signing the papers as a guarantor. The officer before whom defendant no.1 was produced did not enquire about anything from him and his Clerk had got thumb impression of the answering defendant on papers which were never read over and explained to him. Accordingly, it was alleged that he had come to know that defendant no.1 in collusion with Charan Dass, being his sons obtained a collusive decree while he had agreed to sell the land vide agreement dated 12.8.1993 after receipt of Rs.2

lacs as earnest money and possession was also delivered to them. Thereafter, he had executed a sale deed in their favour and the said bargain was in the knowledge of defendant no.1 and Charan Dass. It was also denied that there was any family settlement between him and his sons and he was not in knowledge of the alleged decree. Accordingly, it was contended that the plaintiffs were bonafide purchasers for value and without notice of the decree. Defendant no.7 also prayed that he has no objection if the suit was decreed for declaration as claimed by the plaintiffs and by way of counter claim, also sought a decree for declaration.

6. On the basis of the pleadings, the trial Court framed the following issues alongwith additional issues:-

“1. Whether the decree dated 15.3.1996 in civil suit No.56 of 5.2.1996 is collusive, wrong and void? If so, its effect?OPP

2. Whether the plaintiffs are owners in possession of land in suit as alleged?OPP

3. Whether the plaintiffs are entitled to declaration on the facts as alleged?OPD

4. Whether the suit is not maintainable in the present form?OPD

5. Whether the plaintiffs are estopped by their act and conduct to file the present suit?OPD

6. Whether the suit is bad for non-joinder and mis-joinder of necessary parties?OPD

7. Relief.”

Additional Issue

“6A. Whether the counter claim by one defendant is maintainable against the co-defendants or not?OPD

7. The plaintiffs examined five witnesses whereas defendants examined 8 witnesses and the trial Court after taking into consideration the evidence on record came to the conclusion that Jawala Ram himself had pleaded that he had

alienated the property in favour of the plaintiffs vide Ex. P2 in pursuance of the agreement to sell dated 12.8.1993 and the agreement had also been proved by examining Ram Narain. The defendant no.7 himself having appeared in the witness box had admitted having received full sale consideration which estopped the defendants from raising the plea that no sale consideration had passed and even if the plaintiffs had not been able to prove the source of money it would not make a difference and as per evidence on record, Jawala Ram had received a total sum of Rs.3,50,000/- out of which Rs.1,50,000/- was received at the time of registration. The family settlement dated 20.7.1995 on the basis of which the decree was passed in favour of defendant no.1 and Charan Dass was rejected since it was never relied upon in the plaint itself and thus, the trial Court found that it had been fabricated later on. The statement of Jawala Ram was also referred wherein he had stated that his son Gian Singh had tried to prevent him from getting the sale deed registered in favour of the plaintiffs and the pleadings of the suit in which the consent decree was passed showed that nothing was being given to the plaintiffs and the daughter of Jawala Ram and how their rights had been relinquished and the family settlement was not held to be correct. Accordingly, it was held that rights were being created for the first time at the time of passing of the decree and the registration of decree was necessary and it was liable to be set aside on this ground. The suit was accordingly held to be maintainable and the plaintiffs were not estopped byany act of theirs from filing the said suit. The suit was held not to be bad for mis-joinder and non-joinder of parties since Jawala Ram was the exclusive owner of the property and it was self acquired property and it did not make any difference if the daughter of Jawala Ram had not been impleaded and it was accordingly held that property would revert back to Jawala Ram. The suit was, thus, decreed vide judgment and decree dated 5.5.2003 against the contesting respondents-defendants No.1 to 6. The counter claim of Jawala Ram was also decreed and it was held that the property in excess to the sale made by Jawala Ram in favour of the plaintiffs would revert back to him and he was declared owner of the property.

8. That being dissatisfied with the judgment and decree, defendant No.1 filed an appeal before the District Judge, Kapurthala which has been dismissed vide judgment and decree dated 10.1.2005 and resultantly the present Regular Second

Appeal has been filed.

9. The appeal was filed on 16.3.2005 and was returned on17.3.2005 with objections by the Registry of this Court. The appeal, thereafter, was not filed within the prescribed period of 40 days and was refiled after a delay of 1910 days and the Civil Misc. No.7913-C of 2006 has been filed taking the ground that the file had been mixed up with other admitted cases of the Advocate and could not be located and only when the appellant had enquired on 12.7.2010, the file was found lying amongst the admitted cases and, thus, the reason of the delay was of the bonafide mistake of junior counsel and office clerk. The explanation is absolutely wanting as it is hard to swallow that the appellant himself for a period of more than five years did not enquire about the case and neither the fact that the counsel was aware whether the appeal has been filed or not. However, to avoid any prejudice to the parties, the appeal is also being decided on merits though such a long period of delay is not liable to be condoned as has been held by this Court in Darshan Singh Vs. Surjit Singh 2008(2) PLR 336. The relevant paras read as under:-

“Period of limitation has been prescribed under Rule 5 of the Rules and Orders of Punjab and Haryana High Court, Volume V Chapter I, Part A which deals with judicial business. This Chapter deals with "the Presentation and Reception of Appeals, Petitions and Applications for Review and Revision". Rule 5 deals with the re-filing of the appeals and reads as under:

5. Amendment.- (1) The Deputy Registrar may return for amendment and refiling within a time not exceeding 10 days at a time, and 40 days in the aggregate, to be fixed by him any memorandum of appeal for the reason specified in Order XLI, Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not amended within the time allowed by the Deputy Registrar under Sub-Rule (1), it shall be listed for orders before the Court.

From the reading of the aforesaid Rules, it appears that the maximum period of limitation prescribed under the Rules is 40days. Therefore, whenever an appeal is returned to a party for re-filing, it must be re-filed within 10 days and 40 days in aggregate meaning thereby that the maximum period for refilling of appeal is 40 days. In the present case from the report of the Registry, it appears that though appeal was presented within limitation, but it was returned on 27.5.2005 asking the appellant to page mark the paper-book and also file the fair typed copy of the judgment. Appellant should have removed this defect and re-filed the appeal within 10 days and in any case not beyond 40 days. Otherwise also, the defect pointed out did not require much time. This appeal was re-filed after lapse of one year four months and 22 days i.e. 509 days. Main ground urged in the application is unfortunate death of brother-in- law of the applicant/appellant who died on 21. 1. 2006, according to the averments made in the application. Even if the period upto his death and further moratorium of one or two months is given, still there is absolutely no explanation for not re-filing the appeal within reasonable time. Appeal has been preferred after about nine months after the death of applicant's brother-in-law. Thereafter even if the entire period for rectification of further objections is allowed, appeal was again returned to the applicant on 22.3.2007. It has been re-filed 16.4.2007. There is absolutely no valid reason for retaining the file for a period of one year and about five months initially. Limitation has been prescribed under the Rules and Orders of Punjab and Haryana High Court, Volume V Chapter I, Part A which is in the nature of statutory provisions. Rule 5(1) of the said Rules prescribes maximum period of 40 days for re-filing the appeal. Sub Rules (2) of Rule 5 further provides that if the appeal is not amended within time, it be listed before the court for orders. The question arises whether the period of limitation prescribed under Rule 5 of the Rules and Orders of Punjab and Haryana High Court, Volume V Chapter I, Part A should be strictly construed meaning thereby whether it is mandatory or directory. Section 3 of the Limitation Act makes it obligatory for the Court to consider the question of limitation, notwithstanding any defence by the other side. Sub Section (1) of Section 3 of the Limitation' Act reads as under:

“3(1) Bar of Limitation.- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.”

5. The rigor of Sub-section (1) of Section 3 of the Limitation Act has to operate, if the appeal is not filed within the prescribed period of limitation. Contention can only be allowed to be raised within the purview of Section 5 of the Limitation Act which inter-alia requires that sufficient cause should be shown for not preferring the appeal within the prescribed period of limitation. Rule 5 of the Punjab and Haryana High Court Rules and Orders, Volume V Chapter l-A, Part A also Game up for consideration before the learned Single Judge of this Court in the case of Gurbachan Singh v. Shri Mastan Singh etc. 1984 RRR 27: 1984 P.L.R. 438 wherein following observations have been made:

6. It was urged by Shri R.S. Bindra, Senior Advocate that once the appeal is filed, it has to be taken to remain on the record of the Court even if the memorandum of appeal is returned by the High Court to the party for removing certain defects. In his view, unduly long time spent by the petitioner, which has been considered as unexplained in the order dated March 7, I 980, requires to be ignored. Prithvi Raj v. Smt. Kamal Kanta 1980 P.L.R. 155 is a Division Bench decision of this Court which covers this point also. This judgment was relied upon by me in the order dated March 7, 1980 for dismissing the appeal of the petitioner, being barred by time. Prithvi Raj's case (supra) has been followed in F.A.O. No. ll7-M of 1981 Smt. Kusum Lata v. Rakesh Mohan Pathak decided on 10th November, 1983. Mr. R.S. Bindra, Senior Advocate, urged that the Rules framed by the High Court, providing a limitation of 40 days for the removal of defects pointed out by the Registry of this Court, should be taken to be of a directory nature. Since once, according to him, a memorandum of appeal is filed under Order 41 Rule 1, Code of Civil Procedure, it cannot be rejected on any other ground that the one contained in Order 41 Rule 3 of the same Code. These rules have been made by the High Court to further the ends of justice. A party cannot be given undue latitude in complying with the orders of the Registry to remove the defects pointed out in appeal. The appellant cannot be permitted to move at leisure. If great latitude is given to the litigants, then they might not only take months but years for complying with the orders. The appellant in this case took 85 days to refile the appeal after removing the defects pointed out by the Registry. Such misuses require to be checked.

6. In view of the ratio of the aforesaid judgment wherein a Division Bench judgment of this Court has been relied upon, I find that in the present case, delay in re-filing the appeal has not been explained at all what to say satisfactorily explained. As a matter of fact, there is no explanation for condoning the delay of such a long period in re-filing the appeal. Rigor of Section 3(1) of the Limitation Act will operate. There is no sufficient cause for condoning the delay. This application is accordingly dismissed and consequently the Regular Second Appeal.

10. Counsel for the appellant has contended that the decree had been passed on 15.3.1996 in favour of his brother Chaman Lal and Jawala Ram had no authority to sell the land by way of registered sale deed. The Courts below have found that the decree which has been passed on 15.3.1996 was collusive and result of misrepresentation and fraud and defendant no.7 was an illiterate and rustic old man and he had given the details of fraud and misrepresentation in para No. 3 of the plaint and while appearing in Court had stood by the same. In his deposition he stated that he was residing with his son plaintiff no.2 Chaman Lal for the last 15-20 years and when he had gone to meet his son Gian Singh defendant no.1 he had stayed with him for 2-1/2 -3 months and he had taken him to the city for getting his old age pension enhanced and got his thumb impression on blank papers. Accordingly, it is clear that his son had taken the advantage of his fiduciary relationship with his father and played fraud through the process of the court. The Hon'ble Supreme Court in S.P.Chengalvaraya Naidu Vs. Jagannath (1994) 1 Supreme Court Cases 1 has held that fraud goes to the root of the matter and all such acts are liable to be set aside. The position has subsequently been reiterated by Hon'ble Supreme Court in Hamza Haji Vs. State of Kerala and another (2006) 7 Supreme Court Cases 416 and it has been held that fruits of the litigation arising out of such fraudulent acts are not to go to the parties. The relevant paras read as under:-

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs and Ors. (1993) Supp. 3 SCR 422, this Court stated that,

"it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, Bank-loan dodgers, and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

21. In Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others [(2003) Supp. 3 SCR 352], this Court after quoting the relevant passage from Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341] and after referring to S.P. Chengalvaraya Naidu Vs. Jagannath and Ors. (supra) reiterated that fraud avoids all judicial acts. In State of A.P. and Anr. Vs. T. Suryachandra Rao (2005) 6 SCC 149, this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of Lord Denning in Lazarus Estates Ltd. Vs. Beasley (supra) that,

"No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263:

"Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In Patch Vs. Ward [1867 (3) L.R. Chancery Appeals 203, Sir John Rolt, L.J. held that:

"Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance."

11. The deposition of DW-3 Shangara Singh, Advocate who represented Jawala Ram has been considered by the Lower Appellate Court wherein he has stated that he never knew Jawala Ram personally nor his sons. The absence of alleged family settlement dated 20.7.1995 in the suit in question has also been taken into consideration by the Courts below and it has been held that the document was never in existence at the time when the earlier suit was filed and was prepared to prove the fact that family settlement had taken place. Once Jawala Ram has been owner of the land which was self acquired and opted to sell the same in favour of the plaintiffs after receiving due consideration, the receipt of which had been proved and Jawala Ram had himself admitted the same, no fault can be found with the reasoning of the Courts below as the vendee himself has admitted the receipt of the sale consideration and the defendants no.1 to 5 could not contend that the sale was without any consideration and liable to be set aside.

12. The concurrent findings of the Courts below are not liable to be interferred with and the fraud played by his sons with his father and also keeing in mind that an effort has been made to keep the litigation hanging for a period of more than five years by not refiling the appeal goes further to substantiate the malafide intention of the appellant. Thus, no question of law much less any substantial question of law arises from the records of the present case which would warrant interference in Regular Second Appeal. Accordingly, the present appeal is dismissed in limine and judgments and decrees of the Courts below are upheld.