
Before Viney Mittal, J

SARUP SINGH—Plaintiff/Appellant

versus

KULWANT SINGH AND OTHERS,—*Defendant / Respondents*

R.S.A. 1267 OF 1983

29th October, 2003

Code of Civil procedure, 1908—Plaintiff executing a GPA in favour of his real nephew, defendant No. 1—Defendant fraudulently selling plaintiff's rights in mortgaged land and also his own land on the basis of said GPA in favour of close relatives—Trial Court finding the sale deeds a result of fraud—1st Appellate Court reversing the findings of the trial Court—1st Appellate Court failing to take into consideration the facts and circumstances of the case and dealing with the case in a wrong perspective—1st Appellate Court also failing to advert to the relationship inter se between the defendants which shows the property of the plaintiff sought to be grabbed—Findings of 1st Appellate Court based on mis-reading and non-reading of important evidence and the same can be termed to be judicially perverse and, as such liable to be set aside.

Held, that the learned first appellate Court while reversing the findings recorded by the learned trial Court has neither taken into consideration the entire evidence led by the parties nor had dealt the case in a correct perspective. It has not even adverted to the relationship inter se between the defendants. The said relationship between defendant No. 1 and the remaining defendants definitely points out the manner in which the property of the plaintiff was sought to be grabbed by the defendants.

(Para 20)

Further held, that the plaintiff has proved that he had been defrauded by defendant No. 1 and in turn by fraudulently getting the said power of attorney and acquiring the power of conveyance, said defendant No. 1 had executed the two sale deeds dated 3rd May, 1979 in favour of his brother-in-law and his real nephew as well as his son. The facts speak for themselves.

(Para 21)

Sanjay Majithia, Advocate, *for the appellant.*

Ms. Alka Sarin, Advocate, *for the respondents.*

JUDGMENT

VINEY MITTAL, J

(1) During the course of arguments, the following substantial questions of law have arisen in the present appeal :

- (a) As to whether the findings recorded by the learned first appellate Court having not taken into consideration the facts and circumstances of the case, the said findings can be sustained in law ?
- (b) As to whether the learned first appellate Court having dealt the case in a wrong perspective, the findings recorded by it can be termed to be judicially perverse and as such are liable to be set aside ?
- (c) As to whether the learned first appellate Court having based findings on misreading and non-reading of important evidence, the said findings are liable to be set aside?

(2) The plaintiff is in appeal. He filed a suit for declaration to the effect that the sale deed dated May 3, 1979 vide which the mortgagee rights has been sold by defendant No. 1 Jaswant Singh in favour of defendant No. 2 Kulwant Singh and the sale deed dated May 5, 1979 executed by defendant No. 1 Jaswant Singh in favour of defendants No. 3 to 5 are null and void being the result of fraud and not binding on the rights of the plaintiff. A consequential relief was claimed to restrain the defendants from interfering or taking the forcible possession of the suit land.

(3) The plaintiff claimed that he was in possession of the suit land measuring 20 kanals as mortgagee and was also the owner of the land measuring 31 kanals 17 marlas. The plaintiff pleaded that he is an old man and defendant No. 1 was his real nephew who used to visit him and requested him that in case a general power of attorney was executed in his favour then he (defendant No. 1) will manage the property and will defend the suit land from all litigations and also serve the plaintiff. He further averred that on the aforesaid assurance of defendant No. 1, plaintiff executed a general power of attorney

dated March 29, 1979 in favour of defendant No. 1. Later on, the plaintiff came to know that defendant No. 1 had also got inserted a clause in the said general power of attorney by playing a fraud upon the plaintiff whereby defendant No. 1 had been authorised also to alienate the suit land. It was claimed that the plaintiff had never given any such right to defendant No. 1 to alienate the suit land nor there was any such necessity with the plaintiff to alienate the suit land. It was maintained by the plaintiff that the aforesaid clause was got inserted in the said power of attorney by defendant No. 1 with the connivance of the petition writer as well as the other witnesses. On the basis of the aforesaid power of attorney, defendant No. 1 on May, 3, 1979 sold the mortgagee rights in the mortgage land in favour of defendant No. 2 who was the real brother-in-law of defendant NO. 1 and again through another sale deed dated May 3, 1979 land measuring 31 kanals 17 marlas was sold in favour of defendants No. 3 to 5. In fact defendant No. 5 Sukhminder Singh was the real minor son of aforesaid defendant No. 1 Jaswant Singh whereas defendants No. 3 and 4 were real nephews of aforesaid Jaswant Singh. It was claimed that the aforesaid sale deeds were null and void and were without consideration and the plaintiff had never authorised defendant No. 1 to execute any such sale deeds regarding the suit land. On coming to know of the aforesaid fraud, the plaintiff got cancelled the said general power of attorney on May, 29, 1979. On these averments, the present suit was filed.

(4) The defendants contested the suit. Separate written statements were filed by defendants Nos. 2 and 3 and defendants Nos. 4 and 5. Almost identical pleas were taken by defendants. The maintainability of the suit was challenged. It was also claimed that defendant No. 1 had duly executed the sale deeds in question on the basis of the authority given to him by the plaintiff in the general power of attorney. The defendants also claimed that they had purchased the suit land for a valid consideration. Defendants No. 4 and 5 also claimed that they were *bona fide* purchasers for consideration without notice of any defect in the sale deeds.

(5) A replication was filed by the plaintiff. All the pleas taken in the written statements were controverted and the stand taken by the plaintiff in the plaint was reiterated.

(6) The learned trial Court framed the following issues :—

1. Whether the suit is not properly valued for the purpose of court fee and jurisdiction ? OPD
2. Whether the plaintiff is estopped to file the present suit as alleged in para No. 2 of the written statement ?
3. Whether the plaintiff has *locus standi* to file the suit? OPP
4. Whether the suit is maintainable in the present form? OPP
5. Whether the Mukhtiarnama dated 29th March, 1979 and sale deed and sale of mortgagee rights are the result of fraud played upon the plaintiff ? OPP
6. Whether the plaintiff is entitled to the injunction as prayed for ? OPP
7. Relief.

(7) The parties led their evidence. On the basis of the evidence led by the parties, the learned trial court held that Jaswant Singh defendant No. 1 was the real nephew of plaintiff Sarupa Singh. The learned trial Court also found that Jaswant Singh defendant No. 1 had appeared as DW11 and had admitted in his cross-examination that Kulwant Singh defendant No. 2 is his brother-in-law whereas defendants No. 3 and 4 are his real nephews. It was also admitted that defendant No. 5 is his real minor son. On the basis of the aforesaid relationship as well as the other evidence led by the parties, the learned trial Court found it as a fact that Sarupa Singh plaintiff was an old man of 80/90 years of age and had no issue or wife. It was claimed that some amount was lying in the bank in the name of Sarupa Singh and the land owned by Sarupa Singh was being cultivated through his brother. Nothing had come on record that Sarupa Singh had necessity of money for the purpose of any of his issues or any such other act. No other litigation was pending against Sarupa Singh. On that basis it was held that the power to alienate the land had been got incorporated by defendant No. 1 in the power

of attorney dated March 29, 1979 at the instance of Jaswant Singh with the connivance of marginal witnesses. It was further held that the sale deeds in question were not for consideration. Another fact which had been duly taken note of by the learned trial Court that two receipts Ex. D1 and Ex. D2 dated April 15, 1979 showed that the witnesses of the said receipts were the same as were the witnesses of the sale deeds in question and if the receipts were executed in a normal way then there was absolutely no necessity for the plaintiff Sarupa Singh to have executed the power of attorney in favour of Jaswant Singh for executing the sale deeds. The receipts Ex. D1. and Ex. D2 further showed that the thumb impressions of Sarupa Singh were obtained already and the receipts and not been executed in normal way.

(8) On the basis of these findings, the learned trial Court held that the sale deeds dated May 3, 1979 were the result of fraud and mere execution of power of attorney by Sarupa Singh was no ground to estop him from filing the present suit because Sarupa Singh plaintiff had no intention to alienate the land without any necessity. Accordingly, the suit filed by the plaintiff was decreed.

(9) The defendants felt aggrieved. They took up the matter in appeal before the learned first appellate Court. The learned first appellate Court,—*vide* judgment and decree dated February 8, 1983 accepted the appeal filed by the defendants and after reversing the judgment of the learned trial Court dismissed the suit filed by the plaintiff.

(10) Now the plaintiff has approached this Court through the present regular second appeal.

(11) I have heard Shri Sanjay Majithia, Advocate, the learned counsel appearing for the appellant and Ms. Alka Sarin, Advocate, the learned counsel appearing for the respondents at a considerable length and with their assistance have also gone through the record of the case.

(12) Shri Sanjay Majithia, the learned counsel appearing for the appellant has argued that the learned first appellate Court has approached the case completely in a wrong perspective and had merely been influenced by the due execution of the sale deeds and also the

fact that Sarupa Singh had executed the general power of attorney on March 29, 1979 in favour of defendant No. 1. It has been argued by Shri Majithia that mere execution of the aforesaid documents cannot be taken to mean that the case of the plaintiff was liable to be rejected. According to Shri Majithia, the attending circumstances of the case, the relationship between the parties and the pleas raised by the plaintiff have been completely ignored by the learned first appellate Court.

(13) Shri Majithia has drawn my pointed attention to the statement of the plaintiff while appearing as his own witness. The plaintiff has himself appeared as PW3 to state that he was an old man and was in possession of two and half killas of land as mortgagee and remaining 4 killas of land as absolute owner and was in possession of the entire land and was cultivating the same with the help of his brother. The plaintiff has further stated that defendant No. 1 Jaswant Singh was his real nephew. He has categorically stated that neither he had ever agreed to insert the aforesaid clause with regard to giving any power to Jaswant Singh to alienate or transfer the land in any manner nor there was any such necessity for him to sell the land. He has categorically stated that he had never received the money. Shri Majithia maintains that although Jaswant Singh-defendant No. 1 while appearing as DW11 had also admitted the relationship between the parties and also the fact that the land had been sold through these two sale deeds by aforesaid Jaswant Singh to his brother-in-law, his real nephew as well as his own son but this fact has been completely lost sight of by the learned first appellate Court. On that basis, Shri Majithia maintains that the findings recorded by the learned first appellate Court were clearly contrary to the record judicially perverse and not legally sustainable.

(14) On the other hand, Ms. Alka Sarin, the learned counsel appearing for the respondents has submitted that the general power of attorney dated Marcy, 29, 1979 clearly showed that there was a specific clause authorising the said attorney Jaswant Singh to alienate or transfer the land in any manner. Ms. Sarin maintains that once the power of attorney was duly proved to have been executed by the plaintiff, then the aforesaid clause necessarily gave authority to defendant No. 1 to execute the sale deeds in question and as such no fault could be found with the said sale deeds. Ms. Sarin has also

placed reliance on the two receipts Ex. D1 and Ex. D2 dated April 15, 1979 to contend that the sale consideration had been duly handed over to the plaintiff.

(15) Having given my thoughtful consideration to the rival pleas raised by the learned counsel for the parties, I find that the present appeal deserves to succeed.

(16) In the plaint filed by the plaintiff, he had categorically stated that he was an old man and defendant No. 1 had approached him and assured him that if the plaintiff executed a general power of attorney in his favour, then he would not only manage the property in dispute properly but shall also take care of any litigation which may be instituted with regard to the property in dispute. He also assured that he shall serve the plaintiff. As a matter of fact the execution of the power of attorney dated March, 29, 1979 had been duly admitted by the plaintiff in his plaint. However, the plaintiff has maintained that he never got inserted the clause with regard to any power or authority in favour of defendant No. 1-Jaswant Singh to transfer/ alienate the property in dispute in any manner. It has further been averred that the plaintiff had no necessity to alienate the land in question. The factum that the sale deeds in question had been executed by defendant No. 1 in favour of his brother-in-law (wife's brother) and his real nephew and real son has also been specifically averred in the plaint. It has also been averred that, at no stage, any consideration has ever passed on to the plaintiff with regard to the sale deeds.

(17) The defendants in the written statement denied any such relationship between them and aforesaid Jaswant Singh. However, aforesaid Jaswant Singh appeared as DW1 and in his cross-examination he admitted his relationship with the defendant. From the aforesaid statement of Jaswant Singh itself, it is apparent that the defendants has taken a false and baseless plea and even denied their relationship with defendant No. 1.

(18) I have also perused the two receipts Ex.D1 and Ex.D2. The aforesaid two receipts are dated April, 15, 1979. A persual of the two receipts would show that the space in the writing is not uniform. The said two receipts are shown to have been attested by the same

two witnesses who are the marginal witnesses of the sale deeds. If the plaintiff had himself executed the two receipts which are shown to have been attested by the same witnesses, then there was absolutely no necessity for the attorney to have executed the sale deeds in favour of the defendants. As a matter of fact, the said sale deeds could have been executed by the plaintiff himself. This fact has been duly noticed by the learned trial Court but the learned first appellate court has not even adverted to this circumstance creating a suspicion in the due execution of the sale deeds and passing of the consideration.

(19) It may be relevant to notice here that the plaintiff had again appeared as his own witness on March 3, 1982 in rebuttal. In the said statement, he had duly explained that his thumb impressions had been obtained on blank papers in a school. This evidence of the plaintiff has not at all been adverted to by the learned first appellate Court.

(20) It may be relevant to notice here that one more circumstance which has been taken note of by the learned trial court is that the aforesaid two receipts Ex. D1 and Ex. D2 are shown to have been executed by defendant No. 1 on April, 15, 1979. If the said receipts had been executed prior in time to the sale deeds and the sale consideration had been duly paid to Sarupa Singh plaintiff as claimed by defendant No. 1 through the aforesaid two receipts, then the said fact should have been mentioned in the sale deeds. This fact, although duly noticed by the learned trial Court, has been completely ignored by the learned first appellate Court. It is apparent that the learned first appellate Court while reversing the findings recorded by the learned trial court has neither taken into consideration the entire evidence led by the parties nor had dealt the case in correct perspective. It has not even adverted to the relationship inter-se between the defendants. The said relationship between defendant No. 1 and the remaining defendants definitely points out the manner in which the property of the plaintiff was sought to be grabbed by the defendants.

(21) In these circumstances, I have no hesitation in holding that the plaintiff has proved that he had been defrauded by defendant No. 1 and in turn by fraudulently getting the said power of attorney and acquiring the power of conveyance, said defendant No. 1 had

executed the two sale deeds dated May 3, 1979 in favour of his brother-in-law and his real nephew as well as his son. The facts speak for themselves.

(22) Although the plaintiff had filed the suit on the basis of fraud alone but certain facts which emerge out of the record also clearly show that the plaintiff being an old man of 80/90 years of age at the time of the execution of the said power of attorney and defendant No. 1 being his real nephew, defendant No. 1 had also taken advantage of his relationship with the plaintiff. In these circumstances although the plea of undue influence has not been taken by the plaintiff but the facts and circumstances do show that the said relationship between the plaintiff and defendant No. 1 did play a major role in the execution of the said power of attorney dated March 29, 1979 by the plaintiff in favour of defendant No. 1. In such circumstances in fact the learned first appellate Court should have been extra cautious in determining the controversy in question. Defendant No. 1 in fact being a person in fiduciary relationship with the plaintiff was definitely in a position to influence the reason of the plaintiff. This important aspect of the matter has been completely lost sight of by the learned first appellate Court.

(23) In view of the above detailed discussion, I have no hesitation in answering all the question (a), (b) and (c) in favour of the plaintiff-appellant and as such in holding that the findings recorded by the learned first appellate court are contrary to the record and being judicial perverse are not legally sustainable.

(24) Accordingly, the present appeal is allowed and the judgment and decree of the learned first appellate Court are set aside and that of the learned trial court are restored and consequently, the suit of the plaintiff as originally prayed is decreed. There shall be no order as to costs.

R.N.R.