(1988) 05 P&H CK 0022

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 3363 of 1987

Talwinder Singh	APPELLANT
Vs	
Rupinder Singh	RESPONDENT

Date of Decision: May 11, 1988

Citation: (1988) 05 P&H CK 0022

Hon'ble Judges: M.S. Liberhan, J

Bench: Single Bench

Advocate: R.S. Sihota, for the Appellant; V.K. Bali with Mr. Madan Lev, for the Respondent

Final Decision: Dismissed

Judgement

M.S. Liberhan, J.
Plaintiff filed a suit for pre-emption on 7.11.1984 contending that he was a co-sharer and had a preferential right to preempt sale dated 11.11.1983 for a consideration of Rs. 44362/-.

2. The defendant controverted the facts alleged by the plaintiff and various other legal pleas were taken. The trial Court found that the plaintiff had a superior right of pre-emption on the date he filed the suit. He lost that right during the pendency of the suit as preliminary order of partition of the land in dispute had been passed by the Assistant Collector on 23.9.1986. Since the pre-emptor had lost the right of pre-emption on the date of the decree, the suit was dismissed.

3. The plaintiff preferred an appeal wherein it was found that the order dated 23rd September, 1986 was a void order since it was passed by the revenue authorities without notice to the plaintiff and in fact was set aside vide order dated 6.4.1987 by the appellate authority viz., Collector. Thus there was no order of partition or the date of decree. The plaintiff had the right of pre-emption on all the three dates i.e. the date of sale, the date of suit and the date of decree. Consequently accepting the appeal the judgment and decree of the trial Court was set aside and the suit was decreed.

4. Learned counsel for the defendant-appellant has contended that the appellate court had no jurisdiction to take notice of the order dated 6.4.1987. The appellate court could only determine the legality or validity of the decree passed by the trial Court. Since the order dated 23.9.1986 was in existence on the date of the decree, the plaintiff had no superior right of pre-emption surviving on the date of the decree and the decree for pre emption was validly declined. Learned counsel has relied upon Ramji Lal Ram Lal and another v. State of Punjab through Secretary to Government of Punjab, Revenue Department and others AIR 1966 P&H. 374, State of Punjab Vs. Ramjilal and Others, and State of Haryana and others v. Vinod Kumar and others (1986-1) 89 P.L.R. 222 (F.B.).

5. Counsel for the respondent has controverted these submissions and contends that the order of partition dated 23.9.1985 had been passed without notice to the plaintiff and thus it was a void order and could not be taken notice of. In view of the fact that the appeal against this order was accepted, it should be deemed as if the original order of the Assistant Collector never existed. It is further contended that the order of the Assistant Collector merged into the order of the appellate authority and thus by legal fiction the order of the Assistant Collector would be deemed to be non-existent on the date of the decree. It is further submitted that the order dated 23.9.1986 being void can be ignored. It need not be got set aside in an appropriate proceeding. The appellate Court was bound to take notice of the order passed in appeal in the partition proceeding. He relies upon Kewal Ram Vs. Smt. Ram Lubhai and Others, , State of Haryana and others v. Vinod Kumar and others (1986-1) 89 P.L.R. 222 (F.B.), and Dev Raj Bawa v. Om Parkash Gupta and others (1975) 77 P.L.R. 648.

6. The Full Bench judgment cited by the counsel for the appellant (Vinod Kumar and others'' case) (supra) is not pari materia on the facts, law and circumstances of the case. There is no quarrel with the proposition propounded by the said judgment to the effect that any fact coming into existence depriving the pre-emptor of his right of pre-emption after the passing of the decree by the trial Court cannot be taken notice of and on passing of pre-emption decree, the right of pre-emption becomes vested right and the subsequent events cannot take it away except when they were of retrospective nature. It was further observed in the said judgment as under:-

It cannot be, however, disputed that ordinarily an appellate court can give effect to such rights only as had come into being before the suit had been disposed of and which the trial Court was competent to dispose of.

7. The learned Judges referred to Sakina Bibi''s case and followed it. The learned Judges were of the opinion, that when a pre-emptor establishes his preferential right to pre-empt a sale to the date of the adjudication by the trial Court, his right to get the property in preference to the vendee effectively comes into existence than, and so it becomes a vested right, which obviously can only be taken away from him by retrospective legislation.

8. The only support counsel for the appellant sought from the State of Punjab v. Ramji Lal and others'' case (supra) is that it had impliedly affirmed the law propounded by the Full Bench report in Ramji Lal Ram Lal and another''s case (supra).

9. Lakhwinder Singh and others v. Balvinder Singh 1987 P.L.J. 595 is again distinguishable on the facts and circumstances of this case in as much as in that case partition was effected after the decree by the trial Court had been passed and the learned Judge following the Full Bench Judgment Vinod Kumar and others'' case (supra) observed as follows:-

That partition effected during the pendency of pre-emption appeal cannot be taken notice of as right has to be seen on the date of sale, suit and decree of the trial Court.

There is no dispute with the proposition laid down in Lakhwinder Singh''s case (supra). However, it cannot be said that if right was only eclipsed during trial Court proceeding the appellate Court cannot take notice of removal of the eclipse.

10. I am in agreement with the contention raised by the learned counsel for the respondent, that on the acceptance of the appeal the judgment under appeal shall be deemed to have been non-existent and it cannot be given effect to. Thus it shall be deemed that no partition had ever been ordered. While judging the legality and validity of decree passed by the trial Court it has to be seen that the trial Court has passed the decree without there being any order of partition in the eye of law. The mere factum of existence of the order of partition is not sufficient to hold that the plaintiff had lost the right of pre-emption on the date of the decree. The appellate Court has to take into consideration the effect of order of the appellate authority setting aside the order of partition. The lower appellate Court was right in coming to the conclusion that there was no order of partition on the date of the passing of the decree by the trial Court.

11. Learned counsel for the respondent contends that the order of partition is a void order having been passed at his back. He further points out that it has been so observed in the order dated 6.4.1987 Exhibit P 5 Learned counsel for the appellant has controverted the other submission of the learned counsel for the respondent and has taken me through the orders Exhibits D.1 and D.2 to point out that though neither any presence was recorded, nor it was recorded that the plaintiff was proceeded against ex-parte, yet it should be presumed that it was passed in their presence. He further contends that the practice of revenue authorities is that the presence is not recorded. I find no force in the contention raised by the learned counsel for the appellant. A bare perusal of the opening sentence of Exhibit D. 1 shows that the case was considered in the presence of the counsel for the applicant but there is nothing to indicate whether anybody was present on behalf of the respondent or not. There is no record to show that the plaintiff or the affected parties were ever served with notice or were proceeded ex parte. Nothing has been brought to my notice to show that there is any rule or regulation that the presence is not required to be recorded in the quasi judicial orders of the revenue authorities.

12. The lower appellate court for the reasons recorded has come to the conclusion that the order dated 23.9.1986 was not passed in the presence of all the parties, it was passed without serving the plaintiff any notice, it is a void order. No error has been pointed out in the said finding which is hereby affirmed.

13. In view of my above observation, I find no force in the appeal and the same is dismissed with no order as to costs.