

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No. 5313 of 2012
Date of decision : November 16, 2015

Labh Singh

..... Appellant

Versus

Surjit Kaur and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashok Singla, Advocate
for the appellant.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J (oral).

The appellant-plaintiff is in Regular Second Appeal against the concurrent finding of fact whereby the suit for declaration and permanent injunction and subsequently amended for possession has been dismissed by both the courts below.

Learned counsel appearing on behalf of the appellant-plaintiff submits that Surjit Kaur has mortgaged the suit property to the brother of the appellant-plaintiff. However, subsequent to the registered mortgage deed, entered into an agreement to sell dated 13.6.1976 and in part performance of the same handed over the possession. Before she could initiate the proceedings for redemption, a civil suit dated 29.4.1991 Ex.P-8 was filed for challenging the agreement to sell. Though, in the written

statement Ex.P-9 it was stated that it was only an agreement to sell and not sale deed. The said suit was dismissed vide Ex.P-6 dated 23.12.1993. Thereafter, the suit for redemption before the concerned authority was filed against the mortgagees. The said suit had attained finality in execution of the said proceedings. The order dated 19.7.2005 Ex.P-4 was passed and ultimately the appellant-plaintiff was dispossessed on 10.10.2006, for which fresh cause of action accrued. The amendment of the plaint was sought and additional issue in this regard was framed.

The trial court has not referred to issue No. 10-A. However, the lower appellate court, though referred to the aforementioned issue but has not rendered any finding being last court of fact and law. However, submitted that the trial court closed the evidence of the plaintiff by order. The same was challenged before the trial court and was also challenged in appeal by taking aid of Order 43 Rule 1-A CPC. However, there is no adjudication of the same, therefore the impugned judgments and decrees suffer from illegality and perversity, therefore substantial question of law arise for determination by this Court.

He further submits that both the courts have erred in non-suiting the appellant on the premise that already Gurmail Singh has lost up to this Court, but the fact remains that the appellant-plaintiff who has been in possession in part performance of the agreement to sell as per provisions of Section 53-A of the Transfer of Property Act, 1882 is entitled to protect his possession.

He further submits that the appellant-plaintiff is not

bound by the proceedings initiated for redemption of the mortgage, therefore, the findings are not binding upon him.

I have heard learned counsel for the appellant, appraised the paper book and the case law cited during the course of arguments in regard to protection of possession in part performance of the agreement to sell.

No doubt, the vendee is entitled to protect his possession in part performance, provided certain conditions are applied. It is a matter of record that the appellant has not sought specific performance of the agreement to sell dated 13.6.1976 though, it has been found that he has been in possession as per judgment and decree dated 23.12.1993 Ex. P-6.

In my view, the possession of the appellant-plaintiff in the absence of any claim for specific performance was unauthorized as the limitation to seek specific performance had elapsed. Appellants could have set up counter claim in a suit initiated by Surjit Singh on 29.4.1991. As regards the plea of challenging order whereby the evidence of the appellant-plaintiff was closed, I am of the view that the plaintiff had sought excuse of non-appearance, as he was stated to have been suffering from an ailment, however, no medical record was attached in support of grounds of appeal.

Once the appellant-plaintiff has not stepped into the witness box to prove the averments made in the suit, as well as arguments raised, in my view, has lost the right to claim declaration and consequential relief of injunction much less possession but the position would have been different if the plaintiff had not been

dispossessed, definitely the Courts could have come to his rescue in part performance of the agreement to sell *ibid* as per provisions of Section 53-A of the Transfer of Property Act, 1882 but this is not the situation as the order of dispossession was passed prior to the filing of the suit and dispossession was caused during the pendency of the suit. Once the plaintiff has failed to seek specific performance, he cannot protect possession as the agreement to sell does not confer title.

In my view, the possession was thus converted into a illegal much less unauthorized manner.

I do not intend to differ with the finding rendered by both the courts below which is based on appreciation of oral and documentary evidence. I do not find any illegality or perversity in the aforementioned judgment and decree of the appellate court.

No substantial question of law arise for determination by this Court.

In view of what has been observed above, the appeal is devoid of merits, accordingly, the same is dismissed.

(AMIT RAWAL)
JUDGE

November 16 , 2015
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