

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

RSA No.3646 of 2015 (O&M)

Date of decision : 04.08.2015

Gurcharan Singh

...Appellant

versus

Jaswant Singh

...Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. G.C. Shahpuri, Advocate for the appellant.

RITU BAHRI, J (Oral)

The appellant/defendant has come up in regular second appeal against the judgments of the trial Court dated 17.02.2014 and the lower appellate Court dated 28.05.2015, whereby the suit of the respondent/plaintiff-Jaswant Singh for mandatory injunction directing the defendant to remove his belongings from the shop and vacate the shop, has been decreed.

The shop in dispute was owned by Sh.Balkar Singh, father of the plaintiff. As per a family settlement through decree dated 11.04.1994, the plaintiff was given this shop along with another shop and first floor built thereon, the defendant being son of Balkar Singh was in permissive possession of the shop in question and after the decree dated 11.04.1994 in favour of the plaintiff, the defendant become the licensee of the plaintiff in the shop in question. He was requested by the plaintiff to remove the belonging from the shop in question and vacate the same and hand over the possession to the

plaintiff as the plaintiff terminated the licence of the defendant but the defendant did not do so and hence the suit.

On notice, the defendant filed the written statement and took the stand that he was the owner in possession of the shop in question alongwith house in property at the time of family settlement which took place in the year 1980. Pursuant to the family settlement, now the defendant was running the kharad machine in the shop with the help of bank loan. No decree was passed within the knowledge of the defendant. The following issues were framed:-

- “1. Whether the plaintiff is entitled to the relief mandatory injunction, as prayed for? OPP.*
- 2. Whether the suit is not maintainable in the present form? OPD.*
- 2 (A). Whether the present suit is barred by order II Rule 2 of the Code of Civil Procedure and is liable to be dismissed? OPD.*
- 3. Whether the plaintiff has no locus standi to file the present suit? OPD.*
- 4. Whether the plaintiff is stopped from filing the present suit by their own act and conduct? OPD.*
- 5. Relief.”*

The plaintiff appeared in the witness box and tendered his affidavit PW1/A, whereby he had deposed that during his life time, his father has suffered a decree in April, 1994. In 1995, Gurcharan Singh-defendant filed a suit which was dismissed and partition was confirmed. Thereafter an appeal was filed which was also dismissed and the defendant was asked to remove the material from the shop. Hence he became owner by virtue of the family settlement and decree.

He was in possession of the shop. Gurcharan Singh was carrying on his business of kharad in the shop in dispute and electricity connection was also in his name since 1989. He further deposed that in the decree 1994, it was written that physical possession was handed over to all brothers and as per compromise in 1980, all are in possession of their properties. The plaintiff examined PW2 Kesho Ram, who tendered his duly sworn affidavit PW2/A, wherein he had deposed that in January, 1994 Balkar Singh divided his property. Three shops, first floor (chaubara) came in the share of Jaswant Singh. Adjoining portion western side came to the share of Swaran Singh. Western portion came into the share of Gurcharan Singh and sons of Ajit Singh. He further deposed that Balkar Singh had given permission to Gurcharan Singh to keep machinery etc. with the condition that Gurcharan Singh will remove his machinery very soon from the shop in dispute. In cross-examination, he deposed that he is residing in H.No.298A, Saraswati Colony and house number of Jaswant Singh at 298-B. He admitted that Gurcharan Singh was doing the work of kharad in the shop in dispute and at the time of family settlement his father has asked him to vacate the shop in dispute. The defendant appeared in the witness box as DW1 and reiterated the version of written statement in his affidavit Ex.DW1/A. Electricity connection had been taken in the name of Gurcharan Singh and sons in the year 1980. He had proved the electricity bill No.11493 Ex.D2/A and receipt No.108/001474 dated 03.08.2001 Ex.D3, electricity bill No.88251 Ex.D4 and receipt

No.80/001478 dated 30.08.2001 Ex.D5. He had deposed that he had a licence from Municipal Corporation, Jagadhari in the name of the firm Gurcharan Singh and sons. He had taken a loan from Punjab National Bank and produced the copy of term loan instalment Ex.D12. The physical possession had been handed over to the plaintiff. In cross-examination, he deposed that all the shops were given on rent by his father, but these were vacated in 1977-78. He admitted that judgment and decree dated 18.02.1984 was challenged which was dismissed by the lower Court and appeal was dismissed by the High Court. He admitted that his brother looked after his father. He denied that material of Jaswant Singh was lying in his shop. After going through the evidence, the trial Court came to the conclusion that controversy in regard to challenging decree dated 01.04.1994 had already been decided by the Court vide judgment dated 26.05.2003, appeal was filed before Punjab & Haryana High Court which was dismissed on 08.02.2011. The plaintiff is the owner of the property in dispute as per the judgment passed in the above said suit. As per the electricity bills Ex.D3 to Ex.D5 and Ex.D8 to D11 show the possession of the defendant. In the present suit, the dispute is between Jaswant Singh and Gurcharan Singh and the parties in the previous suit were not the same. The suit was not held barred as per the Order Rule 2 CPC. The suit was decreed and a direction was given to the defendant to hand over the possession within two months.

The lower appellate Court has affirmed the findings given

by the trial Court, vide details given in the paragraph 11 of the judgment and Ex.P1 and P2 have been upheld upto the Hon'ble High Court when the appeal of the defendant was dismissed on 08.02.2011. Vide the above said judgment, the plaintiff was held to be the owner of the suit and possession of defendant was permissive and once the licence was removed the plaintiff was held entitled to claim the possession of the property by way of present suit. Pursuant to the decree Ex.P1 and P2, the defendant did not hand over the possession of the property to the plaintiff and instead claim himself to be the owner of the suit property. The cause of action in the present suit was not barred by Order 22 Rule 2.

Counsel for the appellant cannot take any benefit of the judgments passed by the Hon'ble Supreme Court in the case of *Coffee Board Vs. M/s Ramesh Exports Pvt. Ltd., 2014 (3) RCR (Civil) 104* and *Sunderabai w/o Devrao Deshpande & anr. Vs. Devaji Shankar Deshpande 1954 AIR (SC) 82*, to raise bar of Order 2 Rule 2. The defendant has to make a case that the cause of action in the earlier suit and the present suit was same. However, in the facts of the present case, in the earlier suit, a family settlement had taken place and statements of the parties were recorded. Balkar Singh had given his property in favour of his sons. As per the decree 01.04.1994, the property had fallen to the share of Jaswant Singh. The prayer made by Jaswant Singh was that the property which fell in his share should be handed over to him by Gurcharan Singh who was at best in possession

as a licensee. The prayer in both the suits being not identical the bar under Order 2 Rule 2 would not be applicable. The judgments of both the Courts do not suffer from any misreading of evidence and no substantial question of law arises in this appeal for adjudication.

Dismissed.

04.08.2015

Vinay

(RITU BAHRI)
JUDGE