

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

RSA-1748-1991

Date of decision:-2.2.2017

Pahlad Ram and anr.

...Appellants

Versus

Suraj Bhan (since deceased) represented through his LR

...Respondent

CORAM: HON'BLE MR.JUSTICE GURMIT RAM

Argued by: Mr. Mani Ram Verma, Advocate
for the appellants.

Ms. Ankita Sambyal, Advocate
for the respondent.

GURMIT RAM, J.

This regular second appeal is preferred by aforementioned appellants – herein (defendants) against the judgment and decree dated 4.6.1991 passed by the Court of learned District Judge, Bhiwani vide which the judgment and decree dated 21.5.1990 passed by the Court of learned Sub-Judge Ist Class, Bhiwani were maintained and their (defendants') appeal was dismissed.

2. The case of the respondent – herein (plaintiff) before the learned trial Court in nutshell was that the property in dispute was purchased by plaintiff vide sale deed dated 8.8.1958 from one Smt. Bakhtawari daughter of Prem, resident of Bhiwani. After purchasing this property, he gave it shape of an enclosure by raising boundary wall around it. Further, he also made two latrines on this property. The suit property was described with letters 'ABCD' in

red colour in the site-plan annexed with the plaint. The defendants who had no right, title or interest in this property were threatening to interfere into his possession over this property forcibly and illegally. Hence was present the suit.

3. Defendant No.2 in his written statement took preliminary objections that plaintiff had no *locus standi* and cause of action to file this suit; that the suit was not maintainable in the present form; that the plaintiff had not come to the Court with clean hands; that suit was not properly valued for the purpose of Court fee & jurisdiction and that suit was bad for non-joinder and misjoinder of necessary parties. Further, this defendant admitted that suit property was purchased by plaintiff from Smt. Bakhtawari vide a sale deed dated 8.8.1958 as alleged in the plaint. Herein, it was further his plea that subsequently the plaintiff had sold this property to him vide sale deed dated 6.10.1958 for a sale consideration of ₹800/-. At that time, the plaintiff had delivered the possession of this property in dispute to the answering defendant and since then this defendant has been coming in possession of this property as its owner. On 12.3.1986, the marriage of the grand-daughter of this defendant was to be solemnized and for this purpose, he had stored woods etc. on the property in dispute. Now the plaintiff with a *mala fide* intention has been harassing the answering defendant on the occasion of marriage of his grand daughter, deliberately. Then on merits, it was his plea that since his house is adjacent to the property in dispute, so he raised the construction of alleged two latrines (katcha) on this property about 15 days prior to the filing of the written statement in this case. It was denied that plaintiff had any concern with the property in dispute. Rest of the averments were also denied.

Defendant No.1 did not file any separate written statement and rather adopted the written statement of defendant No.2 filed in this suit.

4. Replication was filed. From the pleadings of the parties, following issues were framed:

1. Whether the plaintiff is owner in possession of the property in dispute as shown in red colour and earmarked by letters ABCD in the site-plan? OPP.
2. Whether the plaintiff has constructed two latrines and boundary wall? OPP.
3. Whether the plaintiff is entitled for the injunction claimed? OPP.
4. Whether the plaintiff has no locus standi to file the present suit? OPD.
5. Whether the plaintiff has no cause of action to file the present suit? OPD.
6. Whether the suit is not maintainable in the present form? OPD.
7. Whether the suit is based on malafides and plaintiff has not come with clean hands? OPD.
8. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD.
9. Whether the suit has not been properly valued for the purposes of Court fee and jurisdiction? OPD.
10. Whether the plaintiff has sold the disputed property to the defendant vide sale deed registered on 6.10.1958, if so, to what effect? OPD.
11. If issue No.10 is proved in affirmative, then whether the above-said sale deed is not binding on the rights of the plaintiff, against law and facts and based upon fraud and misrepresentation? OPD.
12. Relief.

5. Learned trial Court after hearing the learned counsel for both the parties and perusing the record, recorded its findings on all the issues in favour of the plaintiff and decreed the suit for permanent injunction vide judgment and

decree dated 21.5.1990.

6. The appeal filed by the defendants against this judgment and decree dated 21.05.1990 was dismissed by the Court of learned District Judge, Bhiwani vide judgment and decree dated 4.6.1991.

7. The appellants – herein (defendants) being dissatisfied with the judgments and decrees passed by both the Courts below have come up before this Court vide the instant appeal, notice of which was given to the respondent – herein (plaintiff). Record of both the Courts below was also requisitioned.

8. Counsel for both the parties were heard and record was also scrutinized with their able assistance.

9. It is admitted case of both the parties that respondent – herein (plaintiff) Suraj Bhan purchased the property in dispute from Smt.Bakhtawari vide a duly registered sale deed dated 8.8.1958, the certified copy of which was produced on record as Ex.P2 in the statement of PW1 – Suraj Bhan (plaintiff). Then it was the case of appellants – herein (defendants) that suit property was further sold by plaintiff – Suraj Bhan in favour of defendant No.2 – Sheo Ram vide a registered sale deed dated 6.10.1958 for a consideration of ₹800/- which fact was denied by respondent – herein (plaintiff). Since the factum of sale deed dated 8.8.1958 Ex.P2 was admitted by the defendants, so there was no need to lead any evidence in order to prove its execution as well as contents as it is settled law that admitted facts need not be proved.

10. So the burden was heavily upon the appellants – herein (defendants) to prove the execution of sale deed dated 6.10.1958 which was allegedly executed by Suraj Bhan plaintiff in favour of defendant No.2 whereby selling the property in dispute in his favour for a sale consideration of ₹800/-.

Then it was also their case that when suit property was sold by plaintiff in

favour of defendant No.2 vide the alleged sale deed dated 6.10.1958, then he (plaintiff) also handed over the original sale deed dated 8.8.1958 to defendant No.2 which was executed in his favour by Smt. Bakhtawari qua this property. Then at the time of leading their evidence, the defendants disclosed that sale deed dated 6.10.1958 has been lost somewhere by them and they failed to trace out the same despite the search. Then they filed an application for permission to prove the execution of sale deed dated 6.10.1958 by way of secondary evidence which was allowed by the learned trial Court vide order dated 9.1.1989. Certified copy of this sale deed was placed on record as Ex.D1 in the statement of DW1 Pahlad Ram-defendant. Then DW2 Sheo Ram (defendant No.2) deposed clearly that Richhpal Harijan and Norang Brahmin were the attesting witnesses of this sale deed out of whom witness Norang Brahmin has died, whereas Richhpal Harijan is alive. Since the defendants did not examine this Richhpal Harijan, attesting witness of sale deed Ex.D1, so the learned trial Court discarded the sale deed Ex.D1 by drawing an adverse inference against the defendants. From the perusal of certified copy of sale deed Ex.D1, it is found that Nanak Singh, Lambardar, Bhiwani and Johnpal were also the attesting witnesses of this sale deed besides Ram Richhpal Harijan, Member Panchayat. It is no where mentioned in it that any Norang Brahmin was also one of its attesting witnesses. In this background, the suit was decreed by the learned trial Court vide judgment and decree dated 21.5.1990.

11. Then defendants came up in appeal against this judgment and decree before the Court of learned District Judge, Bhiwani and during the pendency of this appeal, they filed an application dated 14.03.1990 under Order 41 Rule 27 of the Code of Civil Procedure (for short 'CPC') for permission to place on record death certificate of above-said Ram Richhpal as additional

evidence on the plea that he expired on 14.11.1984 and further for permission to examine Handwriting Expert Sh.Yashpal Chand Jain. Both these prayers of the defendants were declined and appeal was also dismissed simultaneously by the Court of learned District Judge, Bhiwani vide judgment and decree dated 4.6.1991 which necessitated to file the instant appeal before this Court.

12. Learned counsel for the appellants – herein (defendants) has contended that approach of learned District Judge in declining the application of defendants for placing on record death certificate of Ram Richhpal Harijan, one of the attesting witnesses of sale deed Ex.D1, is quite erroneous as well as unlawful. Herein, he has contended that DW2 – Sheo Ram (defendant No.2) inadvertently deposed before the learned trial Court that this Ram Richhpal Harijan is alive whereas the factual position was that this person Ram Richhpal had expired on 14.11.1984. The said death certificate of Ram Richhpal is a public document issued from the office of Municipal Council, Bhiwani which has a direct bearing on the merits of this case. Further, this document is also very essential to adjudicate the matter in issue which certainly is likely to turn the scale of justice in favour of appellants – herein (defendants).

13. Now, I deem it expedient to go through abovesaid application dated 14.3.1990 and death certificate of Ram Richhpal annexed with this application. In this application, it has been mentioned very clearly that Ram Richhpal son of Hira Lal expired on 14.11.1984 and this fact is also found so mentioned in the affidavit dated 18.4.1991 annexed with this application. Then surprisingly the date of death of Ram Richhpal in the death certificate annexed with this application is recorded as 4.11.1966 which was duly got entered in the record of Municipal Council, Bhiwani on 7.11.1966. So the date of death as mentioned in the abovesaid application and the date of death as recorded in the

death certificate of alleged Ram Richhpal do not tally with each other. There is a lot of difference between these two dates i.e. 4.11.1966 and 14.11.1984. So it is not sure as to whether the alleged death certificate annexed with the abovesaid application was of same Ram Richhpal, who was one of the attesting witnesses of sale deed Ex.D1 or of somebody else. Hence, the above contention of learned counsel for the appellants is accordingly declined.

14. Then the learned counsel for the appellants has also argued that the appellants – herein (defendants) could not examine Handwriting Expert Sh.Yashpal Chand Jain for the reason that on the alleged date, he was bound down in some other case by the Court at Jind. Herein, he has further submitted that the report as submitted by this expert after examining the relevant document was already on the file and as such the examination of this expert as a witness was very material to determine the matter in controversy and hence the approach of learned both the Courts below in declining the same was also not justified.

Herein, I deem it proper to see the relevant proceedings of the learned trial Court relating to the above fact. As per the record, issues in this case were framed on 12.1.1987 and plaintiff closed his evidence on 7.12.1987. Thereafter, this case remained pending at the stage of recording the evidence of defendants till 23.4.1990, when their evidence was closed by order vide order of the said date.

Then as per record, two DWs were examined on 6.11.1989 before the trial Court and the case was adjourned to 29.1.1990 for remaining evidence of the defendants and the last opportunity was granted. On 29.1.1990, three DWs were examined. DW Om Parkash, Deed Writer did not appear despite service and as such he was ordered to be summoned throughailable warrants

on filing necessary process fee and the case as such was adjourned to 23.4.1990. For this date, the requisite fee was not filed nor any effort was made for the service of this witness. Then on that date, written request was also sent by Sh.Yashpal Chand Jain, Handwriting Expert for adjournment which was also declined by the Court on the ground that no summons was issued for his service to appear in the Court for deposing in this case.

In the light of above circumstances, no fault could be found in the approach of both the Courts below in declining the above request of the appellants – herein (defendants).

15. Then it is also contended by learned counsel for the appellants – herein (defendants) that both the Courts below have also failed to take judicial notice of the record of the Municipal Council, Bhiwani regarding the ownership and occupation/possession of the property in dispute. In this regard, he has referred to the copy of the assessment register Ex.D3 for the year 1979-80 of the said Municipal Council, Bhiwani. On a bare perusal, it is found that this document pertained to the property bearing No.B-54 situated on road Aramganj which is shown to be in occupation/possession of one Sheo Ram son of Kalu Ram as its owner. 'Then in the head-note of the plaint, the property in dispute is stated to be situated near Kanhi Ram Eye Hospital, Birban Pana, Bhiwani, Tehsil and District Bhiwani. No number of this property nor the road on which it is situated is mentioned herein'. So the description of the suit property as mentioned in the head-note of plaint also does not tally with the description of the property as given in copy of said assessment register Ex.D3 for the year 1979-80. So the probability that document Ex.D3 is pertaining to some property other than the suit property cannot be ruled out.

16. Then learned counsel for the respondent – herein(plaintiff) has

contended that there are concurrent findings of both the Courts below recorded on the basis of evidence as available on the record and as such in the instant second appeal, as per the provisions of Section 100 of C.P.C. it is not legally permissible to record any other findings contrary to the findings recorded by both the Courts below. In support of her contention, she has relied upon the case law as delivered by a Full Bench of the Hon'ble Apex Court titled as **Deity Pattabhiramaswamy Versus S. Hanymayya and others, AIR 1959, Supreme Court 57** wherein it was held as under:

The provisions of S. 100 of C.P.C. are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence. (The practice of some judges of the High Court disposing second appeals as if they were first appeals deprecated).

17. No other point is raised.

18. In the light of above discussion, this appeal stands dismissed being meritless as well as bereft of any substantial question of law and disposed of accordingly.

2.2.2017
Brij

(GURMIT RAM)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No