

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

R.S.A. No. 1458 of 2017 (O&M)

Date of Decision:- 15.03.2017

Mohinder Singh

....Appellant

vs.

Gurdev Singh

....Respondent

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Akshay Kumar Goel, Advocate,
for the appellant.

DAYA CHAUDHARY, J.

Appellant-Mohinder Singh, who was defendant in the suit has filed the present regular second appeal challenging judgment and decree dated 17.11.2016 passed by the District Judge, Sangrur as well as judgment and decree dated 1.10.2015 passed by the Civil Judge (Junior Division), Dhuri.

Briefly the facts of the case are that respondent-plaintiff filed a suit for possession against appellant-defendant relating to a house which was in *lal lakeer* of the village of the appellant/defendant. As per case of the respondent-plaintiff, the house in dispute was given to appellant-defendant for residing but after some time he constructed his own house and vacated some area which was lying vacant. The appellant-defendant was threatening to alienate, mortgage and to dispose of the house in dispute.

Respondent-plaintiff also filed civil suit bearing No. 102 of 30.03.2017 against the appellant-defendant for permanent injunction restraining him from alienating the property in dispute in any manner which was decreed in his favour vide judgment and decree dated 14.9.2011. It was further alleged that after passing said judgment and decree, the appellant-defendant forcibly entered into the house in dispute by breaking open the lock in the month of October, 2011. Said suit was contested by the appellant-defendant by filing written statement and controverting the contents of the plaint. The Civil suit filed by plaintiff Gurdev Singh was decreed by the trial Court vide judgment and decree dated 1.10.2015 holding that the suit was barred under Order 2 Rule 2 CPC as the earlier suit filed by him was not proved on record by the defendant. It was also held that there was no evidence on file to show it was on the same cause of action and the plaintiff was held entitled to the relief claimed in the suit. Defendant-appellant filed appeal before District Judge, Sangrur but the same was dismissed vide judgment and decree dated 17.11.2016.

Aggrieved by both the judgments passed by the Courts below, defendant-appellant Mohinder Singh has filed the present appeal by raising various arguments.

Learned counsel for the appellant submits that both the Courts below have decided the suit as well as the appeal by ignoring agreement to sell dated nil (Exhibit D-1) and also writing dated 5.4.2003 (Exhibit D-2) on the ground that plaintiff-respondent did not execute any sale deed in favour of his son and that no suit was filed for specific performance but ignored

the protection available under Section 53-A of the Transfer of Property Act. It is also the argument of learned counsel for the appellant that the provisions of Section 49 of the Registration Act, 1908 have not been taken into consideration which provides that unregistered document can be taken as evidence of any collateral transaction, which is not required to be effected by registered instrument. The defendant has proved his possession over the property in dispute by way of agreement to sell. It has been proved on record by agreement to sell that father and brother of the appellant, namely, Gurdev Singh and Harjinder Singh respectively received an amount of ₹ 5,000/- as earnest money and possession was to be delivered on 5.4.2003 after getting the full consideration and execution of the registered sale deed. The writing on the back side of agreement to sell was proved by DW-1-Amar Singh and DW-2-Gurdev Singh. Learned counsel also submits that from the cross-examination of PW-1, it has been proved that the plaintiff was residing separately in the house situated on the way for the last so many years and failed to prove that the appellant-defendant constructed his new house and vacated the house in dispute. He has also admitted in his cross-examination that he never got any water connection in his name but it was in the name of his son, namely, Mohinder Singh. The plaintiff has also failed to prove that the defendant was in illegal and unauthorized possession of the house in dispute. At the end, learned counsel for the appellant submits that appellant was paying the charges of water and electricity connection till the filing of the suit but those documents were not taken into consideration.

Heard arguments of learned counsel for the appellant and have

also perused the judgments of both the Courts below. The trial Court framed the following issues:

“1. Whether plaintiff is entitled to possession as prayed for? OPP

2. Whether suit of the plaintiff is not maintainable in the present form? OPD

2A. Whether suit is barred under order 2 Rule 2 of CPC? OPD

3. Relief.”

The trial Court decreed the suit in favour of respondent-plaintiff. The relevant portion of the finding as mentioned in para no. 25 of the judgment is reproduced as under:-

“25. It is settled law that a party taking the plea that the suit is barred under order 2 rule 2 CPC is required to prove the pleadings of the previous litigation, but admittedly pleadings of the previously instituted suit allegedly file by the plaintiff have not been proved on record by the defendant. There is also no evidence on the file that in respect of the same cause of action, the plaintiff was also entitled to the relief claimed in the present suit and previous and the present suit arose out of the same cause of action, hence, this issue is decided against the defendant and in favour of the plaintiff.”

The judgment passed by the trial Court was challenged by the appellant-defendant by way of filing appeal, which was dismissed vide judgment dated 17.11.2016. The finding recorded by the Lower Appellate

Court is reproduced as under:-

“13. It is a matter of record that prior to the filing of this case, litigation had started between the parties. Gurdev Singh filed Civil Suit bearing no. 102 of 30.03.2007 which was decided in his favour granting him the relief of permanent injunction vide which the defendant was restrained from alienating the property. The certified copy of judgment and decree sheet are Exhibit P2 and Exhibit P3. It is also a matter of record that Mohinder Singh filed suit for permanent injunction against Gurdev Singh and Harjinder Singh which was ultimately withdrawn. The certified copy of order dated 14.09.2011 is Exhibit P/D. The learned counsel for the appellant/defendant has raised the issue that the suit filed by the plaintiff seeking possession is barred under Order 2 Rule 2 of the CPC. This relief was not claimed by the respondent/plaintiff when he filed the suit for permanent injunction against the defendant regarding alienation or disposing of the property. As per the provisions of Order 2 Rule 2 of the CPC, it is required that every suit shall include the whole of the claim which the plaintiff is entitled to ask in respect of the cause of action but the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. The suit filed by the plaintiff seeking permanent injunction

against Mohinder Singh was regarding restraining him from alienating the property. The appellant/defendant took forcible possession of property subsequently. Therefore, the present suit was based on different cause of action. As such, the findings given by the learned lower Court regarding issue no. 2-A are fully justified and do not require any interference.

14. In view of my above discussion the appellant/defendant himself failed to establish his claim over the house in dispute on the basis of said agreement to sell, Exhibit D1 nor his interest is protected under the provisions of Section 53-A of Transfer of Property Act. Admittedly, the respondent/plaintiff is owner of the house situated within Lal Lakir of village Khumbarwal. Therefore, he has got every right to get back the possession of his house which has been taken illegally and forcibly by the appellant/defendant. Therefore, the judgment and decree dated 01.10.2015 passed by the learned lower Court do not require any interference and same is accordingly upheld and the appeal preferred by the appellant/defendant is accordingly dismissed with costs. Decree sheet be prepared. Lower Court file be returned with copy of judgment. File be consigned to the record room.”

On perusal of judgments passed by both the Courts below, it

transpires that house in dispute was situated within Lal Lakeer of village Khumbarwal, Tehsil Dhuri. As per case of plaintiff-Gurdev Singh, it was previously owned and possessed by his father Santokh Singh and after the death of his father, he became owner in possession of the house in dispute. Appellant-defendant Mohinder Singh has shown his ignorance regarding ownership of house but he affirmed that house in dispute was owned by his father Gurdev Singh. Plaintiff Gurdev Singh proved on record his case while appearing as PW-1 and the site plan of the house i.e. Exhibit P1 was proved by PW-2-Jagdev Sharma, Draftsman.

As per case of the appellant-defendant, the house in dispute was purchased by him from plaintiff vide agreement to sell dated nil (Exhibit D-1) and amount of sale consideration was paid in part, whereas, balance sale consideration was to be paid on the date of execution of sale deed. It was for the appellant to prove the execution of agreement to sell. Even Amar Singh during his cross-examination, who was marginal witness of sale deed has appeared as DW-1 and admitted that on the basis of this agreement, no sale deed was executed or registered in favour of appellant-defendant. Appellant also examined DW-3-Jaggar Singh but nothing favourable came in support of his case whereas, he has admitted that no agreement to sell was executed in his presence. He has also stated in his statement that he did not know anything about the actual position of execution of agreement to sell Exhibit D-1. There was nothing on record to show that appellant-defendant has ever availed remedy by way of filing a suit for specific performance in pursuance of agreement to sell Exhibit D-1 and only on the basis of agreement to sell, he cannot claim his title. The

appellant has failed to prove as to how he came into possession of the house in dispute. It has also come on record that there was a previous litigation between the parties. Plaintiff-Gurdev Singh filed civil suit bearing no. 102 of 30.3.2007 which was decided in his favour and relief of permanent injunction was granted to him and appellant-defendant was restrained from alienating the property in dispute. It is also an admitted fact that appellant-Mohinder Singh also filed a suit for permanent injunction against Gurdev Singh and Harjinder Singh which was later on withdrawn. An objection was also raised by the defendant that the suit was barred under Order 2 Rule 2 CPC. Since the appellant-defendant has failed to establish his claim over the house in dispute on the basis of agreement to sell, both the Courts below have held that being owner of the house, the plaintiff-respondent has right to get back the possession of his house which was forcibly occupied by the defendant-appellant.

In view of the findings recorded by both the Courts below, there is no force in the arguments raised by learned counsel for the appellant and the appeal being devoid of any merit is hereby dismissed.

March 15, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

No