

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Date of decision: 28.07.2017

1. RSA No.3790 of 2017 (O&M)

Bhupinder Kumar Aggarwal

... Appellant

Vs.

Surinder Kumar Aggarwal (deceased) through LRs

... Respondents

2. RSA No.3740 of 2017 (O&M)

Bhupinder Kumar Aggarwal

... Appellant

Vs.

Surinder Kumar Aggarwal (deceased) through LRs

... Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. Jasdeep Singh Gill, Advocate and
Mr. Sanjiv Ghai, Advocate for the appellant.

RAMESHWAR SINGH MALIK, J. (ORAL)

These two identical regular second appeals bearing RSA No.3790 of 2017 and RSA No.3740 of 2017 between the same parties, are being disposed of vide this common order, with the consent of learned counsel for the appellant, as both these appeals are directed against the same impugned judgments and decrees passed by the learned Courts below. However, for the facility of reference, facts are being culled out from RSA No.3790 of 2017 (Bhupinder Kumar Aggarwal Vs. Surinder Kumar Aggarwal (deceased) through

LRs).

Defendant is in regular second appeal against the concurrent findings of facts recorded by both the learned Courts below, whereby suit for possession on the basis of title filed by the plaintiff was decreed by the learned trial Court vide its impugned judgment and decree dated 02.09.2014 and first appeals of the defendant-appellant were also dismissed by the learned first appellate Court vide its common impugned judgment and decree dated 24.01.2017.

Brief facts of the case, as noticed by learned first appellate Court in para 4 of its impugned judgment, are that respondent-plaintiff filed a suit for possession and damages, as detailed in the head note of the plaint, against the defendant Bhupinder Kumar Aggarwal on the ground that suit property was earlier owned by Jaspal Rai s/o Ram Rakha Mal, who was father of the plaintiff as well as defendant. During his lifetime, said Jaspal Rai executed a legal and valid registered Will dated 07.05.1973 out of his free sound disposing mind in favour of his two younger sons namely Satish Kumar and Parmod Kumar and on the basis of said Will, Sh. Satish Kumar and Parmod Kumar became exclusive owners of suit property after the death of Jaspal Rai. It was further the case of the plaintiff that suit property was in exclusive possession of the plaintiff, which was in the shape of a double storeyed building i.e ground floor and miani/inter floor since the year 1968 as a tenant and the plaintiff since then was running Atta Chakki in the same. On the ground floor of the property, there was a shop and on the back of that shop, there was a room. The said entire shop and room situated at its back was in exclusive possession of the plaintiff since the year 1968. In the shop on the front, the plaintiff had installed Atta chakki,

whereas the room at its back was being used as a godown for storing wheat and other articles with respect to the business of the plaintiff. It was further the case of the plaintiff that later on, the plaintiff purchased the suit property from Satish Kumar and Parmod Kumar sons of Sh. Jaspal Rai vide registered sale deed dated 17.08.1999 for consideration and become exclusive owners in possession of the entire property and the symbolic possession of the entire ground floor comprises of shop and a room at its back and inter floor/miani above the same, was delivered to the plaintiff at the time of execution of sale deed dated 17.08.1999. It was further the case of the plaintiff that two stories were added by the plaintiff above the already existing construction in the property and residence was also shifted by the plaintiff on the upper floor of the property for a period of about 1/1-1/2 year in 2002-03. It was further the case of the plaintiff that the defendant was running business in an adjoining building bearing No.209 to the said property in the name of Banian Di Hatti with firm name M/s Bhupinder Kumar & Co. since long and the said property was having common wall in between the property No.209 in which he was running business and that of the plaintiff and that property in which the defendant was running business, was owned by wife of the defendant namely Parveen Kumari as per information received by the plaintiff. It was further the case of the plaintiff that in June, 2003 the defendant threatened the plaintiff to interfere into peaceful possession of the plaintiff in the property and as such, the plaintiff filed a suit for permanent injunction in June, 2003 against the defendant and his wife Parveen Kumari, but after filing that suit, the plaintiff suffered heart attack and remained bed ridden for sufficient long time and he was admitted in various hospitals from time to time and as such, even he did not properly look after his business

and as such the suit filed by plaintiff was not properly pursued and same was dismissed in default. Due to ill health of the plaintiff and as his entire family were worried about the health of the plaintiff and as such, the defendant took benefit of the situation and illegally took forcible possession of the room situated on the back portion on the ground floor of the property by breaking a portion of the intervening between the said room and the adjoining property in which the defendant was running business in the name of Banian Di Hatti. It was further the case of the plaintiff that when the plaintiff and his family members came to know about it, they time and again approached and requested the defendant to handover the actual and physical possession thereof and to vacate the said room, but the defendant did not accept the requests of the plaintiff.

Defendant was put to notice. He appeared and filed his contesting written statement, taking more than one preliminary objections. On completion of pleadings of the parties, learned trial Court framed the following issues: -

1. Whether the plaintiff is entitled for possession of the property in dispute as prayed of? OPP
2. Whether the plaintiff is entitled for damages for use and occupation of the said property @ Rs.1000/- per month for the last three years as prayed thereof? OPP
3. Whether the suit of the plaintiff is not maintainable in the present form? OPD
4. Whether the suit of the plaintiff is barred by time of limitation? OPD
5. Whether the defendant is entitled for separate possession of

1/7 share of the property in dispute by way of portion as prayed thereof in the counter claim? OPD

6. Whether the counter claim is not maintainable? OPP
7. Whether the counter claim is not properly valued for the purpose of court fee and jurisdiction? OPP
8. Whether the counter claimant has no locus standi or cause of action to file the same? OPP
9. Whether the counter claim is not properly valued for the purposes of court fee and jurisdiction? OPP
10. Relief.

With a view to substantiate their respective stands taken in their pleadings, both the parties brought on record their documentary as well as oral evidence. After going through the evidence brought on record and hearing learned counsel for the parties, learned trial Court came to the conclusion that plaintiff has duly proved his case by leading cogent and convincing evidence. Accordingly, suit for possession on the basis of title filed by the plaintiff was decreed by the learned trial Court, vide its judgment and decree dated 02.09.2014. Feeling aggrieved, defendant filed two identical appeals. Both these appeals filed by the defendant also came to be dismissed by the learned first appellate Court, vide its common impugned judgment and decree dated 24.01.2017. Hence these two identical regular second appeals at the hands of unsuccessful defendant.

Heard learned counsel for the appellant in both these cases.

It is a matter of record that father of the appellant late Sh. Jaspal Rai executed a Will dated 07.05.1973 in favour of his two sons namely Satish

Kumar and Parmod Kumar. Neither plaintiff nor defendant were the beneficiaries of the Will. This Will was never challenged either by the plaintiff or by the defendant. It has also come on record that on the basis of Will dated 07.05.1973 Ex.P20, beneficiaries of the Will namely Sh. Satish Kumar and Parmod Kumar suffered a sale deed dated 17.08.1999 Ex.P18 in favour of the plaintiff, who was none else but their real brother. On the basis of Will and sale deed, plaintiff earlier filed a suit for injunction in the year 2003. Defendant came to know about the existence of Will as well as sale deed. However, defendant-appellant, for the reasons best known to him, did not lay any challenge either to the Will or the sale deed.

Present suit for possession on the basis of title was filed by the plaintiff in the month of June, 2007. It was at this stage that the defendant-appellant had a second thought and filed the counter-claim challenging the Will as well as sale deed. Since the original copy of the Will was not available, plaintiff sought the permission of the learned trial Court to lead secondary evidence, which was permitted. Defendant-appellant never challenged said order passed by the learned trial Court, permitting the plaintiff to prove the Will by way of secondary evidence. Accordingly, plaintiff proved due execution of the Will as well as the sale deed. Thus, title of the plaintiff came to be duly proved on record. Having said that, this Court feels no hesitation to conclude that the learned trial Court rightly decreed the suit of the plaintiff and no fault can be found with the impugned judgment of the learned first appellate Court as well, whereby first appeal of the defendant, was dismissed.

Once the defendant-appellant came to know about existence of the Will and the sale deed in the year 2003 and he was feeling aggrieved against

these registered documents, it was least expected from him that he would challenge the Will as well as the sale deed, in accordance with law, without wasting any further time. As noticed hereinabove, defendant did not challenge either the Will or the sale deed and that too for no good reasons and for a period of more than four years. His counter-claim became hopelessly time barred, because it was in the nature of declaratory suit.

Counter-claim filed by the defendant was rightly dismissed by both the learned Courts below. Title of the vendors of the plaintiff on the basis of abovesaid Will could not be challenged at the hands of the defendant-appellant. In this view of the matter, title drawn by the plaintiff on the basis of sale deed Ex.P18, was also rightly found to be a perfect title by both the learned Courts below, in favour of the plaintiff. Under these undisputed facts and circumstances of the case, it can be safely concluded that the learned Courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld, for this reason also.

Learned Additional District Judge considered each and every relevant aspect of the matter, before passing the impugned judgment. Learned first appellate Court rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in the correct perspective before arriving at its judicious conclusion. The cogent and relevant findings recorded by the learned Additional District Judge in para 17 of his impugned judgment, which deserve to be noticed here, read as under: -

“..... It is not disputed that both the plaintiff and defendant are the descendants of Jaspal Rai. It is also not disputed that Jaspal Rai was survived by seven legal heirs. The main dispute is of

possession of back room. Plaintiff alleges that he is in possession since 1968 and later on he has become exclusive owner on the basis of sale deed dated 17.08.1999 executed by his two brothers and same is not disputed. The said sale deed has been duly proved and PW-5 the scribe of the Will has been examined. PW-4 HRC Jaspal Singh has proved the registration of the same. PW-7 Rakesh Kumar has stated that the said property was purchased by his father in 1999. Defendant in a way admitted the execution of the sale deed by Satish Kumar and Parmod Kumar, in favour of plaintiff. Even DW- 3 Anil Kumar when cross-examined identify the photographs of Satish Kumar and Parmod Kumar on sale deed Ex.P-18 and even admitted that after purchase of property by sale deed Ex.P-18, Surinder Kumar became owner of the disputed property. He further admitted as correct that during life time of Surinder Kumar, he remained in exclusive possession and exclusive owner of the property. He further admitted that Satish Kumar and Parmod Kumar sold the disputed property on the basis of Will of Jaspal Rai to Surinder Kumar. DW-4 also admitted this fact. Even, defendant has admitted that suit filed by Surinder Kumar is with respect of the shop which was purchased by Surinder Kumar from his brothers Satish Kumar and Parmod Kumar on basis of Will of their father. Earlier suit was filed by plaintiff on the basis of sale deed in his favour and there is reference of Will in that suit. Defendant was in knowledge of the said Will at least in 2003. Present suit has been filed on

15.06.2007. Despite having knowledge, no suit has been filed to challenge the Will and even sale deed. Appellant Bhupinder Kumar has also stated that he has not filed any separate suit to challenge the said sale deed and he has challenged the same in the present case. The said challenge of sale deed by counter claim after lapse of statutory period would be barred under statutory period of limitation. Sale deed is still valid and has not been set aside by any court. Trial court has rightly held that there is no bearing of not proving the Will as per section 69 as plaintiff has not based his title over the property by way of testamentary succession. Since, Will is to be proved by a person who propound the Will and said Will was not in favour of present plaintiff, rather in the Will he was also ignored by Jaspal Rai. Appellant Bhupinder Kumar has also admitted that it might be that suit property has been sold by way of Sale Deed and he has relied upon his possession and not on basis of any document of title. His possession has not been proved to be hostile and adverse. Even if plaintiff has been tenant in the building and even defendant had been in possession of the back room, it would not clothe the defendant with any right/title & even by way of adverse possession as no specific date of start of adverse possession has been proved by the appellant. It is also not the case of the appellant that during life time of his father, he forcibly took the possession and proclaimed himself to be owner in possession. The continuity of possession has not been proved. Trial court has rightly decided the

issue No.1, 2, 4 & 5 in favour of the plaintiff and against the defendants. Since, counter claim was held to be filed after delay and as such same is rightly dismissed.”

During the course of hearing, learned counsel for the appellant could not point out any patent illegality or perversity in either of the impugned judgments and decrees. He also could not refer to any question of law, much less substantial question of law, which is sine qua non for entertaining the regular second appeal at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Narayanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (5) SCC 264.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that both these appeals are wholly misconceived, bereft of merit and without any substance, thus, these must fail. No ground for interference has been made out.

Resultantly, with the abovesaid observations made, both these regular second appeals stand dismissed, however, with no order as to costs.

[RAMESHWAR SINGH MALIK]
JUDGE

28.07.2017
vishnu

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No