

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

R.S.A No. 4083 of 2011

Date of decision : 11.07.2018

Malkiat Singh

.....Appellant

versus

Shingara Singh

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. Sudhir Paruthi, Advocate
for the appellant.

Mr. Hitesh Kaplish, Advocate
for the caveator/respondent

RITU BAHRI, J.

This regular second appeal is directed against the judgment and decree dated 20.03.2009 whereby the suit of the appellant was dismissed and judgment and decree dated 17.02.2011 whereby the appeal of the appellant was partly allowed restraining the respondent from dealing with the property or transferring the same without the consent and instructions of the appellant being its owner. However, with regard to the relief of declaration was concerned, the appeal was dismissed.

The case of the appellant before both the Courts was that he is owner in possession of the suit property and the respondent-defendant has taken the signatures of the appellant on blank papers and the appellant came to know that the respondent has forged and fabricated one document purporting to be a power of attorney of the appellant in respect of the land in question. The alleged document has not been so far got registered by the respondent. After knowing about the same, the appellant issued notice dated 05.03.2004 to the respondent

not to act as attorney of the appellant and required him to hand over the said document to said Harbhajan Kaur, attorney of the appellant as the document stands annulled.

The learned trial Court dismissed the suit of the appellant as the respondent examined Balbir Singh, Tarsem Lal, Kashmiri Lal, D.W.5 marginal witness of the power of attorney, Harish Kumar Deed Writer who proved and deposed regarding the possession of the respondent of the suit property. However, nothing favourable to the appellant came out from the cross examination of these witnesses and their testimony remained unshaken and unshattered during the test of cross examination. The appellant has not examined any expert to prove that the signatures of Malkiat Singh as Ex P4 are forged.

However, the lower Appellate Court partly decreed the suit of the appellant as the title of the property was with the appellant and the appellant is owner of the suit property. The appellant had gone abroad and had been residing there. The execution of General Power of Attorney in favour of the respondent has been duly proved and has been admitted by the parties as well. The plea taken by the respondent that his father had paid the amount of Rs.1,50,000/- to the father of the appellant, was not proved by way of any evidence. Further respondent has not been able to give any reason to prove when the whole consideration amount was paid to the father of the appellant who is owner of the suit property. The appellant has not transferred his right, title or interest in the suit property. The respondent being attorney holder has no right to deny the title of the appellant with regard to the suit property. The appellant has already issued notice to the respondent calling upon him not to act as his attorney in regard to the suit property and thus, the respondent was not entitled to deal with the

property against the instructions of the appellant.

Learned counsel for the respondent on the other hand has referred to judgments of Hon'ble Supreme Court of India in [Anathula Sudhakar vs. P. Bushi Reddy \(Dead\)](#) by LRs **2008 (2)RCR (Civil) 879**,& Ors. and judgment passed by this Court in a case of **Harjit Singh vs. Karam Singh 2007(10) RCR (Civil) 467** to contend that the suit of the appellant for declaration has rightly been dismissed by the learned trial Court, as the appellant has not sought possession in the plaint.

After hearing learned counsel for the parties, the regular second appeal deserves to be allowed, as firstly both the judgments referred by learned counsel for the respondent is not applicable to the facts of the present case, as in the present case, the respondent was given general power of attorney, which was cancelled by the original owner and thus the respondent was not not entitled to deal with the property against the instructions of the appellant. The possession remained with the appellant and in this background there was no necessity to seek possession in the suit filed by the appellant. In the present case, at the time of execution General Power of Attorney in favour of the respondent no possession was delivered to him and no sale consideration was accepted by the appellant and the respondent was only having the right to act on behalf of the appellant, which was subsequently withdrawn by issuing notice to the respondent

This Court in cases of **Lal Chand vs. Smt. Kali Bai, 2004(4) RCR (Civil) 576** and **Smt.Nando vs. Sher Singh, 2006 (3) PLR 36** has interpreted Section 34 of the Specific Relief Act whereby it has been held that suit for declaration simpliciter is maintainable while plaintiff is already in possession of property. It is the right of possession which is relevant and not actual physical possession. **In para 17, 18 and 19 of Lal Chand's case (supra), it has been**

observed as under:-

17. Supreme Court in the decision rendered in the case of [Nazar Singh and Ors. v. Jagjit Kaur and Ors.](#), A.I.R. 1996 S.C. 855, was considering a compromise dated 3.12.1963 whereby land was given to one Harmel Kaur by her husband with the restriction that she will not sell or mortgage this land. Harmel Kaur had executed four sale deeds in November, 1987 and August, 1988 which were challenged by the husband of Harmel Kaur on the ground that she has no right to alienate the said property.

Supreme Court after relying upon V. Tulasamma's case (supra) held that the land became the absolute property of Harmel Kaur the moment she was placed in possession thereof. The Court held to the following effect;-

".. According to Sub-section (1) where any property is given to a female Hindu in lieu of her maintenance before the commencement of the [Hindu Succession Act](#), such property becomes the absolute property of such female Hindu on the commencement of the Act, provided the said property was "possessed" by her. Where, however, the property is given to a female Hindu towards her maintenance after the commencement of the Act, she becomes the absolute owner thereof the moment she is placed in possession of the said property (unless of course, she is already in possession) notwithstanding the limitations and restrictions contained in the instrument, grant or award whereunder the property is given to her. This provision follows from the words in Sub-section (1) which insofar as is relevant read. "Any property possessed by a female Hindu after the commencement of this Act shall be held by her as full owner and not as a limited owner." In other words, though the instrument, grant, award or deed creates a limited estate or a restricted estate as the case may be it stands transformed into an absolute estate provided such property is given to a female Hindu in lieu of maintenance and is placed in her possession. So far as the expression "possessed" is concerned, it too has been the subject matter of interpretation by several decisions of this Court to which it is not necessary to refer for the purpose of this case."

18. In view thereof, I am unable to uphold the finding recorded by the Courts below that the clog on the right of Smt. Ghanni Bai to alienate the

property will not make her full owner of the property. By virtue of operation of law i.e. provisions of [Section 14\(1\)](#) of the Hindu Succession Act, 1956, she is the full owner of the property.

19. The second limb of the argument of learned counsel for the appellant that suit for declaration simplicitor is not maintainable is again without any merit. The possession of the plaintiff is admitted in the compromise decree itself. It is not the case set up by the defendants that she has been dispossessed in any manner thereafter.

Reference has further been made to a judgment of Bombay High Court in a case of ***Nagorao Narayan Diewane v. Narayan Awadutrao Dighe, 2000(4) BomCR 165*** wherein in para 21 it has been observed as under:-

“21. A reference has also been made to the decision . In this case the same principle is laid down and it is found that when defendant is in possession of the suit properties and the plaintiff in his suit does not seek possession of the properties, but merely claims a declaration that he is owner of the suit property, the suit is not maintainable. The suit is hit by [section 42](#) of the Specific Relief Act, 1877. Mere claim for declaration of title over the property without seeking the relief of possession is not maintainable. In the case before hand the factual position is entirely different. It is true that the plaintiff had claimed simpliciter declaration of his title over the suit property. He did not seek a consequential relief of possession, but it is because plaintiff asserted and claimed that he was in possession of the said property, both the Courts below have found as a finding of fact that the suit property was in possession of plaintiff. Therefore, plaintiff's suit was maintainable merely for the relief of declaration simpliciter. In order words it is not barred by [section 34](#) of Specific Relief Act as contended by the learned Counsel for the appellant.

In the present case, the title of the appellant and possession is not in dispute between the parties and thus the suit of the appellant for declaration as well should have been decreed, in view of ***Lal Chand's case (supra)***

Accordingly, the regular second appeal is allowed and judgment and

decree dated 17.02.2011 is modified to the extent that the suit filed by the appellant for declaration and permanent injunction is decreed.

11.07.2018
G Arora

(RITU BAHRI)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No