

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

107

RSA No.5291 of 2012 (O&M)

Date of decision: 18.12.2018

Sushil Sood and another

..... Appellants

Versus

Rai Bahadur Jodha Mal Trust

..... Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Arun Jain, Sr. Advocate with
Mr. Munish Gupta, Advocate
for the appellants.

Mr. J.K. Sibal, Sr. Advocate with
Mr. Sapan Dhir, Advocate
for the respondent.

ANIL KSHETARPAL, J.

Defendant-appellant through his legal heirs is in the regular second appeal against the concurrent finding of fact arrived at by the Courts below decreeing the suit filed by the plaintiff-respondent-Trust for grant of a decree for mandatory injunction directing the defendant to hand over the vacant possession of the premises in dispute which was identified in the attached lay out plan with marks ABCD.

Plaintiff had pleaded that the defendant late Sh. Kishori Lal Mithu was looking after affairs of the Trust and hence, permitted to reside with his family in the premises in dispute, has been asked to vacate, since thereafter, the relationship has become strained. Hence, he has been asked to deliver back the possession vide notice dated 16.08.1993 which was duly received by the defendant but no reply had been sent.

The defendant contested the suit and pleaded that the Trust is not the owner of the property in dispute and the property is ancestral property of the defendant. It is further pleaded that earlier it was a kucha house (temporary construction) and the defendant had constructed a pucca house after getting the building plan sanctioned from the Municipal Committee. However, in para 3 of the written statement, the defendant admitted that he was looking after the affairs of the plaintiff-Trust. Para 3 of the written statement makes an interesting reading which is extracted as under:-

“That this para is correct to the extent that the defendant was looking the affairs of the said trust but it is absolutely wrong that the defendant was allowed by the plaintiff to live and keep his family in the house in dispute. It is also wrong that the defendant ever promised to arrange some suitable accommodation for himself to deliver the vacant possession of the premises in dispute. From the averments of para No.3 of the plaint, it is clear that there was no license created by the plaintiff in favour of the defendant. As a matter of fact, the plaintiff trust did not pay the salary due to the defendant on account of the services rendered by the defendant and the defendant threatened to approach the court of law. The present suit has thus also been filed as a counter blast to the said threat of the defendant to claim his arrears of salary through court of law.”

The defendant further in alternative took a plea that since he continued in possession for more than 12 years, therefore, he has perfected his title by way of adverse possession.

Both the Courts on appreciation of evidence have recorded a finding that the defendant has failed to prove that the property ever belongs to his ancestors to which he has succeeded or he has not perfected his title by way of adverse possession and thus, decreed the suit filed by the

plaintiff.

At the outset, it must be noticed that learned senior counsel appearing for the appellants has submitted that in the original record, statement of PW-2 namely Sh. Jaswant Lal is missing. He has submitted that the statement of Jaswant Lal who appeared as PW-2 as noticed by the trial Court as well as First Appellate Court has been attached by him along with the grounds of appeal. Hence, he submitted that the record of the Courts below has been tempered with. He further submitted that the copy of the Trust deed Ex.PW-7/G which is in Urdu language is also missing from the file.

On the other hand, learned counsel for the respondent-plaintiff has submitted that in fact from the reading of the various orders passed by the Court on each hearing (daily orders-zimani orders), it is apparent that the statement of Jaswant Lal was not recorded as PW-2 as sought to be made out but in fact it was recorded as PW-7 which is available on the trial Court record at pages 67 to 85. He further submitted that PW-2-Jaswant Lal has wrongly been noticed by the trial Court as well as First Appellate Court because while discussing the evidence, reference has been made to the statement to PW-7 i.e. Jaswant Lal, the same witness.

From the daily orders, it is apparent that PW-1 was examined on 22.01.1998. Thereafter, daily orders prove that on 14.12.2004, statement of one witness in part was recorded. As per record on 14.12.2004, the statement of Kishori Lal Mithu son of Jai Kishan Lal was recorded as PW-3, of course incomplete, as counsel for the defendant wanted to move an application for setting aside the ex parte proceedings. Hence, further examination-in-chief was deferred.

Thereafter, daily order shows that on 03.10.2005, the evidence of PW-3 has been examined in-chief and cross-examination has been deferred on the request whereas evidence of PW-7-Jaswant Lal has also been examined in-chief and cross-examination has been deferred. The evidence of PW-4, PW-5, PW-6 and PW-8 has been completed. The adjournment was granted for cross-examination of PW-3 and PW-7. From the aforesaid orders, it is clear that there was no evidence recorded under the head PW-2 because this is not established either from the daily orders or from the record of the trial Court. A copy of the statement annexed with the grounds of appeal in this Court is not a certified copy from the trial Court record. Still further, once a witness has been examined as PW-2, then there was no occasion for examining the same witness as PW-7 in affirmative evidence. If one reads the evidence of PW-7-Jaswant Lal, counsel appearing for the defendant never raised any objection that this witness has already been examined as PW-2 and the alleged evidence given by Jaswant Lal allegedly as PW-2 has never been confronted to the aforesaid witness. Still further, before the First Appellate Court, the defendant-appellant did not raise this point either in the grounds of appeal or at the time of arguments. Hence, for the aforesaid discussion, it is concluded that the statement of Jaswant Lal has been examined as PW-7 and not as PW-2. Reference by the trial Court in para 8 of the trial Court judgment while noticing the names of the witness who have appeared for the plaintiff is only inadvertent error.

Second argument of learned counsel is to the effect that the trust deed i.e. in Urdu language Ex.PW-7/G is not part of the record and therefore, record has been interpolated. It will be noted that translation of

the trust deed has come on record and both the Courts have decided the case on the basis of the aforesaid translation. Further, even before me, both the counsels have relied upon the translation of the aforesaid document. Correctness of the translation of the original trust deed is not in dispute. Hence, even if the original trust deed which is in Urdu language is not part of the record, would not be an impediment for this Court to proceed and decide the matter. Learned District & Sessions Judge is being directed to carry out the investigation and examine how Ex.PW-7/G has gone missing from the record.

Learned senior counsel appearing for the appellants has submitted while referring to the statement of Kishori Lal who appeared as PW-3 that he has admitted that the property in dispute did not belong to the Trust and therefore, the entire basis of the suit is erroneous.

No doubt, this witness Kishori Lal in one sentence has stated that the property in dispute was never under the ownership of the plaintiff-Trust. However, learned counsel has overlooked the next sentence which specifies that the property in dispute is the property of Raj Bahadur Jodha Mal. Raj Bahadur Jodha Mal is the person who created the Trust in the year 1944 vide registered deed translation whereof is on the record.

Learned counsel has further submitted that both the Courts have relied upon the letters written by the defendant i.e. Kishori Lal Mithu, although, no one has proved that these letters were written by Kishori Lal Mithu.

In this respect, it must be noticed that Kishori Lal Mithu when filed written statement does not dispute that he was looking after the affairs of the Trust. Still further, it has come on the file that Kishori Lal Mithu

(Sud) had filed a written statement dated 10.04.1976 in a suit filed by Paras Ram son of Sh. Kirpa Ram against the Trust in which Kishori Lal Mithu was impleaded as Secretary of the Trust as defendant No.2. Paras Ram was tenant on the first floor of the adjoining building. On careful examination of the Trust deed registered in the year 1944, it is apparent that Rai Bahadur Jodha Mal Kuthiala had created a religious and charitable Trust by dedicating his various properties which included one building single-storey along with rooms and the land at Bahadurpur area of Hoshiarpur city. Still further, it has been provided that at Bahadurpur area in Hoshiarpur city on an adjoining property, Smt. Parvati Devi Arya Girls School would be set up and if the school does not come into being or closes down for any reason, the Trust deed would be responsible to revive the same by selling or exchanging some part of the property.

On careful perusal of Ex.PW-7/C, a lay out plan shows that the girl school and hospital is towards northern side of the property in dispute. On one corner, the premises in question has been shown whereas adjoining to that corner towards western side, there is a property which was earlier on tenancy with Globe Studio which closed down. Above the premises occupied by Globe Studio, Paras Ram tenant was in possession and when the petition was filed by Paras Ram, it was defendant who had filed written statement as a Secretary of the Trust.

In view of this overwhelming evidence, a stray line in the cross-examination of the witness namely Kishori Lal (different than the defendant) cannot be used to defeat the right of the plaintiff. Neither it is permissible to read one line in isolation to the entire statement of the witness nor oral evidence can be given preference over the documentary

evidence.

Learned senior counsel appearing for the appellants while drawing attention of the Court to copy of Jamabandi i.e. record of right, has pointed out that niece of the defendant is also recorded as owner of a small share in the property. It will be noted that it is not the case of the defendant that the property belongs to his niece and he is in possession thereof. In the written statement, the defendant has not set up this case. Counsel for the defendants-appellants cannot be permitted to make out a new case which is not pleaded before the Courts.

Learned counsel for the appellants has submitted that the defendant had got the building plan sanctioned and had raised construction of permanent nature and therefore, licence, if any, in his favour has become perpetual. No doubt, Ex.DW-6 is a building plan which was got sanctioned by the Kishori Lal in the year 1976. However, if one compares the building plan produced by the plaintiff Ex.P-7/C, it is apparent that major part of the construction already existed and alternations have been made in the already constructed building. Hence, the argument of learned counsel that the permanent structure has been permitted to be raised, also does not stand close scrutiny.

Learned counsel for the appellants has further tried to raise an argument while referring to municipal numbers to argue that the property in dispute is not part of the property for which Trust was created. It will be noted that the Trust was created in the year 1944. It is not established on the file that in the year 1944, any municipal numbers were assigned to different buildings. The sanction of building plan by the Municipal Committee cannot be treated as a document of ownership. The civil suit

has to be decided on the basis of preponderance of evidence. Both the Courts as well as this Court has examined the evidence in detail produced by the parties and this Court does not find any reason to differ with the findings of fact arrived at by the Courts below.

Hence, the appeal is dismissed.

The pending miscellaneous application, if any, shall stand disposed of accordingly.

18.12.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned

Yes / No

Whether Reportable

Yes / No