

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

RSA No.4092 of 2013 (O&M)

Date of decision : 11.05.2018

Vakil Ahmed

...Appellant

Versus

Rashid Ahmed

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Rajesh Lamba, Advocate for the appellant.

Mr. Pavan Malik, Advocate for the respondent.

ANIL KSHETARPAL, J.

Arguments were heard. Judgment was reserved. The judgment is being released.

The plaintiff-appellant is in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below.

The plaintiff filed a suit for permanent injunction claiming that he has purchased the house on 16.10.2001 and raised certain construction of three rooms. He claimed that he is owner in possession and the defendant should be restrained from interfering in his possession. The plaintiff also prayed that if he is dispossessed during the pendency of the suit, decree for mandatory injunction be passed in favour of the plaintiff.

The defendant contested the suit and pleaded that in fact there was an oral exchange between the plaintiff and defendant, whereby

defendant had given his House No.33, Ward No.12 to the plaintiff and in exchange, the plaintiff had given him house purchased by him vide sale deed dated 16.10.2001. The defendant also filed the counter claim claiming that he is lawful owner in possession of the property detailed in para No.1 of the counter claim and decree for permanent injunction be passed in his favour restraining the plaintiff from interfering in his possession.

Learned trial Court after appreciating the evidence available on the file recorded a finding that it is the defendant who is in possession of the house which was purchased by the plaintiff on 16.10.2001 whereas it is the plaintiff who is in possession of the house No.33 which was purchased by the defendant. The trial Court further found on appreciation of the evidence that the oral exchange between the parties is proved. The Court further found that it is the defendant-counter claimant who has constructed the house on the plot which was purchased by the plaintiff vide sale deed dated 16.10.2001. However, learned trial Court committed an error in dismissing the suit for injunction as well as counter claim after recording a finding that it is the defendant who is in possession of the property.

Appeal was filed before the First Appellate Court. Learned First Appellate Court has held that there was an oral exchange arrived at between the parties and, therefore, the judgment of the trial Court is correct.

This Court has heard the learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record of the Courts.

Learned counsel for the appellant has argued that since Ex.D1, the compromise deed is not proved on file as only a photocopy was tendered

in evidence, therefore, exchange is not proved. He has further submitted that the learned trial Court had dismissed the counter claim filed by the defendant-respondent and since no appeal was preferred, therefore, the learned First Appellate Court was in error in recording a finding that there was an oral exchange between the parties. He has further submitted that in fact House No.33, which was purchased by the defendant was purchased through registered sale deed dated 10.02.2006 in the name of Sajida Begum, wife of the plaintiff and, therefore, the story of exchange is wrong. He has further submitted that the bills for consumption of electricity and water are in the name of the plaintiff and, therefore, it is proved that the plaintiff had raised certain construction.

Counsel for the appellant has further submitted that in fact the trial Court had not returned the finding on the oral exchange and the First Appellate Court has affirmed the finding of the trial Court while recording only five lines in para 15 of the judgment.

Learned counsel has further submitted that while issuing notice of motion, this Court had noticed that the questions of law framed in sub-para (v) and sub-para (vi) in the grounds of appeal arise. Hence, the appeal is required to be admitted.

It may be significant to note here that learned counsel for the plaintiff-appellant had admitted that it is the defendant who is in possession of the property. Thus, it is apparent that the plaintiff did not file the suit with correct facts. Still further, it is not explained by the plaintiff as to how the defendant-respondent came in possession of the house and started living therein. The defendant has examined 9 witnesses to prove that he is residing

in the aforesaid house and had also raised some construction. The defendant had examined official from the Food and Supply Department and Contractor who had constructed the building. The construction material purchased by the defendant was also proved on the file. The defendant also produced DW8 Iqramuddin who has stated that there was an oral exchange between the parties and a Panchayat was convened on 07.11.2006 and the compromise deed was written wherein the plaintiff agree to pay the sum of ₹2,00,000/- to the defendant.

It is not disputed that oral exchange is permissible in the State of Haryana as relevant provisions of the Transfer of Property Act have not been extended to the State. The star argument of the learned counsel for the appellant is that Ex.D1, the Deed of compromise written in the year 2006 has not been proved. Hence, he submits that exchange of the property is not proved. Learned counsel for the appellant has overlooked the fact that it is the pleaded case of the defendant that there was an oral exchange in the year 2005 when the possession was exchanged. It was subsequently in a Panchayat meeting, the parties reduced that compromise in writing. No doubt, only a photocopy thereof has been produced therefore, the Court cannot placed reliance on the same, however, DW8 has made a statement that the compromise was arrived at in his presence. Detailed evidence discussed by the trial Court while recording finding that there was exchange of the property. This Court does not find any substance in the first argument of the learned counsel for the appellant.

Second argument of the learned counsel is that the defendant-respondent has not filed any cross-objections when his counter claim was

dismissed. It may be noticed that although counter claim is to be treated as a separate suit, however, in the present case, counter claim filed by the defendant was not treated as a separate suit. The trial Court proceeded to decide the counter claim by a single judgment and decree. Appeal was filed by the plaintiff. The First Appellate Court recorded that there was oral exchange between the parties. Under Order 41 Rule 33 CPC, the Appellate Court has a power to pass the order irrespective of the fact that whether any appeal has been preferred against the particular finding by the party or not. In the present case, although, the First Appellate Court has not referred to Order 41 Rule 33 CPC, however in the interest of justice, the First Appellate Court has exercised that power and this Court does not find that such exercise of power was erroneous.

Next argument of the learned counsel is that House No.33 which was originally owned by the defendant was purchased by the plaintiff in the name of his wife for a valid sale consideration. He submitted that therefore the theory of exchange is not proved. The copy of the sale deed is part of the trial Court file. A careful reading of the sale deed establishes that no doubt sale consideration has been mentioned but it has been recorded that the entire amount has already been received. No amount is being received at the time of the execution and registration of the sale deed. This is exactly the case pleaded by the defendant-respondent. The defendant-respondent has supported the aforesaid fact from the oral evidence. Hence, there is no substance in the argument of the learned counsel for the appellant.

Next argument of the learned counsel is that the electricity and

water bills are in the name of the plaintiff and, therefore, the construction by the plaintiff is proved on the file. No doubt, electricity and water connections are in the name of the plaintiff, however, there is overwhelming evidence available on the file to prove that construction was raised by the defendant-respondent. Learned trial Court has discussed the evidence in detail and learned counsel for the appellant could not point out any error in appreciation. The electricity and water connection continue in the name of the plaintiff because originally property belonged to him. It is only pursuant to the exchange in the year 2005, the defendant has come in possession.

Learned counsel has further submitted that the learned trial Court has not recorded any finding on oral exchange. He submitted that in the absence of any finding, the trial Court rightly dismissed the counter claim. Learned trial Court has adverted to the compromise deed and recorded a finding that since original has not been produced, therefore, it is not admissible in evidence. The trial Court has recorded a finding that the defendant is in possession of the property in dispute. A reading of the entire judgment does show that the trial Court was convinced that there was oral exchange between the parties. Still further, the First Appellate Court has specifically recorded a finding that the oral exchange is established on examination of the evidence available on the file.

Last argument of the learned counsel is that this Court while issuing notice of motion, had found that substantial questions arise. The substantial questions are extracted as under:-

“(v) Whether the reliance can be placed on a document which has not been proved as per law?”

(vi) Whether the reliance can be placed on a contents of a document in returning a finding of compromise, which has not been proved as per law?”

In view of the discussion made above, this Court does not find that the questions which have been extracted are either the questions of law or arise in the present case in view of the discussion made above.

In view of the above, this Court does not find any good ground to interfere with the concurrent findings of fact arrived at by both the Courts below.

Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

11.05.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No