

RSA No.3614 of 2016

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.3614 of 2016 (O&M)

Date of decision: 12.07.2018.

Wasawa Singh

...Appellant

Versus

Dharam Paul and another

....Respondents

CORAM: HON'BLE MRS. JUSTICE LISA GILL

Present: Mr. Umesh Kumar Kanwar, Advocate for the appellant.

LISA GILL, J. (ORAL)

The appellant/plaintiff is aggrieved of judgment and decree dated 08.05.2014 passed by Civil Judge (Senior Division), Fazilka as well as the judgment and decree dated 24.02.2016 passed by Additional District Judge, Fazilka whereby his appeal has also been dismissed.

The appellant/plaintiff filed a suit seeking a decree for declaration to the effect that he is owner in possession of land measuring 10 Kanals 9 Marlas situated at Village Nihal Khera, Tehsil Fazilka, District Ferozepur by way of adverse possession on the basis of power of attorney dated 07.02.1985 and affidavit dated 25.11.1991 executed by respondent No.2 Swarna Ram in his favour. It was further prayed that sale deed 20.08.2000 executed by respondent No.2 in favour of respondent No.1 is illegal, null, void and liable to be set aside not binding upon the rights of the appellant. Judgment and decree dated 09.01.2009 passed by learned Civil Judge, Fazilka was also the subject matter of challenge.

It was specifically pleaded by the appellant that power of attorney dated 07.02.1985 was executed in his favour by respondent No.2 who was admittedly the owner of the suit property. Affidavit dated 28.02.2000 in this regard was thereafter executed by respondent No.2 after receipt of Rs.40,000/- from the appellant as he sold the land in question to the appellant. The appellant asserted that he was in actual, physical and cultivating possession of the suit land. It was averred that possession of the appellant over the suit land is continuous, hostile, uninterrupted and within the knowledge of the defendants. The above said power of attorney, it was pleaded, was never cancelled by respondent No.2. No eviction order has been passed against the appellant. However, respondent No.2, Swarna Ram illegally transferred the land in question vide sale deed dated 20.08.2000 in favour of respondent No.1. It was further stated that Judgment and decree dated 09.01.2009 passed by Additional Civil Judge (Senior Division), Fazilka in favour of respondent No.1 was also liable to be set aside.

Respondent No.1 contested the suit by specifically submitting that the appellant did not come to the court with clean hands having concealed the material and relevant facts from the court. It was pleaded that the present appellant was very much aware of the suit in which judgment and decree dated 09.01.2009 was passed. The appellant's appeal against the said judgment and decree dated 09.01.2009 was dismissed. Therefore, the present suit was barred under Section 11 as well as 47 of CPC. Respondent No.2 was proceeded against ex parte.

Following issues were framed by the learned trial Court: -

1. Whether the plaintiff is entitled to relief of declaration as prayed for?

OPP

2. Whether the plaintiff is entitled to relief of permanent injunction as prayed for? OPP
3. Whether the plaintiff has not come to the court with clean hands, if so its effect? OPD
4. Whether the suit is not properly valued for the purpose of court fees? OPD
5. Whether the suit is barred under Section 11 and 47? OPD
6. Whether the plaintiff has got no cause of action or locus standi to file the present suit? OPD
7. Whether the suit is not maintainable? OPD
8. Relief.”

Evidence was led by the appellant and respondent No.1. Learned trial Court on considering the facts and circumstances of the case as well as the evidence on record held that the appellant-plaintiff was not entitled to the decree as claimed, therefore, dismissed his suit. It was specifically observed that the appellant had failed to prove the execution of the power of attorney as well as the affidavit in his favour or passing of the consideration of Rs.40,000/- to respondent No.1. It was further observed that the appellant was very well aware of the sale deed dated 20.08.2000. He was a party to the suit filed by respondent No.1 on 07.11.2000. The suit was decreed in favour of respondent No.1 on 09.01.2009. However, the present suit was filed on 24.04.2009 nearly nine years after the execution of the sale deed dated 28.08.2000. No document was placed on record to prove the possession of the appellant over the suit property. Plea of adverse possession raised by the appellant was negated. Appeal preferred by the appellant was also dismissed by Additional District Judge, Fazilka on 24.02.2016. Hence aggrieved, the present appeal has been filed.

Learned counsel for the appellant has vehemently argued that possession of the appellant over the suit property has been duly proved. In this regard, reference is made to order dated 29.08.2001 passed by Divisional Canal Officer which was passed regarding turn of water. It is submitted that the appellant is clearly reflected to be in possession of the suit property. Specific evidence in the form of testimonies of PW1 to PW6 are on record which further prove his possession but the said evidence has been wrongly ignored by the learned Courts below. It is further contended that the appellant's plea of adverse possession has been wrongly declined. The appellant has been in possession of the property since the year 1985. Learned trial Court has wrongly held that the plea of adverse possession can be raised only by way of defence. Moreover, the appellant's suit is not barred by resjudicata. It is thus, prayed that this appeal be allowed.

I have heard learned counsel for the appellant at length and with his able assistance gone through the documents which are part of the record.

There is no doubt that the ownership of the suit property first vested in respondent No.2 Swarna Ram. There is further no dispute that the appellant-plaintiff has laid the foundation of his case on the basis of power of attorney dated 07.02.1985 and affidavit dated 28.02.2000 executed by Swarna Ram. It was pleaded that Rs.40,000/- was handed over to Swarna Ram. The land was sold to appellant-plaintiff who is in actual, physical and cultivating possession of the same since 1985. Therefore, sale deed dated 20.08.2000 it was contended, has been wrongly executed by Swarna Ram in favour of respondent No.1 and decree dated 09.01.2009 passed by Civil Judge (Junior Division), Fazilka has no effect on the rights of the appellant.

Perusal of the file reveals that indeed, there is not an iota of evidence to prove that power of attorney dated 07.02.1985 (Ex.P19) or affidavit dated 25.11.1991 (Ex.P20) was executed in favour of the appellant/plaintiff by respondent/defendant No.2. Both the said documents were executed much prior to the filing of the suit in the year 2009. There is nothing on record to indicate that the appellant-plaintiff ever took any steps pursuant to the execution of said documents. It is further not disputed that respondent Dharam Paul filed a civil suit for permanent injunction claiming possession of the land on the basis of sale deed 20.08.2000 executed by respondent No.2 Swarna Ram in his favour. The said suit was decreed on 09.01.2009. The present appellant challenged the said judgment and decree dated 09.01.2009 by preferring an appeal which was dismissed on 01.05.2009 (Ex.D3). The present suit was filed by the plaintiff-appellant on 24.04.2009 claiming ownership of the land in question on the basis of the said power of attorney dated 07.02.1985 and affidavit dated 25.11.1991.

Learned counsel for the appellant placed strong reliance on order dated 29.08.2001 (Ex.P1) passed by Divisional Canal Officer to urge that the appellant was in cultivating possession of the land in question. The said order pertains to the turn of water which cannot be relied on to prove the ownership and possession of the appellant over the suit land. Reference in this respect can be gainfully made to the decision of this Court in Chetan Singh Vs. Jarnail Singh and others, 2006 (4) RCR (Civil) 78, which deals with the evidentiary value of the nehri girdawaries prepared by the canal authorities. Reliance is placed on the oral testimonies of PW2 to PW6 to cement the case of the appellant that he was in cultivating possession of the suit land. It has been rightly held by the learned courts below that the oral

testimony of the said witnesses does not in any manner prove the possession or title of the appellant over the suit property. It is not in dispute that as per jamabandi (Ex.PW9/D) respondent No.1 Dharam Paul is reflected as the owner of the suit land. It is correctly observed by learned trial Court that evidence of PW8 Jagdish Rai in fact indicates possession of respondent Swarna Ram over the suit land as PW8 has deposed about the application dated 08.01.1990 (Ex.PW8/A) filed by Swarna Ram seeking permission to deposit instalments.

In respect of plea of adverse possession raised on behalf of the appellant, there is clearly no merit. On one hand, the appellant claims to be in possession on the basis of the power of attorney and affidavit executed by the owner Swarna Ram and on the other, is claiming to have become owner by way of adverse possession. The said stand is clearly contradictory, paradoxical in a suit filed by him seeking a declaration to the effect that he is the owner of the suit property. The appellant has clearly failed to establish his title to the property in question by way of any specific documentary evidence. Power of attorney and an affidavit are not instruments conferring title upon the appellant. Moreover, suit filed by respondent Dharam Paul was decreed in his favour on 09.01.2009. Appeal preferred by the present appellant was dismissed on 01.05.2009 by learned Additional District Judge, Ferozepur (Ex.DX). The present suit was filed on 24.04.2009 by the appellant. Learned Courts below have rightly dismissed the suit preferred by the appellant/plaintiff.

No other point has been raised/argued.

In my considered opinion, no substantial question of law is involved in this appeal for the consideration of this Court.

Learned counsel for the appellant is unable to point out any illegality, infirmity or perversity in the impugned judgment and decree dated 08.05.2014 passed by Civil Judge (Senior Division), Fazilka and judgment and decree dated 24.02.2016 passed by Additional District Judge, Fazilka.

Appeal is accordingly dismissed with no order as to costs.

(LISA GILL)
JUDGE

July 12, 2018

Ishwar

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No