

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

**RSA No.3113 of 2018 (O&M)
Date of Decision:13.12.2018**

Nand Kishore

.....Appellant

Vs

Kewal Krishan and others

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. A.S. Manaise, Advocate
for the appellant.

Mr. N.K. Vadhera, Advocate and
Ms. Manzra Dutt, Advocate
for respondent No.1/caveator.

RAJ MOHAN SINGH, J.

[1]. Defendant No.2 is in Regular Second Appeal against the judgment of reversal recorded by the lower Appellate Court in a suit for possession by way of ejectment of the defendants from shop shown by words 'ABCD' filed by the plaintiffs. The shop was pleaded with defined configurations and was shown with red colour in the site plan.

[2]. Brief facts of the case are that a suit for possession by way of ejectment of the defendants from the shop shown by words 'ABCD' with defined configurations and shown in red

colour in the site plan was filed by the plaintiffs. It was alleged that the shop was let out to the defendants on tenancy at will by Harbans Lal predecessor-in-interest of the plaintiffs initially at the monthly rent of Rs.300/- about 25 years ago. The rent was increased with the passage of time and at the time of filing of the suit, the same was claimed to Rs.600/- per month w.e.f. April 2011.

[3]. It was further pleaded by the plaintiffs that earlier Harbans Lal predecessor-in-interest of the plaintiffs used to collect rent. After the demise of Harbans Lal, the plaintiffs started collecting the rent from the defendants. Plaintiffs pleaded existence of relationship of landlord and tenant between them. The provisions of East Punjab Urban Rent Restriction Act were not applicable to the area. The tenancy was claimed to be a tenancy at will. Plaintiffs did not want to keep the defendant as a tenant in the shop and, therefore, they want to eject them as they wanted the shop for their own use. The shop was old and required renovation and structural changes. Plaintiffs issued notice under Section 106 of the Transfer of Property Act terminating the tenancy and called upon the defendants to vacate the shop.

[4]. The suit was contested by the defendants No.1 & 2 on all counts. Defendant No.2 pleaded that father of the defendant

had constructed the shop in dispute from his own income. The shop is situated in *Khewat* No.379/426, *Khatauni* No.525, *Khasra* Nos.45 and 46. Vasdev son of Mulkraj was the original owner of the land to the extent of half share in the revenue estate of village Dorangla, Hadbast No.175, Tehsil and District Gurdaspur and the same was vacant land about more than 60 years ago. Father of defendant No.2 had constructed the shop, where he was running a karyana shop. After his demise, defendant No.2 came in possession of the said karyana shop as its owner. Construction of shop was more than 60 years old. Neither the plaintiffs, nor their father and nor the aforesaid Vasdev had ever interfered in the peaceful possession of defendant No.2. For the last ten years, relationship between the defendants was not cordial and filing of the suit by the plaintiffs was on account of connivance between the plaintiffs and defendant No.1.

[5]. Both the parties went to trial on the following issues:-

- “1. *Whether plaintiff is entitled to the relief of possession as prayed for? OPP*
2. *Whether suit of the plaintiffs is not maintainable in the present form? OPD*
3. *Whether plaintiffs have no cause of action to file the present suit? OPD*
4. *Whether plaintiffs have no locus standi to file the present suit against the answering defendant? OPD*
5. *Whether suit of the plaintiffs is bad for mis joinder*

of the necessary parties? OPD

6. *Whether suit of the plaintiffs is bad for non joinder of the necessary parties? OPD*
7. *Whether no notice has ever been received by the answering defendant from the plaintiffs? OPD*
8. *Relief.”*

[6]. Both the parties led their respective evidence in order to prove their case.

[7]. The trial Court held that the evidence of PW-1 and PW-2 i.e. plaintiff No.1 and PW-2 Tilak Raj was not sufficient to establish relationship of landlord and tenant between the plaintiffs and defendants. Cross-examination of PW-1 would show that he never received any rent from the defendants, nor he ever visited the shop in question. The aforesaid admission made by PW-1 would show that he never received any rent from the defendants. The alleged plea of the plaintiffs in respect of collection of rent by the plaintiffs remained unexplained. The testimony of PW-2 also suggested that the shop was never let out in his presence. The plaintiffs have claimed the possession of the shop as owners. In order to prove ownership the plaintiffs have relied upon sale deed dated 29.11.1968 Ex.P-7 in the rebuttal evidence. No such sale deed was produced in affirmative evidence. The execution of the aforesaid sale deed was required to be proved in terms of the Evidence Act.

[8]. It was further held by the trial Court that plaintiffs relied

upon the aforesaid evidence on the basis of the same to be more than 30 years old document and, therefore, presumption has to be attached in terms of Section 90 of the Evidence Act. Record of sale deed was very much available with the plaintiffs, but they did not prove the execution of sale deed in accordance with law. The sale deed was produced only in rebuttal without mentioning any reason as to why the same could not be produced in affirmative evidence. Perusal of the sale deed would show that no *khasra* numbers were mentioned in the sale deed. In cross-examination of PW-1, the aforesaid fact was admitted. In order to connect the sale deed with the shop in question, the dimensions shown in the sale deed have to be correlated with the site plan. The identification of the shop was not proved by the plaintiffs by examining the draftsman of the site plan Ex.P-1.

[9]. Trial Court further held that the perusal of the site plan would show that towards southern side of shop in question, there was a shop of Varinder Kumar while in the sale deed Ex.P-7 on the southern side there was a shop of Ram Chand etc. The site plan Ex.P-1 did not provide any length and breadth of the shop in question and the sale deed Ex.P-7 was also silent in respect of dimensions of the shop sold through this document. On the other hand, the stand taken by the

defendants was catagoric enough to plead that the shop in question was situated in *Khasra* nos.45 and 46.

[10]. It was further held that PW-1 in his cross-examination did not state as to whether shop in question fell within the Lal Lakir or in *khasra* numbers. Even PW-1 was not alive to the location of the shop in question. Site plan Ex.P-1 was not proved by way of examination of Draftsman. Both the documents viz. Ex.P-1 and Ex.P-7 were silent about the dimensions of the shop and were not in consonance with each other in respect of configuration of the property. The statement of PW-1 would further aggravate the stand of the plaintiffs viz-a-viz. property being old and required renovation and structural changes. While appearing as PW-1, the witness could not say about the strength and defective structure of the shop as he never visited the shop in question. PW-1 had no knowledge about the structure of the shop, nor he ever visited the shop in question.

[11]. The trial Court on the basis of appreciation of evidence dismissed the suit as the sale deed could not be co-related with the material on record, rather the stand taken by the defendants was found to be realistic.

[12]. Feeling aggrieved against the judgment and decree

passed by the trial Court, the plaintiffs filed an appeal before the lower Appellate Court. The lower Appellate Court took cognizance of the issue of sale deed being 30 years old. Therefore, presumption was attached to it under Section 90 of the Evidence Act. Presumption was drawn under Section 114 of the Evidence Act and it was held that the sale deed was validly executed. The lower Appellate Court held that the defendants did not lead any evidence to rebut the sale deed. The lower Appellate Court reversed the judgment and decree of the trial Court. That is how the present appeal has been preferred by the appellant.

[13]. Appellant has framed the following substantial questions of law in para 19 of the grounds of appeal:-

- “a. Whether the findings of Ld. Lower Appellate Court are based upon misreading of evidence and are perverse.*
- b. Whether the impugned judgment and decree dated 23.02.2018 passed by Ld. Lower Appellate Court is wrong, illegal, unjust and perverse?*
- c. Whether a sale deed can be admitted in evidence without examining any witness of the same?*

[14]. Perusal of the aforesaid questions of law as framed by the appellant would require this Court to reframe the substantial questions of law on which consideration can be given in this appeal. According to this Court, substantial question of law

involves in the present appeal is to the following effect:-

“Whether the findings recorded by the lower Appellate Court on the basis of sale deed are perverse and the same are result of misreading of evidence?

[15]. I have considered the submissions made by learned counsel for the parties.

[16]. It is a settled principle of law that the person who claims some right on the basis of document, is required to positively prove the same. Reference can be made to **Subhash Chander and others vs. M/s Active Promoters Pvt. Ltd., 2015(1) RCR (Civil) 62** and **Thiruvengada Pillai vs. Navaneethammal and another, 2008(2) RCR (Civil) 262**. Since the plaintiffs relied upon sale deed Ex.P-7, they were required to prove its execution by leading cogent evidence. The sale deed was tendered in rebuttal evidence, therefore, onus was heavily rested upon the plaintiffs to prove their case viz.-a-viz. the dimensions, length and breadth and other material particulars of the property involved in the sale deed. The dimensions as given in the sale deed did not correspond to the dimensions given in the site plan Ex.P-1 produced by the plaintiffs. Since the site plan was not proved by the plaintiffs by examining the draftsman, therefore, there was no connecting material to prove

due execution of sale deed viz-a-viz. other material in order to prove that the sale deed was in respect of the property in question.

[17]. Even as per issue No.1 framed by the trial Court, the onus of issue No.1 was on the plaintiffs themselves. In the light of discrepancy as pointed out between Ex.P-1 and Ex.P-7, it could not be opined that the property mentioned in the sale deed was the suit property for which Section 90 of the Evidence Act could be attracted. It is true that if the document is more than 30 years old, presumption in term of Section 90 of the Evidence Act would come into being. For such application of presumption, the property has to be co-related with that of the suit property. The property mentioned in the sale deed has to be co-related with the suit property. Plaintiffs could not lead any such evidence to prove that the dimensions in the sale deed were corresponding to the dimensions shown in the site plan attached by the plaintiffs themselves. Execution of site plan could not be proved by them. Sale deed was discrepant in respect of any other particulars. Even the statements of PW-1 and PW-2 did not support the case of the plaintiffs as PW-1 never visited the spot in question, nor he ever collected rent from the defendants. Statement of PW-1 did not advance the case of the plaintiffs.

[18]. In my considered opinion the question of law as framed above needs to be answered in favour of the defendant/appellant. Plaintiffs cannot take benefit of weakness of case of the defendants. Plaintiffs have to stand on the strength of their own case. Plaintiffs could not prove that the subject matter of sale deed was the same as that of the suit property of the shop. On the other hand, defendant/appellant has specifically pleaded existence of shop with reference to *khasra* numbers having defined dimensions. Issue No.1 as framed could not be answered by the plaintiffs for want of evidence. Normal consequences are to follow after inability of the plaintiffs to prove their own case.

[19]. Filing of suit after serving notice under Section 106 of the Transfer of Property Act can be appreciated even without serving the notice. Since only equitable principles of Transfer of Property Act are applicable in the State of Punjab, therefore, filing of suit itself can be taken to be a notice under Section 106 of the Transfer of Property Act.

[20]. The presumption as regards the document being 30 years old, in my considered opinion will not be applicable to the facts of the present case, because original sale deed was tendered only at the stage of rebuttal. It was not a case of leading secondary evidence by the plaintiffs. The presumption

does not apply to a copy or certified copy even though 30 years old, but if a foundation is laid for the admission of secondary evidence under Section 65 of the Evidence Act, then the same is of some avail. If the due execution of document is doubted, the Court will be in its discretion to refuse to give such presumption. Even if, presumption is drawn, the sale deed has to be proved in respect of the suit property. The dimensions shown in the sale deed did not correspond to the dimensions of the site plan adduced by the plaintiffs, even execution of site plan was not proved by the plaintiffs.

[21]. Taking wholesome view of the case, I find that the plaintiffs have miserably failed to prove their case on the strength of their evidence, therefore, this appeal is accepted. Impugned judgment and decree dated 23.02.2018 passed by the lower Appellate Court is reversed and the suit filed by the plaintiffs is dismissed, leaving the parties to bear their own costs.

December 13, 2018

Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No