

[109] IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.4949 of 2018 (O&M)

Date of decision: 30.08.2018

Hari Om, s/o Sh. Parbhati.

.... Appellant

Versus

Hari Om, s/o Sh. Prabhu.

.... Respondent

BEFORE: HON'BLE MR. JUSTICE B.S. WALIA.

Present: Mr. Vipin Yadav, Advocate for the Appellant.

B.S. WALIA, J.,

[1] Appellant/defendant has challenged judgment and decree dated 06.02.2016 passed by the learned Civil Judge (Jr. Div.), Kosli partly decreeing the suit filed by the respondent/plaintiff with costs as also judgment and decree dated 17.04.2018 passed by the learned Additional District Judge, Rewari dismissing the appeal filed by the appellant/defendant with costs.

[2] Learned Counsel contended that as per the statement of DW-3, it stood established that the possession of the suit land never shifted to the appellant/ defendant on the basis of lease deed dated 29.02.2008 and the respondent/plaintiff was always in cultivating possession of the land but the aforementioned evidence had been misinterpreted and wrongly rejected. Learned counsel further contended that the evidence lead by the parties had not been properly appreciated by the courts below as the appellant / defendant had taken a categorical stand that the lease deed was never acted

appellant got the possession of the suit land through a separate transaction entered into by the respondent/ plaintiff with Ramest Bricks Udyog on 06.07.2012 granting permission to the appellant/defendant to excavate earth out of the respondent/ plaintiff's land and that the appellant had lead convincing evidence to prove the same, that the affidavit produced by the appellant/defendant in proof of having taken the land of the respondent/plaintiff on 06.07.2012 to dig out the earth from the same as also of having paid Rs.5 lakh to the respondent/plaintiff on the said date had wrongly been rejected as had the account books (Ex.PX and Ex.PY) containing entries of certain amounts taken by the respondent/plaintiff and lastly that FIR Ex.PW-2/1 dated 26.05.2009 registered against the appellant/defendant for violation of Section 4 (1) and Section 2 and Form 3 (A) of the Haryana Control Bricks Supply Orders Act, 1972 was a false case. Learned Counsel contended that in the circumstances, the judgment and decree passed by the learned trial court as upheld by the learned first appellate court was liable to be set aside and the suit dismissed with costs.

[3] Brief facts of the case leading to the instant appeal are that the respondent/plaintiff filed a civil suit seeking a declaration that the appellant/defendant had violated the terms and conditions of lease deed No.2998 dated 29.02.2008 and not paid the rent amount to the respondent/plaintiff, therefore, the lease deed was liable to be set aside and respondent/plaintiff held entitled to get lease deed amount of Rs.4,00,000/- along with interest @ 24% per annum.

[4] Prayer was also for the issuance of a Mandatory Injunction directing the appellant/defendant to fill the earth illegally removed by him from the suit land as well as from the passage of the suit land and for directing payment of balance amount of rent of suit land as per lease deed,

besides, Permanent Injunction for restraining the appellant/defendant from interfering in any manner with the suit land or from removing earth there from in future, etc.

[5] On the basis of the pleadings, following issues were framed :-

1. *Whether the plaintiff is entitled for a decree of declaration against the defendant as prayed for? OPP*
2. *Whether the plaintiff is entitled for a decree of permanent injunction against the defendant as prayed for? OPP*
3. *Whether the plaintiff is entitled for a decree of mandatory injunction as prayed for? OPP*
4. *Whether the suit is not maintainable in the present form? OPD*
5. *Whether the plaintiff has no cause of action to file the present suit? OPD*
6. *Whether the plaintiff has concealed the material facts from the Court? OPD*
7. *Whether the suit of the plaintiff is liable to be dismissed under Order 7 Rule 11 CPC? OPD*
8. *Relief.*

[6] On the basis of evidence led by the parties, the learned Civil Judge (Jr. Div.), Kosli held that the lease deed and its execution was not disputed by the parties, the lease deed (Ex.PW3/1) was a written and registered document, therefore, it could be cancelled only through a written instrument or by a declaration from a competent Court of law, therefore, the claim of the appellant/defendant that the lease deed was orally cancelled did not carry weight in the eyes of law. The learned Civil Judge (Jr. Div.), Kosli further held that on the one hand, the appellant/defendant claimed that he had never taken possession of the land and had never operated a brick kiln

27.06.2012 he had given Rs.40,000/- to the respondent/plaintiff. The learned Civil Judge (Jr. Div.), Kosli observed that the respondent/plaintiff had also claimed that he was only given Rs.40,000/- by the appellant/defendant and the remaining payment was not made. In the aforementioned background, the learned Civil Judge (Jr. Div.), Kosli concluded that if the lease deed was orally cancelled immediately after its execution on 29.02.2008 then why the appellant/defendant had made payment of Rs.40,000/- to the respondent/plaintiff that too in the year 2012 and that making part payment as per the terms and conditions of lease deed in 2012 clearly showed that the appellant/defendant was sitting on the land of the respondent/plaintiff at least till the time of making payment of Rs.40,000/- on 27.06.2012, therefore, on the said basis held that the lease deed continued to remain in force till the year 2012.

[7] As regards the entries in *Bahi Khata* (i.e. account book) of the appellant/defendant, the learned Civil Judge (Jr. Div.), Kosli observed that except for first entry of Rs.40,000/- dated 27.06.2012, none of the other entries mentioned in the *Bahi Khata* contained the signatures of the respondent/plaintiff and the respondent/plaintiff had nowhere made an endorsement about receiving other payments from the appellant/defendant. The learned Civil Judge (Jr. Div.), Kosli further observed that the first entry (i.e. Ex.PX and Ex.PY) in the *Bahi Khata* was of 27.06.2012 while the second entry pertained to the year 2008 whereafter the entry was of 14.07.2009 and so on. On the basis of the same, the learned Civil Judge (Jr. Div.), Kosli observed that the entries were not in sequence and that generally in account books, entries were maintained date-wise in a perfect sequence but the entries in the *Bahi Khata* of the appellant/defendant were made haphazardly, therefore, the same raised doubt qua the sanctity of the entries.

The learned Civil Judge (Jr. Div.), Kosli further observed that even if it was assumed that somehow entries were made on back dates in the *Bahi Khata* even then it was necessary for the appellant/defendant to take signatures of the respondent/plaintiff or his endorsement regarding acceptance of money to ascertain and prove that he had made the payments as shown in his *Bahi Khata* but there was not a single endorsement or signature of the respondent/plaintiff in front of the entries except entry No.1 dated 27.06.2012 for Rs.40,000/-.

[8] As regards the stand of the appellant/defendant based upon affidavit Mark D-1 on the basis of which he claimed that he had given Rs.5,00,000/- to the respondent/plaintiff in lieu of picking up earth from his fields, the learned Civil Judge (Jr. Div.), Kosli observed that it was admitted by the appellant/defendant that rate for picking up earth was Rs.2,00,000/- per acre and since as per affidavit (Mark D-1), Rs.5,00,000/- was stated to be paid to the respondent/plaintiff by the appellant/defendant, then the total land ought to have been 2 ½ hectares @ two lakh per acre. However, the land mentioned in the affidavit was much less, therefore, it was beyond comprehension as to why the appellant/defendant had made excess payment and the payment allegedly made by him not having been justified and further that if affidavit (Mark D-1) was actually executed then the same being a very important document, the appellant/defendant ought to have preserved it very carefully, however, only its photocopy was tendered by the appellant/defendant stating that he had lost it. The learned Civil Judge (Jr. Div.), Kosli further observed that in case it had been lost then at least the appellant/defendant ought to have lodged a complaint with the police but there was no such proof nor even a DDR in respect of loss of an important document, therefore, the conduct of the appellant/defendant was very

abnormal, unnatural and not appealing to a prudent mind. The learned Civil Judge (Jr. Div.), Kosli further observed that DW-4, Ashok who had claimed that the appellant/defendant had paid Rs.5,00,000/- to the respondent/plaintiff in his presence in the fields had clearly deposed that when the payment was made, he had seen the affidavit and that the affidavit was attested and signed at that time, whereas the affidavit mentioned that the payment of Rs.5,00,000/- had already been made. On the basis of the same, the learned Civil Judge (Jr. Div.), Kosli held that the version of DW-4 contradicted the contents of the affidavit, therefore, the same was not believable and that in the circumstances, it was necessary for the appellant/defendant to examine Pawan, *Munshi* who was stated to be the other eye-witness to the payment but neither was he examined nor was he produced in Court. Likewise, the appellant/defendant did not examine Dayanand, Munshi, a witness to prove entries made by him in the *Bahi Khata* of the appellant/defendant. The learned Civil Judge (Jr. Div.), Kosli further observed that it was important to note that affidavit Mark D1 referred to and mentioned another Bhatta Company i.e. Ramest Bhatta Company while the appellant/defendant was running Hari Om Bhatta Company and that although during arguments it was asserted by the appellant/defendant that he was proprietor of Ramest Bhatta Company also but no proof had been tendered in respect thereto. In the light of the position as noted above, the learned trial Court held that the transaction, if any, which took place in view of the affidavit Mark D1 was completely independent from the suit. Neither the appellant/defendant had filed a counter-claim nor set off to assert his claim of payment of Rs.5,00,000/- to the respondent/plaintiff.

[9] The learned Civil Judge (Jr. Div.), Kosli further observed that

the appellant/defendant had claimed that he could not operate Bhatta on the

land of the respondent/plaintiff due to some technical fault but did not disclose the technical fault which compelled him not to proceed with the operation of the Bhatta activity in the land of the respondent/plaintiff as per the lease deed and further that he had remained silent about the vague entries in the account books. Besides, even after his cross-examination was deferred, the appellant/defendant failed to produce the income-tax entry and *Bahi Khata* entry showing payment made to the respondent/plaintiff. In the light of the position as noted above and considering the fact that the lease deed was undisputed, besides, payment of Rs.40,000/- was admitted by both the sides, the learned trial Court held that it was of the considered opinion that the lease deed operated till 2012 and in view of PW-1 i.e. the Local Commissioner having stated that when some earth was removed, brickbats were found therein, the presence of brickbats in the fields of the respondent/plaintiff upto a depth of 2-3 feet showed that the appellant/defendant had operated his Bhatta from there. Accordingly, the learned Civil Judge (Jr. Div.), Kosli held that it is stood established that upto 2012, the appellant/defendant remained in possession and from 2013, the respondent/plaintiff was cultivating the land. Therefore, as per the terms and conditions of the lease deed, the appellant/defendant was liable to pay Rs.4,00,000/- for five years and that since Rs.40,000/- had admittedly been paid by the appellant/defendant, therefore, the respondent/plaintiff was entitled to receive remaining Rs.3,60,000/- from the appellant/defendant along with interest @ 24% per annum.

[10] As regards the plea for mandatory injunction for directing the appellant/defendant to fill up the earth removed by him from the suit land, the learned Civil Judge (Jr. Div.), Kosli held that it was undisputed that the

respondent/plaintiff and that since the respondent/plaintiff was in possession of his land and the lease deed was no more effective, therefore, the appellant/defendant had no right to interfere or disturb the peaceful use and possession of the respondent/plaintiff over the suit land in any manner. Accordingly, issue Nos.1 and 2 were decided in favour of the respondent/plaintiff while issue No.3 was decided in favour of the appellant/defendant.

[11] Likewise, issue Nos.4 to 6 were also decided in favour of the respondent/plaintiff and against the appellant/defendant while issue No.7 was decided in favour of the appellant/defendant and against the respondent/plaintiff. The respondent/plaintiff was required to file ad valorem Court fees within two months of the judgment otherwise, the suit was ordered to be treated as dismissed for non-prosecution.

[12] In the light of the position as noted above, the suit was partly decreed with costs by holding lease deed No.2998 dated 29.02.2008 to be illegal and void and not binding upon the respondent/plaintiff and further holding the respondent/plaintiff entitled to recover a sum of Rs.3,60,000/- from the appellant/defendant along with interest at the rate of 12% per annum with effect from the date of filing of the suit till realization of decree. It was also ordered that the respondent/plaintiff would pay and deposit appropriate Court fees on the said amount in Court within two months from the date of order. The appellant/defendant was also permanently restrained from interfering in the peaceful use and possession of the suit land by the respondent/plaintiff in any manner whatsoever.

[13] Appeal filed by the appellant/defendant against the judgment passed by the learned Civil Judge (Jr. Div.), Kosli was dismissed by the

learned Additional District Judge, Rewari vide judgment and decree dated 17.04.2018.

[14] I have heard learned counsel and with his able assistance have gone over the relevant record of the case. Admittedly, registered lease deed (Ex.PW3/1) dated 29.02.2008 was executed amongst the parties for 21 kanals 4 marlas of land i.e. suit land for a period of 16 years @ Rs.80,000/- per annum. Use of the suit land for brick kiln stood established from the report of the Local Commissioner (EX.PW1/3) with his site plan Ex.PW-1/14 as per which upon digging of the land in killa Nos.22 and 23 and of the land of passage thorough-fare in the Northern side, the remains of bricks were found. Further FIR Ex.PW-2/1 dated 26.05.2009 was registered against the appellant/defendant for violation of Section 4 (1) and Section 2 and Form 3 (A) of the Haryana Control Bricks Supply Orders Act, 1972. The FIR was registered on 26.05.2009 i.e. after about 1 ¼ years of the execution of the lease deed which goes to establish that the appellant/defendant utilized the suit land, besides, even in the written statement, no reference was made by the appellant/defendant as to the date, year and month and the witness in whose presence the possession of the suit land was delivered back to the respondent/plaintiff. No doubt, the appellant/defendant in paragraph No.4 of his written statement took a plea of his having taken the land of the respondent/plaintiff on 06.07.2012 to dig out the earth from the same but the appellant/defendant could not establish the said fact by leading cogent evidence as the document i.e. Mark D on which reliance was placed, was photocopy of the affidavit, besides, its contents were vague. Moreover, no evidence was led to show payment of the alleged lease amount of Rs.5 lakh to the respondent/plaintiff by the appellant/defendant on the said date in order to prove that the

appellant/defendant had taken the land in question from the respondent/plaintiff on 06.07.2012. The original document i.e. Mark D was not produced and only photocopy of the same was produced. Account book in support of plea of payment of Rs.5 lakh was also not produced, besides, the account book which was produced nowhere showed the entry of the said amount in the said account, nor was any income tax return produced to prove the payment as alleged. In fact the copy of the account book produced by the appellant/defendant in the shape of Ex.PX contained signatures of the respondent/defendant only in front of Entry of Rs.40,000/- dated 27.06.2012. The account books (Ex.PX and Ex.PY) further contained the entries of certain amounts taken by the respondent/plaintiff. However, except for entry of Rs.40,000/-, other entries do not contain the signatures of the respondent/plaintiff in token of having received the said amount. Moreover, the account books as produced by the appellant/defendant were not properly maintained as entries of 2008-09 were recorded after the entry of 27.06.2012 in respect of payment of Rs.40,000/-. Since, the record books do not appear to have been prepared in the ordinary course of nature, no presumption of its correctness can be attached under Section 34 of the Indian Evidence Act, 1872. Besides, the statement of Hans Raj Halqa Patwari Bawwa (DW-3) cannot be accepted as a gospel truth to hold the respondent/plaintiff to be in possession of the suit land throughout after the execution of the lease deed since he did not produce Rapat Rojmnamcha Vakayati and Rapat Rojnamcha Karguzari without which even he admitted that it could not be ascertained as to whether the then Halqa Patwari recorded the khasra girdawari entries after inspecting the spot.

The stand based on photocopy of affidavit Mark D-1 that vide

deed took possession of the suit land by way of independent contract for extracting the earth for preparing the bricks for brick kiln i.e. Ramest Bricks Udyog is also not believable as no evidence regarding the said brick kiln or its accounts were produced.

[15] Accordingly, I find no infirmity with the judgment and decree of the Court below. No substantial question of law arises. The appeal being bereft of merit is, accordingly, dismissed in limine.

(B.S. WALIA)
JUDGE

30.08.2018
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- 1. Whether speaking/reasoned : Yes/No.
- 2. Whether reportable : Yes/No.