

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 5695 of 2017(O&M)

Date of Decision: July 3rd, 2018

Dilbagh Singh

---Appellant

vs.

Gurbax Singh (deceased) through LRs.

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Veneet Sharma, Advocate for the appellant
Mr. Amit Arora, Advocate for the caveator-respondent

Rekha Mittal, J.

The present appeal directs challenge against consistent findings recorded by the Courts whereby suit filed by the respondent-plaintiff for possession of house situated in the area of Patti Mustugi village Verpal, Tehsil and District, Amritsar and for mesne profits was partly decreed by the trial court and judgment and decree passed by the trial court came to be affirmed by the first appellate court.

In short, case of the respondent-plaintiff is that the suit property is owned by him, entire construction was raised by him and electricity connection has been installed in the name of his father namely Tara Singh. Earlier, the respondent alongwith his family had been residing in the suit property. Recently he shifted to village Tur. The suit property was under his lock and key and some of his belongings like Television, fridge, two almirahs, one iron peti and utensils were lying in the suit property. On 9.7.2007, the respondent came to village Verpal to meet his brother Harjinder Singh who resides in a house adjoining the suit property. At about 8-00 p.m., the appellant alongwith his associates namely Jasbir Kaur, Sonu, Disha, Gurpreet Singh, Bukhi, Jagdish Kumar and others armed with deadly weapons came there and forcibly entered the suit house. They

broke open the locks and took illegal possession of articles lying in the suit property. When the respondent and his brother tried to stop them, they attempted to kill him and gave beatings. At gun point, they extorted a sum of Rs. 15,000/- from his pocket. The matter was reported to the police who in place of taking action against the defendant/appellant and his associates detained the respondent illegally and forcibly. The appellant and his associates got his thumb impressions on some blank papers in connivance with ASI Ravinder Singh, the then Incharge Police Post, Verpal at gun point. The respondent filed a suit for mandatory injunction for recovering possession of his property alongwith other articles and to pay mesne profits but the suit was decided by the Court at Amritsar with the observations that the suit is not legally maintainable and the respondent should have filed a suit for possession by affixing proper court fee. Hence, the present suit.

The appellant/defendant filed the written statement and raised preliminary objections inter alia that the suit is not legally maintainable; the respondent has no locus standi to file the suit; the respondent is estopped by his act and conduct from filing the suit; the suit is bad for misjoinder and non-joinder of parties; the respondent has concealed the true and material facts from the court; the plaint is liable to be rejected under Order 7 Rule 11 of the Code of Civil Procedure (in short "CPC") as it is without any cause of action and has not been signed and verified as per provisions of amended CPC and the suit is barred by the principle of res judicata. However, it has been averred that the respondent and his family extracted Rs. 5,50,000/- from the appellant on false assurance to send his son abroad. When he failed to fulfill his promise, the matter was compromised and as per the compromise, the respondent delivered possession of suit property to appellant with promise to pay back Rs. 5,50,000/- and thereafter to take back possession of suit house. The allegations with regard to the appellant having

recovered possession of suit property forcibly on 9.7.2007, have been specifically denied with a prayer for dismissal of the suit.

The respondent filed replication reiterating the averments raised in the plaint and controverted defence plea that either the respondent had taken an amount of Rs. 5,50,000/- for sending son of the appellant abroad or possession of suit house was delivered to the appellant on the basis of alleged compromise effected between the parties.

The trial court framed the following issues for determination:-

1. Whether the suit of the plaintiff is bad for mis-joinder and non-joinder of necessary parties? OPD
2. Whether the plaintiff has concealed the material facts from the court, if so its effect? OPD
3. Whether the present suit is bared by principle of res judicata? OPD
4. Whether the plaintiff is entitled to possession of suit property, as prayed for? OPP
5. Whether the plaintiff is entitled to mesne profit as prayed for? OPP
6. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP
7. Relief

The parties were permitted to adduce evidence in support of their respective contentions. After having heard counsel for the parties in the light of materials on record, issues No. 1 and 4 were decided in favour of the respondent on the basis whereof, suit of the respondent was partly decreed and the appellant was directed to hand over vacant possession of the suit property to respondent within two months from the date of passing of the order. The appellant was restrained from transferring possession of the suit property to any third person.

As has been noticed hereinbefore, findings recorded by the trial court partly decreeing suit of the respondent-plaintiff came to be affirmed by the

Additional District Judge, Amritsar.

Counsel for the appellant raised the following question:-

“Whether the respondent can be allowed a decree of possession in absence of proof of ownership of the suit house?”

It is argued that though the appellant has not specifically denied averments raised in para 1 of the plaint whereby the respondent/plaintiff has claimed himself to be owner of the suit property but the appellant has not admitted him to be owner of the suit house. It is argued with vehemence that as the respondent/plaintiff asserted his right of possession on the basis of plea of ownership of the suit house, the trial court was required to call upon the respondent/plaintiff to prove his ownership of the suit house even if allegations in this regard have not been denied specifically or by necessary implication, thus, deemed to be admitted in view of the provisions of Order VIII Rule 5 CPC. In support of his contention, he has heavily relied upon judgment of the Kerala High Court **SA No. 357 of 2001(A) Ramachandran vs. Rugmni and others decided on 6.12.2011**.

Counsel representing the respondent, on the contrary, has supported consistent findings recorded by the Courts. It is argued that as the appellant did not deny plea of the respondent with regard to his being owner of the suit house and in view of provisions of Order VIII Rule 5 CPC, the said fact shall be taken to be admitted by the appellant and for that reason the trial court did not frame an issue on the question of ownership of the suit house, it does not lie in the mouth of the appellant now to raise an issue in this regard.

Another submission made by counsel is that even as per allegations raised by the appellant, the respondent was in possession of the suit house and its possession was delivered to the appellant under some compromise effected between the parties though the appellant has failed to prove any such compromise, in accordance with law. In addition, it is argued that the appellant has also failed to prove that an amount of Rs. 5,50,000/- was given by the

appellant and his family to the respondent or his family for sending his son abroad when otherwise no such agreement based upon illegality or against public policy can be enforced through process of the court.

I have heard counsel for the parties, perused the paper book and records.

Indisputably, the respondent/plaintiff raised a specific plea that he is owner of suit house and the appellant is liable to deliver possession of the suit house to him. The appellant, in the written statement has not denied the allegations much less specifically with regard to the respondent being owner of the suit house.

Order VIII Rule 5 CPC says that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in pleading of the defendant, shall be taken to be admitted, except as against a person under disability. That being so, in absence of specific denial in the written statement, fact regarding title is to be taken as admitted by virtue of Order VIII Rule 5 CPC. However, proviso to Order VIII Rule 5 lays down that the court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. No doubt, in cases in which the court finds it necessary that a fact must be proved, irrespective of the admission made by the parties, court can require the party to prove the relevant fact. In the same manner, proviso to Section 58 of the Evidence Act also lays down that court may in its discretion require the facts admitted to be proved otherwise than by such admissions even though as per Section 58 of the Evidence Act, admitted facts need not be proved under certain circumstances.

In the judgment passed by the Kerala High Court, the plaintiff-first respondent, daughter of late Purushan claimed 1/10th share in the plaint schedule property as descendant of late Purushan and sought partition of the scheduled property. There was no contest between the parties with regard to the suit

property being owned by Purushan. The trial court held the plaintiff entitled to 1/10th share in the schedule property and a preliminary decree was accordingly passed in favour of the plaintiff. Defendants No. 7 and 8 filed an appeal before the District Court. Appellate court affirmed the preliminary decree and dismissed the appeal. The second appeal was filed before the High Court and a question of law was raised “whether in a suit for partition, can the court grant a decree, in the absence of proof of title or right of plaintiff in the property which is sought to be partitioned?”. The Kerala High Court, after adverting to the provisions of Order VIII Rule 5 CPC and Section 58 of the Evidence Act has held in paras 11 to 13, quoted thus:-

11. It may not, however, be proper for the court to proceed merely on admissions or deemed admissions by rule of pleading or by virtue of section 58 of Evidence Act to hold that a person has right or title over property especially to grant a decree for partition. This is for the main reason that in the absence of insisting for proof of title it is easy to obtain a decree from court in a collusive suit. It must be borne in mind that as per the proviso to both section 58 of Evidence Act and Order VIII Rule 5, court can require that admitted facts be proved otherwise than by such admissions. So, a partition suit is an appropriate proceeding in which the court can exercise the discretion under the said proviso and insist for proof of title or other right of the plaintiff, if any, over the property which is sought to be partitioned, otherwise than on admission.

12. In this case, Plaintiff has only pleaded that plaintiff schedule property belonged to late Purushan and he was in separate possession of the property during life time. Nature of acquisition of right is not stated in the plaint. According to contesting defendants, late Purushan had some self acquired properties and also some ancestral properties

in his possession. It appears that the title and right of late Purushan over property are born by documents. But such documents are not produced by plaintiff-respondent.

13. In a case in which title or right can be established by documents, the party who seeks to establish the right has to produce those documents, going by best evidence rule. If the party is not able to produce the same, it has to be explained why the documents are not produced. At any rate, on the facts of this case, in the absence of production of right or title over the immovable property, decree of partition ought not to have granted in respect of immovable property.”

Reverting to the case at hand, the parties to the suit are at daggers drawn, involved in both civil and criminal litigation since 2007. The appellant has not claimed any title to himself or to a third party qua the suit house. It is also admitted position that before the appellant came in possession of the suit house, the same was in possession of the respondent and his family. The appellant did not contest plea of the respondent with regard to his being owner of the suit house either by denying those allegations specifically or by necessary implication rather admitted the respondent to be owner of the suit house in view of the terms and conditions of alleged compromise, relied upon by the appellant, a copy whereof is marked as Ex. DW4/A. As the document Ex. DW4/A has been sought to be relied upon by the appellant, he is bound by any such admission even though he has failed to prove the same, in accordance with law. A relevant extract from Ex. DW4/A in Punjabi, reads as follows:-

“.....Eh fesla hoeya hai ki Dilbagh Singh apne ladke Gursarup Singh nu Malasia ton vapas sad lawega jis din munda vapas awega us ton 10 din bad Gurbax Singh paise de dewega jekar Gurbax Singh paise nahin denda tan pind Tur the sarpanch Gurdial Singh

*Vir Singh son of Banta Singh, Gurbax Singh da jo makan pind
 Verpal vikhe hai us the kabja karva denge ate bad vich jadon Gurbax
 Singh paise de devega tan dilbag Singh makan khali kar devega.”*

As per categorical plea of the appellant, possession of the suit house was given to him on the basis of compromise Ex. DW4/A. It is further pleaded that Gurbax Singh has failed to return the amount to which reference has been made in the compromise deed Ex. DW4/A. This apart, the trial court in para 9 of the judgment has held to the following effect:-

“.....He has also produced on record electricity and telephone bills including the receipt of payment of these bills as Ex. P4 to P8 to show the ownership and possession of plaintiff over the suit property. Though these documents are not the documents of title but there is no dispute between the parties as to the ownership of the suit property which is stated to be situated within lal lakir of village Verpal.”

I have gone through the grounds of appeal raised before the first appellate court but the appellant has not challenged observations of the trial court that there is no dispute between the parties with regard to ownership of the suit property situated within lal lakir of village Verpal. As the appellant did not challenge findings of the trial court that the suit property is situated within lal lakir, where is the occasion to call upon the respondent to produce a document of title qua the suit property by relying upon judgment of the Kerala High Court. Even otherwise, in **Ramachandran's case (Supra)**, the plaintiff had claimed ownership in the suit property to the extent of 1/10th and sought partition whereas in the instant case, dispute pertains only qua recovery of possession of suit house, admittedly earlier possessed by the respondent and the appellant does not claim ownership thereof. In view of peculiar facts and circumstances obtaining in the present case, this court finds it difficult to accept that the judgments and decrees

passed by the courts are liable to be set aside and the matter is required to be remitted to the trial court for adjudication afresh by framing an issue qua ownership of the suit house and permitting the parties to adduce evidence in regard thereof. As a matter of fact, despite the appellant having not raised an issue qua ownership of the suit house before the courts below, the same has been raked up in second appeal with a clear intent that the respondent may not be in a position to produce any document of title as the suit property is situated in the village and to retain possession thereof for all the times to come as there appears some dispute between the parties with regard to money allegedly paid for sending son of the appellant abroad.

For the foregoing reasons, the appeal fails and is accordingly dismissed with costs. As a natural corollary, the judgments and decrees passed by the Courts are affirmed.

(Rekha Mittal)

Judge

July 3rd, 2018
paramjit

Whether speaking/reasoned: Yes

Whether reportable : Yes/No