

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 1643 of 1994(O&M)

Date of Decision:10.1.2019

Balwinder Singh and others

---Appellants

vs.

Devinder Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Kuldeep Tewari, Advocate
for the appellants

Mr. J.S.Saneta, Advocate
for respondent No. 1

Mr. Sanjeev K. Sharma, Advocate
for respondent No. 2 and Lrs of respondent No. 3

Rekha Mittal, J.

The present appeal directs challenge against concurrent findings recorded by the courts whereby suit for declaration and mandatory injunction filed by the respondent-plaintiff was decreed by the trial court vide judgment and decree dated 3.2.1993 passed by the then Additional Senior Sub Judge, Pehowa that came to be affirmed in appeal by the District Judge, Kurukshetra vide judgment and decree dated 9.5.1994.

The bone of contention in the present suit is a passage measuring 20 karams in length and 2 karams in width. The case of the respondent-plaintiff is that he purchased land measuring 8 kanal comprised in khewat No. 5/9 rectangle No. 6 killa No. 7 vide sale deed dated 26.9.1984

from one Hakam Singh alongwith aforesaid passage in killa No. 6/2 of rectangle No. 6 to approach killa No. 7 from main passage. It is further averred that this passage was reserved by Hakam Singh while he sold a part of his property comprised in rectangle No. 6 killa No. 4, 5/1, 5/2, 6/1, 6/2 and rectangle No. 5 killa No. 1 to 10 to the appellants-defendants and the relevant entry to this effect is depicted in sale deed dated 3.1.1978 executed by Hakam Singh in favour of appellants-defendants. The aforesaid passage was in existence in the year 1985 and remained in existence upto 25.5.1989. The appellants had cultivated the aforesaid passage on 23.5.1989.

The appellants-defendants filed the written statement and raised preliminary objections inter alia that the suit is not maintainable in the present form; plaintiff has no cause of action and locus standi to file the suit; the plaintiff has concealed the true and material facts and the civil court has got no jurisdiction to entertain the suit. On merits, all material averments with regard to existence of a passage in killa No. 6/2 or a passage having been left by Hakam Singh in the said khasra number are denied.

The respondent-plaintiff filed replication and controverted the allegations raised in the written statement while re-asserting his stand taken in the plaint.

The controversy between the parties led to framing of issues, reproduced in para 6 of the judgment of trial court. The parties were permitted to adduce evidence in support of their rival contentions. Having heard counsel for the parties in the light of materials on record, the trial court, on the basis of findings on issue No. 1, accepted claim of the respondent-plaintiff and decreed the suit by directing the appellants-

defendants to restore the passage having length of 20 karams and width of 2 karams in killa No. 6/2 towards Southern side and mutation bearing No. 244 was held to be null and void to this extent for non-mentioning of this passage therein.

As has been noticed hereinbefore, appellants-defendants turned out to be unsuccessful before the first Appellate Court as appeal preferred by them was dismissed and findings recorded by the trial court were affirmed.

Still feeling dissatisfied, the present appeal was preferred by defendants No. 3 to 5 whereas defendants No. 1 and 2 were impleaded as proforma respondents.

Counsel for the appellants would argue that as per plea of the respondent-plaintiff, Hakam Singh left the disputed passage measuring 20 x 2 karams in killa No. 6/2 of rectangle No. 6 and the said fact has been mentioned in the sale deed dated 3.1.1978 executed by Hakam Singh in favour of the defendants qua sale of land comprising killa No. 4, 5/1, 5/2, 6/1, 6/2 of rectangle No. 6 and killa Nos. 1 to 10 of rectangle No. 5. It is vehemently argued that in the sale deed dated 3.1.1978, copy whereof is marked as Ex. D1, there is no reference to any passage being left by Hakam Singh in killa No. 6/2 of rectangle No. 6 which is the subject matter of sale in favour of the defendants. It is further argued that at the end of recitals in the sale deed, there is a note with regard to passage having been left in killa No. 6/1 of rectangle No. 6 measuring 20 karams in length and 2 karams in width. According to counsel, as Sh. Hakam Singh, erstwhile owner of killa No. 6/2 sold land comprising said killa number without reserving any right

in the said killa by way of a passage therein, contention of the respondent-plaintiff with regard to a passage having been left by Hakam Singh in killa No. 6/2 gets falsified and belied. In addition, it is argued that no sooner Sh. Hakam Singh sold his all rights in killa No. 6/2 in favour of the appellants-defendants, any such recital in the sale deed dated 26.9.1984 executed in favour of the respondent with regard to a passage of 20 x 2 karams in killa No. 6/2 is of no consequence nor can it enure to benefit of the respondent and prejudicial to the appellants-defendants.

Counsel for the respondent-plaintiff, on the contrary, has supported consistent findings recorded by the courts based upon detailed and correct appreciation of the materials on record. It is vehemently argued that both the courts have noticed that defendants-appellants have withheld the original sale deed dated 3.1.1978, therefore, they cannot contest claim of the respondent-plaintiff by relying upon a copy thereof which was tendered into evidence in the statement made by counsel for the appellants at the fag end of the trial.

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

The trial court in para 10 under issue No. 1 had held, quoted thus:-

“There is merit in the contention of the learned counsel for the plaintiff. Perusal of Ex. P1 clearly shows that the plaintiff had purchased the land measuring 8 kanals from Sh. Hakam Singh because the passage mention of which has been made in the sale-deed used to lead to killa No. 7. Even, perusal of Ex. P2

akhszra (sic) clearly shows that the southern side of killa no. 6/2 is 20 karam whereas the southern side of killa no. 6/1 is only 16 karams, therefore, the question of reserving passage in killa no. 6/1 by the original owner does not arise because the entire land towards the eastern side of main passage was disposed of by Sh. Hakam Singh in favour of the defendants. Therefore, there was no use to reserve this passage. On the other hand, killa no. 7 was still with him, therefore, to approach the same he reserved this passage and as per statements of PW1 and PW2 that passage was in existence till the year 1989 whereas killa no. 7 was purchased by the plaintiff in the year 1984. No doubt in Ex. D1 entry has been effected that the passage has been reserved in killa No. 6/1 but the original sale deed has not been produced on the file by the defendants and there is every possibility that in original sale deed the entry regarding the reservation of this passage may be in killa no. 6/2. Taking into consideration my aforesaid discussion I decide this issue in favour of the plaintiff and against the defendants.”

The Appellate Court also commented adversely against the defendants for their failure to produce the original sale deed in order to vouch as to whether the passage has been shown to be left in killa No. 6/1 or 6/2. However, counsel for the appellants is not in a position to justify failure of the appellants to produce original sale deed either before the trial court or before the first Appellate Court or even before this court. The very fact that the appellants have withheld the original sale deed from the court is

a strong circumstance to draw an adverse inference against them that passage was left in killa No. 6/1 and not in 6/2.

Undisputedly, the appellants did not seek permission of trial court to prove the original sale deed by way of secondary evidence. It may be true that no specific permission of the court is required to lead secondary evidence but there must be explanation by a litigant as to why he is unable to produce the primary evidence. In the case at hand, counsel for the appellants has failed to point out any materials suggestive of the fact that the appellants submitted any explanation for their failure to produce the original sale deed on record. There cannot be any denial that in view of the settled position in law, a party in possession of best evidence that throws light on the issue in controversy has an obligation in law to produce the same failing which an adverse inference is liable to be drawn. In the given circumstances, I do not find an error much less illegality in findings of the courts by commenting adversely against the appellants for their having failed to produce the original sale deed in order to know if the said sale deed records leaving of a passage in killa No. 6/1 or 6/2.

Counsel for the appellants has not disputed findings of the trial court recorded in para 10, extracted hereinbefore, that Hakam Singh had already sold the entire land towards eastern side of passage shown in aks sajra Ex. P2, therefore, there was no occasion/use to reserve the passage in killa No. 6/1. On the contrary, killa No. 7 adjoining to killa No. 6/2 was still ownership of Hakam Singh, therefore, in order to approach killa No. 7 there was need of a passage in killa No. 6/2. Counsel for the appellants has also not disputed the factual findings recorded by trial court in view of facts

mentioned in aks sajra Ex. P2 that southern side of killa No. 6/2 is 20 karams whereas the southern side of killa No. 6/1 is only 16 karams and as such there was no question of reserving passage of 20 karams in length in killa No. 6/1. This apart, findings recorded by the courts are not amenable to challenge in the second appeal unless the same suffer from perversity or raise a question of law that needs determination. In view of the aforesaid, I do not find an error much less illegality in the judgments passed by the courts, warranting intervention.

For the foregoing reasons, the appeal fails and is accordingly dismissed, leaving the parties to bear their own costs.

(Rekha Mittal)
Judge

10.1.2019
paramjit

Whether speaking/reasoned: Yes
Whether reportable : Yes/No