

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 2093 of 2011 (O&M)

Date of decision : 15.5.2019

...

Attar Chand and another

.....Appellants

vs.

Pawan Kumar and another

.....Respondents

Coram: Hon'ble Mr. Justice H. S. Madaan

Present: Mr. G.C. Shahpuri, Advocate for the appellants

Mr. A.P. Bhandari, Advocate for respondent No.1.

...

H. S. Madaan, J.

Briefly stated, facts of the case are that plaintiffs Attar Chand and Gulshan Lal, sons of Prem Chand, both residents of House No. 5C/41, NIT Faridabad, had brought a suit against Pawan Kumar and Vinay Kumar, both sons of Late Sh. Bansi Lal, residents of Faridabad, seeking a declaration to the effect that Will dated 7.1.2004 allegedly executed by Late Smt. Saran Kaur in favour of the defendants is null and void and not binding upon the rights of the plaintiffs, besides that craving for grant of decree of permanent injunction restraining the defendants from dispossessing the plaintiffs from the suit property illegally, forcibly and unlawfully and further

restraining them from alienating any part of the suit property.

As per version of the plaintiffs, they are co-owners in joint possession of front portion measuring 86 sq. yards bearing Municipal No. 5C/41, NIT Faridabad, in as much as, they alongwith their deceased mother Smt. Saran Kaur and deceased brother Sh. Bansi Lal had purchased the entire house No. 5C/41, NIT Faridabad measuring 231 Sq. yards from the Ministry of Rehabilitation vide conveyance deed dated 4.5.1981. Subsequently, rear portion of the said house measuring 145 sq. yards was sold and Late Smt. Saran Kaur and Late Sh. Bansi Lal received the amount of their respective share out of the sale consideration and handed over the absolute and exclusive possession of the remaining portion measuring 86 Sq. yards, which is front portion of the house, in favour of and into the hands of the plaintiffs and made their separate abode in House no. D/1319 A.C. Nagar, Neelam -Bata Road, NIT Faridabad about 20 years back. In that way, late Smt. Saran Kaur and late Sh. Bansi Lal were not left with any right, title or interest in the suit property and both the plaintiffs are in actual possession of the same as true owners without any interference from any corner and without any hindrance; that plaintiff No.2 is living a bachelor's life and is residing with the plaintiff No.1 in the suit property. However, the defendants have got a factitious Will on 7.1.2004 from late Smt. Saran Kaur, vide which she had allegedly bequeathed her share in the suit property in favour of the defendants in equal share; that Smt. Saran Kaur had expired on 1.7.2004; that she had not executed any Will in favour of the defendants, rather she was not in proper state of mind being aged 75

years. Therefore said Will is null and void, liable to be ignored and set aside being not binding upon rights of the plaintiffs.

On notice, the defendants appeared and filed their written statement raising various legal objections, on merits submitting that total area of 5-C/41, NIT Faridabad was 233 sq. yards, out of which the plaintiffs sold the rear portion, measuring 145 sq. yards, as their share out of the said house. They had not given even a single penny to Smt. Saran Kaur or the defendant or to anybody else and against the share of Smt. Saran Kaur, they have front portion of the house measuring 86 sq. yards; that after sale of the property, the plaintiffs took the house on rent on various places and lastly, they requested their mother and brother Sh. Bansi Lal that they were unable to pay rent, hence they should be given shelter; that out of mercy Smt. Saran Kaur allowed plaintiffs to stay in the house in question; that in the meanwhile Sh. Bansi Lal died; that the plaintiffs became greedy and since the defendants were minor and Smt. Saran Kaur was an old lady and widow of Sh. Bansi Lal was helpless, the plaintiffs took the advantage of these facts and threw out the defendants and their mother from the house in question and took possession of the house in the year 2001; that both the defendants were taking care and looked after Smt. Saran Kaur, as such she was happy with their services; that she executed a Will on 7.1.2004; that Smt. Saran Kaur had been residing in house No. 5-C/41 till her death. On merits, refuting the remaining allegations, the defendants prayed for dismissal of the suit.

The defendants had filed a counter claim seeking a decree for

possession directing the plaintiffs to vacate the property in question and give peaceful possession to them, on the basis of Will dated 7.1.2004 executed by Saran Kaur in their favour, the plaintiffs had refuted the counter claim taking almost same stand as in their plaint.

From the pleadings of the parties, following issues were framed:-

1. Whether the Will dated 7.1.2004 executed by late Smt. Saran Kaur in favour of defendants is illegal and null and void? OPP
2. Whether the plaintiffs are entitled to a decree of permanent injunction as prayed for? OPP
3. Whether the plaintiffs have no cause of action to file the present suit? OPP
4. Whether the suit is not maintainable in the present form? OPD
5. Whether the defendants are owner of house in question and are entitled to possession thereof on the grounds taken in the counter claim? OPD
6. Whether the defendants has not paid the requisite court fee on the counter claim, if so its effect? OPD
7. Relief.

In order to proof his case, plaintiff examined himself as PW-1, Sh. Sumer Singh as PW-2, Sh. Tirath Ram as PW-3, Sh. Rakesh as PW-4 and Smt. Suman Bala as PW-5 and closed the evidence.

On the other hand, the defendants examined Sh. Vijay Kumar as DW-1 and Sh. Parkash Chand ARC as DW-2. The

defendants proved following documents :-

1. Ex PW 4/1 - writing
2. Ex. PW 5/1 - Death certificate of Ram Lal
3. Mark A1, A2 - House tax bill
4. Mark A-3, A4 - Electricity Bills
5. Mark A5 to A7 - House tax/sewerage bill
6. Mark A8 to A11 - Electricity Bills
7. Mark A12 - Compromise
8. Ex. D1 - Conveyance deed
9. Ex D1/A - Will dated 7.1.2004

After hearing the counsel for the parties, the trial Court, by giving issue wise findings, decreed the suit filed by the plaintiffs, declaring the Will dated 7.1.2004 to be null and void. A decree of permanent injunction was also passed, restraining the defendants from dispossessing the plaintiffs from the suit property. Counter claim filed by the defendants was dismissed vide judgment and decree dated 6.2.2010.

The reasoning given by the trial Court is contained in para No. 19 and 20 of the judgment, which for ready reference are reproduced as under :-

“19. Having heard the rival contentions from both side and after going through the case file, evidence led by the parties and the relevant authorities produced by learned counsel for the plaintiffs, it is observed by this court that the claim of the plaintiffs

is that the defendants be restrained from dispossessing the plaintiffs from the suit property as well as WILL dated 7.1.2004, Ex.D1/A be declared as null and void. For proving their claim, the plaintiffs have proved that father of the defendants have already taken an amount of Rs.89,000/- against the sale of his share in the suit property and father of the defendants have stated in the compromise dated 11.5.1995 Mark A12 that Attar Chand plaintiff is having independent right over the suit property measuring 88 sq. yards. Mother of the defendants have already received Rs.25,000/- through receipt dated 7.2.2005 Ex.PW4/1 and has stated that she is having her separate house Jhuggi No. 1310, AC Nagar, NIT Faridabad and she is receiving this money for her husband share (father of the defendants).

20. A copy of decree dated 2.3.1984 passed by the court of Sh. Raj Kumar, HCS, Sub Judge, IInd Class, Faridabad itself proves on file that defendants No. 2 and 3 (now plaintiffs in the suit) are having their separate respective shares. A Civil Court decree must be honoured. Because neither this decree has been challenged by any of the party nor any evidence against this decree is led by the defendants. Thus, this decree also establish the right of the plaintiffs

over the suit property and the compromise dated 11.5.1995 Mark A12 reinforced the right of the plaintiffs which was firstly divided to them through the decree dated 2.3.1984. It is the admission on the part of the defendants that plaintiffs are only living in the suit property and the electricity bills, sewerage bills and house tax etc. produced by the plaintiffs in favour of the plaintiff No.1 established on file that it is the plaintiffs who are in possession over the suit property since the year of 1984 and then as per compromise dated 11.5.1995 Mark A12, defendants never remained in possession over the suit property rather their parents have received their share in the shape of cash amount through compromise Mark A12 and receipt Ex.PW 4/1. Defendants have also failed to prove on file the valid execution of the registered Will dated 7.1.2004 Ex. D1/A as they have totally failed to adopt the mode of proof as envisaged in Section 68 of Evidence Act and 63 of Succession Act. So the authorities, produced by the learned counsel for the plaintiffs are fully applicable to this case.”

The defendants felt aggrieved by the judgment and decree passed by the trial Court and had approached the District Judge, Faridabad, by way of filing an appeal. The appeal was assigned to Additional District Judge, Faridabad, who vide judgment and decree

dated 10.2.2011 set aside the findings of the trial Court on issues No.1, 2 and 5 holding that though the Will dated 7.1.2004 is not proved on record as per law but it cannot be said that it was the result of any fraud. The plaintiffs were not held entitled to the decree of permanent injunction as prayed by them. Since defendants were not exclusive owners of the house in question, they were held not entitled to exclusive possession thereof as contended in the counter claim. The Additional District Judge, Faridabad, disposed of the appeal partly accepting the same with the observations :-

“38. Consequent to entire discussion as above, the findings of learned lower court on issues No. 1, 2 and 5 are set aside. It is held that though Will dated 7.1.2004 is not proved on record as per law but it cannot be said that it was the result of any fraud. It is further held that plaintiffs are not entitled to the decree of permanent injunction as prayed by them. It is further held that defendants are not the exclusive owner of the house in question and they are not entitled to exclusive possession thereof as contended in the counter claim. The impugned judgment and decree dated 6.2.2010 of learned lower court are set aside. Suit of the plaintiffs and counter claim of the defendants is decreed to the effect that plaintiffs are co-sharers in the suit property to the extent of $\frac{2}{3}$ rd share i.e. $\frac{1}{3}$ rd share each; whereas remaining $\frac{1}{3}$ rd share of the suit property belongs to legal heirs of

Bansi Lal, who include defendants. As decree of declaration is granted accordingly. It is further held that plaintiffs are not entitled to decree for permanent injunction but at the same time, defendants cannot seek possession of their share in the suit property except by following due course of law. Appeal is partly accepted accordingly. Decree sheet be drawn accordingly. The file be consigned to the record room. Lower court record be sent back immediately alongwith a copy of this judgment.”

Now it was turn of the plaintiffs to feel dissatisfied, and they have approached this Court by way of filing the present regular second appeal, notice of which was given to the respondents.

I have heard learned counsel for the parties, besides going through the record.

While disagreeing with the trial Court on certain aspects, including finding the plaintiffs to be exclusive owners in possession of the suit property, on the basis of compromise dated 11.5.1995, Mark A-12, receipt dated 7.2.2005, Exhibit PW 4/1 and decree dated 2.3.1984, the Ist Appellate Court had observed that the plaintiffs had not relied upon the said decree dated 2.3.1984 in their pleadings and had not made any reference to it during their evidence. The trial Court had taken cognizance of the judgment and decree since copies thereof were available on the file stating that judicial notice of the same could be taken. The Ist Appellate Court has observed that from perusal of the judgment dated 2.3.1984, it comes out that Bansi Lal

had taken a stand that he alongwith defendants of that case namely, Smt. Saran Kaur, Gulshan and Attar Chand, had partitioned the house in dispute as per the portions referred by him in the plaint and he had sought the declaration that as per the family settlement, he had become owner of the portion of the suit property as described in the plaint. Family settlement was denied by the defendants in that case, since Bansi Lal had failed to substantiate the allegations made by him, so his suit had been dismissed. Learned Ist Appellate Court had observed that it was nowhere pleaded by Bansi Lal that he had given up or relinquished his share in the suit property in favour of the plaintiffs of the present case namely, Gulshan and Attar Chand or anybody else. Therefore, grant of benefit to the plaintiffs relying upon judgment and decree dated 2.3.1984 by the trial Court was not justified.

Coming to receipt dated 7.2.2005, Exhibit PW 4/1, said to have been executed by Smt. Sheela Devi, wife of Bansi Lal, relied upon by the trial Court, the Ist Appellate Court has observed that it bears signatures of one of the plaintiffs of this case namely, Attar Chand and some witnesses. One of the witnesses of this receipt namely Rakesh was examined as PW-4. It has been further noted that from receipt, it comes out that an amount of Rs.1,12,000/- lying deposited in the post office in the name of Smt. Saran Kaur was withdrawn, out of which an amount of Rs.25,000/- falling to the share of Bansi Lal was given to her and it was also mentioned in the receipt that house tax, electricity bill, water bill, sewer bill upto the year 2005 as payable by Smt. Saran Kaur in respect of House No.

5C/41 had been paid. Therefore, this document does not support stand of the plaintiffs that Bansi Lal or Smt. Saran Kaur had relinquished their share in the suit property or that plaintiffs had become exclusive owners of the suit property i.e. 86 sq. yards front portion of the house in question.

The Ist Appellate Court has also dealt with document Mark A-12, a brother-hood compromise dated 11.5.1995 written on the letter head of Mardan Baradari Sabha (Regd.). The document though relied upon by the trial Court was rejected by the Ist Appellate Court for the reason that it had not been relied upon by the plaintiffs in their pleadings or in statement of PW-1 Attar Chand- plaintiff and its due execution was not proved on record. Rather the document went against the case of the plaintiffs since according to that document 145 sq. yards area of house No. 5C/41 was sold for Rs.2,67,000/- which was divided in three shares of Rs.89,000/- each. Bansi Lal had to give Rs.47,000/- to one Jaswant Singh, which he had borrowed about 15 years back. After adjusting payment of that amount, Bansi Lal had received Rs.42,000/-. The other two shares had been given to his mother and other brother and it was mentioned in the document that remaining portion of 86 sq. yards was owned by Attar Chand who had become exclusive owner thereof and can deal with that portion in any manner he likes, which is contrary to the case of the plaintiffs.

Furthermore, in absence of production of original Mark A-12, would not be acted upon. With regard to the Will, the Ist Appellate Court had observed that in absence of examining of either document writer or any of the attesting witnesses, the Will was held

to be not proved by the defendants in accordance with law. It was observed that the same could not be held to be a forged document. Resultantly, the defendants-appellants could not claim to have become exclusive owner of the share of Smt. Saran Kaur in the disputed property. Therefore, after death of Smt. Saran Kaur, the suit property was to be inherited by her three legal heirs in equal share namely, Attar Chand, Gulshan Lal and Bansi Lal. Since Bansi Lal had died, so his 1/3rd share in the suit property would go to his legal heirs including the defendant-appellants.

Therefore, the Ist Appellate Court found the plaintiffs and defendants to be co sharers in the suit property and plaintiffs to be in possession thereof.

The judgment passed by the Ist Appellate Court is well reasoned, based upon proper appraisal and appreciation of evidence and correct interpretation of law. There is no illegality or infirmity therein which might have called for interference by this Court in Appellate jurisdiction. Furthermore, no substantial question of law arises in the present appeal.

Thus the appeal is found to be without any merit and the same stands dismissed.

15.5.2019
chugh

(H.S. Madaan)
Judge

Whether speaking / reasoned Yes/ No

Whether reportable Yes/ No