

RSA-2419-1989 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-2419-1989 (O&M)
Reserved on: 02.04.2024
Date of decision: 12.07.2024

GURCHARAN SINGH (DECEASED) THROUGH LRS & ORS.

..Appellants

Versus

RAM KUMAR (DECEASED) THROUGH LRS & ORS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Adarsh Jain, Advocate
for the appellants.

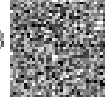
Mr. Tushar Sharma, Advocate
for respondent No.1.

ANIL KSHETARPAL, J.

1. Brief facts of the case:-

1.1 In this regular second appeal, the defendants assail the correctness of the concurrent findings of fact arrived at by the Courts below while decreeing the plaintiffs suit for possession of the suit land. The trial Court partly decreed the suit while refusing to grant relief of removal of construction of residential house with respect to land comprised in Rectangle No.183, Khasra No.3/5 (2 bighas & 16 biswas) and Rectangle No.177, Khasra No.23/2 (0-9 biswas), whereas, the First Appellate Court has entirely decreed the plaintiffs' suit while modifying the judgment passed by the trial Court.

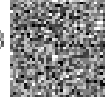
1.2 In order to comprehend the issues involved in the present case, the relevant facts, in brief, are required to be noticed.



1.3 On 12.01.1970, Sh. Ganpat Rai being the owner of land measuring 3 bighas and 5 biswas (2 bighas & 16 biswas out of land comprised in Rectangle No.183 and 9 biswas out of land comprised in Khasra No.3/5) comprised in Rectangle No.177, Khasra No.23/2 entered into an agreement to sell in favour of Sh. Gurcharan Singh and others. It was recited that the land involved in the instrument abuts 6 feet passage on the South. On 05.05.1970, Sh. Gurcharan Singh and others filed a suit for specific performance of the agreement to sell. Subsequently, Sh. Ganpat Rai died and the suit was defended by his heirs including Sh. Amar Prakash son of Sh. Lal Chand. They denied the execution of the agreement to sell. The civil suit was decreed in favour of Sh. Gurcharan Singh and other on 27.08.1971. A conditional decree was passed, subject to payment of Rs.11,300/-. The heirs of Sh. Ganpat Rai did not honour the decree forcing the decree holders to file the execution petition. During the aforesaid execution petition the Court executed sale deed in favour of decree holders with respect to 3 bighas and 5 biswas land comprised in Rectangle No.183, Khasra No.3/5 (2 bighas & 16 biswas) and Rectangle No.177, Khasra No.23/2 (0-9 biswas). On 25.04.1975, Sh. Amar Prakash, who was one of the defendants in the previous suit, sold 18 biswas of land in favour of the plaintiffs namely Sh. Ram Kumar and others comprised in Rectangle No.183, Khasra No.3/5 (0-10 biswas), Khasra No.28/4 (0-8 biswas). While identifying the property in the agreement to sell, the following description was given:-

“North : 10 Gathas shop of Sher Singh and Narata Singh and vacate site of Phool Chand.

South : 10 Gathas of vacant side of Amar Prakash (Possessed and owned by Defendants-appellants now vide their sale deed).



East : 20 Gathas Main Road.

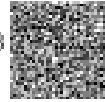
West: 20 Gathas Land of Amar Prakash (Possessed and owned by defendants vide their sale deed).

1.4 On 21.04.1975, a suit for declaration was filed by Sh. Amar Prakash, challenging the judgment and decree dated 27.08.1971, and the sale deed dated 28.02.1975, which was dismissed on 04.08.1977.

1.5 It is the case of the defendants that in April, 1976, the plaintiffs exchanged their land comprised in Khasra No.28/4 with defendants land comprised in Rectangle No.177, Khasra No.23/2. Immediately, thereafter, the defendants constructed the boundary wall around the land comprised in Khasra No.3/5 & 28/2, and constructed their house. On 19.09.1980, the plaintiffs filed a civil suit for injunction claiming that Sh. Gurcharan Singh has started encroaching upon the plaintiffs land comprised in Rectangle No.183, Khasra No.3/5, which was contested by the defendants. The suit was dismissed on 13.12.1981.

1.6 Thereafter, on 25.08.1982, the plaintiffs filed a suit for possession of land measuring 18 biswas, comprised in Khewat No.486/822, Rectangle No.183, Khasra No.3/5 min (0-10) and Khasra No.183/28/4 (0-8) by also seeking removal of constructions thereon. While filing the suit, the plaintiffs alleged that the defendants have encroached upon their plot 1 and ½ (half) year before the filing of the suit. In other words, it was alleged that somewhere in February, 1981, the defendants had encroached upon their property.

1.7 The defendants contested the suit while giving the detailed facts, which have already been narrated. It was alleged that the defendants were put in possession of land comprised in Rectangle No.183, Khasra No.3/5 (2 bighas & 16 biswas) on Ambala-Chandigarh Road and 6 feet wide passage



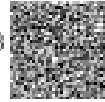
on the South. Thereafter, plaintiffs and defendants in April, 1976, exchanged their land and the defendants took over the possession of the land comprised in Khasra No.28/4 and they allowed plaintiffs to take over the land comprised in Rectangle No.177, Khasra No.23/2.

1.8 The defendants during the pendency of the appeal filed application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), for permission to lead additional evidence in order to produce the agreement to sell dated 12.02.1970, and the judgment dated 04.08.1977, passed in civil suit No.116 of 21.04.1975, filed by Sh. Amar Prakash challenging the judgment and decree passed in the suit for specific performance. The First Appellate Court erroneously dismissed the said application by taking a conservative view of the matter.

2. Reasons recorded by the First Appellate Court:-

2.1 The following reasons have been recorded by the First Appellate Court while modifying the judgment passed by the trial Court:-

- i. Though, oral exchange is permissible in States of Punjab and Haryana due to non-applicability of the relevant provisions of the Transfer of Property Act, 1882. However, considering that Sh. Gurcharan Singh was a Junior Engineer in Railways, he was expected to reduce the transaction into a memorandum of exchange and would have reported the matter to the Patwari in order to make an entry in the revenue record.
- ii. The local commissioner Sh. Kuldeep Singh, Naib Tehsildar, found that the defendants have encroached upon 4 biswas of land out of Rectangle No.183, Khasra



No.24/2, whereas, the remaining 4 biswas are in possession of the plaintiffs. If there was any exchange, this parcel of 8 biswas should have been in possession of the defendants.

iii. The trial Court has wrongly held that the decree for mandatory injunction cannot be passed because the plaintiffs are estopped. Since, the defendants did not take the plea of estoppel, hence, the trial Court erred in making out a new case.

iv. The trial Court was not clear while refusing to pass decree for possession of 18 biswas of land in favour of the plaintiffs.

3. **Arguments put forth by the learned counsel representing the parties:-**

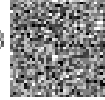
3.1 This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook and the respective synopsis filed by them.

3.2 The learned counsel representing the appellants has made the following submissions:-

“4 Biswa out of Khasra No.28/4 is part of Kothi of Gurcharan Singh and within boundary wall. Kothi of Gurcharan Singh and boundary wall measures 2B-15B whereas 2B-16B was purchased and is situated on Ambala-Chandigarh Highway. There is still deficiency of 1 Biswa.

Ex.D2 is a detailed site plan showing situation of land of both Plaintiffs and Defendants and showing existence of Kothi within boundary wall of Defendants as also land of Phool Chand in which Chakki is situated and adjoining land of Ram Kumar is situated immediately behind the same as also land in exchange.

Moreover in Khasra 183//3/5 both Plaintiffs and Defendants have purchased land. Purchase of Land by



Defendants is prior in time to the Purchase made by Plaintiffs.

Even if Plaintiffs claim sale of specific khara number or specific area, the same shall be treated as a share in Joint Khewat, and is subject to partition. A mere suit for Possession is not maintainable.”

3.3 On the other hand, the learned counsel representing the respondents has made the following submissions:-

“The defendants had pleaded that the said Khara number was exchanged with Khasra no.28/4 purchased by the plaintiffs through their sale deed dated 25.04.1975 in the year 1976 right after the defendants took possession of their land on 05.04.1976. It was alleged that the exchange was oral.

However, the exchanged could not be proved by them and no document was brought on record to prove the exchange except some oral evidence of witnesses who too could not specify the date or month of exchange.

Besides, the defendants did not plead exchange in any of the proceedings before any of the authorities before filing of the present suit and it was only in the present suit that the exchange was ever pleaded by them.

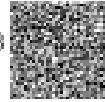
The mutation proceedings culminating into order dated 27.03.1979 did not mention anything about exchange.

Even in their written statement filed in the suit for injunction filed by the plaintiffs, no exchange was ever pleaded by the defendants.

That is why both the courts held that exchange has not been proved by the defendants.”

4. **Other significant facts:-**

4.1 Upon careful study of the judgments passed by the Courts below, the following facts emerge. The plaintiffs and their father Sh. Phool Chand had installed a coal *bhatti* and started running their fuel business alongside their already existing shops, where they are running a flour mill. This parcel of land is located towards the North of the suit land. The property, which is in possession of the plaintiffs is in a compact block located towards South of the flour mill of Sh. Phool Chand, the plaintiffs



father. On South of the parcel of land in possession of the defendants, there is a street, which is 6 feet wide as specified in the agreement to sell. If the plaintiffs case is accepted, they purchased the plot measuring 10 biswas located on Delhi-Ambala Highway, which is a separate parcel, whereas, 8 biswas plot has been purchased from Khasra No.28/4 out of Rectangle No.183, located towards West of the suit property. Thus, the plaintiffs are claiming that they have purchased two separate parcels of land, one measuring 10 biswas, whereas, second measuring 8 biswas. The Presiding Judge after visiting the property, recorded the following inspection report:-

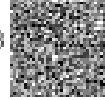
“At the spot I found Kothi of Gurcharan Singh deft. on the main Ambala Chandigarh Road and some vacant land was lying near the Chakki of Phool Chand. The parties at the spot agreed that the land purchased by the plaintiffs and the deft. be got demarcated from a Revenue Official but they prayed for time for filing the applicant. Hence to come up on 23/9/85 for further proceedings.”

4.2 Subsequently, the Court appointed a revenue official as agreed between the parties. The local commissioner after demarcation has reported as under:-

“1) Out of Khasra No. 183//3, Ram Kumar etc. are in possession of 5 Biswas of land. Out of this Khasra number Ram Kumar etc. had purchased 10 Biswas of land: But out of Khasra No. 183//28 Ram Kumar etc. had purchased 0- Bigha 8 Biswas of land, but out of it on 0-4 Biswas of land the possession is of Gurcharan Singh etc. defendants and is located within the boundary wall. In the area in possession of Ram Kumar etc. 183//3 his wood stall, Turi (straw), manure and Gohara and Neem trees are standing.

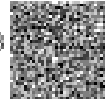
2) Out of Khasra No. 183//3 area measuring 2-16 Biswas was purchased by Gurcharan Singh etc. defendants, but on measurement on the spot, 2-15 Biswas are in their possession and is within the boundary wall. On the spot Kothi is constructed over this number.

3) Area measuring 0-4 Biswa out of Khasra No. 183//28 mentioned in item No.3, is in possession of Gurcharan Singh etc. which had been purchased by Ram Kumar etc.



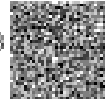
- 4) Area measuring 0-4 Biswas in possession of Gurcharan Singh etc. is owned by Ram Kumar etc. plaintiffs.
- 5) Area measuring 0-4 Biswas of Khasra No. 183//28 is within the boundary wall of the Kothi of the defendants and on the spot 8/9 years old Suffeda trees are standing.
- 6) Land measuring 0-9 Biswas out of Khasra No. 177//23/2 had been purchased Gurcharan Singh etc. but on the spot 0-1 Biswa is within the boundary wall of the Kothi of Gurcharan Singh etc. and on the spot Kitchen etc. of the Kothi is in existence. The remaining area measuring 0-8 Biswa is in the Possession of Ram Kumar etc. plaintiffs. On the spot Barseem fodder and Suffeda trees are standing and barbed wire has also been fixed. The suffeda trees, are 7/8 years old.
- 7) 0-4 Biswas of land out of Khasra No. 183//23 is in the possession of Gurcharan Singh etc. defendants and on the spot it is within the boundary wall of their Kothi, which forms part of the Kothi and the Kothi's boundary wall appears to be old.
- 8) Khasra No. 177//23 (0-9) had been purchased by the defendants out of which 0-8 Biswas is in the possession of Ram Kumar etc. plaintiffs out of Khasra No.183//28 measuring 0-8 Biswas, which had been purchased by Ram Kumar etc. plaintiffs, 0-4 Biswas is in possession of the defendants.
- 9) Out of Khasra No. 183//2 area measuring 0-4 Biswas is in possession of the defendants and the remaining area towards the south is lying vacant which is not in possession of either the petitioners or the respondents.
- 10) The area found deficient in Khasra No.183//28, that area is in possession alongwith the adjoining Khasra No. 183//28 alongwith its western line.
- 11) Khasra No. 183//3 abuts on the Ambala Chandigarh Road out of which Gurcharan Singh etc. defendants had purchased 2 Bighas 16 Biswas of land but their possession is on 2 Bighas 15 Biswas. In this Khasra number along the Road pucca shops of Phool Chand father of Ram Kumar etc. plaintiffs have been constructed; and behind these shops, on 0-Bighas 5 Biswas of land out of this Khasra number, Ram Kumar etc. plaintiffs are in possession.”

4.3 When the Court and the revenue official visited the property, it was found that the defendants had already constructed their residential house along with a boundary wall, which was in their possession. It may be noted here that Sh. Amar Prakash while appearing in evidence has stated that the parcel of land sold to the defendants included a house and a hand pump,



which adjoins the main road (Ambala-Chandigarh Road). When the plaintiff Sh. Ram Kumar appeared in evidence, he admitted that the parcel property, purchased by him did not consist of a house or a hand pump. He admitted that the defendants were already in possession of land, which they had purchased. He also admitted that the flour mill is 2000 yards away from the parcels of land, he had purchased.

4.4 Thus, it is evident that when the Presiding Judge of the Court as well as local commissioner visited the property for inspection and demarcation, respectively, it was found that the defendants are not only in possession of the property purchased by them but also the parcel of plot received in exchange from the plaintiffs. The case of the plaintiffs stood corroborated by the existing position on the spot as found by the presiding judge as well as the local commissioner. The local commissioner further found that Sh. Ram Kumar etc. (plaintiffs) are in possession of land comprised in Rectangle No.177, Khasra No.23/2, which in fact was purchased by the defendants. This parcel of land is located adjacent to the property owned by the plaintiff's father, in the adjoining plot located towards west of the flour mill and fire wood stalls/*bhatti*. 'Ex.D-1' further shows that the old house of Sh. Ganpat Rai was located in the plot comprised in Rectangle No.183, Khasra No.24/2, which was found in possession of the defendants. As per exchange, the entire property owned by the plaintiffs and their father is in one compact block, which is located on Northern side of the suit property. The plaintiffs have not purchased the parcel of plot comprised in Rectangle No.177, Khasra No.23/2. This parcel of land was purchased by the defendants Sh. Gurcharan Singh and others.



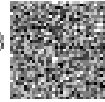
4.5 Before this Court also, the defendants have filed an application under Order XLI Rule 27 of the CPC for permission to produce copy of judgment passed in Civil Suit No.116 of 1975, dated 04.08.1977, filed by Sh. Amar Prakash against the defendants, copy of plaint dated 19.09.1980, in Civil Suit No.491 of 1980 filed by the plaintiffs for grant of decree of permanent injunction, copy of application for grant of temporary injunction, copy of order dismissing the injunction application, copy of order dismissing the appeal against injunction order, copy of judgment passed on 13.02.1981, while dismissing plaintiff's suit for injunction and copy of order passed by the Assistant Collector, IInd Grade, correcting khasra *girdawari* as additional evidence.

5. **Analysis of the reasons recorded by the First Appellate Court:-**

5.1 At this stage, it is appropriate to analyze the reasons recorded by the First Appellate Court.

5.2 The first reason recorded by the First Appellate Court is in fact contradictory. On the one hand, the Court has observed admit that oral exchange of land is permissible in the State of Punjab as Section 118 of the Transfer of Property Act, 1882, has not been made applicable. However, on the contrary, the First Appellate Court has recorded that the defendant is a Junior Engineer working in Railways and therefore, it is expected that he would have prepared a memorandum of exchange and informed the *patwari* and would have got the entry in the revenue record. These observations are based on conjectures and surmises, which cannot be relied upon.

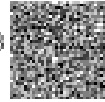
5.3 The second reason assigned by the First Appellate Court is again erroneous. It may be noted here that the local commissioner cannot



determine the person in possession of the property. The First Appellate Court has relied upon the report of a local commissioner. It is for the Court to decide who is in possession of the property. The Presiding Judge of the Court visited the spot on 21.09.1985. He during his inspection found that the defendant is in possession of the residential house, which is located on the main Ambala-Chandigarh Road.

5.4 Similarly, the third reason assigned by the First Appellate Court also holds no firm ground. The Court has erroneously recorded that the trial Court has made out a new case for the defendants. It may be noted here that the defendants while filing the written statement have asserted that they are in possession of the property and they have constructed their house and hence the plaintiffs are estopped from claiming the possession of the property by filing this suit. The trial Court found merit in the defendants case. The First Appellate Court has not set aside that finding. The First Appellate Court has overlooked the assertions made by the defendants in para 3 of their written statement.

5.5 The First Appellate Court has also erred in observing that construction will have to be removed because the plaintiffs have purchased the area. It is significant to note here the defendants agreed to purchase the property in February, 1970. They are prior purchasers of the property, even, though, the sale deed was executed in their favour on 04.03.1975. At that time, there was no dispute between the parties. Sh. Amar Prakash sold land measuring 18 biswas to the plaintiffs on 25.04.1975. Hence, the plaintiffs are the subsequent purchasers. Once, it is established by Sh. Amar Prakash that the property, which was located on the main road was sold to the defendants, in which there was an old residential house as well as a hand pump then

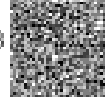


from perusal of 'Ex.D-1', it is evident that the defendants are correctly in possession of the same. Additionally, when the plaintiff appeared in evidence as 'PW-4', he admitted that he never took possession of the property, in which a house and a hand pump existed and the defendants were already settled in possession of the suit property when they purchased the property.

6. Discussion by this Court:-

6.1 Both the Courts have overlooked that the plaintiffs are in possession of one compact plot pursuant to exchange of land comprised in Khasra No.28/4 in Rectangle No.183 with parcel of plot comprised in Khasra No.23/2 in Rectangle No.177. Similarly, the defendants are also in possession of other compact plot. Moreover, it is not recorded in the plaintiffs sale deed that they have purchased two separate small parcels of land. The sale in favour of the plaintiffs is subservient to the sale deed in favour of the defendants, hence, the defendants have a superior right.

6.2 It is also evident that in order to prove the exchange, the defendants have examined 'DW-1' and 'DW-2'. Their evidence is corroborated by the report of the Presiding Judge of the Court, who visited the property. Moreover, the plaintiffs would have found it difficult to utilize the plot comprised in Khasra No.24/2 as it is a stand alone parcel of land located far away from the other parcel of property owned by the plaintiffs. The Courts have also overlooked the fact that Sh. Amar Prakash after having lost in the litigation wanted to harass the defendants. In the first instance, he filed suit on 21.04.1975, which was dismissed on 04.08.1977. In between he sold some portion to the plaintiffs. He lost in the previous round. The plaintiffs also failed to get relief in the injunction suit. While appearing in evidence Sh. Amar Prakash admits that the defendants were put in



possession of the property abutting the Ambala-Chandigarh Highway, then, there was no occasion for the First Appellate Court to decree the suit. Furthermore, it is evident that the First Appellate Court without any appeal from the plaintiffs modified the decree. Under Order XLI Rule 33 of the CPC, the decree cannot be modified without filing appeal.

6.3 It is also observed that the parties have purchased the property from a joint *khata*, hence, they are co-owners.

6.4 The Courts have also overlooked the document 'Ex.D-1', which is a copy of Daily Diary Report, entered by the revenue official on 05.04.1976, delivering possession to the defendants. The plaintiffs claimed that they were delivered possession of the land on 25.04.1975. If that is correct, then there would have been some resistance on the part of the plaintiffs when the defendants were delivered possession of the property. Once, this report is read with the deposition of Sh. Ram Kumar (plaintiff), who appeared as PW-5, it becomes evident that the plaintiffs claimed to have been delivered possession when the defendants were already in possession of the land purchased by them. In these circumstances, the foundation of the plaintiffs case is crumbly and fragile. While filing the suit, the plaintiffs have alleged that defendants have illegally and unlawfully occupied the land in dispute one year and three months before the filing of the suit. In other words, the plaintiffs are alleging that the defendants took over possession in the month of May, 1981. It is not the case of the plaintiffs that the defendants have recently constructed the house. The Presiding Judge visited the suit land in the year 1985 but it was not found that the defendants had recently constructed the residential house. Thus, it is evident that the plaintiffs have miserably failed to prove their case, particularly when the plaintiffs have

admitted that the defendants were already in possession of the property, which they had purchased.

7. Decision:-

7.1 In view of the aforesaid facts and discussion, the appeal is allowed. The judgment passed by both the Courts below are set aside and the plaintiffs suit shall stand dismissed.

7.2 All the pending miscellaneous applications, if any, are also disposed of.

July 12th 2024

(ANIL KSHETARPAL)
JUDGE

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Whether speaking/reasoned

Whether reportable

: Yes/No

: Yes/No