
(2010) 01 P&H CK 0078

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Munishi Ram

APPELLANT

Vs

Rajiv Kumar and Others

RESPONDENT

Date of Decision: Jan. 15, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13

Citation: (2010) 158 PLR 311

Hon'ble Judges: Rakesh Kumar Garg, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Rakesh Kumar Garg, J.

C.M. No. 298-C of 2010

Application is allowed subject to all just exceptions.

R.S.A. No. 70 of 2010

1. This is defendant's second appeal challenging the judgment and decrees of the Courts below whereby suit filed by the plaintiff-respondents for declaration with consequential relief of permanent injunction to the effect that the plaintiff and defendant No. 2 (respondents) are the owners of suit land and the judgment and decree dated 7.5.1994 passed by the Court of Sh. M.S. Viridi, the then Sub Judge, 1st Class, Abohar in Civil Suit No. 782-1 of 9.6.1993 titled as Munshi Ram v. Manmohan Chander and mutation No. 2940 in favour of the defendant-appellant was illegal being based on fraud and misrepresentation, was decreed.

2. Briefly stated, in the civil suit the challenge of the decree dated 7.5.1994 was made on the basis that the appellant was cultivating the suit land as tenant under the respondents and was paying rent to them. The plaintiff was a Government

employee and was posted in the State of Bihar and after his retirement, settled at Delhi while defendant No. 2 was living in Canada for the last many years and had not visited India. Taking undue advantage of the absence of the respondents, the appellant illegally and unlawfully procured an ex parte decree dated 7.5.1994 claiming to be in adverse possession of the suit land and on the basis of the aforesaid decree got entered and sanctioned mutation of transfer of ownership in his favour and got deleted the names of the respondents from the revenue record as owners of the suit land and thus, the aforesaid ex parte decree and judgment was liable to be cancelled for the reasons as mentioned in the civil suit.

3. Upon notice, the appellant filed written statement taking various preliminary objections including that the suit of the plaintiff was not maintainable in the present form as an equal efficacious remedy to file an appeal or application under Order 9 Rule 13 CPC was available to the plaintiff. It was further submitted in the written statement that the plaint was not signed/verified by competent or authorized person and the suit of the plaintiff was not within limitation.

4. On merits, it was pleaded that revenue record does not depict the correct and factual position. The appellant never cultivated the suit land as tenant nor paid any rent to the respondents and he was in occupation of the suit land in his own rights which was lying vacant and he is in continuous possession of the same. It was denied that decree in question was illegal. It was further submitted that the plaintiff was in knowledge of proceedings of the suit in which decree in question was passed. Remaining averments were denied and it was prayed that suit of the plaintiff be dismissed with costs.

5. From the pleadings of the parties, the following issues were framed:

1. Whether the plaintiff and defendant No. 2 are owners of the land measuring 65 Kanal 9 Marlas as mentioned in the heading of the plaint? OPP
2. Whether the judgment and decree dated 7.5.1994 passed in favour of the defendant No. 1 is null and void and result of fraud and mis-representation? OPP
3. Whether the judgment and decree dated 7.5.1994 is liable to be set aside? OPP
4. Whether the plaintiff is entitled to declaration as prayed for? OPP
5. Whether the plaintiff is entitled to possession of the property in dispute? OPP
6. Whether the plaintiff is entitled to injunction as prayed for? OPP
7. Whether the suit of the plaintiff is not maintainable in the present form? OPD
8. Whether the plaintiff is estopped by his own act and conduct? OPD
9. Whether the plaintiff has got no cause of action to file the present suit? OPD
10. Whether the suit of the plaintiff is within limitation? OPD

10-A. Whether the plaintiff is having efficacious remedy to file appeal or revision u/o 9 rule 13 CPC. If so, its effect? OPD

10-B Whether the plaint does not bear signatures of Ramesh Chander and has not been filed/signed and verified by the competent person?

10-C Whether suit of the plaintiff is false and frivolous and defendant is entitled to special costs? OPD

11. Relief.

6. In support of his case, the plaintiff examined five witnesses including one Satish Kumar Gilhotra as PW3, who was the attorney of the plaintiff and who deposed in support of the plaintiffs case.

7. The trial Court on appreciation of evidence decreed the suit of the plaintiff-respondents.

8. The appeal filed by the appellant challenging the judgment and decree of the trial Court was also dismissed by the Lower Appellate Court vide impugned judgment and decree dated 23.11.2009. It is relevant to mention here that before the Lower Appellate Court, the challenge to the judgment and decree of the trial Court was made only on the ground that in view of the alternative remedy of an appeal/filing of an application under Order 9 Rule 13 CPC, the present suit was not maintainable and that the suit was barred by limitation.

9. Still not satisfied, the defendant has filed the present appeal challenging the judgment and decrees of the Courts below. "

10. Learned Counsel for the appellant has vehemently argued that where a plaint contains serious allegations of fraud etc. against the defendants and the verification is sought to be made by an agent under a power of attorney by merely putting on record the power of attorney, it is wholly insufficient for the purpose, as the plaintiffs agent simpliciter holding an authority to sign the verification under the power of attorney and would be incompetent to verify the plaint.

11. In support of the aforesaid argument, learned Counsel for the appellant has placed reliance upon a judgment of the Calcutta High Court reported as [Raj Kumar Dhar and Others Vs. Colonel A. Stuart Lewis](#), and the judgment of the Hon'ble Supreme Court reported as [Shri Ramesh Chander Vs. Shri Suresh Bhasin and Others](#), and has raised the following substantial question of law:

Whether the suit of the plaintiff-respondents who have filed the present suit through an attorney can be maintainable?

12. I have heard the learned Counsel for the appellant and have perused the impugned judgment and decrees. Without going into the question of law as raised by the learned Counsel for the appellant, I find that no such argument as raised

before this Court, was raised by the appellant before the Lower Appellate Court and the grievance raised before the Lower Appellate Court were with regard to the maintainability of the independent suit on the ground that the plaintiff-respondent had equally and efficacious remedy to file an appeal or application under Order 9 Rule 13 CPC challenging the ex parte decree and also that the suit was barred by limitation, only and no other point was raised.

13. In view of the judgment of the Hon'ble Apex Court reported as [Bachhaj Nahar Vs. Nilima Mandal and Another](#), , any question of law on the basis of an argument which was not raised before the Courts below cannot be allowed to be raised in the regular second appeal.

Thus, I find no merit in this appeal.

Dismissed.