
(2004) 04 P&H CK 0100

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 269 of 1983

Bhagwana

APPELLANT

Vs

Mohinder Dass

RESPONDENT

Date of Decision: April 7, 2004

Acts Referred:

- Court Fees Act, 1870 - Section 7
- Evidence Act, 1872 - Section 91, 92, 95

Citation: (2005) 1 CivCC 71 : (2004) 138 PLR 755 : (2004) 4 RCR(Civil) 126

Hon'ble Judges: M.M. Kumar, J

Bench: Single Bench

Advocate: J.S. Malik, for the Appellant; Ashish Kapoor, for the Respondent

Final Decision: Allowed

Judgement

M.M. Kumar, J.

This is defendant's appeal filed u/s 100 of the CPC (for brevity, "the Code") 1908, challenging judgment and decree passed by the learned Additional District Judge, Sonapat, dated 16.8.1982. The learned Additional District Judge has passed a decree in favour of the plaintiff-respondent for possession of the suit property as described in para 1 of the plaint and shown in plan Ex..P3

2. Brief facts of the case are that the plaintiff-respondent filed Civil Suit No:89 of 1976 seeking possession of a plot along with a room (Kotha) alleging that the suit property was earlier owned by the defendant-appellant through a registered exchange deed dated 10.7.1974. By way of exchange a plot measuring 20 sq. yard belonging to the plaintiff-respondent was alleged to have been transferred to the defendant-appellant. On the allegation that 4/5 months before the filing of the suit when the plaintiff-respondent was absent, the defendant-appellant had taken possession of the exchanged plot and proceeded to repair the room without any right.

3. The stand taken by the defendant-appellant in the courts below is that the plot along with the room (Kotha) in dispute was never exchanged. It was asserted that the defendant-appellant had constructed a house over the plot in dispute and had been residing therein and the plaintiff-respondent never came in possession of the plot along with the room. The exchange deed which is alleged to have been executed was the result of fraud and not binding on the plaintiff-appellant. On the basis of the pleadings of the parties, following issues were framed:-

"(i) Whether there was any exchange deed between the parties as alleged in para No. 2 of the plaint? OPP

(ii) If issue No. 1, is proved, whether the exchange deed is invalid and not binding upon the defendant? OPP

(iii) Whether the suit has been properly valued for purposes of court fee and jurisdiction? OPP"

4. On issue No. I, it was found that Ex. PI is a registered document by the Sub-Registrar, Sonapat and the same has been duly executed. In support of document Ex. PI statement made by the plaintiff-respondent appearing as PW1 Mohinder Dass, statement made by Prem Chand, petition writer PW2 and Giani Ram Lambardar PW3, have also been relied upon. However, statement made by defendant-appellant Bhagwana denying the execution of the exchange deed on the ground that he was not in fit mental condition or that the exchange deed Ex. PI was not read over and explained to the parties as stated by Pirthi Singh DW3, have not been believed. On issue No. 2 it was held that there was no ambiguity ever with regard to the area, dimensions, location and the boundaries of the plot given by the defendant-appellant to the plaintiff-respondents in the exchange deed. The views of the learned Additional District Judge in this regard read as under:-

"8. The conclusion arrived at by the learned trial Judge, are, however, not warranted from the evidence on the file. In the exchange deed Ex. PI 20sq. yards area being western portion of Killa No. 541/1/1 measuring 7 marlas has been given by the plaintiff to the defendant. The absence of the dimension of the said western portion of the plot given the defendant is inconsequential because even in the absence of the dimension, the identity of the portion of the killa number given to the defendant by the plaintiff can be fixed. In the instant case, there is unrebutted and unshattered testimony of Giani Ram (PW3), who is also attesting witness of the exchange deed Ex. PI to the effect that 15 x 12 feet western portion of the Killa was given to the defendant by the plaintiff and that the dimensions of the said plot are from north to south 15 feet and from east to west 12 feet. The statement of Giani Ram PW in this respect also remains unshattered. It is thus not a case in which the dimensions and location of the Western of Killa No. 541/1/1 given to the defendant by the plaintiff cannot be fixed.

9. Undoubtedly the defendant stated that the area of the plot owned by him upon which he has also constructed the room is 82 sq. yards and his version of this effect remains unshattered in cross-examination. Ram Singh (DW4) has also proved the site plan Ex.D3 according to which the dimensions of the plot No. 19 of the defendant are East 14 feet, West 15 feet, North 51 feet and South 51 feet. However, according to the exchange deed Ex. P1 and then plans Ex.P2 and Ex.P3, the plot No. 19 with the dimensions East 9 feet, West 9 feet, North 50 feet, and South 50 feet, had been given in exchange by the defendant to the plaintiff. However, the variation between the respective version of the parties regarding the area and the dimensions of plot No. 19 is inconsequential and stands explained. In the exchange deed Ex. P1 also it is mentioned that it is the northern portion of the plot No. 19 that the dimension of 50 feet x 9 feet bounded on the east by the thoroughfare, to west by the plot of Nanhu, north by the plot of Partap and south by the remaining plot No. 19, has been given by the defendant to the plaintiff. It shows that only the plot No. 19 had been given by the plaintiff to the defendant. In the site plans Ex.P2 and Ex.P3 the plot in dispute is shown to be bounded on the south by the remaining part of the plot No. 19. The boundaries of the plot fully tally. It thus appears that a part of the southern portion of plot No. 19 has also been included in the property in dispute as shown in the plan Ex.D3 and as stated by the defendant in his statement DW1. None of the plans has been prepared in accordance with the situation at the spot after due verification. The plan Ex.P3 is part of the exchange deed Ex.P1, and it bears the thumb impression of the defendant. This plan has to be taken as correct. Even otherwise, there is no ambiguity that the northern portion of plot No. 19 with the dimension of 50 feet x 9 feet was given in exchange by the defendant to the plaintiff. There is, thus, no ambiguity either regarding the area, dimension, location or boundaries of the plot given by the defendant to the plaintiff."

5. The trial Court on issue No. 3 concerning the payment of court fee held that the value of the suit for the purposes of Court fee was Rs. 800/- and the plaintiff-respondent paid only Rs. 200/-. The suit was therefore, held to be not properly valued for the purposes of court fee and the same was dismissed. The learned Additional District Judge, however, did not record any finding on this issue but proceeded to decree the suit of the plaintiff-respondent.

6. Mr. J.S. Malik, learned counsel for the defendant-appellant has argued that once the trial Court has dismissed the suit on the ground of deficiency of court fee, the failure to make up the deficiency would result into dismissal of the suit and it must necessarily be presumed that the finding with regard to non-payment of court fee has been affirmed by the court below. According to the learned counsel, it was the duty of the plaintiff-respondent to raise the point with regard to the Court fee and the failure to pay the deficient court fee should have resulted into dismissal of the appeal by the learned Additional District Judge. He has drawn my attention to the order dated 22.10.2003 passed by this Court enabling the plaintiff-respondent to move an appropriate application for making up deficiency in court fee in terms of the judgment of the trial Court. He has pointed out that

the aforementioned order was not complied with as is evident from another order dated 3.12.2003. In support of his submission the learned counsel has placed reliance on a Full Bench judgment of this court in [Krishan Kumar Grover Vs. Smt. Parmeshri Devi and Others](#), , [Municipal Committee, Dhanaula Vs. District Magistrate, Sangrur and Another](#), and [Jabar Singh \(Died\) and Others Vs. Shadi \(died\) and Others](#), and argued that the court fee u/s 7 of the Court Fees Act, 1870 is payable as possession has been sought. On issue No. 2, it has been submitted that the approach adopted by the lower Appellate Court suffers from various legal infirmities. According to the learned counsel under Sections 91, 92 and 93 of the Indian Evidence Act, 1872 (for short "the Act"), parol evidence could not be relied upon to explain the ambiguity in the exchange deed Ex. PI and therefore, reliance made by the lower Appellate Court on the statement made by Mian Ram PW3 is wholly unwarranted.

7. Mr. Ashish Kapoor, learned counsel for the plaintiff-respondent has not been able to advance any argument with regard to the deficient court fee except stating that the plaintiff-respondent has not turned up to do the needful. On the question of issue No. 3, the learned counsel has submitted that there is no absolute principle debarring the exclusion of oral evidence. According to the learned counsel, parol evidence is admissible if it is adduced to explain a latent ambiguity as per the provisions of Section 93 of the Act.

8. The question which requires determination in this case is whether there is any ambiguity in the document Ex. PI which has witnessed the exchange of plots between the parties. As far as the dimensions and location of the plot given by the plaintiff-respondent in exchange are concerned, the same are clearly identifiable. The plaintiff-respondent has given 20 sq. yards area to the defendant-appellant of Kill No. 541/1/1. The total area of the aforementioned Killa is 7 marla. It is thus obvious that the patent characteristics of 20 sq. yards area are evident as the Killa number has been described establishing identity of the portion on the western side. The dimension have been supplied by Giani Ram. PW-3 who was an attesting witness on the exchange deed Ex. PI by stating that 15"x12" western portion of killa number was given to the defendant-appellant by the plaintiff-respondent and the dimensions of the said plot are from North to South 15" and East to West 12". Statement made by Giani Ram Lambardar is evidence of a latent fact removing any ambiguity. Therefore, the said statement is not excluded as per the provisions of Section 95 of the Act which is an exception to the principles laid down in Sections 91 and 92, concerning exclusion of oral evidence to the documentary evidence. Moreover, the document is silent with regard to dimensions and there is no bar even u/s 91 and 92 to supply dimensions by oral evidence as the same would not vary or contradict the terms of the exchange deed Ex.PI. Proviso (2) to Section 92 of the Act specifically incorporates the principles that when a document is silent, the existence of any separate oral evidence which is not inconsistent with the terms incorporated in the document, may be proved. Therefore, I do not see any difficulty in accepting the parol evidence of Giani Ram PW3 with regard to furnishing particulars and dimensions of 20 sq. yards area situated on the western portion of killa No. 541/1/1.

9. It is well-established principle that the terms of a contract once reduced to writing, any extrinsic evidence is generally inadmissible. A classical statement of the aforementioned principle has been made by P.W.Lawrence J. in the case of Jacob v. Batavia and General Plantations Trust,⁴ (1924)1 Ch. 287. However, it was soon realised that the rigid application of the aforementioned principles of the parol evidence rule has caused much injustice. As a result, even the English common law started recognising various exceptions to the parol evidence rule. In this regard reference may be made to the judgments of the court of appeal in the cases of Curtis v. Chemical Cleaning and Dyeing Co., 5 (1951)1 K B 805 and Treital Law of Contract, 5th Edition at pp.141-142. However, Sections 91 and 92 of the Indian Evidence Act, 1872 incorporate the afore- mentioned principles which read as under:-

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

xx xx xx xx xx

92. Exclusion of evidence of oral agreement.- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms:-

Proviso (1).- xx xx xx

Proviso (2).- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the documents.

95. Evidence as to document in unmeaning reference to existing facts.- When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense."

10. Illustration (d) to the section is relevant which reads as under " "A contracts-in writing with B, for the delivery of Indigo upon certain terms. The contract mentions the fact that B had paid the price of other indigo contracted for verbally on another occasion. Oral evidence is offered that no payment was made, for the other indigo. The evidence is admissible."

11. In *Chimanram Maillala v. Diwanchand Govindramfi* AIR 1932 Bom 152, it has been held by the Bombay High Court that Sections 91 and 92 apply when the document evidencing a contract appears to contain all the terms thereof. The inference that a writing was intended to contain the whole agreement may be drawn from the document itself as well as from extrinsic evidence. A Full Bench of the Allahabad High Court in the case of *Ram Gopal v. Tulsi Ram* 7 I.L.R 1928 . All. 79, held that extrinsic evidence is admissible where the parties intended to reduce only a part of the terms into writing and not the whole.

12. Therefore, no doubt is left that the statement made by Giani Ram Lamberdar is admissible and the same is not hit by parole evidence rule.

13. In so far as the plot offered by the defendant-appellant to the plaintiff-respondent in exchange is concerned, portion of plot No. 19 and the dimension of the plot is 50" bounded on the east by the thoroughfare, to west by the plot of Maini Ram, north by the plot of Pardeep and south by the remaining plot No. 19. It clearly shows that a part of plot No. 19 had been given by the plaintiff-respondent to the defendant-appellant. The site plan Ex.P3 is part of the exchange deed Ex.P1 and it bears the thumb impression of the defendant-appellant Mohinder Dass which has to be accepted as correct. There is thus no ambiguity in respect of the plot offered by the defendant-appellant to the plaintiff-respondent as has been observed by the lower Appellate Court.

14. In view of the above, the argument raised by the learned counsel for the defendant-appellant is liable to be rejected and the findings on issue No. 2 have to be affirmed.

15. On issue No. 3, however, it has to be held that the deficiency of court fee has not been made up despite two opportunities granted to the defendant-appellant as is evident from the orders dated 22.10.2003 and 3.12.2003. The finding of the trial Court on the aforementioned issue is categorical and the same reads as under:-

"The witnesses of the defendant told the rate of the land in suit from Rs. 22/- to 60/- per square yard whereas the plaintiff himself told its rate about Rs. 45/- per square yard. His own witness Giani Ram, PW3 told its rate as Rs. 15/20 per square yard. The plaintiff has filed the present suit for the possession of a plot measuring 50 square yards and if the version of his own witness PW3 be deemed as correct even then the value of the suit property becomes approximately Rs. 800/- whereas the plaintiff has deposited a court fee at Rs. 200/-. I, therefore, hold that the suit has not been properly valued for the purpose of court fee. The issue is accordingly decided in favour of the defendant and against the plaintiff."

16. Before the lower Appellate Court, the aforementioned finding were neither challenged nor accepted by the plaintiff-respondent. In this regard the judgment of this court in the case of *Jabar Singh* (supra) and Full Bench judgment of this Court in *Krishan Kumar's*

case (supra), shall be applicable. Therefore, the failure of the plaintiff-respondent to make up the deficiency of the court fee would necessarily result into affirming the conclusion that the plaintiff-respondent is not interested in payment of the court fee. Therefore, his suit is liable to be dismissed. Consequently, the judgment of the lower Appellate Court is liable to set aside.

The net result of the above discussion is that the appeal is allowed. The suit of the plaintiff-respondent is dismissed. However, there shall be no order as to costs.