

(2013) 08 P&H CK 0904

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1966 of 2008 (O and M)

Malkiat Singh

APPELLANT

Vs

Isher Dass and Others

RESPONDENT

Date of Decision: Aug. 23, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Hon'ble Judges: Rakesh Kumar Garg, J

Bench: Single Bench

Advocate: J.S. Brar, for the Appellant; Aarti Gupta, for the Respondent

Final Decision: Dismissed

Judgement

Rakesh Kumar Garg, J.

Defendant No. 5 has filed the instant appeal challenging the judgment and decree of the Lower Appellate Court whereby suit of the plaintiff-respondent has been decreed against the defendants restraining them not to encroach upon any part of private Pahi and not to raise construction or cause obstruction to the plaintiff from the use of said Pahi fully described in the site plan Ex. P-2. Briefly stated, Isher Dass, plaintiff-respondent filed a suit against the proforma respondents and the appellant restraining them from encroaching upon any part of private Pahi which belongs to him and not to raise any construction and further not to obstruct the plaintiff from the use of said Pahi which leads to his land from the road side, as detailed in the site plan. It was further alleged in the suit that the plaintiff-respondent is the owner in possession of the land measuring 2/12/11 bearing Khata No. 181/394, Khasra Nos. 1369/1300/1186/437/0-16-1, 1191/437/1-16-10 in V. Bhojowali as per copy of jamabandi for the year 1997-98 and he took the Pahi in dispute from Pal Dass, father of proforma respondents, in lieu of land left for him as Pahi from other fields. This exchange was effected vide writing dated 10.11.1971 which was signed/thumb marked by the parties and since then the plaintiff-respondent was using the said Pahi which is also shown in Akas Latha of the Revenue Department. This Pahi is the

only way to reach the fields of the plaintiff-respondent but the defendants were threatening to encroach upon the said Pahi and to obstruct the use of Pahi. Hence the suit.

2. Upon notice, defendants filed written statement raising various preliminary objections. On merits, the ownership of the plaintiff-respondent on the land, as mentioned in the foregoing paragraphs, was denied stating that one Smt. Simro @ Silo daughter of Barkha Dass was owner of land bearing Khasra No. 437/1 and 437/3 i.e. 2 Bighas 5 Biswas and 11 Biswas and she transferred the same in favour of Pal Dass, father of proforma respondents. He was also owner in possession of 26-7/8 Karams towards East 27 Karams towards West, 23 Karams towards North and 23 Karams towards southern side out of Khasra No. 437/1 i.e. 1-10-19-1/2 and 11 Karams towards east, 11 Karams towards West, 27 Karams towards North and 26 Karams towards southern side out of Khasra No. 437/2 i.e. 0-14-11-1/2 totaling 2-5-11 and mutation No. 1479 dated 23.2.1976 was sanctioned in favour of Pal Dass. Thereafter, Pal Singh sold land measuring 0-14 Biswas out of Khasra No. 437/1 adjoining to Khasra No. 437/2 owned by the plaintiff, who sold the same to Inder Singh. Pal Dass sold 0-14 Biswas to Malkiat Singh who constructed his house over some part of the property as shown in the site plan and Malkiat Singh left 8-1/2 feet wide space out of said property to reach his land and after constructing mangers in the space left by him for cattle and the plaintiff-respondent has no concern with the same. It was denied that the plaintiff-respondent took Pahi from Pal Dass, father of defendant No. 1 to 4 or the plaintiff left the Pahi to Pal Dass from other fields. The execution of writing dated 10.11.1971 has also been denied and submitted that since Pal Dass was not owner of the alleged property in the year 1971, the question of making alleged exchange will the plaintiff does not arise. So, the writing is forged and fabricated and Pal Dass never signed the same and submitted that when no Pahi is in existence at the spot nor has been shown in the Akas Latha, the question of using the same does not arise and submitted that the plaintiff-respondent used to reach his property in Khasra No. 437/4 through Khasra No. 437/2, but the plaintiff had sold the entire Khasra No. 437/2 to Inder Singh and no passage was kept at that time out of Khasra No. 437/2 to his property to reach Khasra No. 437/4 and now plaintiff-respondent wants to use the property of the defendants as passage illegally. The other averments of the plaint were contested and prayed for dismissal of the suit.

3. By filing replication, the plaintiffs reiterated the averments made in the plaint. On the pleadings of the parties, the following issues were framed:

1. Whether the plaintiff is entitled to permanent injunction restraining the defendants not to encroach any part of private Pahi? OPP
2. Whether the plaintiff is entitled to permanent injunction raising any sort of construction and not to obstruct the plaintiff from using the private Pahi? OPP

3. Whether the plaintiff has no cause of action or locus standi to file the present suit?
OPD

4. Whether the plaintiff filed the suit on wrong facts and concealing the true facts?
OPD

5. Whether the plaintiff has dragged the defendants into unnecessary litigation?
OPD

6. Whether the site plan produced by the plaintiff is wrong and not according to the spot? OPD

7. Relief.

4. The trial Court after considering the evidence and contentions of the parties concluded that the plaintiff-respondent has failed to prove the existence of the passage at the spot and thus, was not entitled to the injunction, prayed for, further concluding that the plaintiff-respondent has filed the suit on wrong facts and the site plan was incorrect.

5. Aggrieved from the aforesaid judgment and decree of the trial Court, the plaintiff filed an appeal before the First Appellate Court which was accepted vide judgment and decree dated 9.4.2008 setting aside the judgment and decree of the trial Court and suit of the plaintiff-respondent was decreed. While decreeing the suit, the Lower Appellate Court observed as under:

The appellant has been non-suited on the plea that existence of Pahi has not been proved but that is not so on the file, as the plaintiff produced on record site plan Ex. P2 showing the passage leading from road side towards the property of the appellant. On one side built-up house of Malkiat Singh is being shown and on other side of the passage built up house of Inder Singh is being shown meaning thereby that passage has been shown in between these two properties. Defendants produced on record site plan Ex. D1 showing similar position with construction of the house of Malkiat Singh and Inder Singh but open space outside the house of Malkiat Singh which the appellant says passage that also starts from road side. The plea of defendants is that Malkiat Singh has left the space outside the wall for going to his some other property at the back of his house. It is strange thing to say that he has left the space outside the wall for going to some other property which could have been easily approached if in existence from within the house. Then it was tried to be asserted in evidence by defendants that Isher Dass passes through the passage which is in between the property of Inder Singh and Surjit Singh but no such passage has been shown by defendants in the site plan Ex. D1, rather road towards the space has been shown in both the site plans from which the plaintiff assert a passage to his fields. Malkiat Singh partly asserts the ownership of Malkiat Singh. Malkiat Singh has not brought on record site plan showing exact measurement of his construction or to make it a part of his ownership inside the

wall and to allege Killas (pegs) and mangers outside the wall is hardly believable.

Another point is that the writing Ex. P1 is alleged through which the passage was got by Isher Dass from Pal Dass in exchange of some other land, writing Ex. P1 has been proved in accordance with the law. It has been tried to be asserted on the plea that Pal Dass was not owner at that time. But writing has been proved by Bhupinder Singh PW1 who had scribed the same. Even though no Khasra number is mentioned but the word is Khuh Milakh Wala meaning thereby the passage was for the land which has been tried to be described as stated above. It is a writing in the village more than 35 years back written by ordinary people, in good faith. The other party has not controverted it by examining any expert that the writing does not contain thumb impression of Pal Dass. The plea was that he became owner later. It may be possible that Pal Dass treated himself to be owner of the land and even appellant had moved application for additional evidence by placing on record copy of judgment and decree sheet. Copy of pleadings of the parties in case between Pal Dass and Simlo decided in 1974 wherein Pal Dass has claimed ownership 3 years earlier to the institution of the suit and on admission of Simlo the case was decreed. So, it cannot be said that Pal Dass had no right to make a writing regarding passage. The appellant had shown leading of passage from road side and so is admitted by witnesses of the defendants in the cross examination that appellant goes to his fields through the passage which goes from road side. Even to PW3 Jagdev Sharma draftsman it was tried to be suggested that Malkiat Singh had left the space for going to his plot but that suggestion has been denied by the draftsman, inference is that he had correctly prepared the site plan. Even the lower court observed that documents Ex. P6 and Ex. P7 are forged as Patwari denies his signatures, but Patwari in his cross-examination admitted that the document is the true copy of the original and it appears that he apparently made wrong statement after issuing document showing the existence of passage but could not stand the test of cross examination but could not deny that document is correct copy of the original. The above discussion shows that the place which Malkiat Singh alleged to have been left by him outside his construction portion is not his space but is a passage meant for Isher Dass for going to his field as they could not prove the existence of any other passage which is being used by Isher Dass and one alleged in evidence only has not been proved in view of the foregoing discussion.

In view of the above observations, the findings recorded by the lower court on material issues are liable to be reversed and findings on issues No. 1 & 2 are reversed holding that plaintiff/appellant is entitled for permanent injunction restraining the defendants not to encroach any part of the private Pahi and not to raise construction or obstruction to the plaintiff. Accordingly, issue No. 1 and 2 are decided in favour of plaintiff and against the defendants. Finding on issue No. 3 which was held against the plaintiff in view of findings on issues No. 1 & 2, but due to reversal of the findings on issues No. 1 & 2 this issue is also held in favour of the plaintiff and against the defendants. Due to reversal of findings on issues No. 1 & 2

it cannot be said that plaintiff filed the suit concealing any fact or dragged the defendants into unnecessary litigation. So, the findings on issues No. 4 & 5 are also reversed and these issues are decided in favour of the plaintiff and against the defendants.

In view of the discussion made above regarding the site plan, it cannot be said that the plaintiff had produced on record wrong site plan.

Thus, finding on issue No. 6 is also reversed and this issue is decided in favour of the plaintiff and against the defendants.

No other point was urged. The net result of the above discussion is that there is merit in the appeal and the same is allowed. Decree for permanent injunction is hereby passed in favour of the plaintiff and against the defendants restraining the defendants not to encroach any part of the private Pahi and not to raise construction or caused obstruction to the plaintiff from use of said Pahi fully described in the site plan Ex. P2. The decree will be with costs. Decree sheet be prepared. Lower Court file be returned and appeal file be consigned to the record room.

6. Aggrieved from the aforesaid judgment and decree of the Lower Appellate Court, only defendant No. 5 has filed the instant appeal framing the following substantial questions of law for consideration of this Court:

a. Whether the judgment of the trial Court is not vitiated by misreading of evidence and misinterpretation of the document and hence perverse?

b. Whether the appellate court has acted on non-existent evidence for its conclusions and hence the judgment is illegal?

c. Whether deed alleged to be exchange can be acted up when it does bear only signatures of one party to exchange?

d. Whether in order to get relief it is not the bounden duty of the plaintiff to establish the identity of the land beyond the site plan he got prepared for the purpose of the suit at his own instance?

e. Whether the alleged exchange bearing signature of one party, not reflected in revenue records or even acted upon would be made the basis of the judgment?

7. A perusal of the aforesaid substantial questions of law would show that pith and substance of the grievance of the appellant is that the judgment and decree of the Lower Appellate Court is vitiated because of misreading of evidence and misinterpretation of the documents on record.

8. In support of his case, counsel for the appellant has vehemently argued that the plaintiff-respondent has miserably failed to prove the existence of any such Pahi, as alleged. According to the counsel for the appellant, the alleged exchange deed

dated 10.11.1971 relied upon by the plaintiff-respondent has not been proved on record in accordance with law. Moreover, documents i.e. Akas Latha (Ex. P-6 and P-7) purporting to have been issued by the Revenue Authorities are forged and fabricated and thus, no reliance can be placed upon the same. It is the further argument of the appellant that in the absence of any admissible evidence on record to prove his case, the judgment and decree in question are liable to be set aside. It is the further case of the appellant that the plaintiff-respondent, who is supposed to stand on his own legs to prove his case, has miserably failed to prove the existence of the Pahi in question and the identity of the land which he surrendered by alleged exchange and the particulars of the land which he received in lieu of the same. On the basis of the aforesaid argument, counsel for the appellant has submitted that the questions of law, as raised, do arise in this appeal and the judgment and decree in question are liable to be set aside.

9. On the other hand, learned counsel for the respondent has supported the judgment of the Lower Appellate Court and has argued that no substantial question of law arises in this appeal and there is no perversity in the impugned judgment and decree of the Lower Appellate Court which have been found on the basis of perusal of the evidence on record. It has been further argued that even if two views are possible on reappraisal of evidence, the Court while exercising its jurisdiction u/s 100 CPC will not interfere in the findings of the Lower Appellate Court to upset the same. Thus, it has been prayed that the appeal be dismissed.

10. I have heard learned counsel for the parties and perused the impugned judgments and decrees of the Courts below. I have also perused the record.

11. It may be noticed that the plaintiff-respondent produced on record a site plan Ex. P-2 showing the disputed passage leading from road side towards his property. On one side, built up house of Malkiat Singh-appellant is being shown and on the other side of the passage, built up house of Inder Singh is being shown. Defendants have produced on record site plan Ex. D1 showing similar position with construction of the house of Malkiat Singh and Inder Singh but open space outside the house of Malkiat Singh which the respondent-plaintiff terms as passage also starts from road side. The plea of the appellant is that he had left the space outside the wall for going to his some other property at the back of his house. However, no such passage has been shown by him in the site plan Ex. D1 that falsifies the stand taken by the plaintiff as there was no justification for him to leave the common disputed space outside his boundary wall. If it was his land, he could have very conveniently used the same vacant space for going to his alleged other property from inside the boundary wall of the house itself.

12. It may further be noticed that writing Ex. P-1 has been proved by Bhupinder Singh, who scribed the same. The said writing was made 35 years back and the same has not been controverted by the defendants by proving that the said writing does not contain the thumb impression of Pal Dass. A further argument that Pal

Dass had no right to make the writing with regard to passage as he had no right in the same is also belied from the facts which have come on record that some earlier litigation between Pal Dass and Simro @ Silo was decreed in his favour on the admission of said Simro @ Silo. The leading of passage from the road side has been admitted by the witnesses of the appellant in their cross-examination. The said passage has also been shown in Akas Latha (revenue record) Ex. P-6 and P-7. However, it has been claimed by the appellant that the said documents produced on record are forged as the Patwari while appearing as a witness has denied his signatures on the said copies. However, it may be noticed that in his cross-examination, the said witness has admitted that the document is a true copy of the original. In view of the aforesaid material evidence on record, establishing the Pahi, it cannot be said that the findings of the Lower Appellate Court are the result of misreading of evidence. The argument raised on behalf of the counsel for the appellant that respondent has not led any positive evidence with regard to his case is of no significance keeping in view the fact that there is enough permissible evidence on record to sustain the findings.

13. Thus, no substantial questions of law, as raised, arises in this appeal. Dismissed.