

(2013) 01 SHI CK 0096

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 9 of 2005

Chuni Lal

APPELLANT

Vs

Sh. Pawan Kumar and Others

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 2013 HP 59

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : G.R. Palsra, for the Appellant; Ambika Kotwal, Vice Counsel, for the Respondent

Judgement

Rajiv Sharma, J.—This Regular Second Appeal is directed against the judgment and decree, dated 22.11.2004, passed by the learned Additional District Judge, Mandi, District Mandi, H.P. in Civil Appeal No. 34 of 1999. Essential facts necessary for adjudication of this Regular Second Appeal, are that the appellant-plaintiff (hereinafter referred to as "the plaintiff" for the sake of convenience sake) had filed a suit for permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as "the defendants for the sake of convenience"). According to the plaintiff, he was owner in possession of the land comprised in Khasra No. 402 and part of Abadi deh comprised in Khasra No. 394. The plaintiff has given this land in exchange to the defendants and the defendants have given the suit land to the plaintiff vide written compromise, dated 30.12.1994, Ex.-PA. This document was signed by both the parties in the presence of Pradhan, Gram Panchayat Har Gumain and other respectable persons of the locality. On the basis of the compromise deed, two complaints were withdrawn and the possession of the suit land was delivered to the plaintiff, over which he has raised a stone wall. The defendants were now trying to demolish the Wall and they have started interfering in the suit land despite the request of the plaintiff not to do so. It is in these circumstances, the plaintiff has filed the suit.

2. The written statement was filed on behalf of the defendants. The defendants have denied that the suit land was given in exchange to the plaintiff by them. It is also denied that the plaintiff has ever constructed any Wall over the suit land.

3. The replication was filed by the plaintiff. Learned Sub Judge, 1st Class, Jogindernagar, District Mandi, H.P. framed the issues on 11.09.1996. He dismissed the suit on 19.02.1999.

4. Feeling aggrieved against the judgment and decree, dated 19.02.1999, the plaintiff has preferred an appeal before the learned Additional District Judge, Mandi, District Mandi, H.P. He also dismissed the same on 22.11.2004. Hence, this Regular Second Appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 23.03.2005:

Whether the First Appellate Court as well as Trial Court has misread, misinterpreted and misconstrued the oral as well as documentary evidence especially Compromise deed Ex. PA and Tatima Ex. PW-4/A and came to a wrong conclusion, which has materially prejudiced the case of the appellant?

6. Mr. G.R. Palsra, learned counsel for the appellant has vehemently argued that both the Courts below have mis-read, misinterpreted and mis-construed the oral as well as documentary evidence, especially compromise deed Ex.-PA, dated 30.12.1994 and Tatima Ex. PW-4/A.

7. Ms. Ambika Kotwal, learned counsel for the respondents has supported the judgments and decrees passed by both the Courts below.

8. I have heard the learned counsel for the parties and gone through the pleadings carefully.

9. The plaintiff has appeared as PW-1. According to him, on 15.12.1994, the family members of defendants damaged his store, which was constructed by him in Abadi deh. He reported the matter to the police. Police came on the spot. The defendants expressed their intention to settle the matter, which led to compromise Ex.-PA. It was executed in the presence of Pradhan and other witnesses of the locality. It was signed by him alongwith the defendants. He gave some part of his land recorded in his possession along with portion of Abadi deh to the defendants and the defendants gave him the suit land measuring 1 biswa, 11 biswansis in exchange. He constructed a wall in the year 1995. In his cross-examination, the plaintiff has admitted that no Patwari was present on the spot at the time of execution of compromise deed. It was agreed that the Patwari would be called later on for measurement of the land exchanged between the parties. PW-2, Hari Singh, PW-3, Jhape Ram and PW-5, Nand Lal have supported the version of PW-1 qua the execution of compromise deed, Ex.-PA.

10. PW-4, Labh Singh has deposed that he has prepared Tatima Ex.-PW-4/A. In his cross-examination, he has admitted that Tatima was prepared by him at the

instance of the plaintiff. In the Tatima, land measuring 0-1-11 bighas, comprised in Khasra Nos. 364/1, 393/1 and 401/1 has been shown. However, in Ex.-PA, dated 30.12.1994, only Khasra Nos. 364 and 401 have been mentioned. The area has not been mentioned in Ex.-PA. It is only in Ex.-PW-4/A that measurement of the land has been recorded. Plaintiff, on the basis of compromise Ex.-PA, has claimed that land measuring 0-1-11 bighas was given in exchange to him by the defendants. According to the compromise Ex.-PA, dated 30.12.1994, Khasra No. 402 owned by the plaintiff was given to the defendants and some portion of Abadi deh comprising Khasra No. 394 which was in possession of the plaintiff has also been given to the defendants and in exchange, the defendants have given to the plaintiff Khasra Nos. 401 and 364. It is reiterated that no specific area of the land was given to the plaintiff in exchange by the defendants out of Khasra Nos. 401 and 364. In the plaint, Khasra No. 393/1 is mentioned, but in the compromise deed, Ex.-PA, dated 30.12.1994, the same has not been included. It has not come even in the statements of PW-2, PW-3 and PW-5 that the suit land measuring 0-1-11 bighas as mentioned in Ex.-PW-4/A, was given in exchange by the plaintiffs to the defendants.

11. DW-1 has testified that a compromise deed Ex.-PA, dated 30.12.1994, was executed between the plaintiff and the defendants, but it was also agreed therein that the Patwari will be called on the spot and Tatima will be prepared and thereafter the land would be exchanged. However, neither Tatima was prepared nor the Patwari came on the spot. According to him, the land was in his possession. The statement of DW-1 has been corroborated by DW-3. Even PW-2, Hari Singh deposed in his cross-examination that the land was in possession of the defendants. He has also stated that the parties have not acted upon the compromise. According to the copy of Jamabandi for the year 1990-91, Ex.-PB, the land measuring 402 is shown in the ownership and possession of the plaintiff. However, as per the copy of jamabandi for the year 1990-91, Ex. P-C, copy of jamabandi for the year 1995-96, Ex.-D3 and copy of jamabandi for the year 1990-91, Ex.-D4, Khasra Nos. 364, 393 and 401 have been shown in the ownership and possession of the defendants.

12. According to paragraph No. 1 of the plaint, the compromise deed was acted upon by both the parties and both of them got two criminal complaints dismissed on the basis of this compromise deed. There is also a recital to similar effect in Ex.-PA, dated 30.12.1994. It is evident that a compromise has been arrived at in order to stifle the criminal proceedings. Thus, Ex.-PA is also hit by Section 23 of the Indian Contract Act. According to condition No. 3 of the agreement, both the parties have agreed to withdraw the cases filed against each other. PW-2, Hari Singh has deposed that the defendants were in possession of the suit land. The Patwari has never visited the spot nor any Tatima was prepared. The plaintiff has failed to prove by leading tangible evidence that the suit land was given in exchange to him by the defendants vide compromise deed Ex.-PA. There are no measurements of the land given in Ex.-PA. Ex. PW-4/A has been prepared by

PW-4, Labh Singh at the instance of the plaintiff. It was rightly discarded by both the Courts below.

13. Their Lordships of the Hon"ble Supreme Court in V. Narasimha Raju Vs. V. Gurumurthy Raju and Others, have held that arbitration agreement between parties in consideration of withdrawal of prosecution is invalid as being opposed to public policy. Their Lordships have held as under:--

17. It would thus be seen that the evidence adduced by the appellant is cogent, satisfactory and categorical, whereas the evidence of respondent No. 1 and of the arbitrator examined by him is not categorical to the contrary and at best is ambiguous. Even according to respondent No. 1 and the arbitrator, the agreement was drafted within the premises of the criminal court just before the criminal case was taken out. In other words, the place where the agreement was drafted and the time at which it was drafted, are significant. It was known that the criminal case would be heard in the afternoon of December 30, 1943 and so, the sequence of events clearly indicates that the parties entered into an understanding, the essence of which was that respondent No. 1 was to get the criminal case dismissed and as a consideration for that, the appellant and the other accused persons had to agree to refer their dispute to the arbitration of Mr. Murty. In this connection, it is very significant that the final draft which was executed and attested was handed over to the arbitrator after the criminal case was withdrawn. Therefore, the circumstances attending the execution of the document and the sequence of events disclosed in the evidence clearly show that the promise of respondent No. 1 to withdraw and not to prosecute the criminal case was a consideration for which the appellant and his friends entered into the arbitration agreement. This is not a case where it can be reasonably said that the withdrawal of the criminal case may have been a motive and not the consideration for the impugned transaction.

18. Then again Cl. 5 of the agreement corroborates the appellant's case that the withdrawal and non-prosecution of the criminal complaint was a consideration for the arbitration agreement. That is why the arbitrator was authorized to decide as to who and in what manner are to bear the expenses incurred in criminal proceedings. The intimate connection of the criminal proceedings and their withdrawal with the arbitration agreement is thus clearly established. That is another factor which supports the appellant's case.

14. The Courts below have correctly appreciated the oral as well as documentary evidence, including Ex.-PA, dated 30.12.1994 and Tatima, Ex. PW-4/A. The substantial question of law raised in the Regular Second Appeal is answered accordingly. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed, so also the pending application(s), if any. No costs.