
(2007) 05 P&H CK 0074
In the Punjab And Haryana At Chandigarh

Mukhbir Singh and Others	Vs	APPELLANT
Jiwan Singh and Others		RESPONDENT

Date of Decision : 15-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 64, 65
Transfer of Property Act, 1882 — Section 53A

Citation : (2008) 1 CTLJ 51 : (2007) 4 PLR 252 : (2007) 3 RCR(Civil) 564

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vinod K. Sharma, J.—This Regular Second Appeal has been filed against the judgments and decrees passed by the learned Courts below vide which suit for possession of plot No. 48, situated in Ram Bagh Gate, Amritsar and for future mesne profits from the defendants on the ground that by virtue of agreement to purchase entered into with the Improvement Trust, Amritsar, they were entitled to seek possession, was ordered to be dismissed.

2. The material allegations of the plaintiff-appellants are that Kirpal Singh defendant No. 7 entered into an agreement with die Amritsar Improvement Trust (hereinafter referred to as the "Trust") through its Chairman for the purchase of Plot No. 48 situated in Ram Bagh, Amritsar vide agreement of sale in form "D" on 12.11.1964 and become intended vendee on the terms and conditions laid down therein and possession was delivered to him. Kirpal Singh further entered into an agreement on 22.12.1964 with Ram Lal and Jagjit Singh and transferred all his rights under the principal agreement dated 12.11.1964 and the latter became intended vendee under the trust which recognised this transfer. Ram Lal further transferred his rights to Smt. Mohinder Kaur, who became the intended vendee. Thereafter, Mohinder Kaur and Jagjit Singh plaintiffs transferred their rights under the principal agreements to Mukhbir Singh plaintiff and he became

the intended vendee under the Trust which fact it again recognised on payment of the requisite transfer fee. It has accordingly been pleaded that Mukhbir Singh plaintiff stepped into the shoes of Kirpal Singh who entered into the original agreement in form "D" with the Trust. By way of an amendment it was added that at the time of sub-sequent transfers made by Kirpal Singh and others, possession was delivered to the subsequent intended vendees. It was also explained that Mohinder Singh son of Jiwan Singh defendant was in possession of a portion of the disputed plot on the basis of a rent note dated 1.9.1965. While vacant possession of the remaining plot was delivered to Mukhbir Singh by Mohinder Kaur and Jagjit Singh, the possession of the said portion under the tenancy of Mohinder Singh was delivered through tenancy rights. Mukhbir Singh plaintiff further entered into an agreement with Amarjit Singh son of Chattar Singh defendant for the sale of this plot on 20.9.1967 which was attested by Jiwan Singh defendant No. 1 and possession of the entire plot was delivered to Amarjit Singh at that time. In respect of the portion under occupation of Mohinder Singh tenant, possession was delivered through tenancy rights. It was further stated that Amarjit Singh defendant was not ready and willing to perform his part of the agreement to purchase the aforesaid plot and he received back his earnest amount of Rs. 8007-. It was further stated that after 31.10.1977 the portion of the plot under occupation of Mohinder Singh was vacated by him and he delivered vacant possession to Mukhbir Singh while Amarjit Singh requested Mukhbir Singh that the portion under his occupation be given on licence to Chattar Singh and Jiwan Singh. Mukhbir Singh accordingly agreed to this proposal and a licence with respect of major portion of this was created in favour of Chattar Singh and Jiwan Singh defendants. According to the plaintiffs, this license was terminated and these defendants became trespassers in the plot in dispute. Alternatively, it was pleaded that if license is not proved, Amarjit Singh defendant took possession of the entire plot under the agreement dated 20.9.1967 and on cancellation of that agreement, he was required to restore back possession to Mukhbir Singh. It was further stated that if the transfer in favour of Mukhbir Singh plaintiff was not recognised by the Court, the other plaintiffs namely Jagjit Singh and Mohinder Kaur were entitled to the possession of the plot in dispute as they were intended vendees. It was further pleaded that the defendants namely Jiwan Singh, Chattar Singh and Avtar Singh filed a suit against the plaintiffs and Kirpal Singh for permanent injunction in which they took up the plea that Jiwan Singh, Chattar Singh and Kirpal Singh defendants were owners of plot No. 48 in equal shares which assertion was wrong. These defendants relied upon some agreement of 1974 which had no value in the eyes of law as it was void and forged document. It was asserted that Kirpal Singh and Mohinder Kaur already having transferred their right, title and interest in the plot in dispute, they could not enter into any such agreement.

3. Mohinder Singh respondent-defendant No. 6 allowed himself to be proceeded against *ex parte* while Kirpal Singh defendant-respondent No. 7 filed written statement admitting all allegations of the plaintiff-appellants.

4. The suit was resisted by defendant Nos. 1 to 5, who controverted all allegations of the plaintiff-appellants. According to them, Jiwan Singh, Chattar Singh and Kirpal Singh were owners of Plot No. 48 in equal shares on which previously there used to be three khokhas in which business was being carried on, bearing No. 1163 to 1165/1 with blue plates No. 1429 and 1430, According to them, Jiwan Singh defendant-respondent No. 1 was in possession of khokha portion. No. 1164/1 and 1165/1 and blue plate No. 1430 while Avtar Singh is in possession of khokha portion No. 1163 and blue plate No. 1429. On 29.11.1976 Jiwan Singh defendant entered into partnership with Swarn Singh and Balbir Singh defendants and since then they are in possession Khokha bearing blue plot No. 1430 while the other "khokha" is in possession of Avtar Singh. According to the plaintiff-appellants, this fact was admitted by Kirpal Singh in the agreement dated 5.2.1974, which was attested by Mohinder Kaur wife of Kirpal Singh. It was explained that initially Kirpal Singh and Jiwan Singh remained in possession of Khokha No. 1430 jointly but Kirpal Singh left the premises about 15 years ago and since then Jiwan Singh remained in possession whereafter he brought Swaran Singh and Balbir Singh in partnership with him. It was denied that Kirpal Singh entered into any agreement with Ram Lal and Jagjit Singh or the latter transferred the same to Mohinder Kaur and Mukhbir Singh plaintiffs. It was asserted that Jiwan Singh and Avtar Singh were in adverse possession for more than 18 years of these khokhas and had become full owners. It was admitted that Mukhbir Singh plaintiff entered into an agreement with Amarjit Singh defendant with respect to this plot on 20.9.1967 but it was asserted that the former had no right, title, or interest in the property and could not convey the same. Amarjit Singh thereupon filed a suit for the refund of the amount paid by him as advance which was refunded by Mukhbir Singh thereby admitting that he had no right, title, or interest in the property and was not capable of transferring any right or title. It was denied that Amarjit Singh was delivered possession at the time of the said agreement. It was further denied that Mohinder Singh ever remained in possession of the property in dispute as a tenant or Chattar Singh, Amarjit Singh and Kirpal Singh were in possession of any portion of the plot. The suit was stated to be bad for misjoinder and non-joinder of necessary parties. Some preliminary objections were raised; that the plaintiffs-appellants had no locus standi to file the suit; the suit was time barred and the plaintiffs-appellants were estopped by their own act and conduct from filing the suit. An objection was taken to the valuation of the suit for the purposes of court-fee and jurisdiction. An objection regarding maintainability of the suit in the present form was also taken and that the plaint did not disclose any cause of action.

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

1. Whether plaintiffs have locus standi to file the present suit? OPP
2. Whether the suit is time barred? OPD
3. Whether suit is bad for misjoinder and non-joinder of necessary parties and causes of action? OPD

4. Whether the plaintiffs are estopped by their act and conduct to file the suit? OPD

5. Whether the suit is properly valued for the purposes of court-fee and jurisdiction? OPP

6. Whether the suit is not maintainable in the present form? OPD

7. Whether defendants Jiwan Singh and Chattar Singh were allowed to occupy the property in dispute in their capacity as licencees? OPP

8. Whether Jiwari Singh and Avtar Singh defendants have become owners of the suit property by adverse possession? OPD

9. Whether plaintiffs are entitled for possession of plot No. 48 Situated in Rambagh Gate, Amritsar? OPP

10. Whether plaintiffs are entitled for mesne profits from the date of filing of the suit till the delivery of possession. If so, at what rate? OPP

11. Whether defendants Jiwas Singh, Chattar Singh and Kirpal Singh entered into an agreement dated 5.2.1974 and the same was attested by Smt. Mohinder Kaur, if so, it effect? OPD

12. Whether the defendants are estopped by their act and conduct and on account of previous litigation from taking the plea of adverse possession? OPP

12-A. Whether the possession had been delivered to Amarjit Singh on the basis of an agreement dated 20.9.1967? OPP

13. Relief.

6. Issue Nos. 1, 9, 11 and 12-A were taken up together by the learned trial Court and the same were decided against the plaintiff-appellants by holding that the plaintiffs failed to establish that they or any of them had secured possession of the plot in dispute in pursuance of the contract for sale. It was further held that Jiwan Singh, Chattar Singh and Kirpal Singh entered into agreement dated 5.2.1974, which was attested by Mohinder Kaur, the result whereof, was that Kirpal Singh admitted the shares of Jiwan Singh and Chatter Singh as intended vendees. It was also held that the plaintiff-appellants failed to show that Amarjit Singh was delivered possession by Mukhbir Singh on September 20, 1967 on the basis of agreement for sale. It was thus concluded that the plaintiffs had no locus standing to file the suit for possession on the basis of mere agreement to sell. Accordingly, issue Nos. 1, 9 and 12-A were decided against the plaintiff-appellants, whereas issue No. 11 was decided in favour of the defendant-respondents. Similarly, issue Nos. 2, 8 and 12 were also taken up together and it was held thereon as under:

While discussing issue No. 1 above, I have held that the plaintiffs never took possession of the shop in dispute at any time. In order to sustain a suit for possession under Article 64, the plaintiffs have to show that they remained in

possession of the property within 12 years of the suit. As a corollary where the plaintiffs failed to show that neither they nor their predecessor remained in possession within 12 years, their suit is not maintainable. Reference may be made to Jugal Kishore Mandal and Others Vs. Fani Bhushan Kundu and Others, and AIR 1963 KARN 1 The contention of the defendants that Jiwan Singh, Avtar Singh defendants have become owners by adverse possession could not also be substantiated by them. The judicial proceedings to which reference has been made above, show that the parties had been taking various stands. Jiwan Singh even attested the agreement for sale executed between Mukhbir Singh plaintiff and Amarjit Singh. The parties asserting adverse possession have to take up a clear plea and substantiate the same that its possession has throughout been hostile to the real owner and the world at large which evidence the defendants have failed to adduce. The defendants are thus estopped from taking this contention in view of the previous litigation. I accordingly decided issue No. 2 in favour of the defendants and issue Nos. 8 and 12 against the defendants.

7. Issue No. 3 was decided against the defendants and in favour of the plaintiffs. Issue No. 4 was also decided against the defendants, whereas issue No. 5 was disposed of as preliminary issue as deficient court-fee was paid, On issue No. 6, it was held by the learned trial Court that the suit filed by the plaintiff-appellants was not maintainable in the present form. Issue No. 7 was also decided against the plaintiff-appellants by observing that they failed to show that any license was created. Issue No. 10 was also decided against the plaintiff-appellants and consequently the suit was dismissed.

8. The findings recorded by the learned trial Court were affirmed by the learned lowed Appellate Court.

9. Before advertng to the arguments raised by the learned Counsel for the parties, it would be pertinent to notice that a concurrent finding of fact has been recorded by the learned Courts below that the plaintiff-appellants never came in possession in pursuance to the letter of allotment issued by the Trust treating them to be intending vendees.

10. Mr. B.R. Mahajan, learned Counsel appearing on behalf of the appellants, submitted that following substantial questions of law arise in this case for consideration by this Court:

1. Whether in view of the provisions of Section 53A of the Transfer of Property Act, the intending vendor is entitled to take back possession of the property in dispute from the intending vendees in the event of cancellation of the agreement of sale?

2. Whether in view of the provisions of Sections 64 and 65 of the Contract Act, the plaintiff-appellants were entitled to get back the possession on cancellation of the contract?

11. The learned Counsel for the appellants in support of his contention argued

that once an agreement of sale was entered into between the parties until the possession was handed over, then on cancellation of the same, the intending vendees were bound to hand back the possession to the appellant-plaintiffs. The contention of the learned counsel for the appellants was that Section 53A of the Transfer of Property Act does not merely cover the giving of possession, but also take care of intending vendees, who are already in possession and the learned Courts below, therefore, were wrong in dismissing the suit of the plaintiff-appellants.

12. The other contention raised by the learned Counsel for the appellants was that in terms of Section 64 of the Contract, when a contract is rescinded, then the party rescinding the contract is liable to restore such benefits which have been received under the said contract. To similar effect are the provisions of Section 65 of the Contract Act.

13. I have considered the arguments raised by the learned Counsel for the appellants and find no force in the same.

14. It is settled law that Section 53A of the Transfer of Property Act is a weapon of defence and not for attack and can be invoked only if it is proved that in part performance of the contract, possession was given to the party. I find support for this view from the judgment of this Court in the case of *Mukand Singh v. Jang Singh* 2002 131 P.L.R. 274, Paras 12 and 13 of this judgment read as under:

12. The question of invoking the provisions of Section 53A of the Act would arise only if it is proved that in part performance of the contract possession of the suit land was given. This can be done only if the finding of the lower appellate Court is reversed and it is held while reversing the finding that the plaintiffs were in actual physical possession. The finding with regard to possession returned by the lower appellate Court cannot be upset on any of the arguments advanced by the learned Counsel for the plaintiffs. In various judgments of the Supreme Court, it has now been held that even if the High Court in second appeal is of the opinion that another view was possible, the findings recorded by the lower appellate Court should not be interfered with as it would be beyond the scope of jurisdiction u/s 100 of the Code of Civil Procedure, 1908. Therefore, it is not a case where substantial question of law is raised as laid down by their Lordships of the Supreme Court in the case of *Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah*, ; *Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar*, ; *Chandrabhagabai and Others Vs. Ramakrishna and Others*, ; *Ram Prasad Rajak Vs. Nand Kumar and BOrs. and Another*, ; *M.G. Hegde and Others Vs. Vasudev D. Hegde*, ; *State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs.*, ; *M. Nadarkesavan Nadar v. Narayanannadar Kunjan Nadar* ; *Baidyanalth Bhattacharya v. S. Karmakar* 2000 (9) S.C.C. 505; *Manorama Thampuratti Vs. C.K. Sujatha Thampuratti and Others*, ; *Chandigragauda and Anr. v. Shekhar Gauda S. Pirtana Goudar and Ors.* 2000 (1) S.C.C. 617; *Thimmaiah and Others Vs. Ningamma and Another*, ; *Mohd. Abdul Muqtadar v. S.K. Fakruddin* 2000 (9) S.C.C. 384; *G. Thankamma Amma v. N. Raghava Kurup* 2000 (9) S.C.C. 517;

Ananta Kalappa Jaratakhane v. Krishtappa 2000 (9) S.C.C. 735; Kempaiah (Dead) by Lrs. Vs. Doddanaraiah and Others, ; MD.Hadi Hussain v. Abdul Hamidl Choudhary and Ors., (2000) 10 SCC 248 and Shri Ajit Chopra Vs. Shri Sadhu Ram and Others, . In these cases their Lordships of the Supreme Court held that for the exercise of jurisdiction by the High Court u/s 100 of the Code the existence of substantial question of law is a sine qua non. It has further been held that where the findings of fact of the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own finding on re-appreciation of evidence merely on the ground that another view was possible. Even in the cases concerning title and ownership, the findings of fact as recorded by the courts below are considered by their Lordships to be final. The same view has been reiterated in the recent judgment rendered in the case reported as Kulwant Kaur v. Gurdial Singh 2001 128 P.L.R. 492 (S.C.), wherein Section 41 of the Punjab Courts Act has been declared ultra vires of Section 100 of the Code.

13. Even otherwise, the provisions of Section 53A of the Act can be availed for enforcement of rights including the rights to protect possession as a shield to a claim and not as a sword. Moreover, this issue has neither been raised nor at any stage issue to this effect was ever claimed.

Thus first part of the arguments of the learned Counsel for the appellants cannot be accepted. Even otherwise, a concurrent finding of fact was recorded by the learned Courts below that the plaintiff-appellants never came in possession and, therefore, it cannot be said that possession was delivered to the defendants under the agreement of sale which was subsequently cancelled.

15. The second contention of the learned Counsel for the appellants also cannot be accepted as under Sections 64 and 65 of the Contract Act, it is only the benefits, which have been given under a void contract, which is rescinded subsequently, are liable to be restored and once it is proved that the possession was not handed over to the intending vendees, it was not open to the plaintiff-appellants to claim possession on the said basis. The finding of the learned Courts below that the present suit was not competent also cannot be faulted with. The mere agreement of sale did not give title to the plaintiff-appellants to maintain the suit for possession and suit for possessory title could only be filed in case it was proved on record that the plaintiff-appellants ever came in possession of the suit property. In view of the concurrent finding of fact recorded by the learned Courts below that the plaintiff-appellants never came in possession, the suit filed by them, therefore, was rightly dismissed. The substantial questions of law as raised above are, therefore, answered against the plaintiff-appellants and in favour of the defendant-respondents.

In view of what has been stated and discussed above, there is no force in the present appeal which is, accordingly, dismissed with no order as to costs.