
(2007) 07 UK CK 0014
In the Uttarakhand High Court

Shri Sanwant Kumar Jain	Vs	APPELLANT
Shri Balwan Singh Jain and Others		RESPONDENT

Date of Decision : 05-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 91, 92
Transfer of Property Act, 1882 — Section 53A, 54

Citation : (2007) 07 UK CK 0014

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Tandon, J.—Heard Sri Arvind Vashisth & Sri Sharad Sharma, counsel for the appellant and Sri Rakesh Thapliyal, counsel for the respondents. Since both the second appeals arise out of a common order, both are decided unanimously.

2. Second Appeal No. 21 of 2004 filed u/s 100 of the CPC has been directed against the judgment and decree dated 27.9.2003 passed by the Addl. District Judge/F.T.C.-I, Dehradun in Civil Appeal No. 24 of 2004 Balwant Singh and Ors. v. Sanwant Kumar Jain and Ors.

3. Second Appeal No. 22 of 2004 filed u/s 100 of the CPC has been directed against the judgment and decree dated 27.9.2003 passed by Addl. District Judge/ F.T.C. -I, Dehradun in Civil Appeal No. 26 of 2000 Shri Sanwant Kumar Jain and Ors. v. Shri Karam Chand and Ors. and the part of the decree dated 24.2.2000 passed by Civil Judge (Jr. Division), Dehradun in O.S. No. 295 of 1986 Sanwant Kumar Jain v. Shri Karam Chand and Ors.

4. Second Appeal No. 21 of 2004 was admitted on the following substantial question of law:

1. Whether the appellate court below is justified in holding that in view of Section 91/92 of Evidence Act no evidence, not even evidence of written and duly

executed document, is admissible against contents of a written document?

6. Whether the appellate Court is justified in reversing whole of decree while one of the defendant against whom decree for mandatory injunction for a specific portion was passed had not filed any appeal?

5. Second Appeal No. 22 of 2004 was admitted on the following substantial question of law:

1. Whether the grant of damages for unauthorized occupation and user, the mesne profit, can be refused after recording a finding that the defendants have occupied Plaintiffs property without any authority and decreeing the suit for decree of mandatory injunction to give possession?

6. Briefly stated, according to the plaint averments, Smt. Shanti Devi, wife of Sri Hari Singh and Sri Ranjeet Singh S/o Sri Hari Singhm resident of 3, Hanuman Chauk, Dehradun were Zamindars of agricultural land measuring about 0.76 acre of Khata No. 1 Khasra No. 83/1 situate at Mahal Balbir Singh, Village Kanwli, Pargana Central Doon. Smt. Veera-defendant No. 4 purchased half portion of the aforesaid land from Smt. Shanti Devi and Sri Ranjeet Singh vide registered sale deed dated 1.5.1979. The sale deed was registered in the Office of Sub-Registrar, Dehradun on 29.5.1979. Sri Gopal Sharma-defendant No. 5 also purchased the left-out portion from Smt. Shanti Devi and Sri Ranjeet Singh vide registered sale deed dated 1.5.1979. In the month of December, 1982 defendant Nos. 4 and 5 have entered into an oral will in favour of the plaintiff and has also challenged the possession in favour of the plaintiff. The plaintiff has constructed the boundary wall on 3rd September, 1983. Agreement was also executed for selling the property and one agreement was registered and another agreement was not registered. Since 1982, the plaintiff is continuing in possession. Since the defendants have started interfering in the possession of the plaintiff, therefore, the plaintiff has filed present suit for injunction restraining the defendants from evicting the plaintiff* except in accordance with law.

7. A written statement was filed on behalf of the defendant No. 1 stating that he is in possession of the land in dispute and the plaintiff has no concern with it. Similar written statement has been filed by the defendant No. 2.

8. Similar written statement was filed by the defendant No. 4, who has denied the execution of any document.

9. The trial Court has partly decreed the suit on 24.2.2000 denying part of the claim.

10. Against the said decree, two appeals before the District Judge being Civil Appeal Nos. 26 of 2000 and 24 of 2000 have been preferred by the plaintiff-appellant and defendants-appellant respectively.

11. The trial Court has framed as many as 9 issues to the following effect:

1- D;k okn dk ewY;kadu de fd;k x;k gS A rFkk vi;ZkIr U;k;"kqYd fn;k x;k gS\\

2- D;k oknh us okn i= ds lwph es of.kZr lEifRr dks dz; djus gsrq dskbZ bdjkj izfroknh ua0 4 o 5 ls fd;k gS rFkk D;k izfroknh ua0 4 o 5 u bdjkjukes ds vUrZxr lEifRr dk dCtk oknh ds ekg flrEcj 82 es lkSik tSlk fd okn i= ds iSjk &6 es dgk x;k gS ;fn gkW rks izHkko\\

3- D;k izfroknh ua- 1] 2] o 3 us oknh ds dCts es gLr{ksi dh /kedh nh tSlk fd okn i= dh pj.k la0 10 es dgk x;k gS ;fn gkW rks izHkko\\

4- D;k nkSjku okn fnukad 17-6-88 dks izfroknh ua0 1] 2 o 3 us lEifRr oknxzLr ds ,d Hkkx dk ftls okn i= ds lkFk layXu ekufp= es &2 es v{kj d] [k] x] ls n''kkZ;k gS ij oknh dks voS/k :i ls csn[ky dj dCtk fy;k gS tSlk fd okn i= dh pj.k la0 14 es dgk x;k gS rFkk D;k oknh dCtk okfil ikus dk vf/kdkjh gS \\

5- D;k oknh izfroknh la01 2] o 3 ls gtkZuk ikus dk vf/kdkjh gS ;fn gkW rks izHkko \\

6- D;k oknh dks Dyse iathd`r vuqca/k dh ''krksZ ds foijhr gS \\

7- D;k fookfnr lEifRr ij izfroknh ua0 1 o 2 v;/kflr gS vkSj izfroknh ua0 1 dk futh vkoklh; Hkou ml ij fufeZr gS \\

8- D;k oknh dk okn dsoy fu''ks/kkKk ds izfrdkj gsrq pyus ;ksX; gS \\

9- vuqrks''k A

12. While deciding the issue No. 2 regarding agreement, a finding was recorded to the following effect:

mijksDr foospuk ,oa Ik=koyh ij miyC/k leLr lk{; ds vk/kkj ij eS bl fu''d''kZ ij igWqprk gwW fd izn''kZ &2 ds vk/kkj ij izfroknh ua 4 o 5 ds }kjk dCtk oknh dks vUrfjr fd;k x;k gS vkSj oknh dk dCtk fookfnr lEifRr [kljk ua0 83@1 [kkrk [ksoV ua0 1 egky cychj flag xzke dkaoyh ijxuk dsfUnz; nwu ftyk nsgjknwu v{kj , ch lh Mh bZ ,Q th ,p vkbZ ts , ls iznf''kZr gS Hkwfe ij Fkk A tks fd izn''kZ &2 ds vk/kkj ij lkfcr gS A

vr% mDr foospuk ds vk/kkj ij okn fcUnq ua0 2 rnkuqlkj oknh ds Ik{k es ldkjRed :i ls r; fd;k tkrk gS A

13. While deciding Appeals No. 26 and 24 of 2000 unanimously, the appellate Court has recorded a finding that there is no document to prove regarding transaction between the plaintiff and the defendants and the plaintiff has filed to prove his possession. However, it has been found that in case there was any agreement between the parties, liberty is given to the plaintiff to agitate the matter in a suit for specific performance.

14. Subject to observations made above, Appeals No. 24 of 200 filed by the defendant was allowed and Appeal No. 26 of 2000 filed by the plaintiff was dismissed.

15. Section 53-A of the Transfer of Property Act reads as under:

53A. Part Performance.--Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

16. In *Nathulal Vs. Phoolchand*, , some conditions have been given for making out the defence of part performance to the following effect:

9. The conditions necessary for making out the defence of part performance to an action in ejectment by the owner are:

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any persons claiming under him is debarred from enforcing against the transferee any right in respect of the property of which the transferee has taken or

continued in possession other than a right expressly provided by the terms of the contract.

17. According to the counsel for the appellant, he has obtained the possession in pursuance of the oral agreement between the parties.

18. However, sale has been defined u/s 54 of the Transfer of Property Act,

54. "Sale" defined.--"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.--Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale--A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

19. Aforesaid Section provides that contract is a contract that a sale of such property shall take place on terms settled between the parties and it does not create any interest in or charge on such property.

20. As will appear from the aforesaid that no right can accrue on the basis of mere agreement to sell. However, since the findings have been recorded that the plaintiff is in possession of the land in dispute, it is made clear that in case the plaintiff is in possession, he shall not be evicted except in accordance with law. However, it is well settled that no injunction can be granted to restrain the defendants for which the plaintiff has no title.

21. In Mahadeo Savlaram Shelke and Others Vs. Puna Municipal Corporation and Another, , it has been held as under-

9. It is settled law that no injunction could be granted against the true owner at the instance of persons in unlawful possession.

10. In Woodroff's Law Relating to injunctions, 2nd revised and enlarged Edn., 1992, at page 56 in para 30.01, it is stated as under:

an injunction will only be granted to prevent the breach of an obligation (that is a duty enforceable by law) existing in favour of the applicant who must have a personal interest in the matter. In the first place, therefore, an interference by injunction is founded on the existence of a legal right, an applicant must be able to show a fair prima facie case in support of the title which he asserts.

22. All the substantial questions of law are decided against the appellant. Both the appeals lack merit and are dismissed.