
(2010) 11 P&H CK 0561

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 4802 of 2010

Smt. Swarn Kanta and Another

APPELLANT

Vs

Amar Chand Tamra and Others

RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Evidence Act, 1872 — Section 114, 85
Notaries Act, 1952 — Section 14, 8
Specific Relief Act, 1963 — Section 22, 34
Transfer of Property Act, 1882 — Section 52

Citation : (2011) 161 PLR 805

Hon'ble Judges : L.N. Mittal, J

Bench : Single Bench

Judgement

L.N. Mittal, J.—Defendants No. 6 and 7, having remained unsuccessful in the trial court, but partly successful in the lower appellate court, are in second appeal.

2. Respondent No. 1 - Plaintiff Amar Chand Tamra filed suit against Respondents No. 2 to 6 (Defendants No. 1 to 5) and Appellants (Defendants No. 6 and 7) alleging that Defendant No. 1 P. D. Jain, vide agreement to sell dated 11.04.1966, agreed to sell the suit plot No. C-2, Model Town, Faridabad, measuring 1000 sq. yds. to the Plaintiff. The plot is located in area developed by Defendant No. 2 M/s DLF Universal Electric Limited. Due to change in layout plan, area of the plot increased to 1667.5 sq. yds. Since Defendant No. 1 did not honour the agreement to sell, Plaintiff filed Civil Suit No. 269 of 1966 against Defendants No. 1 and 2. The trial court dismissed the said suit vide judgment dated 28.06.1968. However, first appeal preferred by the Plaintiff was allowed by appellate court vide judgment dated 03.11.1978 directing Defendants" No. 1 and 2 to execute the sale deed in accordance with terms of the agreement. Plaintiff filed execution petition for execution of judgment and decree dated 03.11.1978 of the appellate court. Defendant No. 1 filed objections in the execution petition. However, the said objections were dismissed by the executing court vide order dated 10.09.1981. Thereafter, sale deed of the suit plot was executed in favour

of Plaintiff and possession was delivered to him. He is owner in possession of the suit plot since then. However, Defendant No. 2 transferred the suit plot to Defendant No. 3 vide registered sale deed dated 31.03.1981. Defendant No. 3, through Defendant No. 4 as attorney and Defendant No. 5 as further attorney, sold the suit plot to Defendants No. 6 and 7 through three sale deeds dated 24.03.1995, 08.05.1995 and 12.05.1995. Defendant No. 7 transferred his half share in the suit plot to Defendant No. 6 (already vendee of the remaining half share) vide sale deed dated 26.02.1996. All these sale deeds have been challenged by the Plaintiff in the suit. The Plaintiff sought declaration that the aforesaid sale deeds and Power of Attorneys are illegal and null and void etc. and do not effect the rights of the Plaintiff in the suit property and Plaintiff continues to be owner in possession thereof. Plaintiff also sought permanent injunction restraining the Defendants from taking forcible possession of the suit property and from dispossessing him therefrom and from interfering in his possession thereon and from changing nature and character of the suit plot by raising construction or otherwise. Temporary boundary wall and shed constructed by Defendant No. 6 does not amount to dispossession of the Plaintiff, but if it is held to be dispossession, then relief of possession by demolition of said construction was also sought.

3. Defendant No. 1 controverted the plaint allegations. He also pleaded that being old man, he did not remember the details of the previous litigation.

4. Defendant No. 2 also contested the suit and controverted the plaint allegations. It was pleaded that Plaintiff is not in possession of the suit property and therefore, suit for declaration and injunction only is not maintainable. It was also pleaded that no relief has been claimed against Defendant No. 2. The disputed plot was allotted to Defendant No. 1 by Defendant No. 2, but no sale deed was executed in favour of Defendant No. 1. On request of Defendant No. 1, the suit plot was transferred by nomination in favour of Kailash Chander Sachdeva on 06.04.1971. Ultimately, the plot was purchased by Defendant No. 3 on 07.01.1981. Defendant No. 2 had no knowledge of the execution proceedings in the previous litigation. Defendant No. 2 did not receive notice. However, previous litigation was admitted, but it was pleaded that Plaintiff never paid the remaining sale consideration and release charges in terms of the decree. Defendant No. 2 was not party to the agreement to sell between Plaintiff and Defendant No. 1. Various other pleas were also raised.

5. Defendants No. 3 and 4 pleaded that Defendant No. 3 purchased the disputed plot from Defendant No. 2 Vide sale deed dated 31.03.1981 registered on 01.04.1981. Defendant No. 3 is bona fide purchaser of the suit property for valuable consideration without knowledge of alleged defect in title. Defendant No. 2 did not disclose the pending litigation to Defendant No. 3. It was admitted that Defendant No. 3 sold the suit plot to family members of M. L. Sachdeva - Defendant No. 5, for consideration.

6. Defendant No. 5 pleaded that he was appointed special attorney by Defendant

No. 4, who was general attorney of Defendant No. 3. Accordingly, Defendant No. 5 executed sale deeds in favour of Defendants No. 6 and 7. Defendant No. 3 represented herself to be absolute owner in possession of the suit property through Defendant No. 4. 7. Defendants No. 6 and 7 are the main contestants. They pleaded that Defendant No. 3 purchased the suit property from Defendant No. 2 and became owner in possession thereof. She appointed Defendant No. 4 as attorney, who nominated Defendant No. 5 as special attorney. Defendant No. 5 sold the suit property to Defendants No. 6 and 7 vide three sale deeds and delivered actual possession of the suit plot to them. They purchased it after making inquiries. They are bona fide purchasers of the suit property without notice of the previous litigation. Alleged agreement between Plaintiff and Defendant No. 1 was pleaded to be illegal. Defendant No. 1, himself being not owner, could not enter into the said agreement. judgment and decree dated 03.11.1978 in the previous litigation have no bearing on the rights of these Defendants. Defendant No. 6 has constructed boundary wall of the suit plot and also a room in it and has obtained electricity connection and has installed submersible pump. Lis pendens doctrine is not applicable. Various other pleas were also raised.

8. Learned Additional Civil Judge (Senior Division), Faridabad, vide judgment and decree dated 25.01.2007, decreed the Plaintiffs suit. First appeal preferred by Defendants No. 6 and 7 has been partly allowed by learned Additional District Judge, Faridabad, vide judgment and decree dated 09.10.2010 and thereby judgment and decree of the trial court have been modified and Appellant No. 1 has been held to be co-owner of the suit plot to the extent of excess area of 667.5 sq. yds. and Plaintiff has been held to be owner in possession to the extent of 1000 sq. yds. area in the suit plot. Feeling aggrieved, Defendants No. 6 and 7 have filed the instant second appeal.

9. Another suit was filed by Respondent No. 1 Amar Chand Tamra, in which facts are almost similar. The said suit relates to Plot No. C-4, Model Town, Faridabad measuring 1000 sq. yds. Meeta Gupta - Defendant No. 7 in the said suit is the ultimate purchaser of suit plot. The said suit was decreed by learned trial court vide judgment and decree dated 25.01.2007 and first appeal preferred by Meeta Gupta - Defendant No. 7 of that suit has been dismissed in toto by learned Additional District Judge, Faridabad, vide judgment and decree dated 09.10.2010. Said Meeta Gupta has preferred R.S.A. No. 5077 of 2010 titled Meeta Gupta v. Amar Chand Tamra and Ors. Since issues involved in both the appeals are the same, said R. S.A. No. 5077 of 2010 shall also stand disposed of by this common judgment. In the said RSA, Mr. Aran Jain, Senior Advocate with Mr. Vishal Goel, Advocate is present on behalf of caveator - Respondent No. 1-Plaintiff.

10. I have heard learned Counsel for the parties and perused the case files.

11. Learned Counsel for the Appellants vehemently contended that in the previous litigation, in which suits of Plaintiffs for specific performance of the

agreements to sell were decreed, relief of possession was not sought and therefore, in view of Section 22 of the Specific Relief Act, 1963, relief of possession could not be granted. In the execution petition, possession of the suit property, therefore, could not be delivered. It was also submitted that only symbolical possession of the suit property was delivered in the execution petition to the Plaintiff. However, the Plaintiff never came in actual possession of the suit property. It was accordingly contended that instant suits for declaration and permanent injunction only are not maintainable in view of mandatory provision of the proviso to Section 34 of the Specific Relief Act, 1963. In this context, it was also pointed out that Plaintiff has himself pleaded that Defendant No. 6 i.e. Appellant No. 1 has constructed temporary boundary wall and shed in the suit property and has also obtained electricity connection and thus, Plaintiff is not in possession of the suit property.

12. Learned Counsel for the Appellants also contended that Plaintiff himself did not appear as witness in the witness-box, and therefore, adverse presumption arises against the Plaintiff u/s 114 of the Evidence Act, 1872. It was also contended that Plaintiff's son appeared as witness as attorney of the Plaintiff, but Power of Attorney in favour of Plaintiff's son was not executed before and authenticated by the Notary and therefore, u/s 85 of the Evidence Act, said Power of Attorney could not be presumed to have been executed by the Plaintiff and thus, there was no valid Power of Attorney in favour of Plaintiff's son and consequently, his testimony cannot be taken into consideration. Reference in this behalf was also made to Sections 8 and 14 of the Notaries Act, 1952.

13. Learned Counsel for the Appellants also vehemently contended that Section 52 of the Transfer of Property Act relating to doctrine of lis pendens is not attracted as the Plaintiff never obtained possession of the suit plot and therefore, possession was rightly transferred by Defendant No. 2 to Defendant No. 3. No lis regarding the possession was pending when Defendant No. 3 purchased the suit property.

14. Learned Counsel for the Appellants also contended that in R. S.A. No. 4802 of 2010, identity of the property is also not established as Plaintiff's claim is over 1000 sq. yds. area, whereas the plot has total area of 1667.5 sq. yds. Question of court fee was also raised regarding relief of possession. Conditions specified in decree dated 03.11.1978 were not fulfilled by the Plaintiff and therefore, the said decree was not executable.

15. Learned Counsel for the Appellants relied on various judgments in support of his above mentioned contentions namely Ram Prasad Vs. Hari Narain and Others, , Jugraj Singh and Another Vs. Jaswant Singh and Others, ; Jugraj Singh and Another Vs. Jaswant Singh and Others, , Electric Construction and Equipment Company Ltd. Vs. Jagjit Electric Works, , Citibank N.A. Vs. Juggilal Kamlapat Jute Mills Co. Ltd., , Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, , Vidhyadhar Vs. Manikrao and Another, , Rudnap Export-Import v. Eastern Associates Co. and Ors. AIR 1984 Delhi 20, Ram Saran and

Another Vs. Smt. Ganga Devi, , Shamsher Singh Vs. Rajinder Prashad and Others, , Niranjan Kaur Vs. Nirbigan Kaur, , Ranjit Singh and Ors. v. Balkar Singh and Anr. (2000) PLR 382 Ramjidas Vs. Laxmi Kumar and Others, ; Thakurai Bhup Narain Singh and Another Vs. Nawab Singh and Others, , Khalil Nahak Vs. Hadu Nahak (dead) and Others, , Bharat Singh and Anr. v. Gopi Ram and Ors. (2001) PLR 35 (Delhi High Court), Hardev Kaur v. Surinder Kaur and Anr. AIR 2009 (NOC) 1079 (P&H) and Rajender Singh and Others Vs. Santa Singh and Others, .

16. Learned Counsel for Respondent No. 1 - caveator in R. S.A. No. 5077 of 2010 contended that question of lis pendens has been dealt with by executing court in detailed order dated 10.09.1981, vide which objections preferred by Defendant No. 1 were dismissed. It was also pointed out that actual physical possession of the suit property was delivered to the Plaintiff in execution proceedings, as also specifically mentioned in the sale deed, which was executed and got registered in the execution proceedings.

17. I have carefully considered the aforesaid contentions. Learned Counsel for the Appellants, with great ability at his command, tried to breathe life in a completely dead case. However, the contentions raised by counsel for the Appellants with great vehemence cannot be accepted. The contention that relief of possession was not sought by the Plaintiff in his previous suits instituted for specific performance of the agreements to sell cannot be accepted because it has been noticed in paragraph 2 of the appellate judgment dated 03.11.1978 passed in the said suits (as shown by counsel for the Appellants himself) that the Plaintiff brought suits for possession by performance of the agreement to sell the disputed plots. Thus, relief of possession had also been sought in the said suits.

18. In addition to the aforesaid, in execution proceedings, possession of the suit plots was delivered to the Plaintiff. Learned Counsel for the Appellants contended that it was only symbolic possession, which was delivered to Plaintiff in execution proceedings. However, even if it be so, it amounted to delivery of possession and the said proceedings have attained finality after the execution proceedings terminated in the year 1981. The said proceedings have never been challenged by anybody. Consequently, it cannot be agitated in the instant cases that possession could not be delivered to the Plaintiff in execution of appellate decrees dated 03.11.1978 in the previous suits. However, it may also be added that according to the sale deeds executed pursuant to decrees in the previous suits, actual physical possession of the suit plots was transferred to the Plaintiff. Thus, examined from any angle, it is apparent that pursuant to execution of decrees in the previous suits, the Plaintiff became owner in possession of the suit plots. Consequently, the Plaintiff was not required to seek relief of possession in the instant suit. In other words, the instant suits for declaration and injunction only are very much maintainable and are not hit by proviso to Section 34 of the Specific Relief Act. Moreover, there is no construction in plot No. C-4 involved in R. S. A. No. 5077, of 2010, whereas in plot No. C-2 involved in R. S. A. No. 4802 of 2010, the Plaintiff, in the alternative, also sought relief of possession of the

suit property. However, since temporary construction was raised by Defendant No. 6 before the filing of the suit, even suit for permanent injunction and mandatory injunction directing demolition of said temporary construction is maintainable.

19. Doctrine of lis pendens is very much applicable because execution proceedings were pending when Defendant No. 2 executed sale deed dated 31.03.1981 in favour of Defendant No. 3. Consequently, the said sale is certainly hit by doctrine of lis pendens and subsequent sales by Defendant No. 3 in favour of Defendants r.o.6 and 7 and also sale by Defendant No. 7 in favour of Defendant No. 6, would become null and void and cannot effect the rights of the Plaintiff in the suit plots. Contention of counsel for the Appellants that lis regarding possession was not pending is again misconceived and untenable. In the execution proceedings, possession of the suit plots was also delivered to the Plaintiff. Moreover, question of title is the central question in the instant suits. Defendant No. 2 could not transfer valid title to Defendant No. 3, who in turn, could not transfer valid title to Defendants No. 6 and 7 i.e. Appellants. Even learned Counsel for the Appellants could not controvert the position that transfer of title by Defendant No. 2 to Defendant No. 3 and subsequent sales are hit by doctrine of lis pendens. In other words, the Plaintiff has become owner of the suit plots and Defendants have no right, title or interest therein. It may also be added that question of lis pendens has also been dealt with in order dated 10.09.1981 passed by the executing court.

20. In view of the documentary evidence, particularly the evidence relating to previous litigation, non-appearance of the Plaintiff himself as witness, pales into insignificance. It is correct that if a party does not appear in the witness-box, adverse inference may be drawn against the said party. However, at the same time, such party cannot be non-suited merely on this ground if other evidence on record is sufficient to sustain the claim of such party. The lis has to be decided and adjudicated upon on the basis of evidence, which has come on record. In the instant case, evidence on record is sufficient to sustain the claim of the Plaintiff. Consequently, contentions relating to Power of Attorney also become irrelevant and insignificant.

21. As regards identity of property, there is no dispute about the identity of property in R. S. A. No. 5077 of 2010. However, in R. S. A. No. 4802 of 2010, the plot agreed to be sold to Plaintiff was measuring 1000 sq. yds., but subsequently, due to change in lay out plan, the area of the plot increased to 1667.5 sq. yds. However, the lower appellate court has taken care of this position and Plaintiff has been held to be owner in possession of plot No. C-2 to the extent of 1000 sq. yds. whereas Appellant No. 1 has been deemed to be co-owner in the said plot to the extent of 667.5 sq. yds.

22. As regards court fee, proper court fee has been paid for relief of declaration and injunction. Court fee was not required to be paid for relief of possession as the Plaintiff is found to be owner in possession of the suit plots.

23. Both the courts below have properly appreciated the evidence and come to concurrent finding in favour of the Plaintiff (except to the extent of excess area of plot in one suit). The said finding is fully justified by the evidence on record and is supported by cogent reasons recorded by the courts below. The said finding is not shown to be perverse or illegal so as to warrant interference in second appeal. No question of law, much less substantial question of law, arises for determination in these second appeals.

24. These cases amply demonstrate the irony of system of administration of justice in this country. Plaintiff filed the previous suits in the year 1966. He succeeded in getting fruits of the litigation after fifteen years with conclusion of execution proceedings in the year 1981. However, still his troubles did not end and he had to file these two suits in the year 1997 i.e. after sixteen years and has now been facing the agony of litigation for another thirteen years. Thus, Plaintiff has been fighting the litigation for 44 years. In spite of having been successful in the previous litigation, his claim in the instant litigation has again been contested up to this Court by second round of litigation, without any substantive defence. Rights of the Plaintiff were sought to be defeated by execution of sale deed dated 31.03.1981 by Defendant No. 2 in favour of Defendant No. 3 while the execution proceedings in the previous litigation were pending. The instant second appeals are not only meritless, but completely frivolous and misconceived and deserve to be dismissed with exemplary costs so as to curb the tendency of frivolous litigation and to assure the rightful claimant about the utility and efficacy of the system of administration of justice.

25. For the reasons aforesaid, both these appeals are dismissed with cost of Rs. 25,000/- in each appeal. In R.S.A. No. 4802 of 2010, the cost amount shall be deposited with the Registry of this Court within one month from today, failing which the case shall be listed for this purpose, whereas in R.S.A. No. 5077 of 2010, the cost amount shall be payable to Respondent No. 1 - caveator-Plaintiff, who can recover the same by execution.