

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**RSA No.127 of 1997 (O&M)
Date of decision: 04.02.2015**

Nachhattar Singh and another ... Appellants

Vs.

Baldev Singh and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Binderjit Singh, Advocate
for the appellants.

Ms. Sukhmani Tiwana, Advocate
for the respondents.

AMIT RAWAL J. (ORAL)

This regular second appeal is at the instance of appellants-defendants directed against the judgment and decree of the trial Court whereby the suit of the respondents-plaintiffs for mandatory injunction has been decreed in favour of the plaintiffs and against the defendants who have been directed to demolish the construction on the street in question within a period of three months.

The appeal filed against the aforesaid judgment and decree of the trial Court also met with the same fate and accordingly,

the appeal was dismissed.

Aggrieved against the aforesaid judgments and decrees of both the Courts below, the appellants-defendants have approached this Court through the aforementioned appeal.

The present regular second appeal was admitted on 18.02.1997 and execution of the judgment and decree was ordered to be stayed. Thereafter, the matter was referred to Pre-Lok Adalat and in the proceedings conducted before the Pre-Lok Adalat, appellant No.1, namely, Nachhattar Singh did not press the appeal and his statement was recorded separately in this regard. Accordingly, the appeal qua appellant No.1 was dismissed as not pressed. Since the dispute is between appellant No.2 and the respondents, was not compromised. The matter was returned to this Court as no compromise was possible between the parties.

It would be appropriate to refer few facts which are essential and necessary for adjudication of the controversy between the parties to *lis*. The respondents-plaintiffs initially had filed a suit for permanent injunction on 22.9.1987 and during the pendency of the suit, had sought the amendment twice, on the premise, that the appellants-defendants during the pendency of the suit had raised construction and therefore, sought the relief of mandatory injunction for an appropriate direction to the defendants to remove the encroachment from the pahi (passage). Appellants-defendants in the amended written statement took up the plea which has been

extracted in the judgment and decree of the trial Court. For the sake of brevity, para No.2 of the judgment of the trial Court is reproduced herein below:-

“Upon notice the defendants appeared and filed written statement. However later on, the written statement to amended plaint was filed by them on 4.8.1993 taking legal objections that earlier the plaintiffs claimed the ownership of four plot but by way of amendment they wanted to change the numbers of those plots but after amendment they have mentioned about only plot No.17, 18 and 19 i.e. to say about 3 plots and nothing has been stated by them regarding the fourth plot as such the amended suit is liable to be dismissed. That the site plan attached with the plaint is factually wrong. In the said site plan, the plaintiffs have shown the street 11 feet wide, which in fact is not in existence. Rather, the defendants have already constructed their house in the said site which is mentioned by the plaintiffs as street and they have constructed the house on this side 27/28 years back. That the present suit has only been filed to harass the defendants. That the plaintiffs have got no right to file the amended suit as such the suit is liable to be

dismissed. That the suit in the present form is not maintainable That the suit is not within time as the defendants have made constructions 27/28 years back as such the suit is liable to be dismissed. That the plaintiffs have not amended the suit rather by changing the pleadings of the suit the very nature of the suit has been changed, as such the suit is liable to be dismissed. That the defendants are entitled for special costs u/s 25-A CPC. On merits, the contents of the plaint have been denied and the legal objections have been repeated stating that the plaintiffs have filed a wrong site plan with the plaint and that there is no such street in existence as has been alleged by the plaintiffs rather the house constructed by the defendants 27/28 years back exists at the site where the street has been alleged by the plaintiffs. They have prayed for the dismissal of the suit.”

Since the parties were at variance, the trial Court framed as many as 7 issues including the issue of Relief and also included issue No.2-A, as to whether the plaintiffs are entitled to injunction as prayed for? In support of their case, respondents/plaintiffs examined following witnesses:-

PW1-Sh. Gurdarshan Singh Patwari who brought

on record Ex.P1 field book, Ex.P2 and Ex.P3 copy of jamabandi for the year 1985-86.

PW2 - Baldev Singh-plaintiff.

The site plan produced by the respondents/plaintiffs was put to the appellants-defendants in cross examination as Ex.D1. The appellants/defendants brought on record jamabandis for the year 1990-91 i.e. Ex.D2 and Ex.D3.

Mr. Binderjit Singh, learned counsel appearing on behalf of appellant/defendant no.2 in support of his grounds of appeal submitted that both the Courts below have committed illegality and perversity in decreeing the suit as well as in dismissing the appeal and the impugned judgments and decrees of the Courts below are liable to be set aside for the following grounds:-

- i) Onus to prove alleged encroachment of 04 marlas was upon the respondents/plaintiffs. Therefore, presumption under Section 110 of the Indian Evidence Act, lies in favour of appellants/defendants.*
- ii) In order to prove encroachment, no demarcation has either been done or any report produced on record.*
- iii) Even in the field book, there is no mention of the plots as shown in the site plan Ex.D1 and site plan was not correct as per the spot and thus,*

not liable to be taken into consideration by both the Courts below.

- iv) *The issue whether there was a gali 11 feet wide in khasra No.180/9/7/1 was sought and if so, whether it adjoined to the plot or not.*

Ms. Sukhmani Tiwana, learned counsel appearing on behalf of the respondents-plaintiffs in support of her contention submitted that the trial Court has rightly decreed the suit and the findings are based upon both oral and documentary evidence and there is no illegality and perversity in the finding rendered by the lower Appellate Court. She further submitted that since the appellants/defendants have though denied the site plan Ex.D1 yet they admitted the construction and therefore, once the appellants-defendants admitted that they have raised the construction then there is no need of connecting the property much less producing the demarcation report on record.

In rebuttal, Mr. Binderjit Singh, learned counsel for the appellant/defendant No2, submitted that in view of the aforementioned submissions, the present appeal involves the following substantial questions of law to be adjudicated by this Court:-

1. *When material issue which goes to the root of the case has not been framed by the trial Court and First Appellate Court observed that the trial Court*

should have framed that issue, whether it was imperative on the part of First Appellate Court to frame that issue and call for the report of trial Court on that issue as per provisions of Rule 25 of Order 41 CPC?

2. *Whether in the absence of any demarcation, findings about alleged encroachment can legally be given?*

3. *When there is not an iota of evidence to prove about alleged dispossession/encroachment during the pendency of suit, whether trial Court was legally justified to allow amendments of plaint?*

4. *Whether revenue entries contained in mutation and jamabandis can be considered a document of title and Courts below were legally justified to treat a mutation as a document of title?"*

I have heard learned counsel for the parties and appraised the impugned judgments and decrees of the Courts below as well as record of the trial Court.

I am afraid of the aforementioned submissions of the learned counsel for the appellants are not sustainable and sans merit and the appeal is liable to be dismissed.

On perusal of the averments made in the written statement, it is irresistibly concluded that appellants-defendants

though denied the site plan Ex.D1 to be wrong yet they admitted that on the site, they have raised the construction for the last 27-28 years. In view of categoric admission with regard to the construction on the property in dispute, it is to be seen as to whether there existed street or not. In order to support the aforementioned findings, perusal of field book Ex.P1 leaves no doubt that there is a pahi (passage) in existence in killa No.7/1 from rectangle No. rect.180//9.

In view of Ex.P1, field book and the stand taken by the appellants-defendants, there is no need for the respondents/plaintiffs to prove the alleged encroachment as per the provisions of Section 110 of the Indian Evidence Act. The appellants-defendants had also taken a stand that they had purchased the property from one Sadhu and Bhag through a bahi writing but no such entry or document has been placed on record to show that they had become owner of property where they have alleged construction. Even the year and date of construction has not come forth. The jamabandis Ex.P2 and Ex.P3 reflect the plot number as mentioned in the site plan. Thus, it does not lie in the mouth of the appellants that jamabandis did not show the plot numbers which are co-related with the plot numbers in the site plan Ex.D1. If at all, appellants-defendants had any dispute with regard to Ex.D1, nothing prevented them to produce their own site plan or get the property demarcated with regard to claim of the respondents-plaintiffs. No such effort has been made by the defendants-appellants and from the evidence discussed above, it is

ex facie found that respondents/plaintiffs have not only proved the existence of the passage of land measuring 04 marlas gair mumkin pahi and coupled with the admission of the appellants-defendants and also raising of the construction on the site, leaves no manner of doubt that the appellants-defendants actually encroached upon the aforementioned street as averred and pleaded much less proved by the respondents/plaintiffs.

Both the Courts below have rendered a finding of fact and law based on appreciation of oral and documentary evidence. No fault can be found with the findings rendered by the Courts below.

The substantial questions of law is, thus, answered against the appellants-defendants and in favour of respondents-plaintiffs.

No other point has been argued.

Accordingly, the appeal is dismissed.

There shall be no order as to costs.

(AMIT RAWAL)
JUDGE

February 04, 2015
savita