

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

**RSA No.3955 of 2011 (O&M)
Date of decision: 26.02.2015**

Shamsher Singh and another

... Appellants

Vs.

Bhagwan 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. N.K.Malhotra, Advocate
for the appellants.

Mr. Sandeep K.Sharma, Advocate
for the respondents.

AMIT RAWAL J.

At the instance of appellants-defendants, this regular second appeal is directed against the judgment and decree of the lower Appellate Court, whereby, the suit for permanent injunction as well as for mandatory injunction has been decided/decreed in favour of the respondents-plaintiffs. In essence, the suit of the respondents-plaintiffs has been decreed and judgment and decree of the trial Court dated 18.08.2010, whereby, suit has been set aside, aforesaid was dismissed.

It would be apt to give preface of the controversy between

the parties to the *lis*.

Respondents-plaintiffs filed a suit on 11.02.2004 for permanent and mandatory injunction on the premise that Sh. Molar Ram son of Boga Ram, father of plaintiff No.1 and defendants and father-in-law of plaintiff No.2 purchased killa No.176 measuring 7 kanal 4 marla along with his brothers, namely, Ujala, Bhagal, Aazara, Bhom and Satbir about 25 years ago. The said killa was abutting the Village abadi and all the vendees partitioned the said killa after purchase and the other co-owners, in the area which fell to their share, have raised residential houses. Thereafter, the plot shown by letters 'ABCD' fell to the share of father of plaintiff No.1 and defendants and father in law of plaintiff No.2 and is bounded as under:-

“East : House of Sh. Gumani
West : Road
North : House of Sh. Satpal
South : Road.”

After death of Sh. Molar Ram, his share was inherited by 4 sons and 4 daughters and widow of Molar Ram, in equal shares. The daughters and widow of Molar Ram transferred their 5/9th share in favour of plaintiff No.2 and defendants and widow of Ramesh, in equal shares, vide registered relinquish deed dated 23.05.2001. The original relinquish deed was stated to be in possession of Kartar Singh. Photocopy of the same was also annexed. Therefore, the

share of plaintiff No.1 and defendants and other sons of Molar Ram was $1/9^{\text{th}}$ each. In essence, share of plaintiffs is $1/4^{\text{th}}$ in equal share and share of defendants is $1/4^{\text{th}}$ each. The area shown by letters 'ABCD' which fell to the share of Molar Ram was again partitioned between the heirs of Molar Ram and the portion marked by letters 'BCEF' fell to the share of Ramesh, which has been shown in yellow colour and the portion marked by letters 'EFGH' which fell to the share of Shamsheer Singh, shown in green colour and the portion marked by letters 'GIJA' which fell to the share of Kartar Singh defendant No.2, shown in blue colour and the portion marked by letters 'IHDJ' shown in the red colour fell to the share of plaintiffs. Thereafter, all the three brothers of plaintiff No.1, have raised residential construction in their respective shares. The plaintiffs about 15 years ago shifted to Kalanaur, in order to provide education to his daughters. The plot which came to the share of plaintiff was/is vacant. Respondents/plaintiffs further averred that defendant No.1, on the instigation and in collusion with Kartar Singh, Shamsheer Singh-defendant No.1, threatened to take possession of the vacant plot of the plaintiffs and opened a door at point 'X' towards plot of the plaintiffs. Plaintiff No.1 on 20.01.2004, reported the matter to the police at P.S.Kalanaur, who, restrained the defendants from interfering in peaceful possession of the plaintiff. But later on, defendant No.1 started raising construction on the plot of plaintiffs and with the timely intervention of the police, construction was

stopped. It was further stated that since the defendants did not accede to the request of the plaintiffs as well as direction of the police, the respondents-plaintiffs were constrained to file suit with the aforementioned averments and prayed a decree be passed in favour of the plaintiffs against the defendants restraining them (defendants) from taking possession over plot of the plaintiffs shown by letters 'HIDF' in the site plan and from interfering in the peaceful possession of the plaintiffs permanently and not to raise any construction upon the same. It was further prayed that if the defendants succeed in their illegal aim the appropriate direction be issued to the defendants to remove the same by way of mandatory injunction.

The aforementioned suit was contested by the defendants-appellants by filing written statement, wherein, it was stated that plaintiffs are neither owners nor in possession of the suit property. The suit was barred by law of limitation, much less, there was no locus standi to file the present suit. On merits, it was stated that site plan submitted by the plaintiffs was incorrect as they did not disclose the measurement of the property and did not indicate the doors, windows installed by defendant-Shamsher Singh, in western side of his house and a shop at point 'D' which was constructed by defendant No.1, 20 years ago. Appellants-defendants did not deny the execution of relinquish deed dated 23.05.2001.

Since the parties were at variance. The learned trial Court

framed as many as six issues, including the issue of Relief.

Respondents-plaintiffs in support of their case examined the following witnesses:-

1. PW1 - Plaintiff-Bhagwan Singh
2. PW2 - Pawan Kumar, who proved the photographs Ex.P5 to Ex.P7, receipt Ex.P4, negatives Ex.P8 to Ex.P10,
PW3 -S. S.Rathi Naksha Navis, who proved site plan Ex.P1, jamabandi for the year 1999-2000, Ex.P2. Release Deed dated 23.05.2001, Ex.P3.

Whereas on the other hand, defendants examined themselves as DW1 & DW3 and examined DW2 Pawan and also placed reliance upon Ex.D1 site plan, Mark-A Extract of Bahi entries to show that they had purchased the land, vide sale deed from the plaintiffs for a sum of ₹60,000/- on 2.5.1990.

The trial Court on the basis of aforementioned oral and documentary evidence though observed that the stand of the respondents-plaintiffs claiming exclusive possession of the suit property by way of verbal partition among brothers was admitted by the appellants-defendants but further held that plaintiffs on filing of the suit, were not able to prove their exclusive and actual possession of the same, for, as per the pleadings, they were residing at the distance village, for the past 15 years and further while relying upon the cross-examination of defendant DW2 that possession was not

with the respondents-plaintiffs, accordingly, dismissed the suit.

The aforementioned judgment and decree of the trial Court was assailed by the respondents-plaintiffs by filing the appeal by taking various grounds and the lower Appellate Court, being last Court of fact and law, after discharging the obligation, as enshrined under Section 96 of the Code of Civil Procedure, by referring to the oral and documentary evidence, allowed the appeal by setting aside the judgment and decree of the trial Court and decreed the suit.

It would be apt to extract relevant paragraphs of the judgment rendered by the lower Appellate Court.

“22 The position which emerges is that both defendants Shamsher and Kartar have admitted partition of the property after death of Molar; that site plan Exhibit D1 of the defendants is identical to the site plan Exhibit PX except the partition shown in red colour in Ex.PX over which plaintiffs and Shamsher are staking claim; that there is no dispute with regard to the separate shares of Ramesh, Shamsher and Kartar Singh as shown in Exhibit D1/Exhibit PX; that defendants have failed to prove that Bhagwan Singh or plaintiff No.2 his wife sold their property to Shamsher. It can therefore, safely be concluded that after death of Molar, there had been a partition between the parties as claimed by

the plaintiffs. Defendant Shamsher and Kartar Singh were in possession of the portions marked by green and blue colour in the site plan Exhibit PX also shown in Exhibit D1. Ramesh brother of the plaintiff No.1 and defendants No.1 and 2 who is not a party to the suit was given yellow colour portion in while the red colour portion in Exhibit PX came to Bhagwan Singh and his wife, plaintiffs No.1 and 2. Possession of defendants Shamsher and Kartar over the green and blue colour portion is not disputed and it can be concluded that they are in separate possession after the partition. There is no doubt left in mind of the Court that partition of the suit property had taken place and the brothers were put in separate possession of the shares.

23. Defendants having failed to prove the sale of the suit property by Bhagwan Singh or by Satpali, having failed to prove that Bhagwan Singh was given a double storey house in the village and land in Killa No.176/1 was given to Shamsher and Ramesh to compensate them and having failed to prove that defendant Kartar Singh purchased a share of suit property of Bhagwan Singh in auction proceedings cannot be permitted to claim that

Bhagwan Singh has no right, title or interest in the property. Plaintiffs title is well proved by Ex.P2 and Ex.P3. Even though plaintiffs may not be residing in village and the suit property was lying vacant, it is proved that it came to their share in family partition, their exclusive possession over the suit property at the time of filing of the suit is proved.

24. Plaintiff has pleaded in para No.8 of the plaint that defendant No.1 opened a door towards his plot and defendant Shamsher also admitted in his cross-examination that on 20.01.2004 plaintiff No.1 had moved a complaint in the police regarding opening the door. From the statement of DW Pawan, it appears that there is only one shop constructed by the defendant No.1 in the suit property and remaining plot is lying vacant. Plaintiff No.1 has stated in his affidavit that before filing the suit, defendant started construction of room at point D. Defendants are not themselves sure when the shop was constructed. In para No.8 of preliminary objections in the written statement, it is pleaded that it was constructed 20 years ago wherein para No.10, it is claimed that shop was constructed 10 years ago. It appears that the room/shop at point D

in the site plan has been raised during the pendency of the suit. Since defendants have succeed constructing the shop, plaintiff is entitled for decree of mandatory injunction directing defendants to remove the construction and restore the possession to the plaintiff. Findings recorded by learned Trial Court under issues No.1 and 2 are not in order and are set aside. Defendants must be restrained from taking the possession of the plot in dispute and should also be directed to restore the possession back after removal the construction. Issues No.1 and 2 are decreed in plaintiffs favour.”

In these circumstances, the aforementioned regular second appeal has been filed by the appellants-defendants.

Mr. N.K.Malhotra, learned counsel appearing on behalf of the appellants-defendants, in support of his grounds of appeal, submitted that judgment and decree passed by the lower Appellate Court suffers from illegality, much less, perversity as it has misread both oral and documentary evidence. He further submitted that judgment and decree of the lower Appellate Court is based on surmises and conjectures, as the evidence of the appellants was not properly discussed rather erroneously ignored, much less, even law had not been referred to. He also submitted that judgment and decree of the trial Court was based on appreciation of oral and

documentary evidence and, therefore, it was a well reasoned judgment and thus, urged that since the judgment of the lower Appellate Court suffers from perversity, the present appeal involves following substantial questions of law, to be adjudicated by this Court:-

- “a) Whether the suit filed by the respondents is hopelessly time barred by limitation?*
- b) Whether the respondents are not entitled to decree for injunction?*
- c) Whether the suit is not maintainable in the present form?*
- d) Whether the suit of the respondents has rightly been dismissed in the situation when they have not proved their case as owners of the land in dispute?*
- e) Whether the respondents have concealed the material facts from the Court?*
- f) Whether the learned First Appellate Court has wrongly considered the evidence as well as judgments produced by the appellants?”*

Mr. Sandeep K.Sharma, learned counsel appearing on behalf of the respondents-plaintiffs, in support of his contentions, submitted that judgment of the lower Appellate Court do not suffer from any illegality and perversity, as it is based on appreciation of

oral and documentary evidence. He further submitted that the trial Court had committed illegality in holding that the respondents-plaintiffs were not able to prove their possession. He also submitted that possession of the vacant piece of land follows title. In support of the aforementioned contention, he relied upon the judgments of Hon'ble the Supreme Court as well this Court in **Fauja Singh vs. Resham Singh and others 2011(1) PLR 265** and **Heirs of Verajlal J.Ganatra vs. Heirs of Parshottam S.Shah 1996(2) RRR 369**. He further submitted that the respondents-plaintiffs made a complaint to the police and got the photographs clicked with regard to illegal construction of small room by defendant No.1 and/ which have been proved through testimony of witnesses. Mr. Sandeep K. Sharma, Advocate for the respondents-plaintiffs further submitted that no substantial question of law arises to be adjudicated by this Court and the appeal is liable to be dismissed.

In rebuttal, Mr. Malhotra, learned counsel for the appellants-defendants, in support of his contention relied upon judgment of Hon'ble the Supreme Court in **Maria Margarida Sequeria Fernades and others vs. Erasmo Jack de Sequeria (dead) through Lrs and others 2012(2) RCR (Civil) 441**, to contend that in a suit for possession filed under Section 6 of the Specific Relief Act, 1963, act of person who claims possession must give following details:-

- i) title of the property

- ii) who is in possession of the title documents
- iii) identify of the claimant or claimants to possession
- iv) the date of entry into possession
- v) how he came into possession - whether he purchased the property or inherited or got the same in gift by any other method.
- vi) In case, he purchased property what is consideration, if he has taken it on rent, how much is the rent, license fee or lease amount.
- vii) if taken on rent, license fee or lease then insist on rent deed, license deed or lease deed;
- viii) who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc;
- ix) subsequent conduct, i.e, any event which might have extinguished his entitlement to possession or caused shift therein; and
- x) basis of his claim that not to deliver possession but continue in possession.

Further relied upon judgment of this Court in **Ram Niwas vs. Santosh Rani and others 1998(1) PLR 444** to contend that simple suit for permanent injunction cannot be maintained by a person who is not in physical possession of the property in dispute

and also relied upon judgment of Hon'ble Allahabad High Court in **Manjoor Ali vs. Kishmat Ali 2005(1) RCR (Civil) 765** to contend that concurrent findings of fact recorded by the Courts below on the basis of admissible evidence as to validity of sale deed has binding effect to possession. The plaintiffs have not been found in actual possession, hence not entitled to injunction while exercising power under Section 100 CPC, there should be no interference in the concurrent finding.

I have heard learned counsel for the parties and appraised the impugned judgment and decree of the lower Appellate Court and the case law cited and am of the view that appeal is devoid of merit and liable to be dismissed.

Admittedly, it has come on record that appellants-defendants have admitted the ownership of the plot in favour of the respondents-plaintiffs. The findings of the lower Appellate Court extracted above have not been challenged in the memorandum of appeal. The plea of the appellants-defendants that it is the pleaded case of the respondents-plaintiffs that they are living at distant village and, therefore, once they are not in possession of the property, injunction should not be granted and the trial Court rightly declined to grant the injunction does not have any substance much less, force, particularly, in respect of the case where, suit property is a vacant plot as it is settled law where there is vacant plot possession follows title.

I am in agreement with the judgments cited by Mr. Sandeep K. Sharma, Advocate in case of Fauja Singh (supra) that presumption would be there that the possession would follow title. In other words, the presumption is stronger in the case, where property remained as a bare land. Non consideration of question of possession in such a situation is inconsequential, even if the plaintiffs failed to establish their possession on such land.

For the sake of repetition, since the appellants-defendants had partitioned the property, after the death of their father-Molar Ram, the site plan brought on record on behalf of appellants-defendants and respondents/plaintiffs i.e. Ex.D1 and Ex.PX are identical except portion shown in red colour in Ex.PX, over which the plaintiffs and defendant No.1 are/is taking claim. There was no dispute with regard to separate shares of other siblings as per Ex.PX and Ex.D1. Appellants-defendants having failed to prove the purchase of the property through bahi entry, Ex.P2 and Ex.P3, rather on the contrary, title of the respondents-plaintiffs has, ex facie, been proved and therefore, even if the plaintiffs are not residing in the village and the suit property, which admittedly is lying vacant, it would be presumed to be in exclusive possession of the respondents-plaintiffs, in view of the ratio *descendi* laid down in case of Fauja Singh (supra). The photographs/negatives also proved the construction of small room on the land of the plaintiffs, constraining the plaintiffs to make a complaint to the police. Though said

complaint has not come on record but the photographs and negatives have been proved through the testimony of photographer and even witnesses of the defendants-appellants. From the statements of the defendants, it is revealed that there was only one shop/room constructed by defendant No.1 in the suit property and the remaining plot is lying vacant. Appellants-defendants have failed to prove by leading direct and cogent evidence that the shop was constructed 20 years ago. Rather it has been proved on record that the room and shop at point 'D' in the site plan has been raised during the pendency of the suit, which necessitated the respondents-plaintiffs to file the suit and the trial Court had granted the status-quo order on the application filed under Order 39 Rule 1 and 2 CPC. The lower Appellate Court discharged the obligation by referring to each and every document, much less, oral evidence and after noticing the fact that appellants-defendants have constructed the shop on the part of the plot and raised construction on the plot lying vacant and thus, rightly enjoined the appellants-defendants not to interfere and take the possession of the plot marked by letters 'IEHJ' in the site plan Ex.PX and further directed appellants-defendants to remove the construction raised by way of decree of mandatory injunction and restore the plot to its original position and, thereafter, deliver back the possession to the appellants-defendants, within a specified period of time i.e. two months. The judgments cited by Mr. Malhotra, particularly, Maria Margarida Sequeria Fernandes (supra), inasmuch

as is not applicable to the facts and circumstances of the present case, rather goes against the appellants-defendants as it was the case of the restoration of the possession in a suit filed under Section 6 of the Specific Relief Act. There is always a presumption of title and possession, in case, where the suit filed under Section 6 of the Specific Relief Act.

No fault can be found with the findings recorded by the trial Court as there is no illegality and perversity in the findings which are based on appreciation of oral and documentary evidence.

No substantial question of law arises for adjudication of this Court.

Accordingly, the appeal is dismissed.

(AMIT RAWAL)
JUDGE

February 26, 2015

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