

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**RSA No.4229 of 2011 (O&M)
Date of Decision: 27.5.2015**

Phul Chand and others

..... Appellants

Versus

Sanjay Aggarwal and another

..... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Gagandeep Singh, Advocate,
for Ms. Ravinder Kaur Manaise, Advocate,
for the appellants.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This appeal came up for the first time in preliminary hearing on December 08, 2011 when no one appeared for the appellants and in the interest of justice the case was adjourned to March 27, 2012. Thereafter, adjournments after adjournments have been sought without addressing effective arguments. Today, another request for adjournment is made which is rejected as it is no longer justified.

Heard the learned counsel on the papers presented in appeal.

The facts in brief are that Sanjay Aggarwal instituted a suit against defendant – Phul Chand and others claiming a decree for permanent injunction restraining the defendants from interfering in his possession over the portion of the suit property marked ABC in the plan attached and for a decree for mandatory injunction directing the defendants to remove the encroachment made by them over the portion marked as BCDE in the site

plan attached. The entire portion of land falling under ABC and BCDE forming part of khasra No.42//2/1/1 measuring 5 marlas situated in Village Naraingarh, District Ambala.

The facts as revealed are that Sanjay Aggarwal purchased the property from one Mohd. Shami who was owner in possession of 4 marlas of land being 4/5th share of land comprising khewat/khatauni No.418/452, khasra No.42//2/1/1 measuring 5 marlas situated at village Naraingarh, District Ambala. The sale deed was registered on June 11, 2004 with the Sub Registrar, Naraingarh and possession was delivered on the spot. The previous owner Mohd. Shami had constructed a wall of about 4/5 feet height and about 20 feet long from points C to F shown in the site plan. The defendants are neighbours and own land bearing khasra Nos.42//1/2/2 and 42/10/1/2. The plaintiff complained that defendants had encroached upon a portion marked as BCDE in the site plan. He requested defendants to remove the encroachment but they were not willing to do so. The encroachment was made about three years prior to the filing of the suit. The plaintiff's immediate cause to bring suit was that he wanted to raise construction over the portion ABC and when he started raising the construction, defendants came and obstructed his venture. Hence, the suit.

The suit was contested by the opposite party. A defence was taken that neither plaintiff nor Mohd. Shami was the owner and in possession of the site in question and the alleged sale deed was a sham transaction. No land as claimed encroached upon exists at the disputed spot. Plaintiff has no right, title or interest in the suit property. The boundaries of the properties of defendants are bounded as described and have been in their possession

for more than 24 years.

Replication to the written statement was filed. Five issues were struck and the sixth as to relief. Parties led their oral evidence and tendered documents in support of their rival stands. No rebuttal evidence was led and was closed on the statement of the counsel for the plaintiff by recorded statements.

A Local Commissioner, a Field Kanungo was appointed by the Court of the learned Civil Judge (Junior Division) Ambala trying the suit who visited the spot and demarcated the property in question i.e. khasra No.42//2/1/1. The report revealed that the suit property consists of 5 marlas out of which 2 marlas are lying vacant at the spot and the remaining 3 marlas of land had been consumed in the construction of the Nahan Road. The trial court found that the property marked ABC regarding 2 marlas was in the ownership of the plaintiff and, therefore, relief of permanent injunction restraining defendants from interfering in the property deserves to be issued.

The moot question remained to be answered as to whether there was proof of encroachment on area BCDE in the site plan. On a reading of the entire evidence, the learned trial Judge held that the plaintiff had failed to show by reliable, cogent and trustworthy evidence that there had been an encroachment over the said portion as alleged by him. Remarkably, 3 marlas of land stood chewed by the Nahan Road and if there was property of the plaintiff, the same stood consumed by the highway. Therefore, if the plaintiff had a complaint, he had it not against the defendants but with the appropriate authority in charge of road construction.

Accordingly, the suit was partially decreed. Plaintiff was protected over the area marked ABC by a permanent injunction but the suit failed with respect to alleged encroachment over portion marked BCDE. The judgment and decree passed by the Additional Civil Judge (Senior Division) Naraingarh was pronounced on November 14, 2009 and the decree sheet drawn on the same date.

Aggrieved by the decree, Phul Chand and company carried an appeal under Section 96 CPC in the court of the learned District Judge, Ambala. Plaintiff Sanjay Aggarwal did not carry an appeal and did not litigate any further with respect to encroachment as was claimed by him in the suit. But Phul Chand and company still felt aggrieved by the directions issued with respect to the portion marked as ABC. The remaining dispute in appeal was confined to the correctness of the order passed by the trial court with respect to portion BCDE over which it issued a mandatory injunction directing handing over of possession thereof.

Defendants in appeal complained that they had filed objections to the report of the Local Commission but the same were not dealt with by the trial court while passing the final order. The court of first appeal re-examined the issue from the standpoint of Jamabandi for the year 1997-98 Ex.P-4 which depicted Mohd. Shami as owner in joint possession of the property in dispute along with other co-sharers. After he sold property to Sanjay Aggarwal, mutation bearing no. 918 Ex.P-2 was sanctioned in favour of the plaintiff with title passing. Plaintiff's cross-examination by the defendants did not shatter his testimony in any manner. The defendants did not deny the site in dispute was part of khasra No.42//2/1/1 with existing

boundaries walls of 4/5 feet in height and adjacent to the saw mill owned by defendant Phul Chand and company. The correctness of the site plans Exs.P-3 and P-6 is not disputed. The defendants did not claim ownership of the land comprised in khasra No.42//2/1/1 which was admittedly surrounded by boundary walls. The learned District Judge, Ambala re-entered the evidence and found that the defendants-appellants had failed to prove their case by leading cogent evidence. He found from the record no signs of the defendants being in possession of the site in dispute and to the contrary, the same were proved to be in possession of the plaintiff. The learned District Judge, Ambala correctly observed that the possession runs with the title. If the defendants failed to prove ownership of the site in dispute then the learned trial court did not commit any material irregularity while partly accepting the claim of the plaintiff. The findings of the trial court were affirmed as one not calling for interference. No other point was urged or argued. The appeal was ordered to be dismissed.

In view of the concurrent findings on facts recorded by both the courts below that the defendants had nothing to do with the portion BCDE nothing remains to be examined in second appeal.

Learned counsel relies on the decision of the Supreme Court in **Sri Thimmaiah vs. Shabira and others**, (2008) 4 SCC 182. In para.5 of the report the Supreme Court observed:-

"5. Per contra, learned counsel for the respondents submitted that the parties proceeded on the basis of title and since the trial Court recorded findings regarding possession which are contrary to the materials on record, the High Court has rightly allowed the appeal. Undisputedly, the suit was one for permanent injunction

and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession."

I fail to see how this judgment helps the defendants when the plaintiff has been restricted to his lawful possession and his claim against encroachment has been negated. He has reconciled himself to the finding of the court against him. But he had a distinct right to an injunction against the defendants restraining them from interfering in his possession minus the portion claimed as an encroachment over suit property.

Help is also drawn from the judgment of the Supreme Court in **Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs & Ors., (2008) 4 SCC 594** where the Supreme Court held that in a suit for permanent injunction the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant had tried to interfere or disturb such lawful possession. The Court held that the question of title is not in issue in such a suit, though it may arise incidentally or collaterally. This judgment is also of no help since the partial decree covers lawful possession of plaintiff by virtue of the sale deed. The story that the sale deed is a sham transaction was neither here nor there since the sale transaction is documented in the office of the Sub Registrar which is notice in *rem* and to the public.

Lastly, reliance is placed on the decision of the learned Single Judge of this Court in **Tej Kaur (Deceased) Through Her LRs. and**

others vs. Baldev Parshad and others, 2012(5) RCR (Civil) 544. This Court held in this ruling that only persons in actual physical possession can to apply for injunction against the defendants in a suit for permanent injunction and not those who claim right to possession for which a different suit would have to be filed claiming declarations of title, ownership and possession. This is also not the situation arising in the present case and the judgment cited is, therefore, distinguishable on facts.

I find no error in the judgments of the courts below warranting interference.

No questions of law as framed or arise which may be regarded as substantial questions of law. There is nothing in this appeal on merits worth consideration and it is, accordingly, dismissed.

(RAJIV NARAIN RAINA)
JUDGE

27.5.2015
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