

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

RSA No.2157 of 2012.

Decided on:-February 21, 2015.

Jagdish.

.....Appellant.

Versus

Jagdish and others

.....Respondents.

CORAM: *HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.*

Argued by:- Mr. Sandeep K. Sharma, Advocate
for the appellant.

Respondents ex-parte.

Dr. Bharat Bhushan Parsoon, J.

Om Parkash plaintiff, now deceased, represented through his legal heirs, respondents No.1 and 2 in this appeal, had filed a suit for seeking a decree of permanent injunction restraining the defendants from interfering in his peaceful possession over the land details of which had been given in the plaint with explanatory boundaries and the revenue record. It was claimed that the defendants owned a plot towards the western side of the plot of the plaintiff and were threatening to encroach upon the alleged plot of the plaintiff by constructing a wall for which they were having no right.

2. Defendants Ram Kumar and Jagdish, (now appellant), and two others had contested the suit. Defendant No.3 Ramdhari died during pendency of the suit and was then represented through his legal heirs viz. defendants No.3-A to 3-C who are now proforma respondents No.4 to 6 in this appeal. Ram Kumar, defendant No.1, is respondent No.3 in this appeal.

3. Denying the case of the plaintiff, it was claimed that, in fact, they were owners in possession of the disputed plot by way of succession from their father Surat Singh. It was explained further that Surat Singh, their father had partitioned the disputed plot among the defendants and thereafter, they had raised construction thereon. Dismissal of the suit of the plaintiff was sought. Whereas a joint written statement had been filed by defendants No.1 and 3 to 5, a separate written statement had come from defendant No.2 but pleas taken by him also coincide with those taken by the other defendants.

4. For adjudication of rival claims of the parties, following issues were framed by the lower court on 26.7.2004:

1. Whether the plaintiff is owner in possession of the disputed plot as mentioned in para No.1 of the plaint? OPP
2. Whether the plaintiff is entitled to the relief of injunction? OPP
3. Whether the plaintiff has no cause of action to file the present suit? OPD
4. Whether the suit is not maintainable in the present form?
5. Whether the plaintiff is concealing the material facts from the court? OPD
6. Relief.

5. After receiving oral as well as documentary evidence from the parties and providing a hearing to their respective counsel, deciding all the issues in favour of the plaintiffs, their suit was decreed vide judgment and decree dated 6.11.2007 by the lower court. The defendants were held to be encroachers upon a particular portion of the disputed plot and were directed to restore the possession of the same to the plaintiffs after removing the encroachment.

6. Defendants Jagdish and legal heirs of Ramdhari filed appeal against the said judgment and decree. The first appellate court concurred with the findings of the lower court on all the aspects in dispute and vide its judgment and decree dated 22.12.2011, affirmed the findings of the lower court.

7. Against the concurrent findings of both the courts below, one of the defendants is in appeal whereas other defendants are proforma respondents in this regular second appeal. The plaintiffs are impleaded as respondents No.1 and 2 and are contesting this appeal tooth and nail.

8. The substantial questions of law needing determination by this Court in terms of Section 100 CPC, are as under:

1. Whether the impugned judgment and decree dated 22.12.2011 and 6.11.2007 passed by the learned courts below are illegal, erroneous, misconceived and unwarranted by the law and facts of the case?
2. Whether the findings recorded by the learned courts below on issues No.1 and 2 are altogether perverse to the oral as well as documentary evidence available on record?
3. Whether the learned courts below have erred in not recording any categorical finding on issues No.3 and 4?
4. Whether the learned lower appellate court has erred in not allowing the application for additional evidence under Order XLI Rule 27 CPC filed by the appellant when the said evidence has great bearing on the just and proper adjudication of the appeal as well as the main suit?
5. Whether the learned courts below have erred in relying upon the report of Local Commissioner, when the said report against the rule and instructions regarding demarcation of a property?

9. It is claimed that the plot in dispute is measuring 1 Kanal 5

Marlas and is duly depicted in revenue record. Details of revenue numbers and boundaries of the plot are not in dispute. It is, however, claimed by the appellants that on the date of filing of the suit, the plaintiff (now deceased and represented by respondents No.1 and 2 in this appeal) was not in possession of the suit property and hence, suit for permanent and mandatory injunction was not even maintainable. It is canvassed that the appellant and other proforma respondents were in established possession of the suit property. It is urged that the first appellate court had wrongly rejected their application under Order XLI Rule 27 CPC though such additional evidence was necessary to prove possession of the appellant-defendant.

10. Claim of the respondents-plaintiffs, on the other hand, is that when location of the respective plot is not disputed, the only aspect to be determined is as to whether the appellant and proforma-respondents were highly ambitious and in their empirical designs were spreading their tentacles as also domain and sweep over the plot of the plaintiffs?

11. When it is a definite case of the plaintiffs that plot of the defendants is located on western side of the disputed plot, the appellant-defendant and proforma-respondents have all through denied existence of any plot of the plaintiffs and have rather claimed the disputed plot to be theirs' own.

12. There is no dispute that one who asserts a fact is required to prove the same. Since plaintiff Om Parkash (now deceased and represented through his LRs) had invoked jurisdiction of this Court claiming ownership in possession of the disputed plot, he was required to prove the same. In repudiation, claim of the defendants was that the disputed plot was inherited by them from their father Surat Singh who had partitioned the same amongst the defendants and thereafter, the contesting defendants had come in possession of the same. When the evidence brought on record by the

appellant-defendant as also by the respondents-plaintiffs was appreciated by the lower court as well as by the first appellate court, both the courts had independently come to the conclusion that on western side of the plot of the plaintiff, existed the plot of the defendants. Plea of the defendants that they were owners of the plot in dispute by inheritance from their father Surat Singh, was disbelieved.

13. When statement of respondent-plaintiff Om Parkash (PW1) is appreciated, it emerges that his father Bhartu and Surat Singh, father of the defendants, were real brothers. It also becomes clear that houses of the parties were existing on their respective plots. His cross-examination is of great relevance. The defendants had put a suggestion to him that his father Bhartu had taken money in lieu of the land upon which the defendants had raised construction 15 years ago and that the defendants were using the said portion of land as they had installed a Kolhu thereon.

14. When perusal of statement of defendant Jagdish as DW1 is made in the interface of statement of plaintiff Om Parkash PW, there is assertion of defendant Jagdish that he had raised construction on the disputed portion of the plot much earlier to filing of the suit by the plaintiff. Report Ex.P5 of the Local Commissioner with explanatory site plan Ex.PC shows that these had been prepared by him by visiting the site and he had obtained signatures of the parties present. When the said report etc. were shown to Jagdish (DW1), he had feigned ignorance about visit of the Local Commissioner and had claimed the report and the site plan to be false and fabricated. Though defendant Jagdish finds sweeping and general support from Jai Narain (DW2), Jagmohan (DW3) and Smt. Sona Devi (DW4), there is no denial of the fact that everyone except the plaintiff had long back raised construction on their respective plots.

15. In such situation and attending circumstances, documentary

evidence of impeccable character only could have solved the real dispute. Though Azad Singh (PW2), a neighbour of the parties had orally explained that defendant Jagdish etc. had tried to encroach upon the disputed plot by raising construction but has stated that when resistance was offered by the plaintiff and neighbouring residents supporting the plaintiff, they had stopped raising construction but soon thereafter, they had made illegal encroachment over the disputed plot raising a structure with bricks and wooden batons. It was also explained by Azad Singh (PW2) that though Jagdish and defendant Ramdhari had raised construction on their plots, Ram Kumar had still not raised any construction. It is not disputed that plot in question is situated towards the north of the houses of the defendants and, in fact, rear wall of the house of the defendants is towards the disputed plot. Satish (PW4) has corroborated the independent version of neighbour Azad Singh (PW2), thus, giving unabating support to the case of the plaintiff.

16. Clinching evidence is, however, available in report Ex.P5, explanatory site plan of which is Ex.P6. Field Kanungo Ramesh Chander after having been appointed as a Local Commissioner at the instance of the appellant/defendant had visited the spot on 9.2.2004 and had effected demarcation at the spot. By comparing the respective plots of the parties, in his report Ex.P5 explaining vide site plan Ex.PC, Local Commissioner Field Kanungo Ramesh Chander (PW3) came to a definite finding that encroachment of 68 Sq. yards has been made on the plot of the plaintiff. Though he had not been delegated powers of identifying as to who had made the encroachment but by evaluating various facts and attending circumstances, he had come to the conclusion that such encroachment had emerged from Ramdhari and Jagdish.

17. Even when we examine the entire evidence, there does not remain any dispute that defendant Jagdish had constructed his house few

months earlier to the house constructed by defendant Ramdhari. Plot of defendant Ram Kumar was lying vacant. When Ram Kumar did not make any construction, he could not have made any encroachment. It is clear that only Jagdish and Ramdhari had overflowed from their plots towards the side of the plot of the plaintiff.

18. Satish (PW4) has also made it clear that such construction was raised by the defendants during pendency of the suit and even once earlier, they had made an attempt to raise construction but were dissuaded from doing so when plaintiff Om Parkash with his son Dharambir had approached him and they had gone together and had dissuaded the defendants from making encroachment over the plot of the plaintiff. He is specific that five months after filing the suit, the defendants had made encroachment by way of raising a wall. At the relevant time, he was member of the Panchayat and his mother was Sarpanch of the village. Thus, even his testimony is of great importance.

19. Contention of the counsel for the appellant-defendant that there is no case of encroachment as the plaintiff has not even been proved to be owner of the plot, is of no merit. Jamabandi for the year 1997-98 (Ex.P3) reveals that the plot in dispute is mentioned to be in the ownership and possession of the plaintiff. There is no rebuttal evidence to repudiate the presumption attached to Jamabandi Ex.P3.

20. Looking from another angle, this plea of revenue record having presumption of truth also falsifies the claim of the defendants that they are in possession of the disputed plot since 1971-72 or from the lifetime of their father Surat Singh. Their claim that the construction was raised during the time of their father Surat Singh, also stands demolished from the report Ex.P5 of the Local Commissioner wherein it is clearly evident that the wall raised by the defendants on the plot in dispute was of very recent origin and

was not constructed alongwith the other construction standing on the plot of the appellant/defendant.

21. Citing *Didar Singh Versus Mohinder Singh 2003(3) PLR 529*, a judgment of co-ordinate Bench of this Court, counsel for the appellant has urged that a simple suit for permanent injunction when the plaintiff was not in possession of the suit property, was not even maintainable.

22. Jamabandi Ex.P3 has clearly established the plaintiff to be owner in possession of the plot. Report Ex.P5 read in relation to the statements of Azad Singh (PW2) and Satish (PW4) also leaves no manner of doubt that the construction in the shape of the wall was raised during pendency of the suit by defendants Jagdish and Ramdhari and the plaint was accordingly amended by the plaintiff. Facts of the case in hand, thus, being entirely different, the aforesaid authority does not sustain and support the cause of the appellant-defendant.

23. Notice Ex.P7 of Local Commissioner Ramesh Chander (PW3) shows signatures of appellant Jagdish as also of Pawan son of Jagdish (defendant No.2) and Smt. Sona Devi widow of Ramdhari (defendant No.3) as also of Ram Kumar (defendant No.1) and of Dharambir son of plaintiff Om Parkash. Memo of presence (Ex.P8) has signatures of few other persons as well including Lamberdar Chander Bhan and Chowkidar Raghbir Singh. Statement of appellant Jagdish (DW1) feigning ignorance about visit of the Local Commissioner, thus, shows his conduct of being an untruthful witness.

24. When this matter is looked from yet another angle, report Ex.P5 with site plan Ex.P6, notice Ex.P7 and memo of presence Ex.P8 came on the judicial record, there was opportunity with the defendants to deny their presence as also to file objections against the said report of the Local Commissioner, but nothing such happened.

25. Even when we look at the oral evidence produced by the defendants, it transpires that they have their own axe to grind. Jagmohan Singh concededly is first cousin of the defendants and, thus, has a natural tendency to testify in their favour. Satbir Singh (DW5) is an accused in an FIR lodged by son of the plaintiff against him and his brother. He has, thus, reason to testify against the plaintiff.

26. Even if oral evidence is kept aside for a while and Jamabandi Ex.P3 is read in relation to report Ex.P5 of the Local Commissioner, there does not remain any dispute that plot in dispute belongs to the plaintiff and encroachment upon a portion of 68 Sq. yards on plot of the plaintiff bearing Khasra No.246/1/2/3 measuring 1 Kanal 5 Marlas has been made by Jagdish and Ramdhari on this plot of the plaintiff during pendency of the suit. Out of the oral evidence produced by the parties, testimony of Satish (PW4) who was then member of the Panchayat and is son of Sarpanch of the said Panchayat and that of Azad Singh (PW2), a neighbour, also is of clinching nature and supports the finding.

27. Counsel for the appellant referring to ***Mahabir and another Versus Surta and others 2006(1) PLR 490***, a judgment of co-ordinate Bench of this Court, has urged that when the Local Commissioner had not made compliance of Chapter 1-M of the High Court Rules and Orders, Volume 1, and had not fixed the Pucca points, report of the Local Commissioner was not reliable.

28. It has specifically been mentioned earlier that this report Ex.P5 with site plan Ex.P6 was neither disputed nor challenged. Rather, the Local Commissioner appeared in the witness box as PW3 and braved the cross-examination from the defendants. More the cross-examination became close and grilling on him, more brightly and finely emerged the case of the respondent-plaintiff. When no such plea had ever been raised in the courts

below, no interference on this count is permissible in the second appeal.

29. Sequelly, it is clear that the encroachment was made by appellant Jagdish and proforma respondent Ramdhari now represented through his LRs, now respondents No.4 to 6. Both the courts below had rightly concluded that encroachment to the extent of 68 Sq. yards has been made on the land of the plaintiff by these defendants and they were liable to handover vacant possession of such land after removing the encroachment. Hence, all the aforementioned five substantial questions of law are answered against the appellant-defendant and other proforma respondents.

30. Keeping in view the facts and circumstances as mentioned earlier, no ground to interfere with the concurrent findings recorded by the courts below, is made out. As such, affirming the impugned judgment and decree dated 6.11.2007 of the lower court as well as judgment and decree dated 22.12.2011 of the first appellate court, this regular second appeal, being devoid of any merit, is dismissed. Decree sheet be drawn.

February 21, 2015
'Yag Dutt'

(Dr. Bharat Bhushan Parsoon)
Judge

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes