

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No.1721 of 2013 (O&M)
Date of Decision: 29.04.2015

Mehar Singh

..... APPELLANTS

VERSUS

Rajinder Singh and another

..... RESPONDENTS

PRESENT: - Mr. H.R. Chaudhary, Advocate for
Mr. Sanjay Verma, Advocate
for the appellant.

CORAM: HON'BLE MR. JUSTICE SHEKHER DHAWAN

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

SHEKHER DHAWAN, J.

CM No.4565-C of 2013

Prayer has been made for condonation of delay of 50 days in filing the appeal.

In view of the grounds mentioned in the application, the same is allowed.

Delay of 50 days in filing the appeal is condoned.

RSA No.1721 of 2013

The present Regular Second Appeal is

challenge to the judgment and decree dated 13.10.2012 passed by the Additional District Judge, Gurgaon whereby the appeal against judgment and decree dated 18.08.2011 passed by Civil Judge (Jr. Divn.), Gurgaon was dismissed.

For convenience sake, hereinafter, reference to the parties is being made as per their status in the Civil Suit.

The detailed facts are already recapitulated in the judgments of the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that plaintiff Mehar Singh filed suit for declaration with consequential relief of permanent injunction on the ground that he is owner in possession of agricultural land bearing Khewat No.258, Rect. No.31, Kila No.11/1 & 11/2, measuring 27 karam x 27 karam and the remaining land of the above said killa numbers is owned and possessed by brother of the plaintiff. The plaintiff purchased 108/576 share in Rect. No.31, killa No.28 on the basis of sale deed and mutation was sanctioned in his name. A tube-well was installed in killa No.28 and the plaintiff was to carry the water from the *dol* falling in between killa Nos.1/1/2/2, 1/1/2/3, 21/3, 22, 20/1 and 19 shown in red colour in the site plan attached with the plaint. The *dol* had been left at the time of consolidation.

The same was being used by the plaintiff and other people as a passage and the plaintiff is also having easement right qua said passage. The defendants want to encroach upon the *dol* shown in red colour in the site plan by cutting the same and further want to add in their above land to which they have no right or title. Hence the suit before trial Court.

The defendants contested the suit and took the plea that the matter had already been decided between the parties vide judgment and decree passed in Civil Suit No.829/1991 and the same was confirmed upto this Court and as such, the present suit is barred by principle of *resjudicata*. On merits, the defendants took the plea that the plaintiff had no right to take water from the *dol*. The site plan is incorrect. The plaintiff concealed the material facts that they have their own tube-well in killa No.19 for the last many years. The tube well in question is lying dry for the last more than 25 years. The *dol* as well as tubewell was never used by the plaintiff. The suit is without any merit and the same be dismissed.

On these facts, the following issues framed and settled by the Court of first instance:

1. Whether the plaintiff is owner in possession of agricultural land being khewat No.258, rect. No.31, killa No.11/1 and 11/2 measuring 27 karam x 13 karam and 27 karam x 27 karam

shown in the site plan attached with the plaint?

OPP

2. Whether the remaining land of above said killa number is owned and possessed by the brother of the plaintiff? OPP

3. Whether the plaintiff is co-owner in joint possession of Gair mumkin Chah Kayami bearing rect. no.31 killa no.28? OPP

4. Whether the plaintiff has acrued right of easement over the doll shown in red colour in the site plan? OPP

5. Whether the plaintiff is entitled to the injunction as prayed for? OPP

6. Whether the suit of the plaintiff is not maintainable? OPD

7. Whether the matter in dispute has been finally heard and decided between the parties vide judgment and decree passed in civil suit No.829/91? OPD

8. Whether the suit is barred under Order 2 Rule 2 CPC? OPD

9. Whether the plaintiff is stopped from filing the present suit by his own act and conduct? OPD

10. Whether the plaintiff has not come to the court with clean hand? OPD

11. Whether the plaintiff has no locus-standi to file the present suit? OPD

12. Relief."

After appreciating the material and evidence available on file, the Court of first instance returned the finding that the suit of the plaintiff is without any merit and

the same was dismissed.

The plaintiff challenged the said judgment and decree by way of first appeal and remained un-successful. Hence the present appeal before this Court.

At the time of arguments, Mr. H.R. Chaudhary, learned counsel for the appellant took the plea that both the Courts below have not appreciated the controversy in question because the plaintiff is co-owner in joint possession of killa No.28. The Courts below returned the findings on issue No.1 in favour of the plaintiff. The findings of Courts below are also erroneous that the suit is barred as per principle of Section 11 of Code of Civil Procedure. As per shart-wazib-ul-arz which has got its evidentiary value as per Section 44 of the Punjab Land Revenue Act, the *dol* was left for the purpose of use of the land as passage but the Courts below never appreciated the said controversy which resulted into erroneous findings. So, the appeal be accepted and judgment and decree of both the Courts below be reversed and suit of the plaintiff be decreed.

Having considered the submissions made by counsel for the appellant and perusal of record, this Court is of the considered view that concurrent findings recorded by both the Courts below on facts do not call for any interference. Both the Courts below have minutely examined

the oral as well as documentary evidence. There is absolutely no substantial question of law involved in this case except appreciation of facts which has already been done by the Courts below.

The present Regular Second Appeal before this Court is not maintainable as the present appeal does not involve any substantial question of law. The Courts have recorded the finding that earlier judgment Ex.D-1 was between the same party and the subject matter was the same. The plaintiff had challenged that they had been using the *dol* for taking water and going to the fields. At that stage also, this Court while deciding the controversy had recorded specific observation that well situated in khasra No.31/28 was not in working condition in the recent past and the appellant (present plaintiff) had tubewell in khasra No.19. There being no substantial question of law that appeal was also dismissed.

In view of the above, the present appeal is without any merit and the same stands dismissed.

(SHEKHER DHAWAN)
JUDGE

April 29, 2015
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