

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

RSA No.3228 of 2015 (O&M).

Date of Decision: 10.12.2015.

Israil

....Appellant.

VERSUS

Idrish

....Respondent.

CORAM: HON'BLE MRS. JUSTICE SNEH PRASHAR.

1. Whether the judgment should be reported in the digest? Yes/No

2. Whether to be referred to the Reporter or not? Yes/No

Present: Mr. Ashish Gupta, Advocate for the appellant.

SNEH PRASHAR, J.

1. This was Regular Second Appeal filed by appellant-plaintiff Israil (hereinafter referred to as the “appellant”) impugning the judgment and decree dated 19.12.2014 passed in Civil Suit No.30 of 2010 by learned Additional Civil Judge (Senior Division), Mewat, dismissing the suit for permanent injunction filed by the appellant against respondent-defendant Idrish (hereinafter referred to as the “respondent”), which was upheld by the first appellate Court vide judgment and decree dated 10.04.2015.

2. The relevant facts are recapitulated hereunder:-

Appellant-Israil claimed to be owner-in-possession of residential plot situated within the abadi of village Ranika, Tehsil Nuh, District Mewat, shown with letters AEFD and red colour in the site plan

annexed with the plaint (hereinafter referred to as the “suit plot”). He alleged that respondent-Idrish, his brother, had earlier filed a civil suit claiming himself to be co-sharer in the suit plot. The matter was compromised and as per terms of the compromise the respondent withdrew the suit on 29.01.2004. Thereafter, he (appellant) constructed his residential house/structures over the suit plot. The respondent then started threatening to dispossess him and to raise construction over the suit plot illegally and forcibly, which necessitated filing of the suit for a permanent injunctive order.

3. The respondent appeared and contested the suit. In the written statement filed by him, besides raising legal preliminary objections with regard to maintainability of the suit, cause of action etc., he denied that the appellant is owner-in-possession of the suit plot or that he had compromised with the appellant and withdrew the earlier suit. According to him, a compromise had taken place between him and the appellant in the presence of respectables of the society and by virtue of the said compromise it was agreed that they both will be owners-in-possession of the suit plot to the extent of half share each. Denying all other averments and claim of the appellant, he prayed for dismissal of the suit.

4. On the rival contentions of the parties, following issues were framed:-

(1) Whether the plaintiff is entitled to a decree for declaration and injunction, if any? OPP.

(2) Whether the present suit is not maintainable in the present form? OPD.

(3) Whether the plaintiff has no cause of action to file the present suit? OPD.

(4) Whether the plaintiff has concealed true and material facts from the court? OPD.

(5) Relief.

5. Both the parties adduced evidence in support of their rival contentions.

6. Considering the ocular as well as documentary evidence led by the parties and the submissions made on their behalf, learned trial Court finding that the appellant and respondent are co-sharers in joint possession to the extent of half share each in the suit plot and that the appellant has an alternative efficacious remedy under Section 41(h) of the Specific Relief Act and the suit in the present form is not maintainable, dismissed the suit.

7. Aggrieved by the judgment and decree dated 19.12.2014 passed by learned trial Court, the appellant preferred an appeal which was dismissed by learned Additional District Judge, Mewat vide judgment and decree dated 10.04.2015.

8. Still not satisfied, the appellant has filed the instant Regular Second Appeal.

9. The submissions made by Mr. Ashish Gupta, learned counsel representing the appellant have been considered.

10. Learned counsel for the appellant argued that the appellant is an absolute owner-in-possession of the suit plot and has constructed a residential house on the same. The respondent filed civil suit No.113 of 2004 for possession by way of partition of the suit plot, but the same was

dismissed by the trial Court invoking the provisions of Order XVII Rule 3 of the Code of Civil Procedure (for short, “the Code”). Since the respondent was unable to lead any evidence to prove that he was a co-sharer in the suit plot, the suit filed by him was dismissed for want of evidence. The findings in that suit filed by him were not challenged by the respondent and have become final between the parties. The said important fact by itself is sufficient to establish that the appellant is absolute owner-in-possession of the suit plot and the respondent has no right, title or interest in the same. To support his argument that when the suit is dismissed under Order XVII Rule 3 of the Code, it must be taken to be a decision on merits of the matter, learned counsel relied upon **Bhagwan Dass (died) through LRs vs. Ramesh Kumar, 1999(4) R.C.R. (Civil) 640.**

11. There appears no force in the arguments of learned counsel for the appellant. As observed by learned first appellate Court, it is an admitted case of the appellant that he and the respondent had purchased the suit plot in equal shares by virtue of sale deed dated 10.06.1992 Ex.P7. His contention is that the respondent by virtue of a compromise arrived at between the parties and reduced into writing in the presence of the respectables during pendency of the previous suit, had relinquished his half share in the suit plot in his favour. However, what to say of proving the alleged compromise in due process of law even a copy of it was not placed on file. Except for his ocular testimony that the respondent had relinquished his half share in the suit plot, no substantive and reliable evidence could be produced by the appellant to prove that the respondent, who is none else but

his real brother, had relinquished his half share in the suit plot.

12. As far as the dismissal of earlier Civil Suit No.113 of 2004 for want of evidence under Order XVII Rule 3 of the Code is concerned, even if it is taken to be a decision on merits, the appellant can take no advantage of the same. By way of that suit, the respondent had sought partition of the suit plot but for want of evidence his suit was dismissed. The appellant may have taken the plea in that suit that he had become absolute owner of the suit plot by virtue of a compromise in the previous suit but admittedly no counter claim was filed by him. The dismissal of the suit of the respondent would not mean that there was finding of absolute ownership of the suit plot in favour of the appellant especially when as per sale deed dated 10.06.1992 Ex.P7 both the brothers are co-owners in equal shares of the suit plot. Moreso, in the present suit the appellant has claimed to have become absolute owner by way of some written compromise which he could not produce or prove. The concurrent findings of learned trial Court and learned first appellate Court that the appellant and the respondent are co-sharers to the extent of half share each and for that reason the appellant is not entitled to any kind of injunction against the respondent, needs no intervention.

There is no substantial question of law involved for decision in the case and the appeal being devoid of merit is dismissed.

(SNEH PRASHAR)
JUDGE

10.12.2015
jitender