

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

RSA No. 5042 of 2015 (O&M)

Date of Decision: September 28, 2015

Avtar Singh

....Appellant..

Versus

Bhagwan Das Chawla (since deceased) and others

...Respondents..

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

Present : Mr. Sumeet Goel, Advocate and
Mr. Samir Rathaur, Advocate,
for the appellant.

1. Whether Reporters of 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?

JASPAL SINGH, J.

This regular second appeal has been preferred by defendant No.1 feeling dissatisfied against judgment and decree dated May 28, 2015 passed by Id. Additional District Judge, Faridabad confirming judgment and decree dated March 26, 2012 passed by Id. Civil Judge, Junior Division, Faridabad whereby suit of plaintiff for mandatory injunction and as a consequential relief of permanent injunction was decreed.

2. Tersely put, case of plaintiffs-respondents is that they are owner in possession of Shop No. 12 measuring about 11'-3" X 17' situated at ground floor forming part of Bungalow-Plot No.R-8, NH-V, NIT Faridabad shown with red colour and marked with letters ABCD in the site plan which was purchased vide registered sale deed No. 4126 dated 30.06.1997 and same was purchased by plaintiff-Bhagwan Dass Chawla and his wife Smt. Sumitra Chawla. But appellant-defendant No.1 is representing himself as owner in possession of Shops No. 1 to 6 forming part of Bungalow-Plot No. 8 and defendant No.1 is owner of portion of plot No.8 which is situated on southern side. It is contended that there are thirteen shops on the ground floor forming part of plot No. R-8 shown in the site plan and plot measuring 499 Sq. Yds. Was purchased by M/s Sharma Construction Company through Sh. S.L. Deepak son of Sh. Ram Lal and M/s Avtar Singh and Sons through Avtar Singh vide registered sale deed bearing document No. 1130 dated 24.04.1987 and thereafter they raised construction of shops and carved out thirteen shops in the said portion of Bungalow plot No.R-8, NH-V, NIT Faridabad and left some portion in the middle i.e. 11' common passage and also constructed two toilets under the stair case on the ground floor. It is contended that there was a 10' common passage on the west of Shop No. 12 and the said passage was abutting to the side road after passing through the remaining portion of Bungalow plot No.R-8, NH-V, NIT faridabad owned by appellant-defendant

No.1. It is contended that 11' common passage as well as 10' common passage on the west of the shop No.12 and two toilets situated on the ground floor were meant for the common use of the owners/occupiers of Shops No. 1 to 13. It is alleged that defendant No.2 had put generator in 10' common passage illegally and unlawfully which is situated on the west of Shop No. 12 and further defendant No.2 has locked collapsible gate installed at point EF. It is alleged that defendant No.2 has done so with the collusion and connivance with appellant-defendant No.1. It is also alleged that appellant-defendant No.1 illegally, unlawfully and without getting the site plan sanctioned, raised construction in the form of a shop marked with letter GHFE which has closed the common passaged 10' which was abutting to the side road after passing through the remaining portion of Bungalow plot No.8 owned by defendant No.1. It is stated that defendant No.1 raised construction about 30 days back. It is alleged that appellant-defendant No.1 raised construction in violation of building by-law in collusion with the official of defendant No.3. It is contended that in the sale deed of plaintiff approached defendant No.3 when the said shop was being constructed by defendant No.1 but defendant No.3 has not taken any action against appellant-defendant No.1 and further defendant No.1 is trying to get the said shop marked with letter GHFE compounded and regularised for which defendants No.1 and 3 have got no right or authority to do so because the said shop is illegal and in case the said shop is

regularised, plaintiff would suffer irreparable loss and injury. It is stated that no suit between the parties or under who they claim litigation has been instituted or decided by the competent court of jurisdiction. However, it is stated that a civil suit titled as Smt. Shashi Bhatia vs. Deepak Colour Lab and others was filed by Smt. Shashi Bhatia and others which is pending in the court of Sh. Amarjit Singh, the then Id. Civil Judge (Junior Division) Faridabad and in the said suit and application under Order 39 rule 1 and 2 read with section 151 CPC was decided by the Court of Sh. Pushpender Yadav, the then learned Civil Judge (Jr. Division), Faridabad on 12.8.2005. It is averred that plaintiff has been requesting the defendants from time to time to remove the obstructions from the common passages and requested defendant No.1 to remove the illegal and unlawful construction of the shop marked with letters GFHE and not to create any kind of obstruction in the 10' common passage situated on the west of the shop of the plaintiff. It is stated that the plaintiff also requested defendant No.3 to stop the illegal construction of shop GFHE and to demolish the same but defendant No.3 failed to take any action. Hence, respondents-plaintiff filed suit for the relief of mandatory injunction.

3. The suit was resisted by defendants No. 1 and 2 by filing a joint written statement raising preliminary objections *inter alia* on the grounds that suit is not maintainable; that suit is malafide; that suit has been filed at the instance and behest of Smt. Shashi Bhatia;

that suit is bad for non-joinder and mis-joinder of necessary parties, that suit is barred by time. It is averred that plaintiff has no locus-standi and cause of action to file the suit; that plaintiff is stopped by his own act and conduct, omission and commission, acquiescence and waiver. It is averred that allegations made by plaintiff are wrong and the alleged site plan is wrong and incorrect and site plan filed by defendants along with written statement is true and correct. It is stated that defendant No.2 never represented at any point of time that he is owner of shops No. 1 to 6 forming part of the plot as alleged. It is admitted that defendant No.1 in his individual capacity was the owner in possession of adjoining southern portion of plot No.R-8 measuring 477 Sq. yds out of which Avtar Singh-defendant No.1 had sold portion 5-R/8 measuring 264 Sq. yds. to Sh. Parmod kaushik whereas middle portion of the said 5-R/8 measuring 499 Sq. yds is in the joint ownership and possession of M/s Avtar Singh & Company and M/s Sharma Construction company.

4. Defendant No.3 filed separate written statement raising preliminary objections as are raised by defendants No. 1 and 2.

5. From the pleadings of the parties, various issues were culled out by Id. trial court and both the parties were afforded ample opportunities to adduce and conclude their evidence. The plaintiffs and defendants led oral as well as documentary evidence in respect of their pleadings and subsequently closed their evidence.

6. After analyzing evidence available on file adduced by parties i.e. oral as well as documentary and hearing learned counsel for parties, suit of plaintiff was decreed as reflected in para 1 of this judgment.

7. Aggrieved against judgment and decree dated March 26, 2012 passed by Id. trial court, defendants No. 1 and 2 preferred an appeal but that was also dismissed by Id. Additional District Judge, Faridabad on May 28, 2015 affirming/upholding judgment and decree dated March 26, 2012 passed by Id. trial court.

8. Disheartened with dismissal of appeal by first appellate court, defendant No.1/appellant preferred instant appeal.

9. While assailing the impugned judgments and decrees passed by both the courts below, it has been ebulliently argued by learned counsel for the appellant that the same are absolutely against the evidence available on file and settled canons of law. Mis-appreciation of evidence has resulted into miscarriage of justice.

10. Both the courts below have failed to appreciate the fact that there is only central passage of 11 feet wide on which all the shops and toilets are located and there is no second passage of 10 feet wide at the back of a generator set room, which has been alleged by the respondent. Id. lower court has also grossly erred in relying upon the sale deed No.3781 dated 29.09.1972, which in fact, cannot be taken into consideration for want of its proper exhibit of

proof. In fact, the respondent forcibly intend to create passage to which they have no right.

11. Learned counsel for the appellant further contends that an application moved under Order 41 Rule 27 CPC seeking permission to lead additional evidence has also been wrongly dismissed by the lower appellate court. In fact, the documents sought to be produced on record are essential for the proper adjudication of the matter in controversy which in fact could not be proved despite diligence. Thus, the impugned judgments and decrees are not sustainable in the eyes of law and are liable to be set aside by way of acceptance of instant appeal.

12. After having heard learned counsel for the appellant, scrutinizing the impugned judgments and decrees and evaluating the submissions made by learned counsel for the appellant, this Court finds that there is no scope to interfere in the concurrent findings arrived at by both the courts below with regard to the existence of 10 feet wide passage at the disputed place.

13. Lets first take-up the application under Order 41 Rule 27 read with Section 151 CPC moved by the applicant before the lower appellate court, there is nothing on the record to suggest that as to what is the relevancy of this document. In fact, there is an admission of the appellant with regard to the existence of the passage in question. It is well settled that the admission is best proof and to prove the same no corroborating evidence is required. Moreover, the

documents sought to be placed on record were well within the knowledge of the appellant, which have not been produced on record despite having due diligence. Thus, it can be said without any hesitation that the application under Order 41 Rule 27 CPC has been rightly dismissed by the lower appellate court and the conclusion arrived at by the lower appellate court in this regard do not call for any interference by this Court.

14. So far as the impugned judgments and decrees are concerned, the same can be termed to be inconsonance with the evidence available on file and settled canons of law.

15. Here, it would be pertinent to mention that the sale deed Ex.P-1 placed on record by the plaintiff pertains to the year 1972 which clearly depicts the existence of passage. It further finds corroboration from the site plan Ex. PW-2/2. Not only this, there is a copy of plaint Ex. PW2/3 bearing No.595 dated 29.07.2009 filed by none else but the present appellant against the respondents as well as Indian Bank. In the site plan, it has been clearly admitted by the appellant that there exists a common passage of 45 feet x 10 feet, which is the same passage, which has been reflected in the sale deed Ex. P-1. Apart from it, the site plan annexed with the plaint Ex PW2/3 also depicts the same position i.e. the existence of the passage.

16. Thus, findings recorded by the Id. trial court qua the existence of the passage and affirmed by the lower appellate court

are based upon oral as well as documentary evidence, which can not be faulted with by this Court.

17. In the light of what has been discussed, this court does not find any merit in the instant petition. As such, the same is dismissed.

September 28, 2015
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(JASPAL SINGH)
JUDGE