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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.5866 of 2015 (O&M)

Date of Decision: 02.12.2015

Dalwinder Singh and others

.....Appellants

Vs

Baldev Singh

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. R.S. Bajaj, Advocate
for the appellants.

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?*

RAJ MOHAN SINGH, J.

[1]. Defendants are in second appeal against concurrent judgments and decrees passed by the Courts below in a suit for mandatory injunction.

[2]. Plaintiff filed suit for mandatory injunction, seeking directions to the defendants to remove wall AB Shown in the site plan and to restore the passage of 11 feet wide in *Khasra* No.205 as per *Jamabandi* for the year 2007-08 in the village. Consequential relief for permanent injunction has also been sought restraining the defendants from encroaching upon the passage in question.

[3]. Plaintiff alleged that he has constructed his house in *khasra* No.201 which faces the main road. Three *parnals* of his house fall in the scheme passage. The defendants are alleged to have residing in the house situated on the western side of the house of the plaintiff and they are in possession of property on the eastern side of the passage in question. The defendants intends to grab the scheme passage and they have illegally raised a wall AB as shown in the site plan by which they have closed the entrance of the passage.

[4]. Defendants contested the suit. They have denied the existence of any such passage. Factum of construction has been admitted, but the same is alleged to be in their own property. Defendants claimed their ownership over *khasra* Nos.203, 204/1 and 206 on the strength of sale deeds.

[5]. On the basis of pleadings of the parties, following issues were framed by the trial Court:-

- “1. *Whether the plaintiff is entitled to mandatory injunction as prayed for? OPP*
2. *Whether the plaintiff is entitled to relief of permanent injunction as prayed for?OPP*
3. *Whether the present suit is not maintainable in the present form? OPD*
4. *Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD*

5. *Whether the plaintiff is estopped by his own act and conduct from filing the present suit?
OPD*
6. *Whether the plaintiff has approached the court with clean hands and has suppressed facts from the Court? OPD*
7. *Relief.”*

[6]. Both the parties led their respective evidence on the aforesaid issues to prove their case.

[7]. Trial Court decreed the suit vide judgment and decree dated 19.09.2014 and the defendants remained unsuccessful before the lower Appellate Court which dismissed the appeal vide judgment and decree dated 09.09.2015.

[8]. Appellants have framed following questions of law in para No.4 of the grounds of appeal:-

- “i) Whether the Id. Courts below erred in law in ignoring the evidence on record and holding that these existed passage in Khasra No.205 even though no passage ever remained in existence at the spot?*
- ii) Whether suit filed by the respondent/plaintiff could have been decreed when admittedly appellants have raised construction over their own land?*
- iii) Whether suit filed by the respondent was liable to be dismissed because of non joinder of*

necessary parties as Gram Panchayat was not made party in the suit?

- iv) *Whether Id. Courts below failed to appreciate that evidence of the respondent was contrary to the site plan produced by him and hence liable to be ignored?*
- v) *Whether the Akas Shajra Ex.P-7 could have been relied by the Ld. Courts below when admittedly the Patwari who had prepared the same was not examined by the respondent?"*

[9]. I have considered the arguments advanced by learned counsel for the appellants.

[10]. There is no dispute about possession of the parties over *khasra* numbers according to their assertion i.e. *Khasra* Nos.201, 203 and 206. The factum of construction is also admitted fact by the defendants. The only difference is that they allege that the same has been done over their own property. In this way the only question which has to be determined is whether the alleged passage is in existence or not?

[11]. The defendants have projected that Gram Panchayat was necessary party in the suit as the plaintiff had no locus to file the suit and due to this discrepancy the suit of the plaintiff cannot be decreed.

[12]. So far as Panchayat being necessary party is concerned. The same is found to be without force. The *lis* is

between two private individuals in respect of street in question. In the absence of Gram Panchayat being a party to the *lis*, the same can be decided and decree can be passed on the basis of evidence on record. Even, if, Gram Panchayat would have been impleaded, the same would have established that in whose ownership *khasra* No.205 is recorded.

[13] Even in the absence of Gram Panchayat, it can be discerned from the *Jamabandi* Ex.P-9 that the *khasra* number 205 is under ownership of the Gram Panchayat and is recorded to be *Shareyam*. The *Jamabandi* being part of the revenue record is maintained by the Authority in public domain, the same has presumption of prove under Section 44 of Land Revenue Act. As per *Aks Shajra* Ex.P-7 and Ex.P-10, *khasra* No.205 is found to be in existence. The defendants are conspicuously silent about the existence of *khasra* No.205 in their pleadings and they have denied the existence of passage whereas it is so recorded in the *khasra* No.205.

[14]. The factum of existence of *khasra* No.205 is an admitted fact as per the testimonies of defendants, whereas it has been admitted by DWs that *khasra* No.205 is in existence and there is *firni* on the eastern side of *khasra* Nos.201, 205 and 207. *Aks Shajra* also corroborated the same. *Khasra* No.201 is found to be in possession of the plaintiff and *khasra*

No.206 is found to be in possession of the defendants. As per site plan Ex.D-3 *khasra* No.205 has been shown to be the house of the plaintiff, whereas in the written statement they have admitted that the house of the plaintiff has been constructed in *khasra* No.201.

[15]. The objection with regard to proving of *Aks Shajra* has been considered by the Courts below. The statement of PW-3 Harjinder Singh cannot dislodge the document *Aks Shajra* by way of any impeachment. The original record which was brought by the witness was not prepared in his presence, rather he brought the old record, therefore, any amount of testimony viz-a-viz. the existence of document in revenue record cannot be diluted by way of any statement to the effect that the document was not prepared in the presence of the witness. The witness was only the custodian of the record which he brought in the Court and the same was perused. Whatever was in existence in the record has to be taken on its face value. Question is not to prove the execution of document which has been brought by the witness as summoned record.

[16]. The statement of PW-3 cannot be read in favour of defendants in any manner, even if he had not seen the spot. The original record do not evolve such a mechanism as was being projected by the defendants before the Courts below.

Existence of passage in the revenue record in *khasra* No.205 in the name of Gram Panchayat as *Shareyam* has been found as a matter of fact. The revenue record has not been impeached which has the presumption in law. The said presumption has not been rebutted by way of any cogent evidence.

[17]. Three *parnals* of the house of the plaintiff are situated in the said passage. Existence of passage in *khasra* No.205 has not been rebutted by the defendants, nor they have demonstrated as to in what capacity they have raised construction in the passage *Shareyam* which has been recorded in the name of Gram Panchayat and defendants have no right to encroach upon the same.

[18]. In view of finding of fact recorded by both the Courts below, the suit of the plaintiff has been rightly decreed as public passage has been encroached upon by the defendants and they have been rightly directed to remove encroachment from public passage i.e. *Shareyam* .

[19]. The substantial questions of law as formulated in para no.4 of the grounds of appeal do not arise at all. Question No.(i) does not arise inasmuch as that *khasra* No.205 has been proved to be path *Shareyam* belonging to the Gram Panchayat. The revenue record carries presumption of truth and the same has not been rebutted by the defendants by way of cogent

evidence.

[20]. Question No.(ii) is a question of fact. The alleged construction has not been found in the land belonging to the defendants, rather *khasra* No.205 is found to have been encroached by the defendants which has been rightly ordered to be removed. Question No.(iii) cannot be answered in favour of the appellants. Factum of *khasra* No.205 being owned by the Gram Panchayat is an admitted fact as per revenue record, which has not been rebutted by any evidence by the defendants. Revenue record carries presumption of truth under Section 44 of the Land Revenue Act. *Khasra* No.205 has been proved to be owned by the Gram Panchayat with reference to *Jamabandi* and *Aks Shajra*.

[21]. It has been admitted by DWs in their cross-examination that *khasra* No.205 is in existence and there is *firni* on the eastern side of *khasra* Nos.201, 205, 206 and 207. Once the existence of *khasra* numbers is proved the factum of possession and ownership can only be seen from the revenue record. In view of aforesaid Gram Panchayat is not the necessary party because the *lis* is primarily between two private individuals in respect of *khasra* No.205 which is admittedly in existence and is proved to be owned by the Gram Panchayat.

[22]. *Khasra* No.205 has been shown as passage *Shareyam*,

therefore, when *lis* is between two private individuals, the Gram Panchayat is not the necessary party. Question No.(iv) does not arise as re-appreciation of evidence is not possible in second appeal.

[23]. Question No.(v) also has its explanatory meaning in terms of discussion recorded by both the Courts in the context of *Aks Shajra* Ex.P-7. Once the *Aks Shajra* has been produced as part of original record by the witness, the witness being not author of the same is inconsequential because the same record has to be brought by the person in whose custody the record is available. The said witness is not supposed to prove the execution of the document, therefore, the controversy as projected in this question does not arise at all.

[24]. Looking from any angle, the findings recorded by both the Courts below cannot be held to be the result of misreading of evidence in any manner or having suffered perversity of any type, therefore, this appeal is found to be devoid of merits and the same is accordingly dismissed.

December 02, 2015

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(RAJ MOHAN SINGH)
JUDGE