

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

RSA No.2367 of 2010
Date of decision : 25.01.2016

Ram Roop @ Ram Sarup

...Appellant

Versus

Balbir Singh and ors.

...Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Rakesh Nehra, Advocate for the appellant.

Mr. Sanjeev Kodan, Advocate for the respondents.

AMIT RAWAL, J. (Oral)

The appellant-plaintiff is aggrieved of the rejection of the relief vis-a-vis the permanent and mandatory injunction on the ground that despite having been proved the ownership, have not been able to prove the possession.

Mr. Rakesh Nehra, learned counsel appearing on behalf of appellant submits that suit was instituted seeking restraint order against the defendants not to encroached upon disputed portion shown as ABCD in the site plan (Ex. P-1). Initially, suit was instituted in respect of area shown as ADEF. The suit was dismissed on the ground that the plaintiff has not been

able to prove the encroachment. In the previous round of litigation, defendants had raised plea of adverse possession. Both the Courts below have misread and misconstrued the present site plan and formed erroneous findings that present suit also pertains to same very area whereas the encroached portion shown as AGHI is measuring 55 feet whereas previous one is 5 feet. Once, the trial Court found that appellant-plaintiff is owner and not found in possession, alternative relief of mandatory injunction was required to be passed but same has totally been ignored, thus, following substantial question of law arises for determination:-

1. Whether the Courts below in the facts and circumstances of the case could have granted the mandatory injunction as sought for?
2. Whether the judgment and decree of the Courts below declining the permanent and mandatory injunction is sustainable in the eyes of law?

Mr. Sanjeev Kodan, learned counsel appearing on behalf of respondent-defendants submits that on juxtaposition of both the site plan filed in the previous suit and as well as in the present suit where the suit property is same and rightly so, the relief qua the permanent injunction and mandatory injunction has been declined being barred by resjudicata. The plaintiff had an occasion to prove the possession on the aforementioned plot bearing khasra No.273 but did not do so. Accordingly, concurrent findings of fact should not be interfered with until and unless very strong and exceptional question of law arises for determination.

I have heard learned counsel for parties and appraised the paper

book.

Before the trial Court, the plaintiff produced on record Ex.P2 and P3 jamabandies to show that he is owner of the property. The trial Court formed the opinion that he was owner of the property but could not prove his possession. The report of the Local Commissioner unequivocally envisaged that respondents-defendants had made encroachment but the same was not looked into for want of any reasons.

Operative part of the findings rendered by the trial Court reads thus:-

“11. By filing the present suit plaintiff claims that he is owner in possession of khasra No.273, as shown in jamabandi Ex.P2 and Ex.P3. After going through the revenue record Ex.P2 and Ex.P3, this court is of the opinion that there is no dispute regarding ownership and possession of plot No.273 of the plaintiff. Now, it is to be seen by this court, whether disputed portion of land as shown in the red colour in the site plan Ex.P1 is part of plot No.273. It is the plaintiff who has to prove his case upon his own legs and he cannot be allowed to take benefits of the weaknesses of defendants. Admittedly, plaintiff stepped into the witness box as PW-1 and he admitted the plot in question is part of khasra No.1694, meaning thereby he himself not support his case that disputed portion is of khasra No.273. The possession of the defendants also admitted on behalf of the plaintiff as he testified on oath that defendants have raised construction of a room and boundary wall and that he has no knowledge when defendants raised their construction. This witness further testified on oath that previous litigation, which took place in the year 1999 regarding same land

was dismissed. Admittedly Daya Krishan also tried to appear before the court as PW-2 and tendered his affidavit Ex.PW2/A, but this witness not appeared before the court of his cross examination, so affidavit Ex.PW2/A cannot be read into evidence in case of the plaintiff story. The entire case of the plaintiff now stands on LC report, which was appointed by the court vide order dated 17.3.2006. Order dated 17.3.2006 duly reveals that Naib Tehsildar, Jhajjar was directed to demarcate Khasra No.273 and Khasra No.1694 as per Bandobast for the year 1879. LC report which is Ex.P8 also gone through carefully. Admittedly, LC not carried out the demarcation of the plot No.1694 and he simply reported that defendants have encroached upon plot No.273, when LC not carried out the demarcation of plot No.1694, then the report submitted by LC, which is Ex.P8 is not complete and is not admissible, specially when plaintiff in his cross examination admitted that disputed property falls under plot No. 1694. Plaintiff in his cross examination further admitted that he has no knowledge, when the defendants raised their construction over the disputed portion of land. Plaintiff himself is not supporting his case. When possession of the plaintiff over the land marked by letters AGHI as shown in the site plan Ex.P1 not proved on the case file, so no injunction can be granted in favour of the plaintiff and against the defendants.

12. Although, the plaintiff is owner in possession of plot No.273, but as plaintiff himself has failed to prove his ownership and possession over disputed portion of land as shown in red colour in the site plan, so this issue decided partly in favour of the plaintiff, that plaintiff is owner in possession of plot No.273. As plaintiff failed to prove his possession over portion of the land shown in red colour in the site plan, so no injunction can be granted in

favour of the plaintiff, so party issued decided in favour of the defendants and against the plaintiff.”

In view of the aforementioned findings, I am of the view that since plaintiff had sought alternative plea, Courts below ought to have granted mandatory injunction for removal of the construction/encroachment, if any, raised by the defendants as per the land shown in red colour AGHI.

Keeping in view the aforementioned facts, I am of the view that judgment and decree of both the Courts below declining the relief of mandatory injunction suffers from illegality and perversity and accordingly are set aside, in essence, trial Court has already declared the appellant-plaintiff as owner. Such findings are not interfered with. However, it was found that he was not in possession & as per the report of the Local Commissioner, decree of mandatory injunction is granted in favour of the appellant-plaintiff directing the defendants to handover the vacant possession and the portion shown as AGHI in case any construction raised thereon shall removed its malba and hand over the possession failing which appellant shall be at liberty to seek execution of judgment and decree.

Questions of law as noticed above are thus answered in favour of appellant and against the respondent-defendants.

Appeal stands allowed in abovesaid terms.

25.01.2016

pawan

**(AMIT RAWAL)
JUDGE**