

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.431 of 2010 (O&M)

Date of Decision: May 16th, 2016

Bhagat Singh & another

...Appellants

Versus

Dr.Ashok Kumar & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

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?

Present: Mr.N.S.Shekhawat, Advocate,
for the appellants.

None for the respondents.

AMIT RAWAL, J.

Appellant-defendant Nos.1 and 2 are aggrieved of the impugned judgment and decree rendered by the Lower Appellate Court, whereby suit seeking permanent injunction at the instance of the respondent-plaintiff, which was dismissed by the trial Court, has been decreed by the Lower Appellate Court.

Mr.N.S.Shekhawat, learned counsel appearing on behalf of the appellant-defendants submits that the plaintiff along with defendant No.3 instituted a suit seeking permanent injunction that they are owners in possession of land comprised in Khewat No.951, khatoni No.1133, killa No.170//10/2/13 land measuring 0 kanal 4 marla gair mumkin hospital, Khewat No.960, Khatoni No.1144, Killa No.170//102/1/2/2 gair mumkin hospital land measuring 0 kanal 3 marla, Khewat No.1132, khatoni

No.1336, kila No.170//11/1/2/1 0 kanal 4 marla gair mumkin hospital, 11/2/2/1 0 kanal 9 marla gair mumkin hospital and killa No.11/1//2/2/2 0 kanal 3 marla gair mumkin hospital and killa No.11/2/2/2/2 0 kanal 7 marla gair mumkin hospital, kita 4 land measuring 1 kanal 3 marla, situated in village Kanina-II Sub Tehsil Kanina, District Mahendergarh as per jamabandi for the year 1998-99 on the ground that appellant-defendant Nos.1 and 2 have no concern with the ownership and possession of the land as a hospital had been built over the land and in this process, left 3 feet land on the eastern side of the hospital for the purpose of ventilators and some land is lying vacant on the southern side.

The suit was contested on the ground that there was concealment of fact as the respondent-plaintiff had become owner of the land vide Civil Suit No.415 of 1995 titled as Ashok Kumar Versus Ashutosh etc.”, decided on 22.7.1995 and the averment made in the plaint was that plaintiff and proforma defendant had built surrounding wall upto DPC (Damp Proof Coating) level, thus, it is clear that the construction, aforementioned, has already been raised and, therefore, they were not left with any land in any side as sought to be injuncted. There were/are ventilators, jangla, door, Nala and patnala on the eastern side of the land detailed in the head note. Keeping in view the aforementioned facts, the trial court dismissed the suit.

The sale deed bearing No.3614 (Ex.PW2/A) of the respondent-plaintiff is dated 9.3.1993 and in view of the aforementioned decree, he got land measuring 1 kanal 10 marlas instead of 1 kanal 9 marlas, whereas the appellant-defendants purchased the land in 2001. The Lower Appellate Court has erroneously decreed the suit by taking into consideration

inadmissible evidence, both oral and documentary. The defendants, on the contrary, placed reliance upon the demarcation report Mark-DA dated 18.7.2002, wherein Naib Tehsildar, Kanina found 1½ feet + 8 inch land of the respondent-plaintiff, i.e., Dr.Ashok Kumar on the eastern side of the building of the hospital. Another demarcation report dated 27.12.2001 (Ex.DW5/B) was also relied upon, whereby the Local Commissioner found that there is no land of the plaintiff on the eastern side. In view of such fact, the Lower Appellate Court ought not to have decreed the suit. The Additional District Judge overlooked the evidence and misinterpreted the judgment and decree (Ex.P4 and Ex.P5), which only clarified that the respondent-plaintiff and proforma respondent continued to remain as owners in possession of the land purchased by them by raising a boundary wall on all the four sides upto the DPC level. The report of the Local Commissioner-PW3 could not have been taken into consideration as there are serious contradictions. The plaintiff, while appearing as PW6, stated that he had raised the construction on about 800 square yards and gave the dimensions, which are not in consonance with the aforementioned report. The plaintiff is owner of 907.5 square yards, whereas the construction is on 858.3/4 square yards. The Lower Appellate Court erroneously observed that DW3 to DW5 have failed to disclose the East-West width of their plot in spite of specific questions. In fact, the observations have been made by completely overlooking the dimensions as given by DW3 to DW5. DW-3 Basant Lal stated that the construction raised by respondent No.1-plaintiff was on his own plot. DW-4 Bhagat Singh also mentioned with regard to the exact dimensions of the property, thus, urges this Court to formulate the following substantial questions of law for determination by this Court:-

- 1) Whether the impugned judgment passed by the Ld.Addl. District Judge, which is based on misreading of evidence, is legally sustainable?
- 2) Whether the suit filed by the respondent No.1/plaintiff was barred by the principle of estoppel?
- 3) Whether an issue, onus of which is on the plaintiff can be decided by taking into consideration the evidence of the defendant?
- 4) Whether a Local Commissioner can be permitted to decide a controversy in a suit and whether reliance can be placed on such a report of the Local Commission?

There is no representation on behalf of the respondents. Some lawyer had appeared on behalf of respondent No.1 on previous dates, but when the case was called many times, no body had appeared and accordingly I proceeded to decide the appeal on merits as the same is of the year 2010.

The case set up by the respondent-plaintiff has already been noticed above. Demarcation report Mark DA rather totally demolishes the defence and stand of the appellant-defendants as they never made any application before the trial Court for demarcation of the land purchased by them to show that they are not in possession of extra land except the one purchased by them. In fact, as per the sale deed of defendants, they purchased the land measuring 1 kanal 13 marlas, which comes to 297 Sarsai.

During the proceedings before the Appellate Court, plaintiff moved an application for demarcation of his land and as well as of the appellant-defendants, but the defendants declined the demarcation of their land on the ground that an attempt was being made to fill up the lacuna.

From the testimony of DW3 to DW5, it has surfaced that the width of the

plot had not come forward. As per the demarcation report Ex.PW3/A, plaintiff is falling short of 48-3/4 square yards, whereas on the contrary, in the report Mark-DA, points G & H measure 37 karam (i.e., western side of the plot of the plaintiff), marked points G & B mention 37 karam (i.e., on the western side of the plot of the plaintiff), points G & B measure 7 karam (i.e. northern side of the land of the plaintiff), marked points B & D mention 40 kara (i.e. eastern side of the land of the plaintiff), therefore, the site plan has been prepared by him as per the measurement at the spot and the said report disclosed that Ashok Kumar plaintiff is having vacant land on the eastern side of his building measuring 8 inches from point A to B in the northern direction and 1-1/2 feet from point C to D in the southern direction. The Lower Appellate Court rightly declined the site plan Mark-DB prepared by the Kanungo, which is not in consonance with the demarcation report Mark-DA.

I have heard the learned counsel for the appellant-defendants and have gone through the paper book and of the view that there is no merit and substance in the pleas of Mr.Sekhawat, for, in the previous round of litigation, the plaintiff sought declaration in respect of land mentioned therein, i.e., with regard to 1 kanal 10 marlas. Plaintiff has specifically stated that he had raised the construction inside the boundary wall of eastern side which was upto the DPC level. The aforementioned admission, in my view, does not amount to giving away right in the area outside the said boundary wall. In the previous suit, no declaration was sought that Ashok Kumar plaintiff was having any piece of land outside the boundary wall, therefore, the findings rendered in the previous suit vis-a-vis the injunction being sought in the present suit would not be binding as the suit

was only with regard to declaration as there was shortage of area. As per the sale deed dated 19.3.1993, area was 1 kanal 9 marla and by virtue of the decree, deficiency in the area was recouped by one marla and the respondent-plaintiff has been declared owner of 1 kanal 10 marlas. The Lower Appellate Court relied upon the demarcation report Mark-DA. For the sake of brevity, relevant portion of the findings reads thus:-

"Defendants also filed demarcation report mark DA. As per this demarcation report of Kanoongo, he marked the point G & H measuring 37 karam (i.e. western side of the plot of plaintiff), marked point G & B measuring 37 karam (i.e. western side of the plot of plaintiff), marked point G & B measuring 7 karam (i.e. northern side of the land of plaintiff), marked point B & D 40 kara (i.e. eastern side of the land of plaintiff). He also prepared the site map as per measurement at the spot which is mark DB and has observed that Ashok Kumar is having vacant land on the eastern side of his building measuring 8 inches from point A to B in the northern direction and 1-1/2 feet from point C to D in the southern direction and the same is highlighted in red ink. Thereafter he gave the opinion that as per revenue record this strip of land running from north to south having dimensions of 8 inches in the eastern side and 1-1/2 feet in the southern side is negligible as per revenue record. In my view this site plan mark DB prepared by Kanoongo is incorrect on the fact of it as the northern side of the plot G to B was marked at a distance of 7 karam whereas it should be about 7.5 karam, being running diagonally. Further, even if I rely on this present report filed by defendants, even then it shows that plaintiff is having strip of land on the eastern side on his building which is in addition to the land as measured by Sh.DD Batra in his report Ex.PW3/B. This report mark DA and DB were tendered by counsel for the contesting defendants is their support at the time of closing their evidence. Though, the report mark DA alongwith site plan mark DB is

not duly proved by the defendants but the same can be read against the defendants being the document relied upon by the contesting defendants.”

DW-2 in the cross-examination admitted that the shop constructed on the northern side front portion of the plot is having width of about 36-1/2 feet. The sale deed in favour of the contesting respondents reveals that the dimension of the plot in the north and south is 6 karam only, i.e., 33 feet. In view of the aforementioned fact, the Lower Appellate Court, being the last Court of fact and law, has rightly arrived at a finding that the appellant-defendants have no right to encroach upon the vacant land of the plaintiff and proforma defendant and granted the injunction and the encroachment made, if any, has been ordered to be demolished.

Keeping in view of the aforementioned facts and circumstances, the findings rendered by the Lower Appellate Court are based upon the appreciation of oral and documentary evidence, which cannot be re-appreciated. The appellant-defendants have failed to make out a case for setting-aside of the judgment and decree rendered by the Lower Appellate Court.

There is no merit in the appeal. The same is accordingly dismissed.

May 16th, 2015
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(AMIT RAWAL)
JUDGE