

RSA No. 540 of 2010

-1-

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 540 of 2010

Date of Decision: 29.4.2016

Rajesh Kumar and others

---Appellants

vs.

Santra and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Amit Jain, Advocate for the appellants
Dr. Surya Parkash, Advocate
and Ms. Bhupinder Kaur, Advocate for respondent Nos. 1 and 2
Mr. M.K. Garg, Advocate for respondent No. 3

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

Rekha Mittal, J.

The present appeal has been directed against the consistent findings recorded by the Courts below whereby suit filed by the plaintiffs namely Sher Singh, Smt. Sarfi and Smt. Barfi, son and daughters of Bishna for possession of suit land was dismissed by the trial court vide judgment and decree dated 13.6.2008 and the appeal preferred by unsuccessful

plaintiffs did not find favour with the Court of Additional District Judge, Jind whereby findings recorded by the trial court have been affirmed.

The facts relevant for disposal of the present appeal are that the plaintiffs/appellants prayed for a decree of possession in regard to land measuring 13 marlas comprised in killa No. 27/1/3 after demolishing the house constructed thereon as well as damages for use and occupation for the last three years till delivery of possession with the averments that disputed land had fallen to their share in the partition proceedings which become final on 11.7.1995 by the Assistant Collector IInd Grade, Jind. Karan Singh defendant No. 3 sold the suit land to Smt. Santra respondent/defendant No. 1 vide sale deed No.1638 dated 12.10.1994. Possession of other killa numbers which had fallen to share of the plaintiffs in partition had been delivered to them but possession of area measuring 13 marlas in dispute could not be delivered as it was found in possession of Suresh Kumar respondent/defendant No. 2 (husband of Santra-defendant No. 1) who had raised construction of a house on the said area.

Defendant Nos. 1 and 2 filed their joint written statement raising preliminary objections inter alia maintainability, locus standi, cause

of action, estoppel and defendant No. 1 being a bona fide purchaser of land measuring 10 marlas, Killa Nos. 27/1 and 27/2 were gair mumkin land (non-agricultural) and was not assessed to land revenue as such only the Civil Court has jurisdiction to partition the same. The suit is stated to be bad for want of proper court fee as defendant No. 1 raised construction of a house on the area sold in her favour by defendant No. 3 in the year 1996 by spending Rs. 8 lakhs and the suit land situates within the municipal limits of Jind. All other material averments of the plaint have been denied with a prayer for dismissal of the suit.

Defendant No. 3 did not file any written statement and rather adopted the written statement filed by defendants No. 1 and 2.

The learned trial Court, on the basis of pleadings of the parties, framed the following issues for determination:-

- “1. Whether the plaintiffs are owners of the suit land?OPP
2. If issue No. 1 is proved, whether the plaintiffs are entitled to the possession of the suit land?OPP
3. Whether the suit of the plaintiffs is not maintainable in the present form?OPD

4. Whether the plaintiffs have no locus standi and cause of action to file the present suit?OPD
5. Whether the plaintiffs are estopped from filing the present suit by their own act and conduct?OPD
6. Whether the defendant No. 1 is a bonafide purchaser of suit land, if so ever?OPD
7. Whether the suit had not been properly valued for the purposes of jurisdiction and court fees?OPD
8. Relief.”

On due consideration of materials on record in the light of rival submissions made by counsel for the parties, issue Nos. 1 and 2 taken up jointly were answered in view of observations recorded in para 25 of the judgment and issue Nos. 3 to 5 were answered against the plaintiffs in view of findings on issue Nos. 1 and 2 and eventually it was held that suit of the plaintiffs qua possession and use and occupation being mesne profits cannot be decreed but to advance the substantial justice, a decree for damages to the tune of Rs. 31,000/- alongwith simple interest at the rate of 12% per annum with costs was passed in favour of the plaintiffs in equal

share and against defendant No. 3 alone. Simultaneously, suit against defendant Nos. 1 and 2 was ordered to be dismissed. The plaintiffs were directed to pay the court fee of Rs. 31,000/- at the rate of 12% per annum from 12.10.1995 within 20 days from the date of judgment failing which the suit shall be deemed to have been dismissed. As has been notice hereinbefore, the findings recorded by the trial court were affirmed by the Court of Appeal without any variance.

Counsel for the appellants has submitted that sale of suit land out of joint property of the plaintiffs, defendant No. 3 and other co-sharers during pendency of partition proceedings which were finally decided vide order dated 11.7.1995 passed by the Assistant Collector IIInd Grade, Jind can neither operate to cause prejudice to the rights of the appellants nor to enure benefit in favour of the respondents, therefore, the courts below have committed a serious error rather illegality in non-suiting claim of the appellants for recovery of possession of the suit land after demolition of the house illegally raised by defendant Nos. 1 and 2 on the basis of sale deed purported to be executed by defendant No. 3. Another submission made by counsel is that as the total area of killa No. 27/1 was 12 kanals 11 marlas

and only an area measuring three kanals out of said killa had fallen to share of the appellants in the partition proceedings, the appellants were not sure about identity of the said area rendering them hapless to raise an objection against raising of construction by defendant Nos. 1 and 2. In addition, it is submitted that the appellants filed an application for execution of the order of partition by delivery of possession in pursuance thereof but in those proceedings, a report was made by the Assistant Collector IIInd Grade, Jind in the year 1997 that possession of the land in question cannot be delivered as defendant Nos. 1 and 2 have already raised construction of their house upon the disputed area and for that reason, the appellants have to seek remedy before the civil court, in accordance with law. It is argued with vehemence that as respondent No. 3 sold the suit property knowing fully well about pendency of partition proceedings, his illegal action cannot be condoned merely because defendant Nos. 1 and 2 have raised construction of a house on the suit land as they cannot have any better rights than that of their vendor.

Counsel for the appellants, in the alternative, has argued that in case house constructed by defendant Nos. 1 and 2 is not allowed to be

demolished for delivery of possession of suit land to the appellants, the respondents may be directed to pay adequate compensation to them by taking into consideration the prevalent market value of the suit land. It is further argued that an amount of Rs. 31,000/- alongwith simple interest at the rate of 12% per annum allowed by the courts below is too adequate.

Another submission made by counsel is that in case the appeal does not find favour with this Court, the appellants may be left at liberty to file a separate suit for damages against the respondents in view of actual loss suffered by them as a result of loss of suit land.

Counsel for respondent Nos. 1 and 2, has supported the findings recorded by the Courts below with the submission that in view of the facts elicited during cross examination of Sher Singh, one of the plaintiffs that he had seen the defendants raising construction of house without any objection and further admitted that they have spent Rs. 8 to 10 lakhs to raise construction of the house, the Courts have rightly balanced equities by holding that the appellants cannot recover possession of the suit land but they are entitled to damages from defendant No. 3 as per assessment made by the trial court and duly affirmed in appeal. It is further

argued that defendant No. 1 purchased 10 marlas of land comprised khasra No. 27/1 with specific dimension and boundaries, detailed in the sale deed dated 12.10.1994 and raised construction of the house in a period of 1½ year and spent more than Rs. 8 lakhs and completed construction by the year 1996. Defendant No. 1 being the bona fide purchaser for consideration and without notice of pendency of partition proceedings cannot be blamed for raising construction. It is argued with vehemence that defendant No. 1 purchased 10 marlas of land equal to 306 square yards and defendant Nos. 1 and 2 have got no objection if a demarcation is conducted at the spot and in case they are found in possession of area more than 10 marlas, possession thereof may be delivered to the appellants.

Counsel for defendant No. 3 echoed the arguments advanced by counsel for respondent Nos. 1 and 2. However, he expressed his inability to seek any further instructions from his client in regard to his willingness to enhance the amount of damages awarded by the trial court. However, he has got no objection if permission is granted to the appellants to file a separate suit claiming damages in regard to the alleged loss caused to them due to a part of the area that has allegedly fallen to their share in partition

has been utilized by defendant Nos. 1 and 2.

I have heard counsel for the parties, perused the paper book and the original records of the courts below.

Counsel for the appellants has not disputed correctness of the facts noticed by the trial court and elicited in cross examination of Sher Singh, one of the plaintiffs examined as a witness. It is also not disputed that Smt. Santra defendant No. 1 purchased 10 marlas of land out of khasra No. 27/1 vide sale deed dated 12.10.1994 that was executed before partition order was passed on 11.7.1995. It has also been proved on record that in the year 1997, a report was made by revenue authorities that on a part of khasra No. 27/1, a house stands constructed by defendant Nos. 1 and 2. There is nothing on record suggestive of the fact that the plaintiffs ever raised an issue much less filed a suit for injunction restraining defendant Nos. 1 and 2 from raising construction of the house. Keeping in view conduct of the appellants coupled with the factum that defendant No. 1 raised construction of a house after purchase of land from one of the co-owners of the suit land, the courts below have rightly held that the appellants are estopped by their act and conduct to seek possession of the suit property. I would hasten to

add that the appellants have filed a suit for possession of land measuring 13 marlas but defendant Nos. 1 and 2 have claimed their possession over an area measuring 10 marlas only. The appellants did not pray for demarcation of the area underneath the house of defendant Nos. 1 and 2 in order to substantiate their plea that the house is in existence over an area measuring 13 marlas instead of 10 marlas. Not only this, counsel for the appellants did not respond to the submissions made by counsel for respondent Nos. 1 and 2 that demarcation may be conducted at the spot and in case defendant Nos. 1 and 2 are found in possession of area more than 10 marlas, they are ready to surrender its possession in favour of the appellants. Keeping in view the facts, circumstances of the case and conduct of the parties noticed by the Courts below, I do not find any error much less illegality in the consistent findings recorded by the Courts below that claim of the appellants for possession cannot be allowed and they are estopped by their act and conduct to recover possession by demolition of the house constructed by defendant Nos. 1 and 2 on the basis of sale made by one of the co-sharers namely Sh. Karan Singh.

This brings the Court to the issue with regard to entitlement of

damages owing to alleged loss suffered by the appellants. Counsel for respondent No.3 has not disputed that market value of the suit property i.e. land measuring 10 marlas being part of municipal area in Jind is much more than an amount of Rs. 31,000/- awarded by the courts below. Counsel for the respondents have further not disputed if the appellants are left at liberty to file a separate suit for asserting their claim qua damages for loss of area measuring 10 marlas. That being so, in place of remanding the matter to the trial court for deciding the question of damages on the basis of evidence to be adduced by the parties, it is expedient in the interest of justice that the appellants are left at liberty to take recourse to appropriate proceedings, in accordance with law, for claiming damages for the alleged loss suffered by them.

In view of what has been discussed hereinabove, the appeal is disposed of in the aforesaid terms. No order as to costs.

(Rekha Mittal)
Judge

29.4.2016
paramjit