

RSA No. 932 of 2010(O&M)

In the High Court of Punjab and Haryana at Chandigarh

RSA No. 932 of 2010(O&M)
Date of Decision: August 24th, 2016

Bimla Devi and another

---Appellants

vs.

Raj Rani and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. V.K.Jindal, Senior Advocate
with Mr. Akshay Jindal, Advocate
for the appellants

Mr. Sudhir Mittal, Advocate
for the respondents

Rekha Mittal, J.

The present appeal has been directed against consistent findings recorded by the Courts below whereby suit filed by the appellants

was dismissed vide judgment and decree dated 27.11.2007 passed by the Additional Civil Judge (Senior Division), Kurukshetra (hereinafter to be referred to as “the trial court”) and the findings recorded by the trial court have been affirmed in appeal by the District Judge, Kurukshetra.

The appellants/plaintiffs filed a suit for permanent injunction restraining the respondents/defendants from interfering in their peaceful possession over the property marked with letter 'GFEDCB' alongwith first floor marked as 'LMNK' shown in the attached site plan or demolishing any construction raised therein and further directing defendant Nos. 2 to 4 to restore the damaged lintel in its original condition.

The facts relevant for disposal of the present appeal are that the property marked with letters 'ABCD' shown in the site plan attached, situated on GT Road, Shahbad Markanda was acquired in the name of Girdhari Lal, defendant No. 1 in lieu of claim of properties left in Pakistan belonging to joint Hindu family consisting of plaintiff No. 2 (in fact plaintiff No. 1), defendant No.1 and their father. Defendant No. 1 being brother of plaintiff No. 2 agreed to sell portion marked with letters 'GFEDCB' alongwith roof of first floor of the entire building marked with letters

'ABCD' to plaintiff No. 1 for a total consideration of Rs. 2500/- in the year 1961 itself. The entire sale consideration was received by defendant No. 1 and agreed to execute the sale deed as and when required by plaintiff No. 1. He (defendant No. 1) also delivered possession to plaintiff No. 2 and since then he is in peaceful possession of the property, detailed hereinbefore. Defendant No. 1 was left with no right, title or interest in the suit property except a formal sale deed remained to be executed. In the year 1978, plaintiff No. 1 purchased portion marked 'IHDA' shown in blue colour in the site plan and thereafter the plaintiffs demolished the existing construction and constructed a residential house in portion marked 'OJHC'. They have also reconstructed the shop marked with letter 'GFOB' and 'IJEa'. Plaintiff No. 1 (in fact plaintiff No. 2) being in exclusive possession as prospective purchaser has also raised construction of residential house on the entire portion marked with letters 'IHCB' of the first floor which includes the portion purchased by plaintiff No. 1 (in fact plaintiff No.2) in the year 1978. The Market Committee, Shahbad (M) assessed the portion marked 'OJHC' as a separate unit bearing No. 647, Ward No. 13, Shahbad (M) in the name of plaintiff No. 1. Since staircase for going on the roof was only

in the said residential portion and there was no access on the roof from any other side as such, the roof was in their exclusive possession.

On 5.3.2000, defendant Nos. 2 to 4 had broken lintel portion of the roof from point X to Y as shown in the site plan, of the first floor illegally and forcibly with intention to take forcible possession of their (plaintiffs) house constructed on the first floor. They have also constructed a staircase in the portion marked with letters 'AEFG' secretly for forcible occupation of the first floor of the building.

Defendant No. 1 (Girdhari Lal) filed the written statement inter alia alleging that the plaintiffs have no cause of action, locus standi to file and maintain the suit. They have concealed the material facts from the Court and the suit is nothing but an abuse of process of law. The property which was acquired in his name in the year 1961 did not belong to Hindu joint family as alleged by the plaintiffs. He had deposited value (amount) of the property out of his own funds. He never entered into an agreement to sell the property to plaintiff No. 2 nor received any sale consideration nor possession thereof was delivered to plaintiff No. 2. He has sold shop marked 'AGFE' to defendant No. 2 vide registered sale deed dated 6.8.1999

alongwith first floor of this shop. Defendant No. 2 is in exclusive possession of the property since the date of its purchase.

Defendant Nos. 2 to 4 filed their joint written statement in line with the allegations raised in the written statement filed by defendant No.1. They have reiterated that defendant No. 2 has purchased the shop in dispute from defendant No. 1 alongwith chobara situated on the roof for a valuable consideration of Rs. 3 lakhs vide sale deed dated 6.8.1999 and possession thereof was delivered to him. Defendant No. 2 was in possession of the shop for the last more than 30 years as tenant and doing business of spare parts of electrical goods and submersible pumps. The defendants are in peaceful possession of the shop, roof as well as chobara constructed thereon. All other material averments of the plaint have been denied with a prayer for dismissal of the suit with costs.

After having heard counsel for the parties and bestowing its thoughtful consideration to the materials on record, the trial court determined material issues against the appellants and as a result, the suit was ordered to be dismissed.

The appeal preferred by the appellants did not find favour with

the District Judge, Kurukshetra and as a consequence, the findings recorded by the trial court were affirmed without any variance.

I have heard counsel for the parties and perused the records.

Counsel for the parties agree that dispute qua ownership of the suit property between the appellants and Girdhari Lal is pending determination in a separate suit. They are ad idem that the only dispute between the appellants and respondent Nos. 5 to 7 is qua chobara on the first floor of shop marked with letters 'AGFE'.

Counsel for the appellants has contended that there is no dispute between the parties that Avtar Singh, respondent No. 5 is in possession of ground floor of shop marked 'AGFE'. He has also not disputed that Avtar Singh was a tenant in the said shop for the past many years before it was sold by Sh. Girdhari Lal in favour of Avtar Singh in the year 1999 vide registered sale deed exhibited on record. He has submitted that as dispute with regard to ownership of the entire property including the shop in possession of Avtar Singh is pending adjudication in a separate suit, he does not press the issue qua competency or otherwise of Sh. Girdhari Lal to execute the sale deed in favour of Sh. Avtar Singh in regard to the

shop in question (ground floor) in the present lis. However, it has been vehemently argued that as Avtar Singh was never delivered possession of any of the chobaras existing above the three shops, one in occupation of Avtar Singh, the other in occupation of Smt. Bimla Devi (appellant No. 1) and the third with Sh. Raj Pal Bhasin (appellant No. 2), the courts below have committed a gross error rather illegality in non-suiting claim of the appellants for issuance of injunction restraining the defendants from interfering in peaceful possession of the appellants over the entire property except one shop on the ground floor, admittedly, in occupation of Sh. Avtar Singh. It is further argued that as the findings recorded by the courts below are the result of misreading of evidence and ignoring report of the local commission which was never challenged by the respondents, the judgments passed by the Courts below suffer from perversity and liable to be set aside.

To substantiate his contention, counsel has three fold submissions to make. In the sale deed executed in favour of Avtar Singh, there is a reference to chobara on the roof towards Western side measuring 10' x 10' purported to be sold alongwith shop measuring 43.33 square yards in favour of Sh. Avtar Singh. Alongwith the sale deed, a site plan was

appended but the said site plan pertains only to ground floor of shop No. 682, Ward No. 13, Shahbad (M). It is further argued that had there been any such chobara measuring 10' x 10' in existence over the roof of the shop towards Western side existing at the spot, there was no reason to append the site plan of first floor alongwith the sale deed. The second submission made by counsel is that as per the site plan Ex. P1, referred to in the plaint, on the first floor of three shops opening towards the GT Road, there is a courtyard (terrace) in the front and behind the courtyard there are two rooms with its measurements given in the site plan Ex. P1 but none of these rooms measures 10' x 10', sufficient to falsify and belie plea of the respondents that either any chobara measuring 10' x 10' is existing on the first floor of shop in occupation of respondent Avtar Singh or possession of the said chobara was delivered to Sh. Avtar Singh on the basis of sale deed dated 6.8.1999. (Ex. D-I). The next submission made by counsel is that a local commission was appointed by the Court and he submitted his report Ex. P-6 alongwith site plan Ex. P6/A of ground floor (bottom portion) and Ex. P6/B of first floor (top portion). The report prepared by the local commission was tendered into evidence without any objection by the respondents. The

respondents did not call upon the local commission to appear in the witness box for cross examination to challenge correctness of his report and the site plans. As per site plan Ex. P6/B, there are two rooms on the first floor above three shops and those rooms measure 13.'10" x 12'.5" and 12'.9"x 12'.5". It is further argued that doors of both the rooms open towards varandah. According to counsel, the site plan prepared by the local commission almost tally with the site plan Ex. P1, relied upon by the appellants. It is argued that version of the respondents in regard to existence of a room measuring 10' x 10' over the shop in possession of Avtar Singh gets demolished to its hilt on the basis of site plan Ex. P1 as well as the documents exhibit P6/A and P6/B.

Another submission made by counsel is that report of the local commission establishes beyond doubt that Avtar Singh and others did not have any access to the first floor over the shops and for that reason, they opened two holes in the lintel of the shop in their occupation and were constructing a staircase to have an access to the room on the first floor. In addition, it is submitted that the Courts have failed to appreciate facts elicited during cross examination of Avtar Singh, sufficient to prove that

Avtar Singh recently started constructing a staircase in his shop in order to have an access to the first floor through the holes made in the lintel, in regard whereof, the appellants claimed relief of mandatory injunction.

Counsel for the contesting respondents has supported the judgments passed by the Courts below with the submissions that consistent findings of fact recorded by the Courts below do not call for intervention in exercise of jurisdiction under Section 100 of the Code of Civil Procedure (in short “CPC”). It is further argued that as the appeal does not give rise to a substantial question of law, the same is liable to be dismissed.

The substantial question of law that arises for adjudication is, *“Whether the findings of the Courts below in regard to claim of the appellants qua their possession of the chobaras on the first floor of the three shops and mandatory injunction to close the holes in the lintel of the shop in occupation of Avtar Singh are the result of ignoring material evidence and misreading of evidence rendering it perverse?”*

As has been noticed hereinbefore, the precise dispute in the present lis is qua possession of the appellants or contesting respondents on the chobara existing on the roof of shop in occupation of Avtar Singh. The

local commission appointed by the Court submitted his report alongwith the site plans. Counsel for the respondents has not disputed that the respondents did not challenge the said report and site plans in any manner whatever. That being so, the report of the local commission as well as site plans Ex. P6/A and P6/B are to be accepted as correct. This apart, the site plan prepared by the local commission of the top portion almost tally with the site plan Ex. P1 relied upon by the appellants. So far as existence of only two rooms over the roof of three shops, i.e. middle one in occupation of Avtar Singh and one each in occupation of the appellants besides open terrace towards Western side of the two rooms/chobaras, the site plan Ex. P6/B totally demolishes plea of the respondents/defendants that a chobara measuring 10' x 10' is existing on the first floor of shop sold to Avtar Singh vide sale deed dated 6.8.1999. If no such chobara measuring 10' x 10' over roof of the shop (towards Western side) sold to Sh. Avtar Singh was existing, the whole story propounded by Avtar Singh that possession of chobara measuring 10' x 10' on the first floor of the shop was delivered to him at the time when sale deed dated 6.8.1999 was executed by Sh. Girdhari Lal in his favour falls to the ground like a pack of cards.

It is an admitted position of the case that there is no staircase to have an access to first floor of the property except staircase in the residential portion behind the shops, admittedly, in possession of the appellants. The plea of the respondent that he had been using the chobara on the first floor above his shop through ladder does not find corroboration from any source whatever.

Avtar Singh appeared in the witness box and tendered into evidence his affidavit DW2/A. A relevant extract from his affidavit in regard to the chobara on the first floor of the shop in his occupation reads as follows:-

“I made a store in the chobara after purchasing the shop in question and made staircase through the shop for going to chobara because earlier there was no staircase for going to chobara and had been going upstairs through a ladder made up of bamboo. I have been using the shop and chobara above the shop as an owner and has made a store in the chobara. I kept extra spare parts there. A chobara measuring 10' x 10' is existing above the shop.”

He has further deposed that malkana possession of the shop and possession of the chobara was received by him at the time of registry.

In his cross examination, he has stated, as follows:-

“It is correct that above three shops there are two chobaras. I do not remember if length and width of the chobara is the same or not. The chobara was constructed 7-8 years before I purchased the shop. I do not remember, if there was a varandah on the Western side of the chobara. There is no staircase for going to the roof of the chobara. There is a wall in the centre of construction above my shop. There are doors on both sides of the said wall. Site plans Ex. P6/A and P6/B were correctly made by the commission. There are stairs in the residential portion of the plaintiffs for going to the first floor.”

It has further been deposed that we have made two holes in the lintel of shop in question for making a staircase which are of half and one feet in width. The holes were made one or two days before

grant of stay in the suit and the same were closed by us after the stay.

The statement of Avtar Singh does not corroborate his plea that any chobara measuring 10' x 10' was in existence at the time of purchase of the shop on the ground floor. It is not his plea that subsequent to purchase of the shop, the appellants made any alteration or structural changes in the chobara(s) existing in the year 1999. As there is no chobara measuring 10' x 10' over the shop purchased by Avtar Singh or otherwise, there is no occasion for Girdhari Lal to deliver possession of any such chobara in favour of Sh. Avtar Singh. As Sh. Avtar Singh could not get possession of any such chobara, there was no question of his using such chobara for the purpose of storing spare parts of electrical goods etc. The plea of respondent No. 5 that he has been using the chobara for storing the electrical goods gets further falsified from the fact that there cannot be any exclusive possession of portion measuring 10' x 10' by the respondents as there is a wall in between two chobaras and doors of both the chobaras open towards varandah on the Western side that is in exclusive possession of the appellants. Further, report of the local commission recording that rooms

were vacant falsifies and belies plea of the respondents that chobara measuring 10' x 10' is used by them for storing electrical good. The Courts below have altogether failed to take into consideration material evidence on record sufficient to demolish claim of the respondents that they are in possession of chobara on the first floor of the shop purchased by Sh. Avtar Singh. On the other hand, the facts elicited during cross examination of Sh. Avtar Singh coupled with report of the local commission establishes plea of the appellants that Avtar Singh and his sons made two holes in the lintel of the middle shop, admittedly, in occupation of Avtar Singh with an intent to have an access to the first floor over the shops through the staircase which was under construction at the time when the local commission visited the spot on 22.3.2000 in the suit instituted on 8.3.2000. In this view of the matter, the findings recorded by the courts below with regard to entitlement of the appellants to seek permanent injunction restraining the defendants from interfering in possession of the first floor of the entire property particularly the chobaras on the first floor of the three shops depicted in the site plans and mandatory injunction directing the respondents to close two holes made in the lintel of the shop in possession of Avtar Singh are the

result of misreading of evidence and ignoring material evidence particularly the report submitted by the local commission. That being so, the aforesaid question is answered in favour of the appellants and against the contesting respondents.

For the foregoing reasons, the appeal is allowed, suit of the appellants/plaintiffs is decreed to the effect that the respondents are restrained from interfering in peaceful possession of the appellants over the chobaras on the first floor of the three shops out of which the middle shop (Ground floor) is in occupation of Avtar Singh. The respondents are further directed to close the two holes made in the lintel of the shop in occupation of Sh. Avtar Singh if the same have not already been closed. No order as to costs.

(Rekha Mittal)
Judge

August 24th, 2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No