

In the High Court of Punjab and Haryana at Chandigarh

**RSA No. 2461 of 2013 (O&M)
Date of Decision: February 08, 2016**

Harbans Kaur

... Appellant

Versus

Gurbax Singh and others

... Respondents

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH
DHALIWAL**

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

Present: Mr. S.S. Salar, Advocate,
for the appellant.

Mr. Sham Lal Bhalla, Advocate,
for the respondents.

Paramjeet Singh Dhaliwal, J.

This regular second appeal has been preferred by the appellant against the judgment and decree dated 29.03.2012 passed by learned Civil Judge (Junior Division), Fatehgarh Sahib whereby the suit filed by the respondents/plaintiffs for declaration and mandatory injunction has been decreed, as well as, against the judgment and decree dated 11.01.2013 passed by learned Addl. District Judge, Fatehgarh Sahib, whereby the appeal preferred by the appellant has been dismissed.

For convenience sake, hereinafter parties will be referred to as they are arrayed in the Court of first instance.

The detailed facts are already recapitulated in the judgments of the Courts below and are not required to be reproduced. However, brief facts relevant for disposal of this second appeal are that plaintiffs filed a suit for declaration and mandatory injunction on the ground that plaintiffs and defendant are joint owners and in possession of the suit property, which has been used jointly for common purposes relating to agriculture. The agricultural land of both the parties is also adjoining the Taur/Well. Earlier, defendant threatened the plaintiffs to change the nature of the Taur/Well and to plough the same and also threatened to dispossess/oust the plaintiffs from the same. Due to the threat from defendant, plaintiffs preferred suit for permanent injunction bearing No. 184 dt. 17.8.2001 before the court of learned Addl. Civil Judge (Senior Division) Fatehgarh Sahib which was dismissed on 08.05.2003. Plaintiffs preferred an appeal against the said decree and judgment, which was allowed by learned Additional District Judge, Fatehgarh Sahib on 22.11.2004. Despite this fact, defendant willfully and intentionally violated the judgment and decree by way of ploughing the Taur/Well and changed the nature of the suit property. The revenue record also shows that the said suit property is Taur/Well known as "Bagewala Khuh". Plaintiffs requested the defendant to restore the Taur/Well but she refused. Hence, suit was filed.

Upon notice, defendant appeared and filed written statement taking preliminary objections regarding maintainability; act and conduct; locus standi, cause of action etc. On merits, it was averred that the alleged Taur had already been partitioned between the plaintiffs and husband of the defendant, and documents were also executed between them. Plaintiffs

have installed their electric motor in Khasra No. 17//23, thus, plaintiffs cannot raise the plea of joint owners as well as joint possession of the suit land and further use of the same for common purposes.

On the basis of the pleadings of the parties, the Court of first instance framed the following issues:-

- “1. Whether the plaintiffs are entitled to the decree for declaration as prayed for in the head note of the plaint? OPP*
- 2. Whether the plaintiffs are entitled to the decree for mandatory injunction as prayed in the head note of the plaint? OPP*
- 3. Whether the suit is liable to be stayed u/s 10 of the CPC? OPD*
- 4. Whether the suit is not maintainable in the present form? OPD*
- 5. Whether the plaintiffs are estopped by their own act and conduct to file the present suit? OPD*
- 6. Whether the plaintiffs have no locus standi or cause of action to file the present suit? OPD*
- 7. Whether the plaintiffs have concealed the true and material facts from this Court? OPD*
- 8. Whether the suit is time barred? OPD*
- 9. Relief.”*

The Court of first instance, after appreciating the evidence on record, decreed the suit vide judgment and decree dated 29.03.2012. Against that, defendant preferred an appeal, which has been dismissed by the lower appellate Court vide judgment and decree dated 11.01.2013. Hence, this second appeal.

I have heard learned counsel for the parties.

Learned counsel for the appellant has submitted that the

following substantial questions of law formulated in para no. 11 of grounds of appeal, arise for consideration in this second appeal:-

- “a) Whether present suit is maintainable when the plaintiffs have already a decree and it is executable?*
- b) Whether Section 112 of Punjab Land Revenue Act creates absolute bar partition of the lands described as Well/Taur?*
- c) Whether a suggestion made to a witness can be termed as admission?*
- d) Whether mark D can be seen so as to see the possession over the land in dispute when admittedly both the parties are in separate exclusive possession?*
- e) Whether without holding the Well to be in operation and being used by the plaintiffs, a decree can be passed for its restoration even by ignoring the principles of irreparable loss and balance of convenience?*
- f) Whether when plaintiffs have installed a separate tubewell in the land exclusively in their possession the Well is not in use, can the Taur be described as in common use?”*

Learned counsel for the appellant contended that the findings recorded by both the Courts below are against law, without appreciation of facts and not sustainable in the eyes of law. Learned counsel further contended that both the courts below have wrongly relied upon Section 112 of Punjab Land Revenue Act. Said section does not create absolute bar on partition. Therefore, the impugned judgments and decrees are liable to be set aside.

On the other hand, learned counsel for the respondents contended that both the courts below have rightly decreed the suit.

I have considered the contentions raised by learned counsel

for the parties and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded concurrent findings of fact. The findings of fact recorded by the lower appellate Court are as under:-

“17. In the light of above evidence brought by both the parties, it is not in dispute that the suit property admittedly was joint between the parties. Defendant/appellant taken the plea of partition on the basis of alleged document brought on record as mark D-2, but this document has neither been proved in accordance with law and nor all the co-sharers have participated in the alleged partition proceedings. Moreover this document mark D-2 has never reflected in the revenue record , therefore, such type of document does not carry any legal value.

18. Leaving aside the above aspect, plaintiffs brought jamabandis from Ex.P-4 to Ex.P-9 which are material documents and proves the fact that the suit property was in the shape of Well, which has been kept reserved for common purposes. The above documentary evidence also finds support and strength from the cross-examination of plaintiff, because defendant has put suggestion to this witness that Taur has been kept common purpose, which amounts to valuable indirect admission on the part of defendant/appellant. As such ocular evidence of the plaintiff also finds support and strength from the documentary evidence in the shape of jamabandi. Learned Lower Court has rightly given the observations that presumption of truth is also attached to this document, which has not been rebutted by defendant/appellant.

19. Now turning to stand of defendant, it has been revealed that defendant in her cross-examination admitted the

existence of well in the suit property. The matter does not ends here because she has further admitted the fact that she has already cultivated the suit property allegedly after partition, but this very appellant has failed to prove any legal partition on record. The matter does not ends here because no such partition has been reflected in the revenue record, as such in the absence of such material evidence, the same cannot be presumed in favour of defendant/appellant. Appellant also raised the objection in regard to the fact that land in khasra No.17//27 has been merged in the land in khasra No.17//23, but no evidence has been led by defendant to prove the same. Defendant during her cross-examination has made an other valuable admission that both the khasra numbers are different, though khasra No.17//27 has been left previously joint between the parties. As such learned Lower Court has rightly evaluated the evidence on record.

20. Plaintiffs have also brought copy of Misal Hakiat-cumjamabandi for the year 1958-59 EX.P1, Naksha Akas-latha EX.P2 and Naksha Musavi EX.P3. From the perusal of copy of Naksha Musavi EX.P3 and from the admitted facts, plaintiffs have successfully established the fact that the suit property is a Well. As such when plaintiffs have been able to establish the factum that the suit property is in the shape of Well, then defendant Harbans Kaur cannot change the nature of suit property illegally, which is not permissible in view of provision of section 112 of Punjab Land Revenue Act. Section 112(2) of Punjab Land Revenue Act lays down the principle that partition of well may not be permissible by the revenue official, which is likely to cause inconvenience to the co-sharer. In the present case when well has been ploughed by defendant/appellant, then it has also caused inconvenience to the plaintiffs and it would also be detrimental to the interest of other co-sharers in the suit property. As such in view of

statutory principle of law it is clear that site of well cannot be converted into exclusive use by changing its nature by other co-sharer, which would be detrimental to the other co-sharers. Site of well has been ear marked for a specific purpose during consolidation of holdings, but defendant admitted the fact that she has cultivated the same. As such this admission on the part of defendant/appellant proves the fact that she has also violated the protected rights of other cosharer including plaintiffs-respondents. As such the learned Lower Court has not committed any illegality pertaining to the legal position, therefore finding recorded by learned Lower Court on both these issues is reasoned one and logical one. As such the plea raised by Learned counsel for appellant in regard to previous institution of the suit, and objections under order 2 rule 2 CPC are found to be bereft of any merits, because both the suits are on different cause of action. Another contention raised by Learned counsel for appellant in regard to single old age widow lady is also found to be fallacious one, when she has violated the rights of other co-sharers. Moreover civil suit has to be decided on the basis of preponderance of probabilities, which lean in favour of plaintiffs-respondents and against the defendant/appellant. Consequently the learned court of First Instance rightly decided issues No.1 and 2 in favour of plaintiffs-respondents and against the defendant/appellant, which are hereby affirmed.”

Concurrent findings of fact have been recorded by both the Courts below. Findings recorded by the Courts below are based on documentary evidence. Learned counsel for the appellant could not show that the said findings are perverse or illegal or based on misreading, non-reading or mis-appreciation of the material evidence on record.

Consequently, said findings of fact do not warrant interference in second appeal. No question of law, much-less substantial question of law, as alleged, arises for adjudication in this second appeal.

No other point has been urged.

Dismissed.

February 08, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge