IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 17.08.2016
RSA No.4183 of 2016

Joginder Singh ... Appellant

Vs.

Sarwan and another ... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

Present:- Mr. Gautam Kaile, Advocate
for the appellant.

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Amol Rattan Singh, J.

This is the second appeal of the plaintiff who had filed a suit seeking a mandatory injunction against the defendants, that they be directed to vacate possession of the area/courtyard of the house of the plaintiff, allegedly covered by the defendant during an injunction order passed by the Court earlier in another suit.

The case of the plaintiff was that the suit property is situated in village Tamnoli, Tehsil Barara, District Ambala, where the plaintiff claimed to have been residing with his family, since 1995-96. It was alleged that the defendants were strangers to the property, of which the plaintiff was the owner in possession and that under “the garb of some forged and fabricated documents of an alleged exchange”, the defendants had been asserting their

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right over the land under the house of the plaintiff and wanted to dispossess him forcibly and illegally.

It was further alleged that the defendants, on 09.08.2009, had entered the house of the plaintiff with other men and had started demolishing the wall of the house and had tried to raise their own construction. When the plaintiff tried to stop them, he, his wife, his son and his sons' wife were beaten up.

It was further alleged that the defendants had constructed the wall through the courtyard of the plaintiff forcibly and illegally, despite the order of injunction earlier passed.

2. Upon notice issued to them, both the defendants appeared and filed a written statement in which, other than the usual preliminary objections raised, it was stated that the plaintiff was neither the owner nor in possession of the suit property and that the matter had already been settled vide a judgment and decree dated 14.09.2012.

It was further submitted that the suit property is a part of the Khasra No.60//11/1/2/2, situated at village Tamnoli, whereas the plaintiff was residing in village Gola. It was further stated that the mutation qua the suit land had been sanctioned in favour of the defendants and had been exchanged thereafter as per law.

The incident dated 09.08.2009 was wholly denied and it was pleaded that the defendants were in possession of the suit land as mortgagees and had every right to the fruits of their possession.

3. Upon the aforesaid pleadings, the following issues were framed by the learned Additional Civil Judge (Senior Division), Ambala:-

> "1. Whether the plaintiff is entitled to the decree of mandatory injunction as prayed for? OPP

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2. Whether the suit is not maintainable in the present form? OPD
3. Whether the present suit is barred by the principle of res-judicata? OPD
4. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD
5. Whether the plaintiff has no cause of action to file the present suit? OPD
6. Whether the plaintiff has not come to the court with clean hands and concealed true and material facts from the court? OPD
7. Relief."

By way of oral evidence, the plaintiff examined Shri Gagan Kohli, Advocate as PW1 and himself as PW2, other than tendering some documentary evidence.

Defendant No.1 examined himself as DW1 with defendant No.2 testifying as DW2. They further examined one Om Parkash as DW3 and Jang Singh as DW4.

They too tendered documentary evidence.

4. Having appraised the evidence, pleadings and arguments, the learned Civil Judge found that mutation No.935 had been entered in favour of the defendants, which was exhibited as Exs.D4 and D5. Further, two sale deeds executed in favour of the defendants, pertaining to Khasra No.60//11/1/2 were also relied upon by the defendants.

It was further found that in his cross-examination, the plaintiff had stated that though the suit land was a part of a Khasra number, he could not give the said Khasra number but gave the description of the land in question by way of dimensions and surrounding properties. This was taken as

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an adverse inference against the plaintiff by the Additional Civil Judge, as he found the description given by the plaintiff to be vague and indefinite, thereby holding that the suit property had not been identified properly by him.

It was further held that the plaintiff was a resident of village Gola and not of village Tamnoli which the defendants had proved by producing the voters' list of village Gola (as Ex.D6), in which the plaintiffs' name was found at Sr. No.178.

The testimony of the defendants as also of the other two witnesses they produced, in support of their stand that they were in possession over the plot, was also found creditworthy by that Court.

As regards the plaintiffs' testimony, it was further found by the Civil Judge that he had testified in cross-examination that he had purchased the land from Arjun Singh son of Mangat Ram but had failed to produce the copy of the sale deed in his favour, even though he undertook to do so during his cross-examination.

5. On the plea of the defendants that the suit was barred on the principle of *res judicata,* the issue already having been decided earlier by a judgment of the learned Civil Judge (Junior Division), Ambala, dated 14.09.2012, titled as Joginder Singh v. Sarwan, that issue was, however, decided against the defendants, in view of the fact that the certified copy in connection with that *lis,* that was placed on record as Ex.D7, was only an order passed on an application under Order 39 Rule 2-A CPC, seeking to initiate proceedings against the defendants for violation of the status quo order dated 06.02.2010.

Thus, it was held that the findings not having been passed in a

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civil suit determining the rights and liability of the parties, the present *lis* could not be held to be a subsequent suit, by which mandatory injunction was sought, necessitating such determination, and therefore, it could not be held to be barred on the principle of *res judicata.*

Eventually, though holding against the defendants with regard to the suit being barred, the stand of the plaintiff having been found to be not proved in his favour, the suit was dismissed by that Court.

6. In the first appeal filed by the plaintiff against the judgment of the learned Civil Judge, the learned Additional District Judge, noticed the facts and the evidence led before the Courts below and found that though Shri Gagan Kohli, Advocate had testified as PW1 to the effect that he was appointed as a Local Commissioner by the Court of the learned Civil Judge (Junior Division), in a previous litigation titled as Joginder Singh v. Arjun Singh, however during cross-examination, he deposed that he had not got the land identified either from a Patwari or from any revenue official, but had prepared his report, Ex.P5, simply on the basis of his own demarcation/assessment.

7. Alongwith the first appeal filed by the plaintiff against the aforesaid judgment, he also filed an application seeking permission to lead additional evidence in the form of agreements dated 27.02.1995 and 15.05.1995, which he stated that he inadvertently had not tendered by way of evidence before the trial Court, also because of the fact that the originals of the said agreements were lying in the Court of the Civil Judge (Junior Division), Ambala, in Civil Suit No.699 of 2009, titled Joginder Singh v. Arjun Singh, which was decided on 15.02.2011, i.e. during the pendency of the suit out of which this 2nd appeal arises.

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He also moved another application for demarcation of the suit land, i.e. plot measuring 1 kanal 6 marlas, by some Government Kanungo. In that application, he contended that he had purchased the land from the aforesaid Arjun Singh vide the aforesaid agreements dated 27.02.1995 and 15.05.1995, whereas the sale deeds relied upon by the defendants (Exs.D1 and D2), pertaining to Khasra No.60//11/1/2/2, were not accompanied by any site plan. It was further contended in the application that it was difficult to identify the property of the respondents and as such a proper demarcation was required.

8. The first appellate Court referred to the sale deeds pertaining to Khasra No.60//11/1/2/2, Exs.D1 and D2, dated 19.05.1995, and it found that defendant No.1, Sarwan Kumar, had moved an application for demarcation of the aforesaid Khasra number before the Naib Tehsildar, Sub-Tehsil Mullana, District Ambala, which application was proved as Ex.D3 and after the demarcation, Sarwan Kumar was found to be in possession of the land, which demarcation was carried out in the presence of the plaintiff, duly admitted by him in his cross-examination.

Consequently, the first appellate Court found no ground to entertain another application for demarcation of the suit land. As regards the certified copies of the agreements to sell, which the appellant-plaintiff sought to bring on record by way of additional evidence, firstly, it was found that they were not produced before the lower Court despite sufficient opportunities and in any case, photocopies thereof were already on record.

The Court also confirmed the finding of fact that the suit land was situated in the *Abadi Deh* at village Tamnoli, whereas the plaintiff is a resident of village Gola as per the voters' list and he failed to examine any

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person of village Tamnoli to substantiate that the suit land was the same as purchased by him from Arjun Singh, as claimed by him.

It was found by that Court that Civil Suit No.699 of 2009 filed by the plaintiff against Arjun Singh was partly decreed and in paragraph 12 of that judgment, it was held that the agreements to sell dated 27.02.1995 and 15.05.1995 did not create any title in favour of the plaintiff, since they were only agreements which were not registered.

It was further held that the judgment passed in that suit on 15.02.2011 was not binding upon the present respondents-defendants, as they were not parties to that *lis.*

9. Other than the above, it was held by the first appellate Court that firstly, the identity of the suit land had not been established by the appellant since he had not examined any photographer nor had he examined the author of the site plan relied upon by him and consequently, he had not been able to establish that the suit land had been encroached upon by the defendants.

In view of the above, the appeal was dismissed.

10. Before this Court, Mr. Gautam Kaile, learned counsel for the appellant, submitted that the Courts below wholly erred in not appreciating the fact that even if the appellant was a resident of a different village, that it did not debar him from owning other property in another village and therefore, since the identity of the property was in doubt, a demarcation report should have been called for from the revenue authorities.

As such, the defendants having encroached upon property specifically averred to by the appellant-plaintiff to be his own, the judgments of the Courts below deserve to be set aside.

11. Having considered the aforesaid arguments, though I agree with

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the learned counsel that both the Courts have held that the identity of the land could not be established by the plaintiff, however, it is seen that eventually what the Courts have held against the appellant-plaintiff is the fact that neither did he examine the person who had demarcated the site plan relied upon by him so as to give a chance of cross-examination of that draftsman to the defendants, nor had he produced any independent evidence that the suit property which he claimed was encroached upon by the defendants, was actually the same that he had allegedly purchased from Arjun Singh. In fact, he could not prove by any documentary evidence that the suit property was owned by him.

It is not denied that the earlier suit filed by the appellant against Arjun Singh was not decreed in toto in his favour, with a positive finding recorded therein that it was he who was the owner of the suit land. Thus, the defendants not being a party to that suit, any negative finding against Arjun Singh in the previous *lis,* cannot hold in favour of the appellant-plaintiff, against the respondents-defendants, without a specific positive finding in favour of the appellant herein, qua ownership of the suit property.

No doubt, learned counsel is correct to the extent that the suit land could have been demarcated again by accepting the application of the appellant before the lower appellate Court, but the learned Court below having found that a demarcation was duly carried out on the application of the first respondent herein (defendant No.1) to the revenue authorities, and such demarcation having been carried out in the presence of the plaintiff, I do not find any ground to interfere even with the rejection by that Court, of the application for a fresh demarcation.

12. Though I also agree with the learned counsel for the appellant

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that simply on account of the fact that the appellant-plaintiff was not found to be a permanent resident of village Tamnoli, that would not oust his claim for property in a different village, especially as even the respondents-defendants are not shown in the memo of parties to be the residents of village Tamnoli, however, more importantly, the appellant-plaintiff failed to prove his ownership of the suit property on the basis of any valid sale deed or other document executed in his favour.

12. Consequently, finding no ground to reverse the judgments of the Courts below, this appeal is found to be without merit and is dismissed *in limine,* with no order as to costs.

August 17, 2016 **(AMOL RATTAN SINGH)**
dinesh **JUDGE**

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