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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA-3277-2015 [O&M]

Date of Decision : January 7th, 2016

Fauja Singh

.... Appellant

Versus

Daljit Singh and others

.... Respondents

CORAM : HON'BLE MR. JUSTICE SHEKHER DHAWAN.

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.Inderjit Sharma, Advocate,
for the appellant.

SHEKHER DHAWAN, J.

Present Regular Second Appeal by Fauja Singh, [defendant No.1 before the trial Court] is directed against the judgment and decree dated 20.04.2015 passed by learned Additional District Judge, Gurdaspur whereby judgment and decree dated 22.4.2014 passed by Additional Civil Judge [Senior Division], Gurdaspur were set-aside.

Relevant facts for the purpose of decision of this appeal are, that Daljit Singh – plaintiff had filed a civil suit seeking decree of mandatory injunction directing the defendants to remove the encroachment made on

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rasta/land marked A-B-C-D and to remove the newly constructed wall at point BC and gate at point AB as shown in the site plan. It is the case of the plaintiff that he had purchased the suit land from defendant No.2 vide registered sale deed dated 2.1.2002 which is less than 1 Marla. The name of the plaintiff exists in the revenue record as 'owner'. Agricultural land of the plaintiff, which is in the name of his father, comprised in Khewat No. 7, khataui No. 7, Rect. No. 8, killa No. 21(8-0) is towards the eastern side of khasra No. 25/2. There was no passage to reach the agricultural land of the plaintiff. For that purpose, he purchased the land/rasta to visit his agricultural land of khasra No. 8R, 21 from the road side. Defendants constructed their residential houses in remaining part of killa No. 25/2. Defendant No.1 constructed 5 shops in his share adjoining the pucca road as shown in the site-plan. The entry of the house of defendants is from the road side. The land as shown marked ABCD i.e. 2X2 karams is exclusively owned by the plaintiff which is the only passage so as to reach the agricultural land from the road side. However, during the pendency of the suit, defendant No.1, in connivance with other defendants, blocked the rasta by constructing a wall at point CB. The construction was raised on 24.1.2009 during the night time. Plaintiff moved the application under Order XXIV Rule 9 CPC for appointment of a Local Commissioner. Defendants had no right, title or interest to do so. Defendants were requested to refrain from doing so, but to no effect.

The version of the defendants is that the plaintiff has no locus standi to file the suit and the suit for mandatory injunction is not maintainable. More so, the site plan is incorrect. On merits, the defendants had taken the plea that defendant No.1 along with his brother

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are owners of land measuring 4 kanals and they have already been in exclusive possession over the land as per their shares since 1998 on the basis of an oral partition. They had raised construction of boundary wall on their land as per their share and also constructed house over the land. The land in dispute is in exclusive ownership of defendant No.1. Remaining averments of the plaintiff were denied by defendant No.1.

As per defendants No. 2 and 3, the plaintiff purchased half marla of land from defendant No.2 vide sale deed dated 2.1.2002 and there was a recital in the sale deed that the land will remain part of thorough-fare. The gate and wall was already in existence before the present suit and defendant No.1 is the sole owner of the land in dispute and gate and wall were legally constructed. Remaining averments of the plaint were controverted and prayer was made for dismissal of the suit.

On these pleadings, parties led their respective evidence and the Court of first instance, after appreciating the evidence, dismissed the suit of the plaintiff vide judgment and decree dated 22.4.2014 of Additional Civil Judge [Senior Division], Gurdaspur.

Thereafter, the plaintiff preferred first appeal before learned Additional District Judge, Gurdaspur and the first appellate Court while reversing the findings recorded by the Court of first instance, accepted the appeal and set-aside the judgment and decree dated 22.4.2014, decreed the suit of the plaintiff vide judgment and decree dated 20.4.2015.

Being aggrieved of passing of judgment and decree dated 20.4.2015 of first Appellate Court, one of the the defendants, namely Fauja Singh, has preferred this Regular Second Appeal before this Court.

Learned counsel for the appellant-defendant No.1 submitted that

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the first Appellate Court totally mis-appreciated and mis-apprised the documents brought on the record. Sale deed [Ex. P1] and Site plan [Ex.P2] do not tally at all and do not depict the correct picture. The first Appellate Court even ignored the evidence of the parties including statement of plaintiff – Daljit Singh [PW-1] wherein he had admitted that Fauja Singh had constructed six shops in his share. Mehal Singh [PW-2] also made a statement that there are six shops at the spot but in the site plan [Ex.P2], there are only 5 shops.

Learned counsel for the appellant further submitted that the Court of first Instance wrongly formed the opinion that suit property marked ABCD which is 2x2 karams with the sole ownership of the plaintiff and is part of passage used as passage and the same was encroached by the defendants during the pendency of the case. Even demarcation report [Ex.P12] was never got conducted during the pendency of the suit. The said document could not be relied upon in a suit for mandatory injunction as the same was not duly proved and the findings recorded by the Court of first Appeal are liable to be set-aside.

Having considered the submissions made by learned counsel for the appellant, this Court is of the considered view that certain facts are not disputed that vide sale deed [Ex. P1], the land was purchased by the plaintiff. In the said sale deed, there was also a recital that the suit property is part of thorough-fare and no co-share shall raise construction over the said land. Plaintiff has been shown as co-sharer in the jamabandi for the year 2005-2006.

Court of first Instance while dismissing the suit had formed the opinion on the premise that the construction of shops stood proved on the

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file and the demarcation report [Ex.P12] was not relied upon.

In the case in hand, the Court of first Appeal has rightly observed that on the basis of documents, Ex. P2, P3, P4 and P12, the existence of passage has been proved. The documents came into existence during the pendency of earlier suit for permanent injunction. Application for appointment of Local Commissioner was filed and the report was received during those judicial proceedings. The demarcation was got done in the presence of the parties. Learned Court of first Appeal has rightly placed reliance upon the said documents because the demarcation report Ex. P12 was prepared in the presence of Fauja Singh, Mehal Singh and Harbhajan Singh including Patwari Sarwan Chand and the site plan was prepared by Halqa Kanungo.

The said report proved existence of passage of 2x2 karams. The demarcation report Ex.P12, dated 14.7.2008 confirmed that till that date, there was passage and no wall or gate was constructed. The Court of first Appeal rightly observed that this was mis-appreciation of evidence on the part of Court of first Instance which resulted into erroneous finding by the Court of first instance and as such, the Court of first Appeal rightly set-aside the said findings. The findings recorded by the Court of first Appeal are based on facts and evidence available on the file. The Court of first Appeal rightly observed that land marked ABCD measuring 2x2 karams was in exclusive ownership of the plaintiff and is part of passage as per the recital in the sale deed Ex. P1. The said land is to be used as passage only. However, the defendants had encroached upon the passage by raising Wall at point BC and erected gate AB and the said encroachment is to be removed by way of mandatory injunction. More so, the Court of first

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Appeal has appreciated the entire evidence available on the file and recorded the findings. The said findings are on facts only and no substantial question of law is involved in the present appeal and hence the present appeal is not maintainable in view of law laid down by Hon'ble Supreme Court in case **Santosh Hazari Vs. Purushottam Tiwai (Dead) by LRs., JT 2001(2) SC 407**. The present Regular Second Appeal stands dismissed *in limine* being without any merit.

(SHEKHER DHAWAN)
JUDGE

January 7th, 2016
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