

In the High Court of Punjab and Haryana at Chandigarh

**RSA No. 5063 of 2015 (O&M)
Date of Decision: February 08, 2016**

Kishan Chand

... Appellant

Versus

Umed 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. Virendra Rana, Advocate,
for the appellant.

Paramjeet Singh Dhaliwal, J.

CM-12102-C-2015

Allowed, as prayed for.

CM-12103-C-2015

Having heard learned counsel for the appellant and for the reasons recorded in the civil misc. application, same is allowed. Delay of 3 days in filing the appeal is condoned.

RSA No. 5063 of 2015

This regular second appeal has been preferred by the appellant against the judgment and decree dated 08.07.2014 passed by learned Civil Judge (Senior Division), Jhajjar whereby suit filed by the respondent Nos. 1 and 2/plaintiffs for possession has been decreed, as well as, against the judgment and decree dated 20.04.2015 passed by learned

Addl. District Judge, Jhajjar, whereby 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 possession of encroached portion of the land ABE as shown in red colour in the site plan attached with the plaint, which is part and parcel of the plot of Khasra No. 350 on the ground of which plaintiffs with other co-sharer are owners in possession of gair mumkin plot comprising in khewat No. 43, Khata no. 90, khasra no. 350, situated in abadi deh of village Khatiwas, Tehsil and District Jhajjar. In the month of August, 2002, defendant no.1 under pretext of raising construction over his own plot of khasra no. 349 encroached upon the portion of the plot of the plaintiffs and assured the plaintiffs that demarcation will be conducted and encroachment if found, will be removed. Later on, defendant no.1 got demarcated his plot and found encroachment over the portion ABE of plot of khasra no. 350. Plaintiffs asked the defendant to remove the encroachment, but he refused the same. Hence, suit was filed.

Upon notice, defendants appeared. Defendant no.1 filed a written statement taking preliminary objections regarding maintainability; locus standi; estoppel; limitation and non-joinder of necessary parties. On merits, it is averred that he has never encroached upon the portion ABE, rather, it is the part and parcel of plot of khasra no. 349. On 08.05.1996, an

agreement was executed between the defendants and the brother of the plaintiff. According to that agreement, a joint wall was got constructed on common expenses of the parties and the same wall is existing at the spot in question. The demarcation has wrongly been conducted and the same is not binding upon him. Defendant no.2 once appeared before the Court, but later on he failed to appear, therefore, ex parte proceedings were initiated against him.

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

- “1. *Whether the plaintiffs along with other co-sharer are owner in possessio of gair mumkin plot comprised in khewat no. 47, khata no. 90, khasra no. 350, situated in the abadi of village Khatiwas? OPP*
2. *Whether the defendants are owner in possession of plot no. 350, which is on the north side of the plot of plaintiffs? OPP*
3. *Whether the suit of the plaintiffs is not maintainable in present form? OPD*
4. *Whether the plaintiffs have no locus standi 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. *Relief.”*

The Court of first instance, after perusal of the evidence led by the parties, decreed the suit vide judgment and decree dated 08.07.2014. Against that, defendant no.1 preferred an appeal, which has been dismissed by the learned lower appellate Court vide judgment and decree dated 20.04.2015. Hence, this second appeal.

I have heard learned counsel for the appellant.

Learned counsel for the appellant has submitted that the following substantial questions of law formulated in para no.20 of grounds of appeal, arise for consideration in this second appeal:-

- “a) *Whether the judgments and decrees passed by the learned courts below in decreeing the suit filed by the plaintiffs/respondents are perverse the same being based on misreading and non-reading of the important evidence and thus are liable to be set aside?*
- b) *Whether the writing/agreement dated 08.05.1996, Ex.D1 entered/executed between the co-sharers is valid in the year 2009 i.e. when the civil suit was filed and the construction was raised in the year 2002, particularly the same was never challenged by any of the co-sharer or their legal heirs before any court of law?*
- c) *Whether the exchange of certain areas between the co-sharers relating to two plots i.e. plot no. 349 and 350 was rightly appreciated by both the learned courts below before decreeing the civil suit?*
- d) *Whether the civil suit, filed in the year 2009, for decree of possession of the alleged encroachment was maintainable after completion of the construction in the year 2002 especially when no objection was raised by any of the co-sharer, muchless by the plaintiffs/respondents during the course of construction in the year 2002 in view of the subsistence of the writing/agreement dated 8.5.1996, Ex.D1 between the co-sharers?*
- e) *Whether the civil suit can be decreed merely on the basis of the report of the local commissioner?”*

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. The judgments and decrees of

both the Courts below are based on conjectures and surmises. Therefore, the impugned judgments and decrees are liable to be set aside.

I have considered the contentions raised by learned counsel for the appellant and perused the record.

Both the Courts below, after appreciating the evidence on record, have recorded concurrent findings of fact. A finding has been recorded that defendant no.1 has encroached upon the portion ABE of the plot of khasra no. 350. In the demarcation report (Ex.P4), the local commissioner categorically mentioned that defendant no.1 has encroached towards northern side of plot of khasra no. 350. Defendants failed to submit any objection qua the local commissioner report, which is *per se* admissible.

Concurrent findings of fact have been recorded by both the Courts below. Findings recorded by the Courts below are based on oral as well as, 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 in limine.

February 08, 2016
vkd

[Paramjeet Singh Dhaliwal]
Judge