

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.6455 of 2014 (O&M)
Date of Decision: 10.08.2016

Joga Singh

.....Appellant

Vs

Harbans Singh

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. B.D. Sharma, Advocate for the appellant.

RAJ MOHAN SINGH, J.

[1]. Defendant is in second appeal against the concurrent judgments and decrees passed by the Courts below.

[2]. Plaintiff filed a suit for mandatory injunction to the effect that defendant be directed to restore the site as shown in red colour in the site plan comprised in khasra No.9//2/1/2 as per *jamabandi* for the year 2003-04 shown by words 'BIFE' situated within *abadi* of the village. Removal of the manure heaps was also sought by restoring the original position of the site in question. Consequential relief of permanent injunction was also sought seeking to restrain the defendant from raising any type of construction over the suit property.

[3]. Trial Court decreed the suit. Mandatory injunction was

granted and defendants were directed to restore the site shown in red colour i.e. 'BIFE' in the site plan in its original position by removing dher/manure heaps within stipulated period. However, the site was held to be the subject matter for final determination in a suit for partition between the parties. The Court did not return any finding as regards the nature of the suit property, whether the suit property 'BIFE' was a private passage or not. The defendants were restrained from raising construction over the suit property. The judgment and decree dated 19.04.2012 passed by Additional Civil Judge (Senior Division), Balachaur was affirmed by the lower Appellate Court vide judgment and decree dated 26.10.2013.

[4]. I have heard learned counsel for the appellant.

[5]. The property in question has not been partitioned so far. Perusal of site plan Ex.P1 would reveal that the house of the plaintiff is situated on the eastern side of the property shown by letters 'BIFE' in red colour. This property has an access to bricks paved street shown in yellow portion towards northern side of the defendant property. The suit property is situated in front of the property of the defendant-appellant.

[6]. Plaintiff PW-1 in his cross examination admitted that the disputed property is a common property as there is no actual partition effected between the parties. Parties are

co-sharers. In common parlance, this admission on the basis of plaintiff-PW 1 would give direct impression that a co-sharer cannot injunct other co-sharers in the absence of partition between the parties. The disputed property is situated in such a way that it provides connectivity to both the parties. There is a septic tank shown in blue colour between the property of the plaintiff and the suit land.

[7]. In a Civil Suit No.07 of 2006 filed by the defendant against plaintiff (Ex.P4), findings were recorded to the effect that the properties held by the parties were in their exclusive possession. Plaintiff in that suit i.e. Joga Singh (defendant-appellant hereinafter) admitted that the construction raised by him was without any partition. The findings recorded in the said suit were to the effect that the plaintiff concededly did not intend to raise construction over strip of land in question which was being used as a passage to his house. The proposed use of the strip was shown to be a passage. It was held in the order Ex.P8 passed by this Court that till partition of the land, plaintiff can use the portion purchased by him from Joga Singh's brother. The findings recorded by the trial Court were upheld up to this Court. The claim of defendant was rejected by the Court and therefore, he was not supposed to put any hindrance by putting any manure heap in the site marked 'BIFE' in the site plan, nor

the defendant was supposed to raise any construction over the said strip. Plaintiff may be a co-sharer and there may not be a partition, but so far as strip is concerned, the same cannot be usurped by either of the party exclusively.

[8]. In the earlier litigation, the stand of the present defendant being plaintiff was vindicated and the judgment and decree of the trial Court was upheld up to this Court. The stand of the plaintiff in present litigation would not deny any right of co-sharer more particularly the defendant viz-a-viz the suit land shown in red colour by letters 'BIFE'. Defendant is also not supposed to create any hindrance in free passage of the plaintiff in the suit property. Plaintiff nowhere proposed to raise any construction over the strip in question, rather his claim is for a free passage from the property in question. On the other hand, the defendant has been found to be involved in creating hurdle in free passage by putting manure heaps in the property. Such a behaviour is against the spirit of concept of co-sharership, where all the co-sharers are free to use the property till such time the same is partitioned by metes and bounds. Act of one of the co-sharer cannot be utilized to oust the other co-sharer. Admittedly, parties are co-sharers to the suit property. None of the parties are in exclusive possession over any part of the suit property. No party can claim exclusive use of the portion 'BIFE'

shown in red colour, nor can usurp the said portion for his exclusive use. Since dher/heaps of manure were found at the instance of the defendant, therefore, defendant was obligated to remove the same.

[9]. In my considered opinion, such an observation by the Courts below and findings recorded on the basis of evidence on record cannot be held to be the result of misreading of evidence or having suffered with any perversity. Site marked by 'BIFE' is claimed to be a passage over which no construction has been proposed by the plaintiff. At this juncture, no such finding can be recorded that the suit land is a private passage. It all depends upon the facts and circumstances which would borne on record when ultimate partition would be recorded between the parties. The title to the property viz-a-viz the property a private property or a common property would be gone into in an appropriate proceeding. Evidently, the parties have not resorted to the partition so far. The nature of property would be decided by the competent Court in the suit for partition. Till such time none of the party shall have any right to raise any construction over the suit property, nor shall create any hindrance to the detrimental to the right of user by any of the co-sharer. The septic tank in existence would not be damaged and shall continue to operate till partition between the parties.

[10]. The Courts below were justified in directing the defendant to restore the site in question to its original position and final status between the parties would be decided in appropriate proceedings. The nature of property would also be gone into by the competent Court, whether the same is private passage or not.

[11]. In considered opinion of this Court, the findings recorded by the Courts below are based on correct appreciation of evidence and cannot be faulted with in Regular Second Appeal. No questions of law much less substantial questions of law are involved for consideration of this Court. The questions of law as framed by the appellant in grounds of appeal do not arise for consideration inasmuch as that the concept of co-sharership has been explained in respect of suit land. The questions No.2 and 4 are pure questions of facts. Since the findings have been recorded on the basis of previous litigation, therefore, question No.3 does not arise at all. Overall assessment of record would reveal that the Courts below have followed a correct and viable legal course to preserve the property for common use of the parties till such time the land is partitioned amongst the co-sharers. The suit land has been preserved and the defendant has been rightly directed to remove hurdle from the passage so as to make it free for use of the co-shares till civil rights of the

parties are determined by the competent Court. Finding no substance in the appeal, the same is hereby dismissed.

10.08.2016
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No