

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No.3974 of 2016 (O&M)

Date of Decision:08.11.2017.

Natha Singh and others

.....Appellants

Versus

Gurjant Singh

.....Respondent

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

**Present: Mr. Rajan Bansal, Advocate
for the appellants-defendants.**

AVNEESH JHINGAN, J.

The present regular second appeal is at behest of the defendants being aggrieved of the suit of the plaintiff being decreed by the learned trial Court and the decree being upheld by the learned First Appellate Court.

The parties for the sake of convenience are being referred to as per their status in the original suit.

The plaintiff filed a suit for permanent injunction to the effect that he has exclusive ownership and possession of the suit property detailed in the plaint and the defendants be restrained from constructing any water channel or from passing any water through it and further from interfering into the possession of the plaintiff over the said land and further restraining the defendants from uprooting the trees and causing damage to the crops of the plaintiff forcibly.

The facts as averred by the plaintiff are that the property detailed in the plaint was a joint property between the plaintiff and the defendants. The same was partitioned between the plaintiff and the defendants. As per the partition, the plaintiff had become owner in

possession of the suit land and mutation had already been sanctioned. It was further averred that the defendants were harassing the plaintiff and were bent upon to carve out a passage out of the land of the plaintiff for which a suit for permanent injunction was filed and status-quo order was passed. Thereafter, the defendants illegally and forcibly wanted to construct a water channel interfering in the cultivating possession of the plaintiff, destroying the crop of the plaintiff and to cut the trees standing in the suit land. The defendants had no right to do so and hence the suit was filed.

On notice defendants filed written statement.

Learned Trial Court framed the following issues:

1. Whether the plaintiff is entitled to the relief of permanent injunction?OPP
2. Whether the plaintiff has no cause of action and locus-standi to file the present suit?OPD
3. Whether the plaintiff is estopped by his own act and conduct?OPD
4. Whether the suit is not maintainable in the present form?OPD
5. Whether the plaintiff has not come to the court with clean hands and has concealed material facts?OPD
6. Whether this Court has no jurisdiction to try the present suit?OPD
7. Whether the present suit is infructuous?OPD
8. Relief.

In order to support the suit, the plaintiff himself stepped into the witness box as PW1 and sworn his affidavit Ex.PW1/A. Jamabandi for the year 2005-06 was exhibited as Ex.P1 and photographs were produced as Mark-A to Mark-C. Satpal Singh Patwari, deposed as PW2 and he brought the field book. Rajeev Sharma, photographer deposed as PW3 and proved the clicking of photographs.

On the other hand in order to rebut the evidence produced by the plaintiff, defendant Natha Singh himself stepped into the witness box as DW1. Pargat Singh(defendant No.4) appeared as DW2. The site plan issued by the Irrigation Department as per the order of Deputy Collector, Sangrur, Irrigation Division, Sangrur, file No.89-10/79 dated 11.4.1979 regarding the water course bearing No.RD-11115/R was exhibited as Ex.D1.

The learned trial Court after appreciating the facts and considering the evidence produced, decided issue No.1 in favour of the plaintiff holding that no water course exists in the suit property and defendants have no right to construct the same forcibly.

Issues No.2 to 7 were decided against the defendants.

Learned trial Court decreed the suit vide its judgment and decree dated 11.8.2015.

Aggrieved of the judgment and decree passed by the learned Trial Court, the defendants filed the first appeal. The learned District Judge, Barnala, vide judgment and decree dated 6.2.2016, dismissed the appeal and upheld the judgment and decree passed by the learned trial Court.

Hence, the present regular second appeal.

It may be mentioned at this stage that along with the Regular Second Appeal, the defendants had moved an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as 'CPC') for placing on record Annexure-A2, i.e. the other site plan issued by the Irrigation Department which was issued on 16.6.2016.

It is important to note at this stage that there is no dispute in the present litigation regarding the ownership and possession of the land in dispute. There is no issue that earlier it was a joint property which was

partitioned. The only dispute is to the fact that "whether there is a water course existing through the land of the plaintiff to irrigate the land of the defendants or not?"

The plaintiff had denied any such water course but the defendants relied upon 1979 order of Deputy Commissioner Irrigation Division, Sangrur to state that there was a water course.

In order to decide the above said controversy it would be pertinent to note that the plaintiff relied upon PW2 Satpal Patwari. He had brought the field book to state that no water course exists in the suit land. But at the same time in his cross-examination he deposed that he is Halqa Patwari and not Patwari from Irrigation Department and the record of the Irrigation Department is not with him. He further stated that if any new water course was carved out after the consolidation then the same was not incorporated in the revenue record.

On the other hand, defendant No.1 had admitted in his statement that in an earlier suit he had suffered a statement that he would not carve passage through the land of plaintiff. He further admitted that he had cut trees of the plaintiff from the upper side. He further admitted that Ex.D1 on which he was heavily relying upon to show that there was a pucca water course, had not been proved by any official. His admission is there to the fact that water course was running through Khasra No. 3,7 and 8 up till 14 and not through Khasra No.14.

Defendant No.4 Pargat Singh, who appeared as DW2, had admitted that water course shown in Ex.D1 is upto Khasra No. 14 and no further.

Apart from the above stated statements, even if Ex.D1 is

perused, the water course is only abutting Khasra No.14 and not passing through it. The same is positioned in Aks Latha as Ex.P3. The dispute between the parties is with regard to Khasra No.445/14/1, where the water course exists. DW1 himself has admitted that the water course does not cross through the suit property but it shifts after touching khasra No.14. In such circumstance, the learned lower courts have rightly come to the conclusion that it has not been proved that there exists a water course through the suit property.

Learned counsel for the appellants-defendants candidly and fairly stated before this Court that he cannot have any grievance against decreeing of the suit as per the position shown in Ex.D1. His main reliance was on his application moved under Order 41 Rule 27 CPC that if Annexure-A2 now produced, is considered it will show a kacha water course going upto Khasra No.17, which is not there in Ex.D1.

At this belated stage, it would not be appropriate to allow the defendants to bring on record a new site plan so that the entire matter can be re-looked into.

It may be mentioned at this stage that suit was instituted in June 2012. After availing the remedies before the two Courts now in the third proceeding, an application has been moved for adducing additional evidence.

Order 41 Rule 27 is reproduced below:

"27. Production of additional evidence in Appellate

Court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been

admitted,or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or)

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

From the perusal of the above, it is evident that relevant is Rule 27 (1)(aa).

The requirements of Rule 27(1)(aa) are that the party has to establish that inspite of the due diligence such evidence was not within his knowledge or inspite of his exercising due diligence, the evidence could not be produced at the time when the decree appealed against was passed.

In the present case, none of the requirement is fulfilled, what to talk of due diligence, rather Ex.D1 was the document produced and relied upon by the defendants themselves.

They had not even bothered to get it proved by producing any official from the Irrigation Department. Now at this stage another copy of the site plan is being adduced as an additional evidence. Firstly the same cannot be relied upon as it is, without the same being proved. Secondly this site plan has been issued on 16.6.2016. The earlier site plan was issued on

change during these intervening eight years.

Hon'ble the Apex Court in **Lekhraj Bansal Vs. State of Rajasthan and another**, 2015 (4) SCC (Civil) 480, has held as under:

“7. The parties to an appeal shall not be entitled to produce additional evidence in the appellate court unless the conditions stipulated under Order 41 Rule 27 Code of Civil Procedure are satisfied. It is not the case of the Appellant that the trial court had refused to admit the said evidence which ought to have been admitted. It is also not the case of the Appellant that the said evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him during pendency of the suit before the trial court. On the other hand it is vehemently contended that the said evidence namely the document was filed but was omitted to be tendered in evidence and got exhibited in the suit. The lower appellate court elaborately considered the factual matrix and held that the Appellant has not satisfied any of the conditions stipulated under Order 41 Rule 27 and hence is not entitled to produce additional evidence. In our view the said finding has rightly been confirmed by the High Court.”

From the perusal of the above decision, it is evident that the additional evidence cannot be adduced in the regular second appeal as a matter of right. In such circumstance, the defendants cannot be permitted to adduce Annexure-A2 as additional evidence at this stage.

In the Regular Second Appeal five substantial questions of law had been framed which are reproduced as under:

(1) Whether the impugned judgments-decrees passed by

the ld.Courts below are illegal and perverse and run contrary to the oral as well as documentary evidence on the file and are a result of mis-reading and non-reading of material evidence and pleadings on the file?

(2)Whether plaintiff-respondent is entitled to any relief from the ld. Courts as he did not approach the ld. Courts with clean hands?

(3)Whether site plan issued by Irrigation Department which shows that Khal is in existence can be ignored?

(4)Whether any admission if any, contrary to documents can be taken into consideration?

(5)Whether any document which goes to the root of the decision of the case can be taken as additional evidence u/o 41 Rule 27 CPC at the stage of second appeal?

At the time of hearing of the appeal, learned counsel for the appellants-defendants had only pressed questions No.5 which has been dealt with.

No other argument was raised.

Considering the facts and circumstances of the case noted above, coupled with the reasons afore-mentioned, this Court is of the considered view that the present appeal is bereft of merit and without any substance, thus it must fail.

Resultantly, the instant Regular Second Appeal is dismissed, however, with no order as to costs.

(AVNEESH JHINGAN)
JUDGE

08.11.2017

reema

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No