

**HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT
CHANDIGARH**

RSA No.4643 of 2015 (O&M)

Date of decision:24.8.2017

Ram Kishan

...Appellant

Versus

Lala @ Virender Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr.R.S.Chauhan, Advocate for the appellant.

RAMESHWAR SINGH MALIK, J. (Oral)

Unsuccessful plaintiff is in the regular second appeal against the concurrent findings of facts recorded by both the learned courts below, whereby suit for possession was dismissed by the learned trial court, vide its impugned judgment and decree dated 26.7.2010 and his first appeal was also dismissed by the learned Additional District Judge, vide impugned judgment and decree dated 20.4.2013.

Brief facts of the case, as noticed by the learned first appellate court in para 2 of the impugned judgment, are that the plaintiff was owner in possession of land comprised in khasra no. 543//21(0-8) and 4/160 share, measuring 4 kanal 4 marla, situated in Ram Singh Colony, Hansi, District Hisar, by way of registered sale deed No. 1834 dated 12.12.1977 and he constructed a house thereon. However, defendant forcibly encroached upon some portion of the land measuring 1X48 square feet, which had been shown in red colour with letters ABCD in the site plan and included the same in his house during the construction of the house forcibly without any legal right. Plaintiff had requested the defendant

not to raise further construction over the suit land and deliver its vacant possession to him, but he remained adamant, which necessitated the present suit.

By way of present suit, plaintiff sought possession of the suit land and also to declare him owner in possession of land comprised in khasra No. 543//21(0-8) and 4/160 share, measuring 4 kanal 4 marla, situated in Ram Singh Colony, Hansi, District Hisar, by way of registered sale deed No. 1834 dated 12.12.1977 and also for issuance of mandate directing the defendant to deliver the vacant possession of suit land, which had been illegally encroached upon by him and to make the payment for use and occupation charges of the suit land.

Having been put to notice, defendant appeared and filed his contesting written statement, raising more than one preliminary objections. Plaintiff-appellant did not file any replication. On completion of pleadings of the parties, the learned trial Court framed the following issues:-

- i. Whether the plaintiff is entitled to the relief of possession as well as injunction with respect to the disputed land as prayed for by him on the grounds so mentioned in the plaint? OPP
- ii. Whether the plaintiff has no locus standi and cause of action to file the present suit ? OPD
- iii. Whether the suit is not maintainable ? OPD
- iv. Relief.

With a view to substantiate their respective stands taken, both the parties led their oral as well as documentary evidence. After hearing the learned counsel for the parties and going through the evidence brought on record, the learned trial Court came to the conclusion that the plaintiff has failed to prove his suit for possession. Accordingly, suit of the plaintiff was dismissed by the learned trial court, vide its impugned judgment and decree dated 26.7.2010. Feeling aggrieved, plaintiff filed his first appeal,

which also came to be dismissed by the learned first appellate court by passing the impugned judgment and decree dated 20.4.2013. Hence this regular second appeal, at the hands of unsuccessful plaintiff.

Heard learned counsel for the appellant.

It is a matter of record that defendant purchased a piece of land in the year 1970 and constructed a residential house thereon. After more than 7 years, plaintiff purchased the suit property vide sale-deed dated 12.12.1977 and he also raised construction thereon. It is also not in dispute that plaintiff earlier filed a suit for injunction vide Civil Suit No.230-C of 2002, which was dismissed by the learned court of competent jurisdiction, vide judgment and decree dated 27.11.2004 Ex.D2. Plaintiff filed his first appeal, which was also dismissed by the learned Additional District Judge, vide judgment and decree dated 31.10.2007 and the judgment dated 27.11.2004 Ex.D2 passed by the learned trial court attained finality against the plaintiff.

As per said judgment Ex.D2, plaintiff as well as defendant were found having separate but adjoining walls of their respective houses. It was further held that southern wall of the house of the plaintiff was not a common wall. Exactly the same issue is again being raked up by the plaintiff now by filing the suit for possession qua that very piece of land. Having said that, this Court feels no hesitation to conclude that both the learned courts were well within their jurisdiction to pass their respective impugned judgments and decrees and the same deserve to be upheld.

Under the peculiar fact situation obtaining on record of the case in hand, there cannot be any doubt that the relief of possession which is now being claimed by the plaintiff-appellant was very much available to him at

the time of filing his earlier suit in the year 2002. Earlier suit was against this very defendant-respondent qua this very property in question. In such a situation, provisions of law contained in Order 2 Rule 2 CPC would immediately be attracted against the plaintiff-appellant.

When confronted with the above-said factual as well as legal aspect of the matter, learned counsel for the appellant had no answer and rightly so, it being a matter of record. Under these undisputed facts and circumstances of the case, it can be safely concluded that both the learned courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be upheld, for this reasons also.

Before arriving at its judicious conclusion, the learned first appellate court rightly examined, considered and appreciated true facts of case as well as the evidence available on record, in correct perspective. The relevant and cogent findings recorded by the learned first appellate court in paras 13 and 14 of its impugned judgment, which deserve to be noticed here, read as under:-

“Stand of the plaintiff is that he is owner in possession of land comprised in khasra No. 543//21(0-8) and 4/160 share, measuring 4 kanal 4 marla, situated in Ram Singh Colony, Hansi, District Hisar, by way of registered sale deed dated 12.12.1977 and has constructed a house thereon and that defendant has forcibly encroached upon some portion of the land measuring 1X48 square feet by raising southern wall of his house. He has based his claim on the demarcation report Ex. P3 prepared by PW3 Gian Chand Sethi, retired Kanungo. However, the demarcation report Ex. P3 does not inspire confidence and is not acceptable. He has stated that on the application Ex. P1 moved by the plaintiff Ram Kishan before

Tehsildar, he was deputed to conduct the demarcation of the suit land and consequently on 27.3.2003, he had conducted the demarcation of the suit land and defendant was found to have encroached upon land measuring 1 X 49.5 sq. feet. However, during his cross-examination, he stated that defendant was not present at the spot at the time of conducting the demarcation. Though, PW3 stated that he had issued notice Ex. P2 to the parties, yet the notice Ex. P2 does not bear the signature of defendant, meaning thereby, the demarcation was conducted in the absence of defendant and without any notice to him. It seems that plaintiff in connivance with revenue authorities had clandestinely got conducted the demarcation of the suit land to create evidence. As such, the demarcation report Ex. P3, upon which plaintiff has based his claim, cannot be relief upon.

No doubt, plaintiff earlier had filed civil suit bearing No. 230-C of 2002 which was dismissed by the court of Sh. Lal Chand, the then Additional Civil Judge (Senior Division), Hansi, vide judgment and decree dated 27.11.2004 Ex. D2 and appeal filed against the judgment and decree was also dismissed by the court of Sh. S.K.Kaushik, the then learned Additional District Judge, Hisar, vide judgment and decree dated 31.10.2007, but a perusal of judgment Ex. D22 shows that plaintiff had filed that suit for injunction seeking to restrain the defendant from using the southern wall of his house as a common wall and no relief qua possession was sought nor any issue in this regard was framed. However, learned Trial Court committed a grave illegality by holding that the relief which has been claimed by the plaintiff in the present suit has already been declined to him even upto learned Appellate Court. It is well settled that issue on res-judicata is a mixed question of fact and law and since no plea was raised in the previous suit with regard to possession and no issue was framed in this regard, any observation in the previous judgment cannot operate as res-judicata as matter in issue had not been finally decided by the court. As such,

finding of learned Trial Court to this extent is not sustainable. However, a perusal of judgment Ex. D2 reveals that it was observed by the Court that houses of plaintiff and defendant are adjoining to each other and both the parties have separate walls of their respective houses and the southern wall of the house of the plaintiff is not a common wall. Since, the parties and subject matter of the suit in hand and that of aforesaid previous suit are same, finding of the Civil Court that both the parties have separate walls of their respective houses and the southern wall of the house of the plaintiff is not a common wall, which has attained finality, is thus binding upon the parties. Moreover, it has come in evidence that defendant had purchased the plot owned by him in the year 1970 and constructed his house over the same, whereas plaintiff purchased the house later on from the previous owner on 12.12.77 and thereafter constructed his house which shows that house of defendant was already in existence over the area owned by him and there was thus no occasion for defendant to encroach upon the land owned by plaintiff. A false plea thus has been taken by plaintiff that defendant has encroached upon the land measuring 1X48 sq. feet owned by him. Even date of alleged encroachment has not been disclosed and such a suit should have been instituted only within 12 years of the encroachment.”

During the course of arguments, learned counsel for the appellant could not point out any patent illegality or perversity in either of the impugned judgments passed by both the learned courts below, while recording their concurrent findings of facts. He also could not refer to any question of law much less substantial question of law nor any such question of law has been found involved in the present appeal, which is *sine qua non* for entertaining any regular second appeal, at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil

Procedure. In this view of the matter, no interference is warranted in the present appeal. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in *Naryanan Rajendran Vs. Sarojini Lakshmy, 2009 (2) RCR (Civil) 286* and *Santosh Hazari Versus Purshottam Tiwari, 2001 (3) SCC 179*.

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the instant appeal is bereft of merit and without any substance, thus, it must fail. No case for interference has been made out. Consequently, both the impugned judgments and decrees passed by the learned courts below are upheld.

Resultantly, with the above-said observations made, the present regular second appeal stands dismissed, however, with no order as to costs.

24.8.2017
mks

(RAMESHWAR SINGH MALIK)
JUDGE

Whether Speaking/reasoned	:	Yes/No
Whether Reportable	:	Yes/No