

RSA No. 5071 of 2015 (O&M)

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

RSA No. 5071 of 2015 (O&M)

Date of Decision: 21.9.2017

Surya Parkash (since deceased) through Lrs and others

.....Appellants

Vs.

Dhanpati

.....Respondent

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. R.N. Lohan, Advocate
for the appellants.

RAMESHWAR SINGH MALIK J. (ORAL)

Unsuccessful defendants are in regular second appeal against the concurrent findings of facts recorded by both the learned Courts below, whereby suit for permanent injunction, filed by the plaintiff-respondent, was decreed by the learned trial Court vide its impugned judgment and decree dated 19.1.2015 and first appeal of the defendants was also dismissed by the learned first appellate Court vide impugned judgment and decree dated 24.4.2015, upholding the judgment and decree of the learned trial court.

Brief facts of the case, as noticed by learned first appellate Court in para 2 of its impugned judgment, are that respondent/plaintiff filed a suit for permanent injunction, inter alia, on the allegations that plaintiff alongwith others was owner in possession of triangular residential plot depicted with letters ABC in Najri site plan and situated within the revenue estate of Tauru, Tehsil District Mewat, fully detailed and described in para No.1 of the plaint which was residential plot and old well and peepal tree

RSA No. 5071 of 2015 (O&M)

also existed over the same. The suit property was reserved from 90 years for public use and since then the suit property was being used for public use by the general public though managed by the plaintiff and other owners. The defendants had no concern with suit property in any way or in any manner, whatsoever.

Previously, father of defendants-Daulat Ram and others threatened to raise construction over suit property and to instal the door and windows in the suit property and said Daulat Ram and others in the year of 1961 illegally and unlawfully opened door abutting towards suit property and on that, father-in-law of plaintiff Dharam Dutt filed civil suit against said Dault Ram and others and said suit was decreed in favour of Dharam Dutt vide judgment and decree dated 27.3.1962. Said Daulat Ram preferred an appeal against said judgment and decree dated 27.3.1962 and same was also dismissed on 27.2.1963. Defendants and others illegally and unlawfully opened doors and window towards suit property and father-in-law of plaintiff filed a suit for mandatory injunction against defendant. Said suit was dismissed on 1.1.1992 by the court of Additional Civil Judge, Nuh. Father-in-law of plaintiff filed an appeal against said judgment and decree dated 1.1.1992 and said appeal was accepted by the Court of District Judge, Gurgaon and said appellate court held that 'defendants cannot make any alteration of their property without getting a fresh plan sanctioned' from the Municipal Committee and said appellate court passed a decree of mandatory injunction in favour of father-in-law of plaintiff and directed defendants to close the doors and windows. Said appellate court also held that defendants were at liberty to construct the window and ventilators again after getting a plan sanctioned from the Municipal Committee.

RSA No. 5071 of 2015 (O&M)

3

Defendants, without getting sanctioned the site plan from Municipal Committee and against the judgment and decree dated 1.9.1994, were threatening to raise construction over suit property detailed in para No.1 of the plaint and were intending to dispossess the plaintiff from the same. If defendants succeeded in their evil mission in that case plaintiff and other co-shares would suffer an irreparable loss and injury which cannot be compensated. Plaintiff asked defendants several times not to change the nature of suit property detailed in para No.1 of the plaintiff and also not to raise any sort of construction over same, but defendants did not pay any heed to the genuine request of plaintiff and finally refused to do so on 25.12.2011.

Having been put to notice, defendants appeared and filed their contesting written statement raising more than one preliminary objections, claiming themselves to be in possession. However, defendants did not take any plea of adverse possession despite their claim that they were coming in old and settled possession of the suit land. On completion of pleadings of the parties, learned trial Court framed the following issues: -

- 1) Whether the plaintiff is entitled to relief of permanent injunction as prayed for?OPP
- 2) Whether the present suit is not maintainable in the present form?OPD
- 3) Whether the suit of plaintiff is hit by principle of res-judicata?OPD
- 4) Whether the suit of plaintiff is barred by Section 91, 47, 11 of CPC?OPD
- 5) Whether the plaintiff has concealed the true and material fact from the court?OPD
- 6) Whether the plaintiff has no locus standi to file the present suit?OPD

RSA No. 5071 of 2015 (O&M)

- 7) Whether the plaintiff has no cause of action to file the present suit?OPD
- 8) Whether the plaintiff is bad for non-joinder of necessary parties?OPD
- 9) Whether the plaintiff is liable to pay special cost under Section 35-A CPC?OPD
- 10) Relief.

In order to prove their respective stands taken in their pleadings, both the parties brought on record their documentary as well as oral evidence. Plaintiff herself appeared as PW1. With a view to corroborate her stand taken in the pleadings, plaintiff also examined Ram Kishore as PW2, Naresh as PW3 and Amit Goswami as PW4. Earlier judgment and decree dated 1.9.1994 passed in Civil Appeal No. 77 of 1992 titled as Dharam Dutt Vs. Daulat Ram (deceased) through LRs and others', was also proved on record as Ex.PW1/C.

After hearing learned counsel for the parties and going through the evidence brought on record, learned trial court came to the conclusion that the plaintiff has duly proved her case by bringing on record cogent and convincing evidence. Accordingly, her suit for permanent injunction was decreed by the learned trial Court vide its judgment and decree dated 19.1.2015. Defendants felt aggrieved and filed their first appeal, which also came to be dismissed by the learned District Judge, vide his impugned judgment and decree dated 24.4.2015. Hence this regular second appeal at the hands of unsuccessful defendants.

Heard learned counsel for the defendants-appellants.

It is a matter of record that there was an earlier round of litigation between same parties qua the same property. Finally, a decree of mandatory injunction was passed by the learned first appellate court vide its

RSA No. 5071 of 2015 (O&M)

judgment and decree dated 1.9.1994 (Ex.PW1/C). It is also pertinent to point out that in fact, it is the third round of litigation qua the same property. Initially, late Sh. Dharam Dutt-predecessor-in-interest of the plaintiff-respondent filed a suit on 8.6.1961, which came to be decreed against late Sh. Daulat Ram-predecessor-in-interest of defendants-appellants, vide judgment and decree dated 27.3.1962 and same attained finality against late Sh. Daulat Ram. While passing the decree dated 27.3.1962, defendant-Daulat Ram was directed to close his windows and doors opened towards the property in question. However, when the defendants-appellants again opened windows and doors towards property of the plaintiff, late Sh. Dharam Dutt-predecessor-in-interest of the plaintiff had to file another suit, which was also finally decreed by the learned District Judge, allowing first appeal, vide judgment and decree dated 1.9.1994 (Ex.PW1/C).

During the second round of litigation, a plea was raised on behalf of the present appellants-defendants that second suit filed by late Sh. Dharam Dutt was not maintainable, because he could have sought execution of the earlier decree dated 27.3.1962. However, said plea raised on behalf of the defendants was turned down by the learned court below, holding that once the defendants again started opening fresh doors and windows towards property of the plaintiff, it would amount to fresh cause of action.

Relevant observations made by the learned District Judge in para 8 and 9 of his judgment dated 1.9.1994 (Ex.PW1/C), which are pertinent to be referred here, read as under:-

“Learned counsel for the plaintiff-appellant argued that once the decree passed in the earlier had been executed by closing down the doors, the act of defendants is opening the doors afresh gives a fresh cause of action and plaintiff cannot

be asked upon to go for execution of the decree for permanent injunction. He submits that on every infringement made by the defendants over the property in suit which was held to be belonging to the plaintiff and his ancestors and which has been reserved for public use, the plaintiff and others co-owners are not expected to go for fresh execution one after the other, once the decree had been satisfied. He has placed reliance on case reported as Ramesh Mohan and another Vs. Raj Krishan and others, 1984, Punjab Law Reporter, 211, wherein our own Hon'ble High Court taken has the view that, while administering justice, equity always plays an important part and the courts cannot loose sight of equities and, thus, help a wrongdoer on mere technicalities. Learned counsel for the appellant further relied upon another judgment of our own High Court in case Kaur Sain VS. Bibi Birinder Kuar AIR, 1971 Punjab & Haryana, 489. In the said case, the land of the plaintiff-respondent was lying vacant and defendants had made opening of their house towards the said site and installed doors, windows, ventilators an water spouts. Relying upon an old judgment of Lahore High Court in Kashi Nath Vs . Ram Jiwan, AIR 1933, Lahore, 847, it was held in Kaur Sain's case (supra) that the owner has got a right to open windows and ventilators but not doors and water spouts. Applying the said authority to the present case, it can be well stated that the defendants have certainly got a right to open in apertures in their own wall but this cannot be done in a manner to cause any detriment to the ejectment of the property by the neighbours. In the instant case in view of the judgment passed in Civil Suit No. 251 titled Dharam Dutt Vs. Salig Ram etc., the claim of ownership set up by defendants cannot be accepted. The propitiatory rights of the parties were adjudicated in the earlier litigation and cannot be questioned by the defendants. In case the defendants are allowed to continue with the opening of the doors towards the site in dispute it will virtually amount to exclusive enjoyment of

RSA No. 5071 of 2015 (O&M)

the site by the defendants. The property which previously belonged to the ancestors of the plaintiff was reserved for use by general public. There is also a well situated in the property which had been made available to the general public. The trial court erred in taking the view that the remedy available to the plaintiff is by way of execution of the earlier decree irrespective of the decree for permanent injunction passed earlier, the new, infringement caused by the defendants gave a fresh cause to the plaintiff and he could not be non-suited on the ground that he could go for fresh execution of the earlier decree.

Admittedly, there is a municipal committee at Taouru. Defendants cannot make any alteration in their property without getting a fresh plan sanctioned from the municipal committee. Since the opening of the doors and windows is admitted by the defendants, a decree for mandatory injunction is, therefore, passed in favour of the plaintiff and against the defendants requiring the defendants to close the doors and windows. The defendants shall be, however, at liberty to construct the windows and ventilators again after getting a plan sanctioned from the municipal committee but it will have to be closed windows of the type, so as to not allow ingress from or towards the site in dispute. The judgment and decree of the trial court are set aside. The appeal is accepted with costs.

Announced in open court.”

A bare perusal of the abovesaid observations made by the learned District Judge will make it crystal clear that although permission was granted to the present appellants-defendants to construct doors and ventilators again but only after getting the site plan sanctioned from the Municipal Committee, yet they did not do so, for the reasons best known to them. On the other hand, owing to their incorrigible nature, defendants again started opening doors and windows towards property of the plaintiff, giving yet another cause of action to the plaintiff to approach the learned

RSA No. 5071 of 2015 (O&M)

civil court by filing present suit for permanent injunction. Thus, this is the third round of litigation, which has been imposed by the defendants on the plaintiff and that too, for no good reasons.

Admittedly, there is no document of title with the appellants on the basis of which they might claim ownership and possession of the suit property. By now, there are three civil court decrees in favour of the plaintiff and against defendants-appellants. It is also pertinent to note here that when the plaintiff was seeking execution of the instant impugned decree and the learned executing court ordered attachment of the property of the appellants, they approached this Court by way of CR No. 5259 of 2017 (Surya Parkash (deceased) through LRs and others Vs. Dhanpati).

When both these matters were put together for hearing on 28.8.2017, following order was passed by this Court:-

“After arguing the case for some time and having been failed to convince this Court on merits, learned counsel for the appellants in the appeal and for the petitioners in the civil revision petition, seeks short adjournment to enable him to place on record respective undertakings by way of affidavits on behalf of all the appellants-petitioners, as per the instructions given to learned counsel for the appellants by one of the appellants namely Sh. Jai Parkash @ Jai Kishan, who is present in the Court, so as to undertake that the appellants-petitioners shall vacate the suit property mentioned in the civil suit, within a period of one month.

On his request, adjourned to 06.09.2017.”

In compliance of the abovesaid order passed by this Court, petitioners in the abovesaid revision petition and appellants in the present

RSA No. 5071 of 2015 (O&M)

appeal furnished their undertakings by way of their respective affidavits dated 18.9.29017 to the effect that they shall vacate the physical possession of the suit property within a period of 15 days. After permitting the petitioners in the revision petition to furnish their respective undertakings by way of their affidavits, said revision petition was disposed of by this Court today by a separate order, directing the learned executing court to detach the property of the appellants-petitioners after a period of three weeks but only after ensuring that physical possession of the suit property is handed over to the plaintiff-respondent/decreed holder, within a period of two weeks.

Looking to the overall conduct of the appellants, this Court is of the considered opinion that they are not only incorrigible but had also been found misconducting themselves right from the year 1962, thereby misusing the process of law. Having said that, this Court feels no hesitation to conclude that the appellants have not been found to be bonafide litigants. They had no right, title or concern qua the suit property, which has been repeatedly held to be exclusive ownership of the plaintiff. Though defendants have been claiming that they are in possession of the suit property from the time of their forefathers but they had nothing to show that they had been continuing in settled possession over the suit property.

It is so said because had the appellants-defendants been found in settled possession of the suit land, there was no scope at the hands of the learned courts below to pass repeated decrees for mandatory and permanent injunction in favour of the plaintiff and against the appellants. Under these undisputed facts and circumstances of the case, it can be safely concluded that learned courts below committed no error of law, while passing their respective impugned judgments and decrees and the same deserve to be

RSA No. 5071 of 2015 (O&M)

upheld, for this reason also.

Before arriving at a judicious conclusion, the learned District Judge rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in correct perspective. Relevant and cogent findings recorded by the learned first appellate court in para 15 to 19 of its impugned judgment, which deserve to be noticed here, read as under:-

“In judgment Ex.PW1/C, the suit filed by Dharam Dutt-grandfather of the plaintiff, was decreed, while setting aside the judgment and decree of the learned lower court and in para NO.9 of the judgment Ex.PW1/A the Court concluded as under:-

“ Admittedly, there is a municipal committee at Taoru. Defendants cannot make any alteration in their property without getting a fresh plan sanctioned from the Municipal Committee. Since the opening of the doors and windows is admitted by the defendants, a decree for mandatory injunction is, therefore, passed in favour of the plaintiff and against the defendant requiring the defendants to close the doors and windows. The defendants shall be, however, at liberty to construct the windows and ventilators again and after getting a plan sanctioned from the Municipal Committee but it will have to be closed windows of the type, so as to not allow egress or ingress from or towards the site in dispute. The judgment and decree of the trial court are set aside. The appeal is accepted with costs.

In view of juxtaposed para No.9 of the judgment Ex.PW1/C, a decree for mandatory injunction directing the defendants to close the doors and windows was passed and a liberty was given to the defendants for getting the site plan sanctioned if windows and ventilators are to be opened.

RSA No. 5071 of 2015 (O&M)

It is admitted case of the defendants that after judgment dated 1.9.1994 Ex.PW1/C, no fresh site plan was got sanctioned from the Municipal Committee and when compliance of judgment dated 1.9.1994 was made and doors and ventilators were closed. The defendants have no right to open the doors, windows etc. until and unless site plan is sanctioned.

When the defendants are adamant to interfere in the disputed property by way of raising construction certainly a fresh cause of action accrued in favour of plaintiff for filing the present suit and the contention that present suit is barred by principle of res-judicata is not tenable because the earlier judgment was complied with and when defendants are again adamant to raise construction over the disputed property, certainly fresh cause of action arose and present suit is maintainable.

The rights of the parties have categorically been adjudicated upon, when judgment Ex.PW1/C was passed and presently as per admitted case of the parties, the rights are finalized and defendants cannot be permitted to raise any claim over the disputed property in violation of judgment Ex.PW1/C.”

During the course of hearing, learned counsel for the appellants failed to point out any patent illegality or perversity in either of the impugned judgments passed by the learned courts below. He also could not refer to any question of law much less substantial question of law, which is sine qua non for entertaining a 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 regard, reliance can be placed on the law laid down by the Hon’ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286** and **Santosh Hazari Vs. Purshottam Tiwari, 2001 (3) SCC 179.**

No other argument was raised.

RSA No. 5071 of 2015 (O&M)

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 present appeal is misconceived, bereft of merit and without any substance. Thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

21.9.2017
Ak Sharma

(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No