

Sr. No. 108

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

**RSA No. 4373 of 2017(O&M)
Decided on: 12.09.2017**

**Balbir Singh(since deceased) thr. LRs and others
.....Appellants**

versus

**Resham Singh and others
.....Respondents**

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

**Present: Mr. Raj Kumar Kakkar, Advocate
for the appellants.**

Rajbir Sehrawat, J.(Oral)

Civil Misc. No. 11339-C of 2017

Allowed as prayed for.

Civil Misc. No. 11340-C of 2017

This is an application for condonation of delay of 62 days in re-filing the appeal.

For the reasons mentioned in the application, the delay of 62 days in re-filing the appeal is condoned.

Civil Misc. application stands allowed.

Civil Misc. No. 11341-C of 2017

This is an application for permission to file the appeal by impleading the legal representatives of Balbir Singh, since Balbir Singh expired after the judgment and decree were passed by the lower Appellate Court.

For the reasons mentioned in the application, civil misc. application is allowed. Necessary leave to appeal is granted and the

appellants herein are permitted to file the present appeal.

C.M.No. 11342-C of 2017

This is an application for staying the operation, execution and implementation of impugned judgment and decree dated 20.02.2015 passed by the learned Additional Civil Judge(Senior Division), Guruharsahai.

Corollary to the order in the main appeal, this civil misc. application stands dismissed.

RSA No. 4373 of 2017

This is a second appeal filed by the defendants against the concurrent findings of both the Courts below whereby the suit filed by the plaintiffs seeking possession of the suit property was decreed.

The facts in nut-shell, as mentioned in the plaint are that the plaintiffs claimed to be the owner of land measuring 6 Marlas comprised in Khasra No. 126/14(0-2), 126/15(0-2), 126/13(0-2) situated in village Panje Ke Uttar. It was pleaded by the plaintiffs that they were recorded as co-sharers in the suit property. The defendants/appellants herein had no right or title over the suit property in any capacity whatsoever. However, the defendants have illegally encroached upon their property and have raised constructions over the same. Therefore, the possession alongwith mandatory injunction for removing the construction was sought by the plaintiffs.

Having been given notice of the suit, the defendants claimed that their houses exist on the spot for the last 30 years. It was further claimed by them that their houses are situated within the Abadi-Deh and are not on the land of the plaintiffs. They also claimed that they have never taken the possession of the suit property from the plaintiffs. In this way, it was pleaded by the defendants that the plaintiffs were not connected with

the suit property in any manner whatsoever.

In the evidence, plaintiff No. 1 stepped into the witness box as PW-1. He also tendered in evidence the jamabandies of the year 2005-06 as Ex:P-1 and P-2. The defendant did not examine any witness nor led any documentary evidence. Therefore, the evidence of the defendants was closed vide order dated 11.09.2014 by the Trial Court.

After appreciating the evidence on the file, the Trial Court decreed the suit issuing a direction to the defendants to hand over the vacant possession of the suit property to the plaintiffs within a period of two months failing which plaintiffs were made entitled to take recourse to coercive methods as well.

Aggrieved by this, the predecessors-in-interest of the present appellants filed the appeal before the lower Appellate Court. However, the lower Appellate Court also dismissed the appeal filed by the defendants. While dismissing the appeal filed by the defendants/appellants, learned lower Appellate Court has recorded a finding that the plaintiffs have been recorded as co-owners of the land comprised in Khasra No. 126/14(0-2), 126/15(0-2), 126/13(0-2) situated in village Panje Ke Uttar which is the suit property in the case. It was further held by the lower Appellate Court that the plaintiffs have duly proved their ownership qua the suit property. It was further held by the lower Appellate Court that the defendants had taken a plea that they have raised the constructions and these constructions are existing for the last 30 years. However, the ownership of the plaintiffs qua the suit property has not been denied by them. The lower Appellate Court also recorded that, although the defendants claimed to be in possession for the last 30 years, however, it has not been pleaded or proved as to when the

defendants came into possession. Therefore, it cannot be presumed that their possession has matured into adverse possession over the suit property.

While arguing the case, learned counsel for the appellants has submitted that the land on which the houses of defendants/appellants herein are situated is within the Abadi-Deh and the plaintiffs have not got demarcated the land in question to prove that it is a numbered land as claimed by them. It is his submission that it was for the plaintiffs to prove that the land is not situated in the Abadi-Deh because the plea of the defendants is that it is within the Abadi-Deh. It is further submitted by learned counsel for the appellants that the lower Appellate Court has wrongly presumed that the defendants were claiming adverse possession over the suit property. It is his submission that the defendants never claimed adverse possession over the suit property. They claimed to be having houses within the Abadi-Deh only on a different land than the one claimed by the plaintiffs.

The next argument of learned counsel for the appellants is that the plaintiffs have claimed relief of mandatory injunction. However, the Court has not dealt with that at all and therefore, the present defendants/appellants herein cannot be bound down to remove the constructions from the spot. It is the further submission of learned counsel for the appellants that since the suit was for possession and the requisite court fees has not been paid, therefore, the suit could not have been entertained by the Court. Still further it is the contention of learned counsel for the appellants that the suit is time barred because the houses of the appellants are situated over the suit property for the last 30 years.

Having heard learned counsel for the appellants and perusing

the available records, this Court is of the view that there is nothing wrong, illegal or perverse in the findings recorded by the Courts below. The appellants herein had taken a plea that the plaintiffs claimed the suit property to be the property comprised in particular khasra number bearing the numbering of the revenue record. The appellants had taken a plea that the land and the houses of the appellants are over the land of Abadi-Deh and not in the khasra numbers claimed by the plaintiffs. However, the defendants could not muster the courage to appear before the Court as a witness and to own even their pleadings in the written statement. Therefore, the defendants have failed to discharge even prima facie burden of their claim that their houses are situated within Abadi-Deh. In absence of such a prima facie evidence, it was not bounden duty of the plaintiffs to resort to the demarcation of the suit property. They have duly proved their ownership on the suit property through revenue records.

So far as the contention of learned counsel for the appellants that the suit is barred by limitation and court fees has not been paid by the plaintiffs, therefore, the suit should have been dismissed, is concerned, the same are also liable to be rejected for the simple reason that these are mixed questions of fact and law. The present defendants had neither claimed any issue on these points nor any evidence was led by them on these points. Not only that even the pleadings are not there qua these points in their written statement. Therefore, they cannot be heard to raise these arguments in second appeal before this Court.

So far as the argument of learned counsel for the appellants that the Courts below have not dealt with the part of the mandatory injunction prayed in the suit is concerned, suffices it to say that the decree passed by

the Courts below makes it very clear that the defendants are to hand over the vacant possession of the suit property and not only the possession of the suit property. Direction regarding handing over the vacant possession contains an inbuilt mandatory injunction into it to the effect that the said constructions over the suit property has to be removed by the defendants. Therefore, this submission of learned counsel for the appellants also deserves to be noticed only to be rejected.

No other argument was raised by learned counsel for the appellant.

In view of the above, the findings, judgment and decree passed by the Courts below are upheld. Hence, the present appeal is dismissed being devoid of any merit.

12th September, 2017

Shivani Kaushik

**[RAJBIR SEHRAWAT]
JUDGE**

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*