

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.4648 of 2017 (O&M)
Date of decision: 04.10.2017

Suman Saini

... Appellant

Vs.

Mukesh Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. H.N. Sahu, Advocate
for the appellant.

RAMESHWAR SINGH MALIK, J. (ORAL)

Feeling aggrieved against the concurrent findings of facts recorded by both the learned Courts below, whereby suit of the plaintiffs for declaration, permanent injunction and mandatory injunction was partly decreed by the learned trial Court vide its impugned judgment and decree dated 27.05.2014 and first appeal of the defendant was also dismissed by the learned first appellate Court vide its impugned judgment and decree dated 19.08.2017, defendant has approached this Court by way of instant regular second appeal.

Brief facts of the case, as noticed by the learned first appellate Court in para 2 of the impugned judgment, are that plaintiff No.1 was owner in possession of his residential house shown in green colour in the site plan attached with the plaint. Plaintiff No.2 was owner in possession of his

residential house shown in black colour in the site plan attached with the plaint. The plaintiffs' house was situated within the Khewat No.4473/3878, Khatoni No.6009 and Khasra No.9704/1321, situated in Gurgaon Gaon, Tehsil and District Gurgaon, as per jamabandi for the year 1991-92. It was a plot, over which the plaintiffs constructed the house and the Municipal Committee, Gurgaon allotted House No.98/9 and the plaintiffs were regularly paying house tax. It was alleged that plaintiffs No.1 and 2 were the decedents of a common ancestor and the land beneath the houses of both the plaintiffs plus the land shown in red colour marked by letter PQRS in the site plan were the land of common nucleus. When the branches of plaintiffs No.1 and 2 separated the lands shown in red colour marked by letters PQRS in the site plan, was left as common chowk for the joint use of plaintiffs No.1 and 2 only. In this way, plaintiffs No.1 and 2 were joint owners in possession of above detailed portion of land in red colour, left between their houses and called common chowk of the plaintiffs exclusively. The defendant had no right, title, interest or concern whatsoever with the above common chowk. It was alleged that the defendant had purchased only 1/3rd share in residential house shown in yellow colour in the site plan vide sale deed No.12922 dated 20.09.2006. The defendant had malafide intentions to illegally encroach upon the suit property from the very beginning and that is why, she got incorporated wrong boundaries in the sale deed. The said sale deed conferred no right whatsoever on the defendant qua the suit property. It was alleged that the defendant was a strong headed person and had no respect for the law. The defendant had illegally constructed a staircase in the suit property at Mark 'W' and had also installed a wash basin at Mark 'X' in

the suit property. The defendant threatened plaintiff No.1 to remove his window, opening in the suit property at point 'V' and to close his doors fixed at point 'D'. Similarly the defendant threatened plaintiff No.2 to close his doors at point 'D'. The defendant had no right to illegally encroach upon the suit property and she was under a legal liability to remove her staircase and wash basin, which she had installed illegally in the suit property. The plaintiffs requested the defendant many times to admit their claim but in vain.

Defendant was put to notice. She appeared and filed her contesting written statement, raising more than one preliminary objections. On completion of pleadings of the parties, the learned trial Court framed the following issues: -

1. Whether the portion PQRS shown in red colour in the site plan attached with the plaint is the common chowk, owned and possessed by plaintiffs jointly? OPP.
2. If issue No.1 is decided in affirmative as to what effect? OPP
3. Whether suit filed by the plaintiff is not maintainable? OPD.
4. Whether suit of the plaintiff is time barred? OPD.
5. Whether the plaintiffs are estopped from filing the present suit by their own acts and conduct? OPD.
6. Relief.

With a view to prove their respective stands taken in their pleadings, both the parties brought on record their documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, learned trial Court came to the conclusion that plaintiffs have partly proved their case to the effect that common chowk was

meant for use of both the parties to this avoidable litigation. Accordingly, suit of the plaintiffs was partly decreed by the learned trial Court vide its impugned judgment and decree dated 27.05.2014. Defendant filed her first appeal, but the same was also dismissed by the learned first appellate Court vide its impugned judgment and decree dated 19.08.2017, upholding the judgment and decree of the learned trial Court. Hence this regular second appeal at the hands of unsuccessful defendant.

Heard learned counsel for the appellant.

The bone of contention in the instant litigation was a small open chowk, which was common for both the parties. However, when the defendant-appellant was trying to encroach upon that common area, plaintiffs were forced to file the suit for declaration, permanent injunction and mandatory injunction, which was partly decreed by the learned trial Court. In the operative part of the impugned judgment dated 27.05.2014, the learned trial Court made it clear that nothing shall prevent the defendant from using the common chowk for her ingress and egress to her house. However, since the chowk was meant for common use of both the parties and the defendant was found to have constructed staircase and washbasin in the said common chowk, a decree for mandatory injunction was issued by the learned trial Court, directing the defendant-appellant to remove the staircase and washbasin from the said common chowk.

Defendant was also restrained from illegally encroaching upon the said common chowk in any manner. However, both the parties were held entitled to use the said common chowk. That is how the learned trial Court tried

to do substantial justice between the parties and rightly so, because that was the only balanced approach, which was supposed to be adopted by the learned trial Court. Similarly, the learned first appellate Court was found fully justified in upholding the judgment and decree of the learned trial Court, by passing its impugned judgment and decree. Having said that, this Court feels no hesitation to conclude that the learned Courts below were well within their jurisdiction to pass their respective impugned judgments and decrees and the same deserve to be upheld.

Plaintiffs were justified in examining PW1 Smt. Kela Devi, who happened to be the common vendor for both the parties. Defendant-appellant as well as the plaintiffs-respondents purchased their respective shares in the constructed building from Smt. Kela Devi. While deposing before the Court as PW1, Smt. Kela Devi has categorically proved the case of the plaintiffs. She has also proved that the encroachment made by the defendant in the shape of staircase of iron and washbasin etc. was liable to be removed, because the common chowk was meant for use of both the parties. Smt. Kela Devi cannot be said to be an interested witness, because she was common vendor of both the parties. Under these undisputed circumstances of the case, it can be safely concluded that 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 reason also.

Before arriving at its judicious conclusion, learned first appellate Court rightly examined, considered and appreciated true facts of the case as well as the evidence available on record, in the correct perspective. The relevant

and cogent findings recorded by the learned Additional District Judge in paras 16 to 18 of the impugned judgment, which deserve to be noticed here, read as under: -

“So first of all the question arose whether the portion of common chowk belongs to plaintiffs or defendant. To prove their case, plaintiffs examined Smt. Kela Devi from whom the defendant and plaintiffs purchased the land. PW1 Smt. Kela Devi categorically stated that she sold the land in 2006. She stated that at that time the staircase and wash basin were not there. It was open. She further denied that staircase and wash basin were constructed on the basis of mutual consent. She further stated that there is staircase to be used by defendant in back side of her portion and defendant cannot use the staircase made in front portion because the said portion was sold out to Muni Devi. In her affidavit Ex.PW1/A, Smt. Kela Devi categorically deposed that she sold the part of the suit property shown by plaintiffs on 20.09.2006 in which right for encroachment by erecting any staircase and wash basin was not given to the defendant. She categorically deposed that if anything in the shape of staircase of iron and wash basin etc. by defendant constructed against the sale deed then same is liable to be removed.

The plaintiff duly proved the contents of plaint by examining Mukesh Kumar as PW2. The defendant to prove her case that staircase and wash basin is in her property examined herself as

DW1 by way of affidavit Ex.DW1/A. In her affidavit, she stated that she became owner of property vide sale deed vasika No.12922 dated 20.09.2006. She further admitted that she has not filed any site plan along with written-statement. So there is no proof filed on record by defendant to show that vide sale deed vasika No.12922 dated 20.09.2006 Ex.D1, she became the owner of space in which staircase and wash basin are constructed. She purchased the property from Smt. Kela Devi but Smt. Kela Devi in her affidavit denied the case of the defendant.

The trial Court on issues No.1, 2 & 5 took the notice of the oral and documentary evidence and rightly gave findings on the said issues. I myself have gone through the material on record to test the findings of the trial Court and find that defendant had purchased 1/3rd share vide sale deed Ex.D1 but she could not prove on record that the portion purchased by her from total area of 110 sq. yards, the area in which she constructed the iron staircase and wash basin, was in her exclusive ownership as per sale deed. The said suit property was purchased by her from Smt. Kela Devi and Smt. Kela Devi absolutely denied the case of the defendant regarding any staircase and wash basin which are constructed by defendant later on. It is admitted fact that it was a built-up house purchased by the parties. It was a residential house shown in the site plan. so the arguments of learned counsel for the appellant that it was an open land sold out to appellant or the trial

Court failed to consider the said fact have no merit as PW1 Smt. Kela Devi in her cross-examination only stated regarding the portion of the common chowk in which the staircase and wash basin were constructed by defendant. PW1 in her cross-examination categorically stated that staircase and wash basin installed by the defendant later on. The photographs mark-D1 to mark-D3 and Ex.PW5/B to Ex.PW5/F produced on record and the photographs clearly showing that plaintiffs are having their doors opening in their common chowk and defendant is also having her door in the said common chowk which showing that said common chowk was not in the domain of any one and liable to be used by both the parties. So there is no illegality or infirmity in the findings given by trial Court on issues No.1, 2 & 5 and same are liable to be up-held.”

During the course of hearing, learned counsel for the appellant could not point out any patent illegality or perversity in the impugned judgments and decrees passed by the learned Courts below. He also failed to raise any question of law, much less substantial question of law, 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 regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Narayanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (5) SCC 264.**

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 since no illegality has been found in either of the impugned judgments and decrees passed by the learned Courts below, the same deserve to be upheld. Present regular second appeal having been found wholly misconceived, bereft of merit and without any substance, must fail. No ground for interference has been made out.

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

[RAMESHWAR SINGH MALIK]
JUDGE

04.10.2017
vishnu

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