

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

RSA No.5811 of 2017 (O&M)
Date of decision: 21.12.2017

Ram Dass

.... Appellant

Versus

Labh Singh (since deceased) through LRs and others Respondents

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mr.Ashok Sharma Nabhwala, Advocate
for the appellant.

Avneesh Jhingan, J.

The present regular second appeal is at the behest of plaintiff being aggrieved of concurrent judgments and decrees of the learned Courts below dismissing the suit.

For the sake of convenience, the parties are being referred to as per their original position in the plaint.

The plaintiff filed a suit for possession of land measuring 4 marlas by removing the super structure over the suit land marked ABCD and shown in red colour in the site plan attached. The suit property was detailed in the plaint. The said property was situated in abadi of Purana Bhangala, Tehsil Mukerian, District Hoshiarpur. Consequential relief of permanent injunction restraining the defendants from changing the nature

of land by raising any type of construction over the suit land was also prayed.

The facts as narrated in the plaint are that the plaintiff was a resident of village Purana Bhangala and at the time of filing of suit, residing at Chandigarh. He is retiree and had purchased 4 marlas of land from Gian Singh, Nidhan Singh and Chajju Ram vide registered sale deed dated 21.06.1983. It was stated that defendants No.1 to 3 are sons of Girdhari Lal who owned plot on the northern side of the suit land. Defendant No.4 had purchased the plot from Ravi Singh on the western side of the suit land. The plaintiff about three years before filing the suit visited the village as he wanted to construct house on the suit land. On his visit, he saw that defendants No.1 to 3 had encroached upon the suit land and even defendant No.4 had also encroached some portion of the land. Request of the plaintiff to the defendants to remove the encroachment was not acted upon, hence, the present suit was filed.

Upon notice, defendants No. 1 to 3 filed a common written statement. Apart from raising preliminary objections, it was submitted that the defendants had purchased their own land vide registered sale deed dated 28.05.1976 from Bhag Singh. Bhag Singh owned total 16 marlas of land, rest of the land was purchased by Partap Singh, Girdhari Lal and cattle shed had been erected thereupon. It was stated that plaintiff had never taken any demarcation of the suit land before filing of the suit. It was further stated that defendants were residing in the property since the time of partition of the country.

Defendant No.4 filed a separate written statement. It was averred that he had purchased the property vide sale deed dated 25.11.1986. It was denied that any encroachment had been made. It was further averred that the residential house was constructed in 1968 which was later on reconstructed and the land near the house was purchased vide registered sale deed dated 25.11.1986.

The learned trial Court framed eight issues.

The plaintiff, in order to prove the claim, examined Ashok Kumar, who scribed sale deed dated 21.06.1983. He further proved that the said deed is entered in his register at serial No.645 dated 21.06.1983. Tarsem Singh was examined as PW2. He deposed that property in dispute was sold by his uncle and father to plaintiff vide a registered sale deed dated 21.06.1983. Parshotam Singh, who had prepared the site plan at the spot appeared as PW3. Arjun Dev-PW4 identified the signatures of his father who was the marginal witness to registered sale deed dated 21.06.1983. Plaintiff himself appeared as PW5.

The defendants in order to rebut the claim of the plaintiff examined Tilak Raj, Registration Clerk as DW1 who proved the sale deed dated 28.05.1976 in favour of the defendants. He also proved sale deed dated 25.11.1986. DW2 Bachittar Singh deposed that suit has just been filed to harass the defendants who were title holders of property adjoining to the property in dispute. Arjun Dev was examined as DW3. He identified signatures of his father on the sale deeds dated 28.05.1976 and 25.11.1986. Vijay Kumar DW4 was examined who had prepared the site plan on the

spot. Defendant No.3 deposed as DW5.

Learned trial Court after considering the facts and appreciating the evidence produced decided issue No.1 against the plaintiff and issue No.2 in favour of the plaintiff. Issue No.3 was decided against the plaintiff. issue No.4 was decided in favour of the defendants. Issues No.5 and 6 were decided in favour of the defendants and issues No.7 and 8 were decided against the defendants. The net result was that vide judgment and decree dated 12.12.2013, the suit was dismissed.

Aggrieved of the judgment and decree, appeal was filed. The Additional District Judge, Hoshiarpur, dismissed the appeal vide judgment and decree dated 10.11.2016.

Hence the regular second appeal.

Learned counsel argued that the Courts below erred in dismissing the suit inspite of the fact that defendants No.2 and 3 had admitted in their written statement the claim of the plaintiff. He argued that site plan attached with the suit was not considered by the Courts below. His contention is that defendant No.4 who had plot adjacent to the suit property admitted that he was only occupying his own share. His further grievance is that no local commissioner was appointed as per Order 26 Rule 9 of the Civil Procedure Code.

No other contention was raised.

The issue involved in the present appeal has two limbs. Firstly is the ownership of plot of the plaintiff. There is no dispute raised by any of the defendants with regard to the ownership of the plaintiff of the suit

property. The evidence adduced by the plaintiff was also in support of the fact that he was the owner of the disputed property.

Secondly, for suit to succeed what is required to be seen is that there is any encroachment by the defendants. The onus was on the plaintiff and the same had not been discharged. The witnesses PW1, PW2 and PW4, all deposed to the effect that the suit property was owned by the plaintiff. None of the witnesses stated that there was encroachment by the defendants. Rather, it would be important to note that there was no demarcation got done by the plaintiff before filing of the suit. But during the cross-examination, the plaintiff asserted that he had taken a demarcation report. In spite of opportunity, the said report was never produced. Even the witness produced by the plaintiff, PW2 asserted that defendants never encroached upon the suit land.

The contention raised by learned counsel that defendants No.2 and 3 admitted claim of the plaintiff in para 6 of the written statement filed cannot be accepted, as from reading of the said para, it is evident that there was no admission rather an alternative plea was taken "that if any part of the suit property comes under the possession of the defendants then they had become owner by way of adverse possession". This by no stretch of imagination can be construed as admission. Rather in para 5 in reply on merits, it had been specifically denied that defendants No.1 to 3 had encroached any part of the suit property.

The issue that site plan had not been considered will not enhance the case of the plaintiff. Site plans were produced by both the

parties. These had been prepared by the persons who were paid by the respective parties. Nothing has been brought on record to show the basis on which the said site plan were drafted. There are no details mentioned in the said site plans.

The contention of the counsel for the plaintiff that defendant No.4 admitted that he was occupying his own plot and had not encroached upon the suit property, nowhere proves the allegation that the defendants had encroached the plot of the plaintiff. The counsel tried to read the written statement of defendant No.4 that if he had not encroached then it means defendants No.1 to 3 had encroached upon the suit land, this cannot be the interpretation. Defendant No.4 has nowhere so stated. The argument is based on the presumption that there was an encroachment.

The law is well settled that the plaintiff has to prove its own case by its own evidence and he cannot merely rely upon the weaknesses in the evidence or pleadings made by the defendants. Reliance in this regard is placed upon the judgment of the Hon'ble Apex Court in **Union of India and others Vs. Vasavi Co-op. Housing Society Ltd. and others, 2014 (2) SCC 269**, wherein it has been held that the plaintiff has to succeed only on the strength of his case and not on the weakness of the case set up by the defendants in a suit for declaration of title and possession.

Similarly, **in Rangammal Vs. Kuppuswami and another, 2011 (12) SCC 220**, the Hon'ble Apex Court held as under :-

*“14. Section 101 of the Indian Evidence Act, 1872
defines ‘burden of proof’ which clearly lays down*

that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.”

In the aforesaid judgment, it has been laid down that until the court comes to a conclusion that the person upon whom burden to prove a fact lies has been able to discharge his burden, it cannot proceed on the basis of weakness of the other party.

The grievance of the plaintiff that local commissioner was not appointed and hence Order 26 Rule 9 CPC had not been complied with has no substance.

For ready reference, Order 26 Rule 9 CPC is reproduced as under :-

“9. Commissions to make local investigations.-

In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the court shall be bound by such rules.”

From the perusal of the provision, it is important to note that it is not that each and every application which is moved for appointment of local commissioner is to be accepted. It is the discretion of the Court. It is to be allowed only in cases where Court deems it appropriate that local investigation would be required for resolving the dispute.

There is another aspect to the said argument. The appointment of local commissioner would have been of no help because the sale deed relied upon by the plaintiff gives no details of the suit land. It only gives that the suit land is bounded by such and such property. Even in the application a request was made for appointing local commissioner to know

the actual existing position on the spot. That would have not proved the case of the plaintiff. The entire endeavour was that inspite of there being no dispute of the ownership of the abutting plots, the plaintiff should be given his 4 marlas of land irrespective of the fact that whether there was any encroachment or not? It would be pertinent to note that the plaintiff claimed that he had got demarcation done but said report was never produced.

In such circumstances, no grievance survives against the application for appointment of local commissioner having been declined.

During the course of hearing, learned counsel for the appellant could not point out any illegality or perversity in the impugned judgments passed by the Courts below. He could not refer to any question of law much less substantial question of law which is sine qua non for this court to exercise its appellate power under Section 100 of the CPC.

The cogent findings recorded by the learned trial court as well as the first appellate court have been found factually correct and legally justified. Thus, no fault can be found in the impugned judgments and decrees passed by the courts below and the same deserve to be upheld.

No other argument was raised.

Considering the 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 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

21.12.2017
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1. Whether the order is speaking/reasoned: Yes
2. Whether the order is reportable : Yes