

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 21st March, 2017*
Judgment Delivered on: 27th March, 2017

+ **RSA 168/2016**

HARI CHAND SAINI Appellant

Through: Mr.Rajesh Chaudhary, Advocate

versus

UDAY RAJ & ORS Respondents

Through: Mr.P.K.Dixit, Adv. for R-1 & R-2
Mr.Sanjeev Kumar & Mr.Wahid Ali,
Advocates for R-3

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

RSA 168/2016

1. This Regular Second Appeal under Section 100 of Code of Civil Procedure, 1908 has been filed by the appellant/plaintiff impugning the concurrent findings of the Courts below i.e. order dated 12th February, 2015 passed by learned Trial Court in CS No.61/2014 whereby the suit has been dismissed holding that the plaintiff has concealed the material facts which was evident from the record thus there was no requirement of adducing evidence on said facts, the order dated 23rd May, 2016 passed in M.C.A. No.03/2015 whereby the First Appellate Court upheld the decision of the learned Trial Court and dismissed the appeal.

2. The Civil Suit No.61/14 was filed on 26th June, 2014 by the appellant/plaintiff Hari Chand Saini impleading Uday Raj and his wife Pinki as well as SHO, PS Inderpuri as defendants pleading that he had been

running nursery on a piece of land measuring 4,000 sq. yds which was taken on rent from Sh.Ram Singh Rawat (now deceased, represented through his LR i.e. respondent No.3). He had been running nursery under the name and style of M/s Sainik Nursery for about 30-40 years.

3. However, the intention of the erstwhile owner Sh.Ram Singh Rawat became dishonest and at his instance the respondent No.1/defendant No.1 and his wife – respondent No.2/defendant No.2 started causing hindrance in the enjoyment of the property and also caused damage to the nursery.

4. At the behest of Sh.Harshvardhan, LR of Sh.Ram Singh Rawat, the respondent Nos.1 & 2/defendant Nos.1 & 2 started causing nuisance. Various complaints made to the concerned SHO also did not desist them from causing the nuisance as the concerned SHO refused to interfere in the matter on the ground that the dispute was of civil nature. No relief was claimed against defendant No.3 – the SHO, PS Inderpuri.

5. In para 6 & 7 of the plaint in Civil Suit No.61/2014, the averments have been made against defendant Nos.1 & 2 that they were acting at the instance of Harshvardhan (defendant No.3), but Harshvardhan was not impleaded as a party. The averments as made in para 6 & 7 giving rise to cause of action are as under:

“6. That since the defendant No.1 is a person of criminal nature and since he had always been working at the instance of Sh.Ram Singh Rawat in creating nuisance to the Plaintiff and his employees as such after the death of Sh.Ram Singh Rawat, his son namely Sh.Harshvardhan @ Raja also started boosting the defendant No.1 to continue with his nefarious activities with the motive to dispossess the Plaintiff from the nursery plot. In such attempts and endeavors, the defendant No.1 alongwith his wife (i.e. defendant No.2) and his children forcibly entered into the Nursery plot and took possession of two rooms on the rear side on 05.12.2011. It is submitted that since the local Police did not take any action against the defendant No.1 as such the

Plaintiff got filed another Criminal Complaint case against him and the same is also pending in the Court of Ms.Vijeta Singh, M.A., Patiala House Courts, New Delhi. Photocopies of all the four criminal complaint cases are annexed herewith.

7. That the defendants No.1 and 2 started creating nuisance to the Plaintiff and his employees at the instance of Sh.Harshvardhan @ Raja with the sole motive to dispossess the Plaintiff from the Nursery Plot/land. ”

6. The prayer made in the Civil Suit No.61/2014 was only against defendants No.1 and 2 and reads as under:

“(a) a decree of Permanent Injunction in favour of the Plaintiff and against the defendants No.1 & 2, their servants, agents, attorneys etc. thereby restraining them from causing any hindrance in repair of the main gate and also from putting any hindrance and/or any filth, dirt etc. in the passage as shown red in the site plan annexed with the Plaint.

(b) a decree of Permanent Injunction in favour of the plaintiff and against the defendants No.1 & 2, thereby restraining them, their servants, agents, attorneys etc. from removing/digging soil from the well of the plaintiff.

(c) a decree of Mandatory Injunction in favour of the Plaintiff and against the defendants No.1 & 2, thereby directing them to remove the angle irons from the passage near the gate and also to remove the concrete pipes from the passage so as to make the passage clear and unhindered for the use of the Plaintiff, his employees, customers etc.

(d) a decree of Mandatory Injunction in favour of the Plaintiff and against the defendants No.1 & 2, thereby directing them to make a separate passage apart from the existing passage as shown red in the site plan.

(e) grant such other and/or further reliefs to the Plaintiff and against the defendants No.1 & 2 as may be deemed just and proper in the facts and circumstances of the case.

7. In the Civil Suit No.61/2014, on 8th July, 2014, the appellant/plaintiff Sh.Hari Chand Saini and defendant no.1 Uday Raj made statement that they

have agreed to resolve the dispute in respect of the common passage which was stated to be causing rift between the parties and resulted in various complaints being made against each other. The terms and conditions agreed between the parties to settle the dispute in Civil Suit No.61/2014 read as under:-

“1. Since there is common passage and while using the same, rift is caused between the parties, which has led to filing of various complaints against each other. Now it has been resolved that that the plaintiff shall get constructed a separate passage for the use of the defendant no.1 and 2, their agents and associates towards south of the suit property towards Todapur, adjoining/adjacent to the shed of the nursery plants and at the distance of 7.5 ft. from the others property as shown in the site plan. The approximate length of the wall shall be about 55 ft. long and it shall be 9” thick with 3 ft. deep foundation.

2. The said separate passage shall be used exclusively by defendant no.1 and 2, their agents and associates. After the said passage is constructed, defendant no.1 and 2 shall not use the common passage shown red in the site plan.

3. The defendant no.1 shall pay ₹7,000/- to plaintiff towards the part payment of the construction of the wall for the separate passage and the remaining expenses shall be borne by the plaintiff. However, the expenses for the gate shall be paid by the defendant no.1 and 2.

4. After the separate passage for defendant no.1 and 2 is constructed, plaintiff shall be at liberty to put the wire towards the portion in possession of the defendant leading from the common passage. The defendants shall further remove the angle irons installed by him on the main gate as well as on the common passage.

5. Both the parties shall be bound by the above said terms and conditions.”

8. After recording the statement of the parties, the learned Trial Court listed the case for further proceedings on 21st July, 2014. At that stage, the

respondent No.3 Sh.Harshvardhan sought his impleadment under Order I Rule 10 CPC claiming that Civil Suit No.61/2014 had been filed by the plaintiff against defendant Nos. 1 & 2 in collusion with them by suppressing the material facts and without impleading him though he was a necessary party being owner/landlord and in possession of 2,000 sq. yds. (rear portion) of the suit property.

9. As the defendant No.3 SHO, PS Inderpuri was neither summoned nor plaintiff insisted to proceed against SHO the suit against SHO was dismissed as withdrawn. The application under Order I Rule 10 was allowed and the applicant, Harshvardhan was impleaded as defendant No.3. Thereafter defendant No.3 Harshvardhan filed an application under Order VII Rule 11 CPC for rejection of the plaint and the appellant/plaintiff filed an application under Order VI Rule 17 CPC seeking amendment of the plaint claiming the suit land stands acquired and that the defendant No.3 is left with no right or interest in the said property.

10. Learned Trial Court vide order dated 12th February, 2015 dismissed the application under Order VI Rule 17 CPC for the following reason:

“9. The proposed amendment changes the basic structure of the suit and not merely change in the nature of relief claimed. The proposed amendment introduces a totally different new and inconsistent case. Further, the prayer in the plaint and the amendment sought is not necessary for the purpose of determining the real controversy between the parties. The plaintiff has filed the suit for permanent and mandatory injunction only in respect of the passage leading to his portion. He in his plaint has admitted that late Ram Singh Rawat and after his death his son as the owner of the property and himself as tenant under him, but now by virtue of proposed amendment, he is challenging the very right, title and interest of Harshvardhan. No doubt such plea of plaintiff is on the basis of the photocopy of one document placed on record by defendant Harshvardhan, however, the proposed amendment changes the

very basic structure of the suit and not only the nature of relief claimed as portrayed by the plaintiff. Hence, the application of the plaintiff seeking amendment in the plaint is accordingly dismissed.”

11. While dismissing the suit for injunction, learned Trial Court considered various acts of the appellant/plaintiff to form an opinion that he had suppressed the material facts and tried to mislead the Court. Institution of the suit by him against defendant Nos.1 & 2 only without impleading appellant/defendant No.3 was held to be an abuse of the process of law. The suit was dismissed observing that since the suit has been filed after suppressing the material facts as evident from the record, there was no requirement of adducing the evidence on the said facts. Even the relief obtained by the plaintiff under the garb of settlement with defendant No.1 was also taken away by the Court by directing for demolition of the wall used for constructing a separate passage under the settlement dated 8th July, 2014 so as to restore the suit property in the same condition as it was prior to the filing of the civil suit No.61/2014.

12. Aggrieved by the decision of the learned Trial Court the appellant herein preferred M.C.A.03/2015. The First Appellate Court while concurring with the finding of the learned Trial Court observed that the Appellate Court should not substitute its own opinion unless the discretion exercised by the learned Trial Court is arbitrary or perverse, dismissed the appeal.

13. Learned counsel for the appellant has vehemently contended that without giving an opportunity to the plaintiff to adduce evidence, learned Trial Court could not have dismissed the suit. It was further contended that the application under Order VI Rule 17 CPC was based on documentary evidence (annexure-A7) which was dismissed without considering that the

land (suit property) stands acquired. Thus, the respondent No.3/defendant No.3 was not left with any title or interest in the said property. It has been contended that as is established from the certificate dated 10th March, 1993 issued by the Office of the Deputy Commissioner, Delhi (Land Acquisition Branch) (Annexure A-7) the said property stood acquired vide award No.1829 announced on 29th June, 1965 vide notification No.F.15(3)/59 LSG dated 13th November, 1959. It had been further contended that application under Order 7 Rule 11 CPC could not have been allowed by learned Trial Court as necessary averments regarding previous litigation were made in the plaint. Order VII Rule 11 cannot be invoked on the basis of averments made in the written statement. The plaint filed by him disclosed cause of action hence could not have been rejected by the learned Trial Court. Learned counsel for the appellant has relied upon *Mayar (H.K.) Ltd. & ors. vs. Owners & Parties Vessel M.V. Fortune Express & Ors.* AIR 2006 SC 1828 in support of his contentions.

14. Learned counsel for the respondents has submitted that both the Courts below have rightly held the appellant/plaintiff guilty of suppressing the material facts for obtaining a collusive decree, which disentitled him to claim the discretionary relief. He has relied upon *Dalip Singh vs. State of UP & Ors.* in Civil Appeal No.5239 of 2002, *S.P.Chengalvaraya Naidu v. Jagannath* AIR 1994 SC 853, *A.Shanmugam vs. Ariya kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam Represented by its president etc.* 2012 (6) SCC 430, *Sandeep Kumar vs. Nihal Chand* 207 (2014) DLT 104, *Ram Chandra Singh vs. Savitri Devi* 2003 (8) SCC 319 in support of his contentions.

15. Litigation started between the parties with the institution of Civil Suit No.283/2006 earlier filed by the appellant/plaintiff Sh.Hari Chand Saini

against Sh.Ram Singh Rawat wherein status quo was ordered to be maintained by learned civil judge. Learned Trial Court also appointed a Local Commissioner to ascertain the possession. Sh.Ram Singh Rawat expired on 10th February, 2011 and was substituted by his LR, Sh.Harshvardhan (respondent No.3/defendant No.3). The said suit No.283/2016 was disposed of on the basis of statement made by the parties on 3rd March, 2012 admitting their possession in respect of 2,000 sq. yds. each i.e. out of the total land ad-measuring 4000 sq.yds., plaintiff Hari Chand Saini was in possession of 2000 sq.yds. in the front portion of the suit property and defendant Harshvarshan (LR) was in possession of 2000 sq.yds. in rear portion of the suit property and the appellant/plaintiff was not to be dispossessed from the portion in his possession except with due process of law.

16. Section 41(i) of the Specific Relief Act, 1963 provides that injunction can be refused when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court.

17. The regular second appeal has to be only entertained if there arises any substantial question of law. Appreciation of evidence is within the jurisdiction of the original Court and the Appellate Court, which cannot be lightly interfered with for maintaining the second appeal which can be entertained only when a substantial question of law is raised.

18. The certificate (Annexure A-7) on the basis of which the appellant herein wanted to seek amendment of plaint was dated 10th March, 1993 (Annexure-A7). Since the appellant herein had been claiming himself to be a tenant under Sh.Ram Singh Rawat, the right, if any, of the appellant/plaintiff could flow only through the right, title and interest of the landlord and not independently. Otherwise also, in the Civil Suit

No.61/2014, the appellant/plaintiff sh.Hari Chand Saini had not disclosed about the settlement between him and Sh.Harshvardhan – legal heir of Sh.Ram Singh Rawat (defendant in Civil Suit No.283/2006) despite the fact that the Civil Suit No.283/2006) was disposed of on the joint statement of the appellant/plaintiff and the legal heir of landlord Sh.Ram Singh Rawat. The title of the defendant No. 3 was not in issue in the Civil Suit No.61/2014 and otherwise also, being tenant the appellant/plaintiff Hari Chand Saini was estopped from taking such plea. The amendment could not have also been allowed for the reason that it was not a new fact which came to his knowledge after the institution of the suit.

19. The civil suit seeking injunction against Uday Raj and his wife Smt.Pinki – defendants No.1 and 2 was dismissed noticing the conduct of the appellant which disentitled him to claim this discretionary relief. The learned Trial Court examined the submissions of the respondent No.3/defendant No.3 about the collusive nature of the Civil Suit No.61/2014 as well that on failure to get the same relief in M-27/2012 titled as Hari Chand Saini vs. Harshvardhan & Anr., he had filed this Civil Suit after suppressing the material facts to obtain the collusive decree. The discussion by the learned Trial Court on this aspect appears in paras 13 to 16 of the impugned judgment and extracted as under:-

13. After hearing this argument from the counsel for plaintiff, the present court was constrained to read the entire application filed by the plaintiff in contempt petition no. M-27/ 2012 pending before CCJ (North) Delhi. The para 6, 7 and prayer clause of the said application is entirely contradictory to the arguments of the counsel for plaintiff and same is reproduced as under:

“6. That seeing the position the contemnors now have obstructed the way of the main gate by putting cement pipes in front of the gate and have also fixed angles in the way in front of the gate. The contemnors have also thrown garbage in front of the gate in the way thereby completely obstructing the way / access to the nursery. The petitioner is suffering a lot on this account. The sale of plants of nursery has lower down and is about the verge of collapse / closed. He is suffering monetary loss.

7. That with intention to finish the dispute, the petitioner suggests that a separate way be given / made for the contemnors adjacent to the wall of Pusa farm. A 10' way / rasta will be sufficient for them to go to their portion and a wall of 10' height can be erected separating the portion of both the parties. The petitioner can be compensated for the land given in the way of the contemnors by giving equal land to the petitioner towards his tubewell.

Prayer: It is therefore, most respectfully prayed that an order may be passed to carve out / make the access / rasta of 10' wide to the portion of contemnors by the side and adjacent to the wall of Pusa farm and equal land to the land given in the way / access of the contemnors may be ordered to be given to the petitioner from their portion near the tubewell of the petitioner and further a wall of 10' height may be ordered to be raised at the expenses of both the parties separating the portion of petitioner from that of the contemnors so that the litigation between the parties may come to an end”.

14. In the said contempt petition, along with Harshvardhan, plaintiff has also impleaded Uday Veer, who is defendant no. 1 in the present matter. Interestingly, for the reasons best known to plaintiff, he in the present suit did not implead Harshvardhan and only impleaded Uday Veer and his wife as defendants. It is only subsequently that on the application of Harshvardhan he has been impleaded as a party to the suit.

15. Now coming to the relief sought in the present suit. It is prayed that defendants be restrained from causing any hindrance in repair of the main gate . They be further restrained from removing / digging soil from the well of plaintiff. It is further prayed that defendants be directed to remove the angle iron from the passage near the gate and also to remove the concrete pipe from the passage so as to make the passage clear and unhindered

16. Now the question for consideration is whether by merely wording the relief in some other words, it gives rise to new cause of action. Even, if, it is assumed that some of the reliefs were not prayed before the previous court, however no explanation has been tendered by plaintiff as to why he did not impleaded Harshvardhan as a party to the suit , when plaintiff himself has filed one similar application, praying for the similar relief in another court where Harshvardhan and defendant no. 1 herein are also a party. The plaintiff though in his plaint has disclosed about some of the litigations, probably those, which were suitable to him, but not all the cases / litigations pending between the parties. It is argued by the counsel for plaintiff that it was not necessary for him to disclose the facutm of said application in the present suit. The relief of injunction is an equitable relief and the party who seeks such relief should approach the court with clean hands. The plaintiff has not only concealed the pendency of similar application with the similar prayer before some other court but has also deliberately not impleaded Harshvardhan as a party to the suit

and on the very first day of effective hearing, in collusion with defendant Uday Veer entered into compromise and even constructed the wall and a separate passage within a few days of giving the settlement statement.

20. The learned Trial Court examined the conduct of the appellant/plaintiff in the light of various decisions reported as *Satyender Singh vs. Gulab Singh* MANU/DE/1047/2012, *Dalip Singh vs. State of U.P.* (2002) 2 SCC 114 and *Maria Margarida Sequeria Fernandes vs. Erasmo Jack de Sequeria (dead) through LRs.* and held the appellant/plaintiff not entitled to the discretionary relief of injunction especially observing that the fraudulent and dishonest litigants must be discouraged. Not only that, the relief availed by the appellant/plaintiff under the garb of settlement was also taken away by directing him to restore the suit property to the position it existed prior to the institution of the suit for injunction.

21. The learned Trial Court has compared the averments made in Civil Suit No.61/2014 and held that material facts have been concealed, there is no question of entertaining the second appeal merely because after noting the conduct of the appellant/plaintiff discretion has not been exercised in his favour. Learned Trial Court has rightly held that the conduct of appellant/plaintiff was evident from the record and that the Civil Suit No.61/2014 was filed in collusion with defendants No.1 and 2 suppressing the material facts without impleading the respondent No.3/defendant No.3. Thus refusal to exercise the discretion on well established principle does not give rise to any substantial question of law. It is also necessary to note here that the defendant who is a tenant, and was in the knowledge of the notification and award No.1829 announced on 29th June, 1965 could not have sought an amendment that the respondent No.3/defendant No.3 had no right, title or interest left after the land has been acquired. After the land

has been acquired possession has to be taken by the Government and he was in possession only as tenant in respect of 2,000 sq. yds. of land under late Sh.Ram Singh Rawat and thereafter under his LR.

22. The First Appellate Court has concurred with the view of the learned Trial Court.

23. The relief of injunction being a discretionary relief cannot be claimed as a matter of right. Both the Courts below have found the conduct of the appellant/plaintiff to be an abuse of the process of law which disentitled him to claim the relief of injunction.

24. Both the Courts below have exercised their discretion after deliberating on the conduct of the plaintiff evident from the previous litigation between the parties and how the material facts have been concealed and the collusive suit was filed by the appellant/plaintiff without impleading Harshvardhan, son of Sh.Ram Singh Rawat, the owner/landlord.

25. The instant appeal does not raise any substantial question of law so as to require interference by this Court.

26. The appeal is dismissed.

27. LCR be sent back alongwith copy of this order.

CM No.23773/2016 (Stay)

Dismissed as infructuous.

PRATIBHA RANI
(JUDGE)

MARCH 27, 2017
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