Sr. No.308

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

**RSA No. 1280 of 1988 and
X-OBJ No. 32-C of 1988
Decided on: 22.03.2018**

Kasturi Lal(deceased) through LRs

..........Appellants

versus

Smt. Daya Kaur and others

..........Respondents

Coram: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. Vishal Garg, Advocate
for the appellant.

Mr. G.S.Nagra, Advocate
for respondent Nos.3(i), 5(i),
14(ii), 27 & 30.

Mr. Munish Gupta, Advocate
for respondent No.19(i), 17,
22(ii), 14(ii), 26 & 29.

Rajbir Sehrawat, J.(Oral)

This order shall dispose of the regular second appeal filed by the plaintiff against the concurrent findings of the Courts below; dismissing his suit for possession and the cross objections filed by the defendants whereby they had questioned the judgment and decree passed by the lower Appellate Court to the extent it reversed the grant of special costs by the Trial Court.

For the convenience, the parties herein would be referred to as the plaintiff and the defendants as they were described in the original suit.

The brief facts of this case as mentioned in the judgment of the lower Appellate Court are that the plaintiff filed a suit for possession in which he claimed that the defendants had encroached upon a part of property No.B-XI-S-1/32-34 situated in village Urmar. This property which comprised of two properties having municipal properties numbers B-XI-S-1/32 and B-XI-S-1/34 was purchased by him in auction on 28.09.1960. It was claimed that in September, 1969 the plaintiff had gone to Gaziabad in connection with the business. When he returned in December, 1971 he found that defendant Nos. 2 to 15; in collusion/conspiracy with Sunder Singh, had constructed some shops on the suit property, which was described in the plaint in dimensions and colours as depicted in the site plan. It was claimed by the plaintiff that the defendants had no right to construct the shop on the suit property. Therefore, he was entitled to the vacant possession of the suit land. Thereafter, the suit was amended and defendants No. 16 to 34 were also added alleging that they had further encroached upon part of the above said property and constructed 6 more shops on the eastern side of the plot. Hence the suit for possession was maintained against defendant Nos. 16 to 34 as well. It was further pleaded in the suit that Sunder Singh, from whom the defendants claimed to have purchased the property in khasra No. 188, had no authority to sell the suit land since it is a property belonging to the plaintiff.

On being put to notice, the defendants filed their written statement claiming that the suit property was not part of the property No.B-XI-S-1/32-34 situated in village Urmar. In fact the property under-neath their shops was comprised in revenue khasra No. 188; of which Sunder Singh, defendant No. 1 was the owner in possession. They were the bona fide purchaser for consideration from Sunder Singh. Therefore, they were protected under Section 41 of the Transfer of Property Act, 1882. The plaintiff was estopped by his act and conduct from suing them since the shops in question were constructed a number of years ago and he was witness to the construction but he never objected thereto. Therefore, the plaintiff was not entitled to possession of the suit plot. On the pleadings of the parties, the Trial Court framed the following issues:-

"1) Whether the suit plot was a part of the plot No. B-XI-S-1/32-34.

2) If question No. 1 is proved in the affirmative, whether the plaintiff was estopped from instituting the suit giving rise to this appeal.

3) Whether the suit plot was a part of the area comprised in the revenue khasra No. 188."

Subsequently more issues were framed as under:-

"1. Whether the plaintiff is owner of the property No.B-XI-S-I 32; OPP

2. Whether the property in suit forms part of the property comprised in issue No.1? OPP.

3. Whether defendants No. 2 to 15 purchased the property in suit for consideration and without notice from defendant No.1?OPP.

4. Whether defendant No. 1 is owner of Khasra No.188?OPD

5. Whether the suit property forms part of Khasra No.188?OPP

6. Whether the suit is liable to be stayed for the reason given in para 12 of the preliminary objection of the written statement?OPD

7. Whether plaintiff is estopped by his act and conduct to file the suit?OPP

8. Whether plaint is properly valued for the *purpose of court fee and jurisdiction?OPP*

9. Whether defendants are entitled to the special costs under section 35- A of the Civil procedure Code?OPD

10. Relief."

Parties led their respective evidence.

Besides this, the Trial Court also appointed Mohinder Singh, PW-5 as Local Commissioner for ascertaining as to whether the suit land formed part of the property No. B-XI-S-1/32-34 or it formed part of revenue khasra No. 188. The Local Commissioner submitted his report. Initially this report was found suffering from some vagueness. Therefore, the Trial Court required him to re-visit the spot. Thereafter, the Local Commissioner submitted his report on 26.10.1981. The parties were to file objections to this report. However, none of the parties pressed any objections against the report. Accordingly the report of the Local Commissioner was accepted by the Trial Court. The report of the Local Commissioner found that the suit plot was part of the property No. B-XI-s-1/32 as well as part of area comprised in the revenue khasra No. 188.

After appreciating the evidence, the Trial Court accepted the report and recorded a finding that the property No. B-XI-S-1/32 was purchased by the plaintiff from the Rehabilitation Department in 1960 and sale certificate for this property, dated 23.11.1964 Ex:PW4/A was duly issued by the department. In this sale certificate, the property was described as property with municipal property number and the boundaries were also given. Regarding khasra No. 188, claimed to be belonging to Sunder Singh, the vendors of the defendants, the Trial Court held that the said Sunder

Singh was owner by purchase dated 16.12.1964 from rehabilitation department, of several pieces of land in different khasra numbers, as is evident from the revenue record. However, during consolidation khasra No.188 was allotted to Sunder Singh. Therefore, the said Sunder Singh became owner of Khasra No. 188.

The Trial Court further held that the report of the Local Commissioner shows that the suit property forms part of khasra No. 188 and also forms part of property No. B-XI-S-1/32. Accordingly, the Trial Court held that there was over-lapping of ownership qua the suit property. In view of this, the Trial Court held that the plaintiff was the purchaser of the property No. B-XI-S-1/32 since 28.09.1960 whereas Sunder Singh became owner of area of Khasra No. 188 since 16.12.1964. Hence since the suit property already stood sold to the plaintiff by the Rehabilitation department, therefore, the Rehabilitation department was not having any title to transfer the same to the said Sunder Singh thereafter. Hence the said Sunder Singh was not having any ownership over the suit property. He was the owner of Khasra No. 188 minus the area comprised in Property No. B-XI-S-1/32 owned by plaintiff. Accordingly, the exclusive ownership of the plaintiff over the suit property was held by the Trial Court.

However, the Trial Court held that since the plaintiff had not raised any objection when the shops were being constructed by the defendants, therefore, he shall be deemed to have waived his title over the suit property. Therefore, he is not entitled to decree for possession. For the same reason, while deciding issue No. 9, the Trial Court held that plaintiff slept over his right. The plaintiff was aware of the possession of the defendants and he continued seeing the construction over the suit land.

Therefore, the claim of the plaintiff for possession of the suit property was vexatious. Accordingly, the Trial Court held that the defendants were entitled to compensatory cost and awarded compensatory costs to the defendants to the tune of Rs. 5,000/- against the plaintiff.

However, the claim of the defendants regarding their ownership over the suit property by way of adverse possession was declined by the Trial Court on the ground that the same is not proved by the defendants and that the plaintiff has claimed his title within the period of limitation, before maturity of the adverse possession. Accordingly, while dismissing the suit for possession filed by the plaintiff, the Trial Court awarded the compensatory costs to the defendants to the tune of Rs. 5,000/- against the plaintiff.

Aggrieved against this judgment and decree the plaintiff filed appeal. The defendants did not file either any appeal or cross-objections against any finding recorded in the judgment of the Trial Court.

After hearing the parties and perusing the record, the lower Appellate Court also dismissed the appeal filed by the plaintiff. While dismissing the appeal filed by the plaintiff the lower Appellate Court also recorded that Trial Court has rightly accepted the Local Commissioner report, thereby holding that the suit land was part of the plot property No. B-XI-S-1/32 as well as part of area comprised in revenue Khasra No. 188. The lower Appellate Court further held that the purchase of property No. B-XI-S-1/32 by the plaintiff was not reflected in the revenue record. Therefore, the defendants were the bona fide purchaser from Sunder Singh. The plaintiff did not object to construction of shops by them. Hence the Trial Court has rightly concluded that the plaintiff chose to stand-by and see one Sunder Singh as well as his transferees raising construction over the suit property. Omission/failure on his part to take any objection at that time brings in the doctrine of estoppel against him. Hence the plaintiff shall be deemed to have abandoned his right and he is estopped by his own act and conduct from instituting the suit in question.

However, while reversing the finding on issue No. 9 lower Appellate Court also held that there was no justification for holding the plaintiff liable to pay the compensatory costs of Rs.5,000/- to the defendants. The lower Appellate Court also held that there was no evidence as to how and in what manner the defendants suffered damages corresponding to the tune of Rs. 5,000/-. Hence the finding of the Trial Court in this regard was also set aside.

Challenging the judgment and decree passed by the lower Appellate Court, the plaintiff has filed the present appeal. The defendants have filed cross-objections in appeal filed by the plaintiff. However, their cross-objection is restricted to challenge the finding of the lower Appellate Court whereby it has reversed the finding of the Trial Court on the issue of compensatory costs. No other finding of the lower Appellate Court or of the Trial Court is the subject matter of the cross-objections filed by the defendants/respondents herein.

I have heard learned counsel for the parties and perused the record with their able assistance. The present appeal is liable to be allowed for the simple reason that the Trial Court had relied upon the uncontested report of the Local Commissioner which had categorically found that the suit property was comprised in property No.B-XI-S-1/32 owned by the plaintiff as well as in the area of khasra No. 188. Keeping in view the fact that the plaintiff purchased the suit property prior in time, the same property could not have been sold to Sunder Singh. Consequently, the Trial Court has held that Sunder Singh shall be deemed to have become owner of the area of khasra No. 188 minus the area comprised in property No.B-XI-S-1/32 owned by the plaintiff. This finding was not challenged by the defendants before the lower Appellate Court by filing any appeal or by filing any cross-objection. Hence they had accepted this finding which was recorded in favour of the plaintiff. Even the lower Appellate Court has upheld this finding recorded by the Trial Court and has also accepted the report of the Local Commissioner which was relied upon by the Trial Court. Even before this Court in the present proceedings, the defendants have not filed any appeal or cross-objection to question the concurrent finding recorded by both the Courts below; on the acceptance of the report of the Local Commissioner or against the finding that the vendor of the defendants had become owner only of the area comprised in khasra No. 188 minus the property No. B-XI-S-1/32 owned by the plaintiff. The cross-objection filed by the defendants before this Court is also restricted to challenge the finding of the lower Appellate Court whereby it had reversed the finding of the Trial Court on the point of compensatory costs. Hence the finding of fact recorded by both the Courts below that the plaintiff is the owner of the suit property has gone unchallenged by the defendants. Hence this Court has to accept that the plaintiff is the owner of the property No. B-XI-S-1/32 and the suit land is comprised in the property owned by the plaintiff. Hence it is held that the plaintiff is the owner of the suit property.

One more fact which needs to be noticed in this case is that learned counsel for the appellant has presented the judgment and order passed by this Court in RSA No. 326 of 1984 decided on 10.03.2004. In that case the appeal filed by the present plaintiff/appellant was allowed qua the property No. B-XI-S-1/34, which was part of the jointly purchased property No. B-XI-S-1/32-34. In that case also, the Local Commissioner had found that the suit property was part of property No. B-XI-S-1/34 as well as part of khasra No.188. In that case also, the plaintiff was held entitled to get possession of the suit property comprised in property No. B-XI-S-1/34. Accordingly; learned counsel has informed this Court that; the possession of the land comprised in purchased property No. B-XI-S-1/34 has already been taken from other persons who had constructed their shops. Only the suit land involved in the present suit which is comprised in property No. B-XI-S-1/32 remains with the defendants in the present suit. This fact is not even disputed by the respondents.

So far as question of entitlement of the plaintiff to the possession of the property is concerned, this Court finds that finding recorded by both the Courts below in this regard are not sustainable. Both the Courts have held that since the plaintiff had not taken objection to the construction of the shops by the defendants, therefore, he shall be deemed to have waived and abandoned his right over the suit property. In view of this Court; this approach of the Courts below is not sustainable. First of all, merely because there is no document regarding objection taken by the plaintiff at the time of construction of the shops by the defendants is not the conclusive proof of the fact that he had not taken any objection. Secondly, even if he had not taken any objection, then also his right to property can not be deemed to have been abolished merely because he had chosen not to speak when the shops were being constructed. Merely because a person has suffered construction or encroachment upon a part of his property does not mean that he has lost title or a right to hold that property or to re-claim the possession of that property from the encroacher or from the person who has raised construction. In case of possession of other person over the property of the plaintiff, the possession of such other person could have matured into abolition of title of the plaintiff only in case of the ingredients of Section 27 of the Limitation Act, 1963 qua adverse possession of such other persons were made out. However, the Trial Court has recorded a specific finding that the defendants have failed to prove the ingredients of adverse possession. This finding also has not been challenged anywhere by the defendants. Once the plaintiff has filed the suit for possession within the prescribed time of limitation, nothing adverse can be read into his conduct to dis-entitle him to his right to hold and possess the property. Hence the finding recorded by the Courts below that the plaintiff has lost his right to hold and possess the property; merely because he suffered construction being raised by the defendants; is set aside.

So far as the plea of bonafide purchaser in favour of defendants invoked by the lower Appellate Court is concerned, the same is also liable to be set aside. The plea of bonafide purchaser can not be raised and sustained against the original owner of the property, more so when he is not even alleged to have sold it to any person at all. The original owner of the property remains the owner of the same till he transfers his property rights through some recognised mode of transfer of property or till his right to hold and possess the property is extinguished by prescription or operation of law. None of these situations is available in the present case. Hence the finding of bonafide purchaser invoked by the Courts below in favour of defendant and against the plaintiff; is also held to be not sustainable.

However, both the Courts below have recorded concurrent finding that the plaintiff did not object to the construction of the shops being raised by the defendants. Even the plaintiff has said that he had gone out of station in business connection for some time and when he came back he found that some shops were constructed over the suit property. Even thereafter, some more shops were constructed. Hence the conduct of the plaintiff has also been of slackness in exercising his legal right, though not defeatable on account of limitation or estoppel. But because of this slackness the defendants have suffered to some extent. Therefore, it has to be held that the defendants are entitled to some compensation due to harassment of litigation and the expenses incurred by them. The Trial Court had awarded Rs.5,000/- in favour of the defendants and against the plaintiff. This Court finds itself in agreement with the finding recorded by the Trial Court in this regard. The lower Appellate Court has reversed this finding on the ground that no evidence has been led to quantify the loss or prejudice suffered by the defendants, nor any discernible formula for determination of the compensation has been applied by the Trial Court. While the lower Appellate Court may be legally right in strict sense on this aspect, however, the defendants can not be denied consideration in equity. In determination of any compensation, as always, some reasonable guess work is involved. The Trial Court held in its assessment; the compensatory costs to be Rs.5,000/-. The lower Appellate Court has also not suggested any other determinable amount of compensatory costs. Hence the compensatory cost allowed by the Trial Court is upheld reversing the finding recorded by the lower Appellate Court in this regard.

In view of the above, the appeal filed by the plaintiff is allowed. His suit for possession is decreed.

At the same time, cross-objection of the defendants, only to the extent of claim of compensatory costs, is also allowed. The cost in favour of the defendants, as determined by the Trial Court at Rs. 5,000/-, is awarded against the plaintiff.

In view of the above, the appeal as well as cross-objections are allowed.

22nd March, 2018 **[RAJBIR SEHRAWAT]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*