

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

RSA No.1471 of 1994(O&M)

Date of decision:14.11.2018

Parkash Singh (deceased) through LRsAppellant

VERSUS

M.C. Dina Nagar and anotherRespondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. R.K. Arya, Advocate for the appellant.

Ms. Manpreet Kaur, Advocate for the respondents.

REKHA MITTAL, J.

Challenge in the present appeal has been directed against judgments and decrees passed by the Courts whereby suit for permanent injunction restraining the respondents/defendants from interfering or disturbing possession of appellant/plaintiff qua land bearing khasra No.237 measuring 1 kanal 2 marlas as per jamabandi for the year 1982-83, situated in the area of Municipal Committee Dinanagar, Tehsil Gurdaspur was dismissed by the trial Court on the ground that the suit is barred under Order 23 sub-Rule (4) of the Code of Civil Procedure, 1908 (in short 'CPC') and the Appellate Court affirmed findings on issue No.3 with additional observation that suit is also barred by principle of res judicata under Section 11 CPC.

The appellant/plaintiff claimed that he is cultivating the suit land for the past about 8/9 years but Patwari Halqa has not shown the entire land under cultivation of plaintiff. The jamabandi and revenue record shows possession of the plaintiff over suit land as *gair dakhilkar*. The respondents/defendants have no title or interest in the suit land that belongs to Provincial Government. Defendant No.1 has threatened to take possession illegally and forcibly. Hence, the suit after service of notice under Section 49 of the Punjab Municipal Act, 1911 (in short 'the Act').

The respondents/defendants filed written statement controverting plea of the appellant that he is in possession of suit land. They raised preliminary objections inter alia that suit is not maintainable in view of Section 11 CPC and the appellant is not in possession of suit land as already held in Civil Suit No.21 of 1984 decided on 28.02.1985. The appellant is not entitled to discretionary relief of permanent injunction as he has not disclosed fate of previous suit filed by him.

The appellant/plaintiff filed replication re-asserting his claim raised in the plaint while denying the preliminary objections taken by the respondents/defendants.

The controversy between the parties led to framing of following issues:-

1. Whether the plaintiff is in possession of the property in dispute? OPP
2. Whether the plaintiff is entitled to the injunction prayed for? OPP

3. Whether the suit is barred by the principle of res-judicata? OPD

4. Relief.

The parties were permitted to adduce evidence in support of their respective contentions. Having heard counsel for the parties in the light of materials on record, the trial Court determined issue No.1 in favour of the plaintiff/appellant but issue No.3 was answered against the plaintiff as noticed hereinbefore on the basis whereof issue No.2 was decided against the plaintiff/appellant. The Appellate Court affirmed findings of the trial Court on issue No.1 as well as issue No.3 with the aforesaid additional observations and consequently, the appeal was dismissed.

The sole submission made by counsel for the appellant/plaintiff is that no sooner the appellant is held to be in possession of suit land, he cannot be dispossessed therefrom except in due course of law. It is further argued that a person in settled possession cannot be dispossessed by true owner except in accordance with law because no one can be allowed to take law in his hand.

Counsel representing the respondents has supported findings of the Courts on issue No.3 with the submission that prior to filing of present suit, the appellant/plaintiff filed a suit for permanent injunction in respect of same land measuring 1 kanal 2 marlas comprising khasra No.237 but the same was dismissed by the trial Court vide judgment and decree dated 28.02.1985 but the appeal preferred by the appellant/plaintiff was dismissed as not pressed by the Court of District Judge, Gurdaspur.

Perusal of the judgments impugned and so also judgment passed in case No.21 dated 11.01.1984 decided by Additional Senior Sub Judge, Gurdaspur on 28.02.1985 makes it evident that issue with regard to appellant/plaintiff being in possession of suit land was consistently decided in favour of the appellant/plaintiff. Judgment dated 28.02.1985 is available on record and marked as Ex.P6. In the said case, the Court framed three issues to the following effect:-

1. Whether the plaintiff is in possession of the suit land as tenant? OPP
2. Whether the plaintiff is entitled to the injunction prayed for? OPP
3. Whether a notice was required to be served? If so, effect of not serving the notice?OPP.
4. Relief.

Issue No.1 was answered in favour of the appellant that he is in possession of suit land but not as a tenant. Issue No.2 was answered against the plaintiff with the findings that the appellant failed to substantiate his plea if the defendant-Committee is threatening to dispossess the plaintiff illegally and forcibly and rather his case is that they are taking possession only in accordance with law, therefore, the plaintiff has failed to prove any threat and is not entitled to injunction. Issue No.3 was also decided against the appellant with the findings that notice under Section 49 of the Act was required to be served but no such notice was actually served, therefore, the suit is not maintainable. The appeal preferred by the appellant against judgment and decree dated 28.02.1985

was dismissed as not pressed vide order dated 21.04.1986 that records that the appellant and his counsel made a statement that notice under Section 49 of the Act was not given before filing the suit and the appeal may be dismissed as not pressed.

A plain and careful reading of the judgment/order passed in the previous litigation leaves no matter of doubt that in the said litigation, appellant was not allowed the relief of injunction for his failure to prove any threat of dispossession at the hands of respondents/defendants and for want of notice under Section 49 of the Act.

The Courts, in the instant suit, have accepted plea of the appellant that he is in possession of suit land. Issue No.2 with regard to his entitlement to injunction has been decided against him simply on the basis of findings on issue No.3 with regard to the suit being barred under Order 23 CPC.

The question for consideration is whether suit filed by the appellant is barred under Order 23 Rule 1 sub-Rule (4) or hit by the principle of res judicata laid down in Section 11 CPC.

Order 23 Rule 1 and sub-Rule (4) says that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

In the instant case, the previous suit for injunction instituted by the appellant was dismissed on twin grounds that there is no threat qua interference in his possession or dispossession by forcible and illegal

means and the suit is bad for want of notice under Section 49 of the Act. It is difficult to understand that if the previous suit is dismissed for want of necessary cause of action at that relevant point of time and notice under Section 49 of the Act, either any permission was required to file a fresh suit in case there is any threat against forcible dispossession in future or the appellant is debarred for all the times to come to file a fresh suit for injunction after serving necessary notice in case he has any grievance to express against interference in his peaceful possession. In this view of the matter, findings of the Courts that suit filed by the plaintiff is barred under Order 23 Rule 1 sub-Rule (4) CPC are erroneous and cannot stand the test of judicial scrutiny and accordingly set aside. Similarly, observations made by the Court in appeal that principle of res judicata under Section 11 CPC gets attracted in the given scenario is the result of failure to appreciate findings in the previous suit, in the light of scope of Section 11 CPC. As has been noticed hereinbefore that even if the previous suit has been dismissed for want of any cause of grievance at the relevant time or service of notice under Section 49 of the Act, Section 11 does not debar the appellant to file a fresh suit on a distinct or separate cause of action against his forcible dispossession. The matter would have been different had the issue qua possession of suit land by the appellant been answered against the plaintiff in the previous suit because in that eventuality, the appellant would have been handicapped to agitate the same issue of his possession by filing another suit for injunction. In this view of the matter, findings recorded by the Courts on issues no.2 and 3 are the result of misconstruing the provisions of Order 23 and Section 11 CPC and failure of

the Court to appreciate findings in the previous suit in right perspective.

As a consequence, judgments and decrees by the Courts cannot be allowed to sustain and accordingly set aside.

For the foregoing reasons, the appeal is allowed. As a natural corollary, suit filed by the appellant/plaintiff for grant of permanent injunction is decreed to the effect that he will not be dispossessed from suit land except in due course of law. No order as to costs.

NOVEMBER 14, 2018		(REKHA MITTAL)
‘D. Gulati’		JUDGE
Whether speaking/reasoned	:	yes/no
Whether reportable	:	yes/no