

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

-:-

RSA No. 1346 of 2012 (O&M)

Date of decision: 06.03.2018

Kulbir Singh

... Appellant

Vs.

Swaran Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Puneet Sharma, Advocate, for the appellant.

Mr. Atul Jain, Advocate, for respondent No.1.

AMIT RAWAL, J. (Oral)

C.M No. 3625-C of 2012

For the reasons mentioned in the application, delay of 270 days
in re-filing the appeal is condoned.

C.M stands disposed of.

RSA No. 1346 of 2012 (O&M)

This regular second appeal preferred by the appellant/plaintiff
claiming injunction against the respondent/defendant and their agents not to
interfere in the peaceful possession of land of plaintiff situated at village
Tibba, Tehsil Sultanpur Lodhi, District Kapurthala, as per jamabandi for the
year 1998-99, Hadbast No.44, Khata No. 508/994, Khasra No. 32//19/4-2 as
well as for forcible interference and possession has been dismissed and the
counter-claim of the defendant No.2 for mandatory injunction with regard to
khasra No. 428 dismissed by the trial Court but in an appeal preferred

by defendant No.2 has been allowed whereas the plea taken by the appellant/plaintiff purportedly under the aid of the provisions of order 41 Rule 33 qua injunction with respect to Khasra No. 32//19/4-2 has been rejected.

The appellant/plaintiff filed a suit on the ground that plaintiffs had been in possession of Khasra No. 32//19/4-2 since long and had a threat from the defendants of forcible interference. The defendants wanted to harvest the crop from the suit land and, therefore, cause of action arose to file the suit.

Respondent/defendant No. 1 and 2 appeared and contested the suit on the ground of want of cause of action much less concealment of the facts and having approached to the Court with soiled hand. On merits it was submitted that Khasra No. 428/3-3 was a gair mumkin passage which had been carved out during the consolidation and passage was 2 karams wide leads to their land but the major portion of land had been encroached upon by the plaintiff for cultivation. The matter was reported to the Gram Panchayat. A demarcation of the said passage was got conducted by the Sarpanch which was admitted by the people present including plaintiff No.1. The passage was restored in its original position and the same was being used by defendant Nos. 1 and 2. However, the plaintiffs demolished the boundary wall and merged the passage in their land. The complaint was submitted before the Police Station Talwandi Choudharian, which led to compromise whereby appellants/plaintiffs agreed to get the demarcation of the land on 10.06.2004, but no such demarcation was conducted and sought the dismissal of the suit on this ground. However, defendant no.2 namely,

Swaran Singh set up a counter-claim by claiming mandatory injunction directing the plaintiff and performa defendant to vacate the encroached portion of the passage.

All the averments in the written statement to the counter-claim filed by the plaintiff were denied. From the pleadings of the parties the following issues were framed :-

1. Whether plaintiffs are entitled to injunction prayed for? OPP
2. Whether the plaintiffs (wrongly typed, it could be defendants) are entitled to mandatory injunction direction the plaintiffs and proforma defendant's to vacate the portion of passage comprised of Khewat, Khatauni No.1450/2023 Khasra No.424/3-3 as detailed in head note of counter claim?OPD 2
3. Whether the plaintiffs have got no cause of action to file this suit? OPD 1 and 2.
4. Whether the plaintiffs have not come to the Court with clean hands? OPD 1 and 2.
5. Relief.

Both the parties in support of their cases, examined the witnesses i.e. PW1 Kulbir Singh, PW2 Balwant Singh and PW3 Nirmal Singh. Defendant No.2 Swaran Singh counter claimant stepped into the witness box as DW1 examined Kewal Singh as DW2, Gurmail Singh as DW3 and Lakhwinder Singh as DW4 and tendered documentary evidence. The trial Court on the basis of the evidence dismissed the suit as well as counter-claim.

Defendant No.2 preferred an appeal against the dismissal of his counter-claim bearing No. 257 of 2006, Same has been allowed whereby counter-claim by issuing a mandatory injunction against the plaintiff-respondent to vacate the encroached portion of the passage comprise in Khasra No. 428 (4-12) Gairmumkin Rasta. It is in this back-ground the present regular second appeal has been filed.

Mr. Puneet Sharma, learned counsel appearing on behalf of the appellants submitted that no doubt the appellant/plaintiff did not institute the separate appeal against the appeal preferred by the defendant No.2 for counter-claim but all the points raised were in compliance of provisions of Order 41 Rule 33 of the Code of Civil Procedure viz-a-viz the injunction for Khasra No.32//19, for, while dismissing the suit the trial Court observed that defendant did not object to the exclusive possession of the plaintiff forming a part of the afore-mentioned khasra number and that finding has not been set aside even in the appeal preferred by the counter-claimant. In view of such finding, the injunction ought to have been granted viz-a-viz afore-mentioned khasra number. With regard to Khasra No.428, he submitted that the trial Court while appointing the Local Commissioner gave a direction to the Local Commissioner to conduct a demarcation for Khasra No.429 and not for Khasra No.428, but yet Local Commissioner deviated from direction and conducted demarcation of Khasra No.428. In that scenario of the report of the Local Commissioner's report Ex.D2 was required to be rejected and therefore, mandatory injunction as granted by the lower appellate Court while decreeing the counter-claim is liable to be set aside. There was no encroachment to the passage in fact the

defendants/counter-claimants failed to prove any encroachment viz-a-viz Khasra No.428. The Courts below ought to have granted the relief viz-a-viz the threat perception for Khasra No.32//19. The appellants/plaintiffs did not prefer any appeal against the judgment and decree dated 16.05.2006 rendered by the trial Court. In the absence of the cross-objections/appeal the provisions of Order 41 Rule 33 can be pressed into service.

Mr. Atul Jain, learned counsel for the respondent submitted that during the pendency of the suit an application under order 6 Rule 17 for amendment of the written statement was filed regarding encroachment of Khasra No.428, which was allowed and the same was not objected to. Thus there was no occasion for Local Commissioner to re-demarcated the land. It was also submitted that as per Order 26 Rule 10(2) report was per se admissible in evidence and objections were not maintainable.

I have heard learned counsel for the parties and perused the paper-book.

Learned trial Court while dealing with the respective contentions of the parties after examination of the evidence found that the defendants did not deny the possession of the plaintiffs on Khasra No.32//19 having area of 4 kanals 10 marlas, despite the aforementioned fact declined to grant the injunction as sought for. In my view trial Court remained oblivious of the fact that plaintiff had sought injunction with regard to above-mentioned khasra also against the defendant viz-a-viz forcible interference and dispossession but focussed on adjudication of counter-claim only. The applicability of the provisions of Order 41 Rule 33 of the Code of Civil Procedure are no longer in dispute. In my view the

appellants/plaintiffs had taken a plea and drew attention of this Court to sub-para 4(iv) of Para 5 grounds of the appeal, which reads as follows:-

“iv) That the Ld. Lower Appellate Court failed to appreciate the evidence on record as had been appreciated by the Ld. Trial Court particularly with regard to Masawi (Ex.P-3) and the field book Ex. P-4 which clearly show that the gair mumkin area abutting the land of the appellant/plaintiff on the one side and the said rebulet on the other side bears categoric dimensions wherein Khasra No.39//19 (4K-10M) is the land belonging to the appellant and Khasra No.428 bearing 4 kanal and 2 marla is the land of gair mumkin passage.”

Therefore, arguments of Mr. Atul Jain, Advocate, viz-a-viz assailing the findings of the trial Court as well as the appellate court for Khasra No.32//19 is not tenable and is hereby rejected. There is no force in the submission of Mr. Puneet Sharma, Advocate, with regard to the fact that Local Commissioner deviated from the direction of the Court in carrying out demarcation of Khasra No.429 and not Khasra No.428, but the fact of the matter is that respondent/counter-claimant sought amendment in the written statement which as noticed above had been allowed in terms of the provisions of Order 43 Rule 1(A) of the Code of Civil Procedure. The report of the Local Commissioner is per se admissible in view of judgment of this Court in **Balbir Dewan Cold Storage General Mills Vs. Naveen Chander** **AIR 1989, Punjab and Haryana 257.**

Once the Local Commissioner prima facie found that the plaintiff had encroached 13 marlas from the Khasra No.428 by sowing the

crop thereon, the injunction granted by the lower appellate perfectly legal and justified and do not require any interference. Resultantly, judgment and decree of the lower appellate Court and of the trial Court are modified viz-a-viz to the extent of non-granting of injunction to appellant/plaintiff to Khasra No.32//19 for possession as admitted by the defendants holding that the defendants/respondents are restrained from the forcible interference in possession of plaintiff from Khasra No.32//19 measuring 4 kanals 10 marlas. However, a decree of mandatory injunction directing the appellants- plaintiffs to remove the encroachment as per the demarcation is hereby maintained.

The appeal stands disposed of.

Decree sheet is ordered to be prepared.

March 06, 2018
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(AMIT RAWAL)
JUDGE

Whether speaking/reasoned : Yes/No
Whether Reportable: Yes/No