

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

RSA No.4707 of 2011 (O&M)

Date of decision : 30.08.2018

Amita

...Appellant

Versus

Kishori Lal

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. D.S. Malwai, Advocate for the appellant.

Mr. Sanjay Ghalawat, Advocate for
Mr. Rohit Sood, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

CM No.10248-C of 2015

Prayer in the application is for direction to the respondents to
pay the mesne profits.

Application is dismissed as not pressed.

Main case

The plaintiff-appellant is in the Regular Second Appeal
against the judgment passed by the First Appellate Court reversing the
judgment passed by the learned trial Court.

In the considered opinion of this Court, the following
substantial question of law requires determination:-

1. Whether in absence of any plea in the pleadings coupled with the

supporting evidence, the Appellate Court is justified in making out a new case in favour of a party?

Undisputed facts are that Mansa Ram, predecessor-in-interest of both the parties was owner of the plot measuring 6 marlas. He has two sons namely Mukesh and Kishori Lal. Mansa Ram has sold/transferred the entire property in dispute including the construction thereon in favour of the plaintiff-appellant-Amita i.e. wife of Mukesh Kumar, one of the son. The plaintiff filed a suit for permanent injunction restraining the defendant i.e. Kishori Lal from raising any construction and for mandatory injunction directing the defendant to remove his belongings from the above said portion and deliver this vacant possession.

The defendant-Kishori Lal contested the suit and pleaded that the transfer is mala fide as the property was partitioned by Mansa Ram equally amongst two sons and both the sons are in separate possession of their respective houses.

Learned trial Court after appreciating the evidence, decreed the suit filed by the plaintiff. However, learned First Appellate Court while relying upon the building plan got sanctioned in two parts, one under the name of Mukesh Kumar and other in the name of Kishori Lal, reversed the judgment passed by the trial Court while returning the finding that since Kishori Lal was a licensee and he had executed a work of permanent character and incurred expenses in the construction, therefore, the licence has become revocable as per Section 60 of the Indian Easements Act, 1882.

Now the stage is set for considering the question of law framed above.

It is not in dispute that the defendant-respondent neither pleaded nor led any evidence to prove that he was given the property on licence and he has executed a work of permanent character which results in creation of irrevocable licence.

Learned counsel for the respondent-Kishori Lal, fairly admitted that there are no pleadings to that effect. However, he submits that the plaintiff herself has taken a plea of licence and, therefore, the pleadings of the licence exist.

No doubt, the plaintiff's case is based on licence, however, for making a licence irrevocable in terms of Section 60 of the Indian Easements, 1882, it was for the defendant-respondent to prove that he has executed a work of permanent character and incurred expenses in the construction thereof. However, no evidence on this aspect has been led. In absence of any plea, the First Appellate Court recorded a finding without therebeing the pleadings or evidence in support to prove that Kishori Lal carried out any work of permanent character. Mere sanction of buildings cannot give rise to inference that it is Kishori Lal who got the construction made. It is well settled that a Court cannot make out a new case for party.

Learned counsel for the appellant has further pointed out that Kishori Lal himself has admitted that he has shifted from the aforesaid house and started residing in his new house. He further submitted that the

building plans no doubt were got sanctioned separately but construction has been raised as a single unit. He while drawing attention of the Court to the evidence of the defendant-respondent, pointed out that there is only one sewerage tank and the lanter/roof of the entire building is common. He further submitted that no evidence has been brought on record by Kishori Lal to prove that he had raised construction of the portion which was being claimed by him. He rather submitted that Mansa Ram had appeared in the witness-box and has specifically stated that it is who has raised the entire construction.

Learned counsel for the appellant further pointed out that even the electric connection of the portion in which Kishori Lal was residing has been got disconnected and the house is lying abandoned.

Learned counsel for the respondent submitted that once building plan has been sanctioned separately, therefore, it must be assumed by the Court that Kishori Lal and Mukesh Kumar had separately raised the construction.

In the considered opinion of this Court, such assumption cannot be drawn by the Court. The finding cannot be recorded by the Court unless there is evidence on file. The First Appellate Court drew assumption only on the basis of the photograph where Mansa Ram admitted that Kishori Lal is standing in the photograph which was shown to him during cross-examination in the disputed portion and on the door, name plate of Kishori Lal is depicted. It is not in dispute that Kishori Lal was residing in the aforesaid house but as noted above, Kishori Lal had

already shifted from the aforesaid premises.

Mansa Ram had sold/transferred the entire property in favour of the plaintiff vide registered document dated 18.04.1996. Mansa Ram while appearing in the witness-box has admitted the transfer of the aforesaid property. Exclusive ownership of Mansa Ram is not in dispute. The defendant has failed to prove that there was any family partition in which he was allotted one half share in the property.

Hence, question of law as framed is answered in favour of the appellant.

Keeping in view the aforesaid facts, the judgment passed by the First Appellate Court is reversed and that of the trial Court is restored.

Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

30.08.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No