

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

RSA No.869 of 2012 (O&M)

Date of Order: 23rd May, 2018

Mohar Singh Yadav and others

..Appellants

Versus

Khushi Ram Yadav

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sanjay Vij, Advocate,
for the appellants.

Mr. Jai Singh Yadav, Advocate,
for the respondent.

ANIL KSHETARPAL, J.

Defendants-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below.

In the considered opinion of this court, question which needs determination are:-

- (i) Whether a plaintiff who has filed a previous suit which was withdrawn without seeking liberty to file a fresh one can be permitted to file a subsequent suit on the same cause of action?
- (ii) Whether a non party to the sale deed is bound by the description of the properties situated on four sides?

Plaintiff claims that he had purchased the property in dispute from one Sh. Mohan Lal vide sale deed dated 20.06.1972. He has pleaded that in the lay out plan attached to the aforesaid sale deed on the North side,

a street was shown and the defendants-appellants have encroached upon the same by constructing a wall.

It is not in dispute that the plaintiff previously instituted a suit with respect to same property claiming that the property belongs to him, on 12.08.1987. The suit was instituted by the plaintiff against father of the defendants. In the aforesaid suit, plaintiff claimed that he had left the property in dispute from his own property for his own use and the defendants have no right, title or interest in the property. It was further claimed that the defendants interfered in his possession. Copy of the plaint is Ex.DW4/A on the file. Along with the aforesaid suit, plaintiff also filed a lay out plan which is Ex.DW2/B on the record. The lay out plan now filed and the lay out plan filed in the earlier filed are same. The aforesaid suit was withdrawn by the plaintiff vide his statement dated 17.10.1988 on the ground that there is defect in the layout plan attached. No permission was sought from the court to file a fresh suit on the same cause of action.

Plaintiff thereafter filed the present suit for permanent and mandatory injunction on 12.11.2002. Plaintiff pleaded that a wall has been constructed by the defendants when he was away to Chandigarh.

Defendants contested the suit.

Both the courts on appreciation of the evidence available on record have decreed the suit.

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

QUESTION No.(i):

Whether a plaintiff who has filed a previous suit and had withdrawn the aforesaid suit without seeking liberty to file a fresh one can be permitted to file subsequent suit on same cause of action?

Under Order 23 Rule 4 of the Code of Civil Procedure, the

plaintiff is precluded from filing fresh suit in respect of such subject matter or such part of the claim. Order 23 Rule 4 of the Code of Civil Procedure is extracted as under:-

“[1. Withdrawal of suit or abandonment of part of claim.-

(1) XX XX XX.

(2) XX XX XX.

(3) XX XX XX

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) XX XX XX”

In the present case, the subject matter of the earlier suit and the present suit is same.

Learned counsel for the respondent has submitted that the words “subject matter” is to be read in the context of cause of action and not in the context of the property involved in the suit. He submitted that in the present case, cause of action which accrued to the plaintiff was fresh one.

This court has considered the submissions.

In the previous suit, the plaintiff was claiming the property in dispute to be his own property which he had left for his own use. Now the plaintiff claims that it is a part of street. Property remains the same. Significant words used in Order 23 Rule 4(a) of the Code of Civil Procedure are “such subject matter or such part of the claim”. Learned counsel for the

the case of *Ram Chander and another vs. Deepan and others, 2015(2) R.C.R.(Civil) 902* wherein while relying upon some other judgment, it has been held as under:-

12.The word “subject-matter” is not defined in the Civil Procedure Code. Further, the said words have been explained and interpreted by judicial precedents and in this regard, I would first like to rely upon the judgment of this Court in the case of Sheikh Allanaur (supra). The term “Subject-matter” occurring in sub-clause (3) of Order 23, Rule 1, CPC, would mean 'the plaintiff's cause of action for his suit.' Similarly, in the case of Vallabh Das (supra), the Hon'ble Supreme Court has held that “the expression “subject-matter” is not defined in the CPC. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same, as in the first suit, it cannot be said that the subject-matter of the second suit is the same as that in the previous suit.” In the case of Pandillapalli Singa Reddi (supra) also, it has been held that “without attempting an exhaustive definition of all that may be included in the term “subject-matter”, we are of the opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause

of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit.”

13. The consistent view of the Courts is that the expression “subject-matter” does not relate to the property rather it relates to the right in the property. The right in the property in the present case is the right to possession and right to possession is mandated from the ownership of the property by the plaintiffs. The expression includes the cause of action and the relief claimed, meaning thereby that both the things i.e. cause of action and relief claimed have to be construed together and if the cause of action and relief claimed in the previous suit and subsequent suit are not same, then the subsequent suit is not barred by Order 23 Rule 1(3) of the CPC.

Respectfully agreeing with the aforesaid judgment, question no.

(i) is answered in favour of the respondent-plaintiff.

QUESTION NO.(ii)

Whether a non party to the sale deed is bound by the description of the properties situated on four sides?

In the present case, no evidence has been led to prove that property in dispute is a part of street. Plaintiff only relies upon the sale deed executed by his vendor Mohan Lal in favour of the plaintiff. It is admitted fact that the defendants or their predecessors were not party to the aforesaid sale deed. As such, the description of the surrounding properties as given in

the sale deed would not bind the defendants. Plaintiff-respondent has not produced any other evidence to prove that there was some street in existence between the property of the defendants and the plaintiff. No municipal record has been produced. A non party to the instrument is not bound by the contents of the aforesaid instrument.

Further the plaintiff has only filed a suit for permanent and mandatory injunction claiming that a new wall has been constructed by the defendants, however, on a careful reading of the evidence including the report of Local Commissioner, it is not established that any new wall has been constructed by the defendants.

Still further in the previous suit, plaintiff claimed that the property in dispute is part of his property which was purchased by him. Now he claims that it is part of a street. Filing of previous suit filed was not disclosed by the plaintiff while filing the present suit.

Hence, question no.(ii) is answered in favour of the defendants-appellants.

In view of the aforesaid discussion, the judgments under appeal are set aside and the suit filed by the plaintiff shall stand dismissed.

The regular second appeal is allowed.

23rd May, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No