

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

Date of decision: 16.10.2018

1. RSA No.1130 of 2017 (O&M)

Hari Singh Saini and others

..... Appellants

Versus

Jai Parkash Bansal and others

..... Respondents

2. RSA No.224 of 2017 (O&M)

Tek Chand and another

..... Appellants

Versus

Jai Parkash Bansal and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Aditya Jain, Advocate
for the appellants (in RSA-1130-2017)

Mr. R.K. Girdhar, Advocate, for
Mr. Sanjay Mittal, Advocate
for the appellants (in RSA-224-2017).

Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Sharma, Advocate
for the cross-objector.

ANIL KSHETARPAL, J.

Vide this judgment, RSA No.1130 of 2017 and RSA No.224 of 2017 as well as cross-objections No.25-C-2018 and 24-C-2018 shall stand disposed of as both the appeals and cross-objections are arising from a suit disposed of by a single judgment by the trial Court as well as by the learned First Appellate Court. Counsel for the parties are also agreed that they represent each of the party to the litigation and there is no requirement of

issuance of any notice. Correctness of the photocopy of the record produced by learned counsel for the parties is not being disputed.

RSA No.224 of 2017 and RSA No.1130 of 2017 are filed by the defendants whereas cross-objections in both the appeals have been filed by the plaintiffs.

Plaintiffs have filed the present suit claiming that they are owners in possession of land comprised in Rect. No.96, Killa No.12/2/1 (0-10) and land measuring 13/1/1 and 13/1/3 total land measuring 3 kanal and 5 marlas. It is the case of the plaintiffs that their maternal grand-mother namely Smt. Chandrapati was owner of the property and after her death, her daughter Smt. Premwati inherited the property and after the death of Premwati who died on 25.05.2003, her property was inherited by the plaintiffs. It is pleaded case of the plaintiffs that the land comprised in Killa No.13/1 was 4 kanal and 12 marlas but subsequently a road was carved which resulted into compulsory acquisition of 1 kanal and 7 marlas of the land and therefore, the land comprised in Killa No.13/1 was bifurcated into three parts. On one side, land comprised in Killa No.13/1/1 (0 kanal and 15 marlas) Killa No.13/1/3 (2 kanals and 10 marlas) owned and possessed by the plaintiffs is situated whereas on the other side of the road, the land bearing 13/1/2 (1 kanal and 7 marlas) is located. It is further case of the plaintiffs that due to clerical mistake, entry of Killa No.13/1/1 was left due to oversight and the plaintiffs moved an application for correction of the revenue record which was corrected vide Fard Badar No.20 dated 10.03.2008 (Fard Badar is a order of correcting the revenue record). It was claimed that the defendants have unauthorizedly occupied certain portion of the property as is clear from the demarcation of the area

by retired Sadar Kanungo Sh. Ganga Ram dated 27.08.2002. It has been pleaded that the defendants have constructed a wall. Therefore, relief of mandatory injunction was also prayed for. Defendants No.1 to 4 filed their joint written statement pleading that the plaintiffs are neither owner nor in possession and in fact, it is a gair mumkin land being Banjar Qadim (non-cultivable). The report sanctioning the mutation in favour of the plaintiffs was claimed to be fake and bogus. It was claimed that the property is recorded as Shamlat Deh Hasab Rasab Kabza.

Defendants No.5 and 6 also took a similar stand and pleaded that the property is not part of Killa No.12/2/1 or 13/1/1. It is further pleaded that the plaintiffs are not residents of Badshahpur for the last more than 50 years and therefore, the entries in their favour are incorrect.

Learned trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to decree for permanent injunction as prayed for? OPP*
- 2. Whether the plaintiff is entitled to mandatory injunction as prayed for? OPP*
- 3. Whether suit of the plaintiff is not maintainable in the present form? OPD*
- 4. Whether the plaintiffs have no locus standi to file the present suit? OPD*
- 5. Whether the plaintiffs have no cause of action to file the present suit? OPD*
- 6. Whether the plaintiffs have concealed the material facts from the Court? OPD*
- 7. Relief.”*

Voluminous record was filed by the plaintiffs to prove their ownership. It was proved that vide sale deed dated 10.11.1979, the property was purchased by their predecessor-in-interest of Lala Prabhu Dayal measuring 10 bighas and 6 biswas. The sale deed is Ex.P-9 whereas

its translation is Ex. P-10 on the record. It was further proved that on the basis of the aforesaid sale deed, the revenue record was updated and entry was corrected in the name of the predecessor of the plaintiffs.

Learned trial Court dismissed the suit on the ground that the suit for permanent injunction would not be maintainable as the defendants are in actual physical possession of the property in question on the date of filing of the suit and the defendants have failed to show any right, title or interest better than the actual occupants of the property. Thus, the suit was dismissed.

Plaintiff-appellants filed the first appeal. Learned First Appellate Court after re-appreciating the evidence decreed the suit partly by recording a finding that the plaintiffs are proved to be in possession of some part of the property and therefore, the plaintiffs are entitled to protect the same. The Court has further found that the plaintiffs have proved their ownership on the basis of sale deed dated 10.05.1939. However, learned First Appellate Court has refused to grant relief of mandatory injunction directing the defendants to remove the encroachment on the ground that a separate suit for declaration of title is pending, therefore, the plaintiffs can claim the relief of possession in the aforesaid suit by impleading the defendants as parties.

In the considered view of this Court, the question which needs determination is:-

“Whether a suit for mandatory injunction against an unauthorized occupant who had occupied a small piece of land is maintainable?”

As per Specific Relief Act, relief of mandatory injunction can

be filed against any person who is duty bound to take certain action but he fails to do the same. The mandatory injunction is provided under Section 39 which is extracted as under:-

“39. Mandatory injunctions. - When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.”

It is apparent that the Court can issue mandatory injunction to prevent the breach of an obligation when it is necessary to compel the performance of such acts which the Court is capable of enforcing. In other words, the mandatory injunction is in fact in the nature of suit for possession only. In the present case before instituting the suit, the plaintiffs moved an application before the revenue authorities who got the land demarcated in the presence of defendants No.2, 5 and 6 along with Prabhu Dayal, father of defendant No.1 who had put their thumb impressions/signatures on the aforesaid demarcation. The demarcation was carried out by Ganga Ram, retired Sadar Kanungo and in the presence of Sunder Singh, Girdawar of the area. In the demarcation, it was found that the defendants have encroached upon two separate parcels of land. One parcel of land out of Khasra No.12/2/1 has been encroached upon by defendants No.1 to 4 whereas other parcel of land has been encroached upon by defendants No.5 and 6 i.e. comprised in Khasra No.13/1/1.

In the present case, Ganga Ram, retired Sadar Kanungo and Sunder Singh, Girdawar Halqa have been examined as PW-5 and PW-3.

Their demarcation report is Ex.P-6 on the file. On careful perusal of Ex.P-6, it is apparent that at that point of time when demarcation was carried out

on 30.08.2002, the land was vacant. It is thereafter that the defendants secured the property with boundary wall. In order to prove their ownership, the plaintiffs have produced the sale deed, copy of mutation, revenue record for the last 50 years to prove that fact. It has also come in evidence that the mother of the plaintiffs gifted the land measuring 16 kanals and 5 marlas out of land comprised in Rect. No.105 Khasra No.2/2, 3/1, 8/2 and 9/1 in favour of Education Department, Haryana for establishment of a Government school. Copy of the gift deed is Ex.P-39 on the record. Copy of the record by which the revenue record was corrected is Ex.P-47 which was duly sanctioned by the competent authority after noticing that by inadvertant mistake, the land comprised in Rect. No.96, 13/1/1 has wrongly been omitted from the revenue record. The record of compulsory acquisition of land has also been produced for construction of the record was also produced.

The defendants are claiming that the land in dispute is in their possession being members of the proprietary body. However, the defendants have not sufficient produced evidence to in support thereof. None of the Court has found that the defendants have proved that they are members of the proprietary body and hence, in possession thereof according to their share. On the other hand, the plaintiffs have not only produced record before the consolidation of holdings but also produced record of consolidation of holdings which also proves that their predecessor-in-interest had purchased the property and during consolidation, the land was allocated to them.

Learned First Appellate Court has refused to grant relief of mandatory injunction on the ground that a suit for declaration of title is

pending. It will be noted here that counsel for the appellant has produced a photocopy of the plaint filed by the plaintiffs dated 29.07.2009. In the aforesaid suit, the prayer made is only to the effect that the property does not vest in Gram Panchayat being Shamlat Deh Hasab Rasab Kabza. This suit is not against the defendants. In the aforesaid suit, the plaintiffs are also only praying that the revenue record showing entry of Shamlat Deh Hasab Rasab Kabza should be corrected. Once the aforesaid suit is not against the defendants, the learned First Appellate Court erred in refusing to grant mandatory injunction. The First Appellate Court found that the plaintiffs are owner of the property and voluminous evidence has been produced to prove that fact, learned First Appellate Court erred in refusing to grant relief of mandatory injunction or in other words, possession.

In the considered view of this Court, such suits cannot be treated as merely injunction suits particularly when the mandatory injunction is being sought for on the basis of title and the parties have led their evidence to prove that fact.

Although, technically the plaintiffs ought to have filed a suit for possession against the unauthorized occupants, however, once the plaintiffs have been declared to be owners and entitled to possession, the Court is always within its power to direct the plaintiffs to deposit the ad valorem Court fee on the value of the property and consequently, pass a decree for possession.

Keeping in view the aforesaid facts, the judgments passed by the learned First Appellate Court partly dismissing the suit filed by the plaintiffs is set aside. The suit of the plaintiffs is decreed in entirety.

Instead of relief of mandatory injunction, decree for possession is passed

subject to deposit of the ad valorem Court fee on the value of the property in accordance with the provisions of Court fee Act, 1870 with respect to the suit as well as appeals.

Accordingly RSA No.1130 and 224 of 2017 are dismissed whereas the cross-objections No.24-C-2018 and 25-C-2018 are allowed.

The pending miscellaneous application, if any, shall stand disposed of accordingly.

16.10.2018
Dinesh Bansal

(ANIL KSHETARPAL)
JUDGE

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