

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

**RSA No.5713 of 2014 (O&M)
Date of Decision.21.05.2018**

Om Parkash and another

.....Appellants

Vs

Puran Chand and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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

Mr. Varun Gupta, Advocate
for respondent No.1 to 4.

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AMIT RAWAL J.(ORAL)

C.M. No.13552-C of 2014

For the reasons stated in the application, delay of 68 days
in re-filing the appeal is condoned.

Application is allowed.

RSA No.5713 of 2014

The appellants-defendants are in regular second appeal
against the concurrent finding of fact whereby the suit of the
respondent-plaintiff for possession as well as permanent injunction in
respect of joint chowk and *rasta sare-aam* shown in red colour in the
site plan allegedly grabbed by defendant No.1 unauthorizedly decreed
by both the Courts below.

The suit aforementioned was filed on the premise hat
there was a joint chowk and *rasta sare-aam* of the parties situated in
Mohalla Sarai Dhusran, Narnaul, which was used jointly. Civil suit
bearing No.352 instituted on 19.7.1990 filed by the plaintiff was

dismissed on 3.12.1992 but lower Appellate Court in appeal vide judgment and decree dated 3.3.1999 restrained the defendants not to encroach upon the joint, rasta, chowk and *poli* and directed the defendants not to take possession of the suit property left for common purposes. Since the defendants were adamant to raise construction over the suit property forcibly, suit aforementioned was filed.

The aforementioned suit was contested by defendant No.1, 2 and 4 by filing joint written statement and raised the objection qua maintainability of the suit to be barred by Order 2 Rule 2 CPC and also set up a counter-claim on the premise that it was plaintiff, under the garb of judgment and decree dated 3.3.1999 encroached upon the joint chowk and *rasta sare-aam*. Correct site plan attached along with the written statement depicted the actual picture and prayed for dismissal of the suit.

Since the parties were at variance, the trial Court framed the following issues:-

“1. Whether there exists any joint chowk-common fair as shown in red colour in the site plan as alleged? OPP

1A. Whether the contesting defendants are entitled to the relief as claimed in the counter claim? OPD

2. Whether if defendants No.1 to 4 have illegally encroached upon joint chowk and joint common fair? OPP

3. Whether if above issues proved then plaintiff is entitled to decree of possession with consequential relief of mandatory injunction directing the defendants to

remove illegal encroachment on joint chowk-common passage as prayed for? OPD

4. Whether the plaintiff has no locus standi to file the present suit? OPD

5. Whether the present suit is not maintainable in the present form? OPD

6. Whether the plaintiff has not come in the court with the clean hands and concealed the material facts from the court? OPD

7. Relief.”

The plaintiff in support of his pleadings examined Hari Om Draftsman as PW1, Amar Singh as PW2, Inder Mohan Gupta as PW3, Rajender Singh Saini as PW4, Puran as PW5, Ramesh Kumar clerk as PW6, Devender Kumar as PW7 and Raj Kumar as PW8 and tendered documents Ex.P2 to P8. On the other hand, defendants examined Kamal Singh Saini Draftsman as DW1, Mussadi Lal Bhardwaj as DW2, Hari Om Sharma as DW3, Mahabir Parshad as DW4, Raj Kapoor as DW5, Surender Kumar Sanghi as DW6, Raj Kapoor as DW7, Om Parkash as DW8, Pawan Sharma as DW9, Hoshiyar Singh as DW10, Raj Kapoor as DW11 and Om Parkash as DW12 and tendered documents Ex.D1 to D6 and Mark D1.

On the preponderance of the evidence particularly the finding rendered by Additional District Judge in judgment and decree dated 3.3.1999 whereby the appellants-defendants were restrained not to encroach and site plan Ex.P2, the trial Court decreed the suit and dismissed the counter claim. The appeal preferred by the defendants

against the aforementioned judgment and decree was also dismissed.

Mr. Sanjay Vashisth, learned counsel appearing on behalf of the appellants-defendants submitted that the respondent-plaintiff had miserably failed to discharge the onus of proving the alleged encroachment. The entire thrust of the Courts below had been on the order of the Additional District Judge, which remained oblivious of the fact that the plaintiff did not discharge the onus by proving on record any demarcation report to prove the alleged encroachment. Site plan Ex.P2 prepared by the Draftsman was not sufficient piece of evidence to prove encroachment, therefore, there is gross illegality and perversity, much less, misdirection of the evidence.

On the contrary, Mr. Varun Gupta, learned counsel appearing on behalf of respondent No.1 to 4 submitted that since the appellants-defendants had admitted the existence of joint chowk and *rasta sare aam* being used jointly and had placed on road building material with an intent to encroach upon the aforementioned *rasta*, therefore, the same could not hit by Order 2 Rule 2 CPC because fresh cause of action accrued. In the meantime, encroachment was made, therefore, relief of possession was also added. The concurrent finding of fact cannot be interfered with unless and until there is gross illegality and perversity.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Sanjay Vashisth. The onus to prove alleged encroachment on the basis of ownership is always upon the plaintiff.

The Court below could not decree the suit in the absence of any evidence to prove the alleged encroachment at the hands of the opposite party i.e. appellants-defendants herein. Since both the parties admitted joint ownership of the property, it was incumbent upon the plaintiff to prove the alleged encroachment through the intervention of the Court or revenue authorities. Having failed to discharge onus, I am of the view that the plaintiff has miserably failed to prove the per pleaded case but the Courts below remained oblivious of the vital issue involved in the suit seeking removal of encroachment on the basis of title, thus, there is gross illegality, fallacy and perversity.

During the course of hearing, learned counsel for the respondent-plaintiff attempted to read the judgment and decree dated 3.3.1999 whereby the appellants-defendants had been restrained from encroachment. Once the injunction had been granted, separate suit cannot be filed for the same cause of action as the remedy is to seek enforcement under Order 21 Rule 32 CPC. Be that as it may be, the Courts below were enjoined upon to ponder upon the issue of alleged encroachment instead of laying focus on previous judgment.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918

would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the

Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

As an upshot my finding, the judgments and decrees rendered by the Courts below suffer from illegality and perversity and the same are hereby set aside. The second appeal is allowed. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

May 21, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No