

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

**R.S.A No.3576 of 2017(O&M)
Date of decision :23.08.2018**

Saleem

..... Appellant

Versus

Narain (deceased) through his LRs and others

..... Respondents

CORAM : HON'BLE MRS. JUSTICE LISA GILL

Present: Mr.Keshav Partap Singh, Advocate
for the applicant-appellant.

LISA GILL,J

Present appeal has been filed against the judgement and decree dated 31.10.2014 passed by the learned Civil Judge (Jr. Division), Hodal, whereby the suit filed by the plaintiff-appellant has been dismissed as well as judgement and decree dated 19.07.2016, passed by the learned Additional District Judge (1), Palwal, whereby their appeal has also been dismissed.

Brief facts necessary for the adjudication of the case are that the appellant-plaintiff filed a suit for mandatory injunction directing respondent no.1 (now represented by his legal representatives) to remove the illegal and unauthorized construction over the property as described in the suit as well as a decree for permanent injunction for restraining the defendants-respondents from interfering in the peaceful and lawful possession of the plaintiff and from encroaching upon the same. It was pleaded that the property in question, measuring 1 Kanal 8 Marlas was

previously owned and possessed by Dropadi Devi, daughter of Jamna Bai. The said property was purchased by the plaintiff vide sale deed dated 16.04.1991. The appellant-plaintiff claimed to be the owner in possession of the suit land. Mutation No. 3092 in this respect was duly entered in the revenue record on 20.05.2009. Respondent no.1-Narayan son of Har Kishan was alleged to have encroached upon a small portion of the land to the extent of 150 Sq. yards. It was pleaded that construction was raised by respondent no.1 about two years prior to the filing of the suit while taking undue advantage of the absence of the vendor of the plaintiff. Respondents no.2 to 4 were stated to be threatening the plaintiff of encroachment on the suit land. Hence the suit was filed.

Joint written statement was filed by all the defendant-respondents. While resisting the suit, various preliminary objections were taken. Averments on merits were denied to the extent that there was any encroachment etc. It was stated that the defendants and their predecessors had purchased the suit land in the year 1958-59 from the actual owner of the suit land i.e. Smt. Jamuna Devi, resident of Village Pingore. Residential house had been constructed on the suit land and the respondents were residing therein with their families. Dropadi Devi was never the owner of the same and was not competent to alienate the suit land in any manner. Jamuna Bai was stated to be a migrant from Pakistan. Land was allotted to her in village Pingore. Jamuna Bai had sold all her land to the villagers on nominal prices and about 100 families were residing on the said land.

No replication was filed. From the pleadings of the parties,

the following issues were framed:-

1. Whether the defendants have encroached 150 Sq. yards of land of plaintiff forming part of suit land mentioned in para no.1, of the plaint?OPP
2. Whether the suit is maintainable in the present for,? OPP
3. Whether the suit has not been valued properly for the purpose of Court fees and jurisdiction?OPD
4. Relief.

Both the parties lead evidence in support of their respective claims.

Learned trial Court decided issue no.1 while concluding that since respondent no.1 was already in possession of the suit land even before the appellant had purchased the same vide sale deed Ex.P-1, suit for mandatory injunction was not maintainable. Appellant's suit was thus dismissed on this ground alone.

Appeal was preferred by the appellant. Learned Additional District Judge (1), Palwal, while referring to the provisions of Order 14 Rule 2 CPC, observed that the issue of maintainability was a mixed question of law and facts and the lower court was required to give the findings on each issues separately. However, specific findings were returned by the learned Additional District Judge(1), Palwal.

Learned Additional District Judge (1), Palwal, concluded that the plaintiff-appellant failed to prove that respondent no.1 had encroached upon 150 Sq. yards land of the plaintiff-appellant which formed part of the entire suit measuring 1 Kanal 8 Marlas. It was further observed that in case the appellant had succeeded in proving the encroachment by the defendants, then in that situation the appellant would have been entitled to the relief of mandatory injunction but she

was unable to do so. Appeal was therefore dismissed by the learned Additional District Judge (1), Palwal, vide impugned judgement and decree dated 19.07.2016.

Aggrieved therefrom, the present appeal has been filed.

Learned counsel for the appellant-plaintiff argues that both the learned Courts below have wrongly dismissed the suit filed by the appellant-plaintiff. There is specific evidence on record to show that the defendants have encroached upon the suit land measuring 150 Sq. yards belonging to the appellant-plaintiff. Therefore, the present suit for mandatory injunction was indeed maintainable.

I have heard learned counsel for the appellant and have gone through the file with his able assistance.

Appellant-plaintiff filed the present suit for mandatory injunction directing the defendant-respondents to remove the illegal/unauthorised construction raised over Killa No. 1313/1 of Rect. No. 69 out of the suit property. It is the pleaded case of the appellant-plaintiff that respondent-defendant no.1 had encroached on a small portion of the land of Killa No. 13/1, Rect. No. 69 to the extent of 150 Sq. yards. Construction was raised thereon two years prior to the filing of the suit while taking undue advantage of the absence of the vendor of the present appellant, who was stated to be living away from village Pingora. It is thus clear that the defendants were in possession of the suit land even prior to the purchase of the said land by the plaintiff-appellant. It has been specifically observed by the learned Additional District Judge (1), Palwal, as under:-

- “13. It is important to note here that the plaintiff has claimed himself as owner in possession over Khewat No. 27, Khatoni no. 29, Rect. No. 69, Killa No. 13/1 (1-6), 13/3 (0-2) measuring 1 Kanal 8 Marlas in this suit, however, at the costs of repetition, as per sale deed No. 135, dated 16.04.2009, killas no. 13/1 (1-6), 13/3 (0-2), 27 (2-9) and the plaintiff has not included killa no.28 (2-9) in the suit land, the reason best known to the plaintiff.
14. The plaintiff was required to prove that the defendant no.1 has encroached upon the suit land, after its purchase, at the same time, the plaintiff has stated in para no.3 of the plaint that the defendant no.1 has encroached upon a small portion of land of Killa No.13/1, rect. no.69 to the extent of approximately 150 sq. yards, out of the suit land and has raised construction over the same two years ago by taking undue advantage of absence of the vendor of the plaintiff, who was living away from village Pangore. The abovesaid pleadings of the plaintiff go a long way to show that the defendants have encroached upon the suit land earlier to the purchase of the plaintiff.
15. A bare perusal of the sale deed does not indicate so, that the defendant no.1 encroached upon 150 Sq. yards of the suit land and his vendor i.e. Dropti Devi is not in possession of 150 Sq. yards. Had this fact been mentioned in the sale deed, then it would have been said that the plaintiff has not concealed anything from the Court.
16. The suit land pertains to khasra number. Ironically enough to say that there is no demarcation on the file, to show that the defendant no.1 has encroached upon such and such area and boundaries.

17. No doubt, there is a site plan Ex.P-3, has been put up by the plaintiff on the file, which has been prepared by PW-6, Chandan Singh, draftsman, who would say during his cross-examination that he did not verify the mustkil no.69, killa no.13/1 and 13/3 from any Patwari or Halqa Girdawar. It is worthwhile to mention here that in the site plan, there is no measurement of the encroachment, has been shown by this draftsman, but it is beyond the comprehension of this Court, how the plaintiff has come to know that defendant no.1 has encroached upon the portion of the suit land to the extent of 150 square yards.”

It is further to be noticed that in the site plan Ex.P-3, there is no indication of the encroached land. Sale deed in question is not supported with any site plan. Statements of PW-3 and PW-1 are contradictory and do not advance the case of the appellant-plaintiff in any manner.

It is the case of the appellant that encroachment has been made over 150 Sq. yards of the property owned by the present appellant-plaintiff. Appellant-plaintiff himself claims to be the owner in possession over Khewat No. 27, Khatoni No. 29, Rect. No. 69, Killa No. 13/1 (1-6), 13/3 (0-2), total measuring 1 kanal 8 Marlas.

In this view of the above, the plaintiff has failed to prove the encroachment of the respondents over 150 Sq. yards. Therefore, the suit for mandatory injunction filed by the appellant-plaintiff has rightly been dismissed by both the learned Courts below.

No other argument has been raised.

Learned counsel for the appellant-plaintiff is unable to point

out any question of law much less substantial question of law which may be involved for consideration in this regular second appeal. Both the impugned judgements are well reasoned judgements rendered after proper appreciation and consideration of the evidence on record.

Keeping in view the facts and circumstances as discussed above, I do not find any infirmity, illegality or perversity in the impugned judgments and decree dated 31.10.2014 and 19.07.2016 passed by the learned Civil Judge (Jr. Division) Hodal and learned Additional District Judge (1), Palwal, respectively, which warrant any interference by this Court.

There is a delay of one hundred and thirty two (132) days in re-filing of this appeal. Keeping in view the fact that the matter has been decided on merits, the question of delay in re-filing of this appeal has been rendered academic. Application is accordingly disposed of.

Present appeal is, consequently, dismissed with no order as to cost.

23.08.2018

s.khan

**(LISA GILL)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No