

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

**RSA No.1996 of 1988 (O&M)
Date of Decision.13.05.2019**

Kapoor Chand (since deceased) through LRs ...Appellant

Vs

Jorawar and others ...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Shiv Kumar, Advocate
for the appellant.

Mr. Umesh Aggarwal, Advocate
for the respondents.

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AMIT RAWAL J. (ORAL)

The present regular second appeal is at the instance of the defendants against the concurrent finding of fact and law whereby suit for permanent injunction filed by the respondents-plaintiffs for taking possession of the house in dispute i.e. Ward No.9, Mohalla Koliwara, near post office Ballabgarh in pursuance to warrant of possession issued by the competent court has been decreed by the trial Court and affirmed in appeal.

Plaintiffs Jorawar Singh, Prem Singh sons of Umrao alleged that the house aforementioned was purchased by their father Umrao Singh from one Asha Ram son of Ganeshi Lal vide registered sale deed dated 18.07.1962 and thereafter, plaintiffs along with their father were residing there. In the year 1970, plaintiffs submitted a plan for construction of the house in Municipal Committee, Ballabgarh and the same was duly approved on 8.7.1971 and thereafter construction was raised. On 10.08.1970, defendants obtained some decree, fraudulently, against Jagdish Chand, Nand

Kishore, Daya Nand son of Lala Deep Chand, which was a collusive one. Jagdish Chand, Nand Kishore, Daya Nand or their subsequent transferees had no right, title or interest in the house in dispute nor they were in possession. Plaintiffs were not bound by the collusive and fraudulent decree. Measurements in the previous suit were given by submitting a incorrect site plan.

The appellants-defendants opposed the suit and raised the preliminary objection that the plaintiffs were occupying a portion of the suit property at the instigation of the judgment debtors/mortgagees and the possession was being taken in accordance with law as the judgment and decree qua redemption of suit property. On merit, it was denied that the plaintiffs were owners of the house or in possession. The decree attained finality upto this Court as confirmed in regular second appeal on 27.04.1982 and the SLP was also dismissed. The averment of incorrect measurement of the mortgaged property was also emphatically denied.

Defendants No.2 to 6 filed separate written statement.

Replication was filed and thereafter, the trial Court framed the following issues:-

- “1. Whether the plaintiffs are owners in possession of the disputed house? OPP*
- 2. Whether the defendants do not derive any title to the suit property under the alleged decree? OPP*
- 3. Whether the plaintiffs have no locus-standi to file the present suit? OPD*

4. *Whether the plaint does not disclose any cause of action as alleged? OPD*
5. *Whether the suit is barred under Section 47 and Order 21 Rule 101 CPC? OPD*
6. *Whether the suit is bad for non-joinder of necessary parties? OPD*
7. *Whether the suit has been filed at the instance of Jagdish, Nand Kishore, Daya Nand and Premwati, if so to what effect? OPD*
8. *Whether the suit is not maintainable in the present form? OPD 2 to 6.*
9. *Relief.”*

Both the parties led extensive evidence. Respondents-plaintiffs examined six witnesses and brought on record revenue record qua alleged possession whereas defendants examined two witnesses and brought on record Ex.D1 to D4 including previous judgment and decree.

Mr. Shiv Kumar, learned counsel appearing on behalf of the appellants-defendants submitted that witness of the sale deed Ex.PW6/A was not examined to establish ownership of the vendor Asha Ram. Ex.P2 is the copy of sale deed whereby Sohan Lal purchased the equity of redemption and defendant admitted the same to be correct. The remedy was to file the separate suit of claiming declaration or objection under Order 21 CPC which could have been tried as a separate suit. Both the Courts below have relied upon jamabandi to notice possession but it was not being taken forcibly but

in accordance with law. Plaintiffs failed to establish on record as to how they came into possession.

Per contra, Mr. Umesh Aggarwal, learned counsel appearing on behalf of the respondents-plaintiffs submitted that they did not deny decretal of the suit of 1968 in 1970 and dismissal of regular second appeal upto this Court but the revenue record established their possession. The execution could not have been proceeded as the appellants-defendants so far not challenged the sale deed, which is a registered document, thus, urges this Court for confirming the finding under challenge as concurrent finding does not suffer from illegality and perversity.

This Court on 16.09.1992, while issuing notice in the appeal also restrained the alienation of the land in dispute or creating any charge on the same, which was confirmed on 2.11.1992.

I have heard learned counsel for the parties, appraised the paper book, records of Courts below and of the view that following Substantial Question of Law arises for determination by this Court.

- (i) Whether the suit for injunction in the absence of any availment of remedy under Order 21 Rule 97 or 101 CPC or separate suit qua forcible interference and dispossession except in due course of law was maintainable?

The judgment and decree qua redemption of the suit property against the plaintiffs and its attainment of finality upto Hon'ble Supreme Court is not in dispute. The judgment and decree is

of the year 1970 whereas the sale deed propounded by the plaintiffs is 18.07.1962 but the respondents-plaintiffs miserably failed to lead evidence i.e. witnesses and the ownership record of Asha Ram connecting the property subject matter of the previous round of litigation wherein the execution as per the site plan and description given in the mortgage deed was sought. If at all, there was some grievance, respondents-plaintiffs could have availed the remedy as noticed above i.e. Order 21 Rule 97 CPC or 101 CPC. Simpliciter suit for injunction in the absence of declaration was not maintainable as the appellants-defendants, who were plaintiffs in the previous suit being decree holders had sought possession in accordance with law. Both the courts below have abdicated in not noticing the aforementioned fact despite the fact that previous judgment is part of the record.

In view of the aforementioned finding, the substantial question of law is answered in favour of the appellants-defendants and against the respondents-plaintiffs. The concurrent finding of fact and law, in my view, suffers from illegality and perversity and accordingly set aside. Resultantly, the second appeal is allowed. Decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

May 13, 2019
Pankaj*

Whether speaking/reasoned Yes

Whether reportable No