

In the High Court of Punjab and Haryana at Chandigarh

RSA-5364 of 2012 (O&M)

Date of Decision: 3.7.2019

Babu Lal and others

---Appellants

versus

Ram Pyari and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Rakesh Dhiman, Advocate
for the appellants
Mr. Sudhir Aggarwal, Advocate,
for the respondents

Rekha Mittal, J.

Challenge in the present appeal has been directed against judgment and decree dated 31.5.2012 passed by the Additional District Judge, Gurgaon whereby appeal against the judgment and decree dated 26.2.2011 passed by the trial court decreeing suit of the plaintiffs-appellants and dismissing counter claim filed by the defendants/respondents was accepted, judgment and decree impugned were set aside and suit filed by the appellants-plaintiffs was dismissed and counter claim preferred by the respondents-defendants was allowed.

The facts relevant for disposal of present appeal are that the plaintiffs filed suit for permanent injunction restraining defendants-respondents from raising pucca wall from point E to D and F to C and some portion of killa No. 11/1 of Rect. No. 27 or to change nature of suit property. It is also prayed that in case the defendants are successful in doing

so, mandatory injunction may be granted directing the defendants to remove the same from suit property. It is averred that plaintiffs along with other co-sharers are in joint possession of land comprised in killa No. 14/3 (3-16), 14/1(2-18), 15 (8-8) Rect. No. 27, Killa No. 11/1 (5-8), 11/9 (0-6) gair mumkin Khad Gadha 20/1 (1-13), situated in village Darrapur, Tehsil Pataudi District Gurgaon. The defendants are co-owners in possession of khasra No. 138 marked by letters 'EFGM'. Defendants have constructed pucca wall from point F to G and point E.M. of about 7 feet height and there is no wall at point F to E adjacent to killa No. 11/9 of the plaintiffs measuring N-20 Karam, S-22 Karan, E-31 Karam and W-22 Karam respectively.

Defendants filed the written statement raising preliminary objections regarding maintainability; cause of action; locus standi; estoppel; suit being bad for non-joinder and misjoinder of parties; concealment of true and material facts and suit being not properly valued for the purpose of jurisdiction. On merits, it has been averred that site plan attached with the plaint is not as per existing state of affairs. The correct site plan is given by the defendants. The wall constructed by the defendants is in their own land. The plaintiffs are strong headed persons and on 2.6.2004, they made encroachment upon portion ABGFED. On 23.6.2004, the defendants applied to Illaqua Tehsildar for demarcation of their land and a commission was sent to inspect the disputed spot and it was reported to the Tehsildar that the plaintiffs have made encroachment upon land of the defendants regarding which they filed counter claim.

The plaintiffs filed replication to the written statement of

defendants.

The trial court framed issues, reproduced in para 7 of judgment of the said court. The parties adduced their evidence, referred to in para 8 thereof. Having heard counsel for the parties in the light of materials on record, trial court decreed suit of the plaintiffs and defendants were restrained from raising construction on disputed land. However, counter claim of defendants was dismissed.

In appeal preferred by the defendants, the court reversed the judgment and decree passed by the trial court, noticed hereinbefore.

Counsel for the appellants has challenged the judgment passed by the first Appellate Court primarily on two counts. The first submission made by counsel is that vide judgment and decree dated 26.2.2011, the trial court decreed the suit for injunction of the plaintiffs and dismissed the counter claim, treated as cross suit in the eye of law. It is vehemently argued that since the defendants filed only one appeal, findings recorded in counter claim would constitute res judicata qua the suit for injunction filed by the plaintiffs, therefore, the first Appellate Court committed grave error rather illegality by accepting appeal of the defendants whereby suit of the plaintiffs was dismissed and counter claim of the defendants was allowed. In support of his contention, he has relied upon judgments of Hon'ble the Supreme Court **Premier Tyres Limited vs. Kerala State Road Transport Corporation AIR 1993 (SC) 1202**, **Harbans Singh and others vs. Sant Hari Singh and others 2009(2) SCC 526** and **Girija and others vs. Rajan and others 2015(2) RCR (Civil) 320**. Reference has also been made to judgments of this Court **Sukhdev Singh vs. Baldev Singh and others**

2014(55) RCR (Civil) 861 and Bhajan Singh vs. Jasvir Kaur 2016(2) PLR 489.

Another submission made by counsel for the appellants is that the trial court appointed local commission to conduct demarcation at the spot and he submitted report Ex. D4A. It is argued that the appellants submitted objections against the report of local commission and the trial court refused to rely upon the said report but the Appellate Court without properly appreciating deficiencies, lacunae and legal flaws in demarcation and report prepared on the basis thereof, has relied upon the said report to accept counter claim filed by the respondents-defendants. To bring home his contention, counsel has specifically pointed out that both in the notice issued for fixing date of demarcation Ex. D2A and demarcation report Ex. D4A, there is overwriting on the date making 23 to 24.

Counsel representing the respondents, on the contrary, would argue that reasoning adopted by the trial court to reject demarcation report has rightly been set aside by the first Appellate Court with the submission that no such issue was raised by the appellants even in the objection petition that demarcation was not conducted at the spot or the same was not conducted on 24.11.2004. In the report Ex. D4A, in the date under the signatures of Tehsildar there is overwriting but there is no such overwriting in the date mentioned under the signatures of Patwari and Kanungo which is clearly recorded as 24.11.2004. It is further argued that local commission was appointed by the trial court on the basis of application filed by the plaintiffs and the defendants raised no objection in view of endorsement made on the application itself. It is argued with vehemence that in the given

scenario, overwriting in the date assumes no significance as was tried to be attached by the trial court for rejecting the report.

With regard to issue qua filing a single appeal against the decree passed by the trial court, it is argued that appeal lies against a decree and not against a judgment. The trial court decided suit of the plaintiffs and counter claim of the defendants by a composite judgment and decree, therefore, there was no alternative with the respondents-defendants except to file a single appeal challenging grant of permanent injunction in favour of the plaintiffs and dismissal of their counter claim. In support of his contention, he has relied upon Division Bench Judgment of Keraka High Court **Cholapilakkal Abdul Nazer vs. Kuttanparambath K Laxmana and another AIR 2016 CC 2864**. In addition, it is argued that before the first Appellate Court, no such question was raised by the plaintiffs-appellants that since the respondents have filed a single appeal, decision in one case would constitute res judicata for the other, therefore, judgment and decree passed by the trial court cannot be set aside. He would apprise the court that subject matter of suit for permanent injunction filed by the plaintiffs and counter claim preferred by the defendants is in respect of land comprising different khasra numbers though adjacent to each other, therefore, any decision in respect of khasra number claimed to be owned by the plaintiffs and other khasra number claimed to be owned by the defendants would not constitute res judicata in the given scenario.

I have heard counsel for the parties, perused the paper book and records.

Before dealing with merits of the case, it is appropriate to address the question of filing of one appeal or non-filing of two appeals to challenge the judgment and decree passed by the trial court decreeing suit of the appellants- plaintiffs and dismissing counter claim of the respondents- defendants. There cannot be any dispute about settled position in law that counter claim is a cross suit and requires to be separately registered. In the present case, counter claim was not separately registered by the trial court. Suit filed by the plaintiffs and counter claim preferred by the defendants were decided by a composite judgment and decree dated 26.2.2011.

Counsel for the appellants has not disputed that an appeal lies against a decree and not against a judgment. Since the trial court drew only one decree, the defendants-respondents possibly could not prefer two appeals against one decree. This apart, there is nothing on record suggestive of the fact that appellants ever raised any objection before the first Appellate Court that since the defendants-respondents did not file two separate appeals to challenge decreeing suit of the plaintiffs and dismissal of their counter claim, appeal filed by them is liable to be dismissed in the light of principle of res judicata.

A Division Bench of the Kerala High Court in **Cholapilakkal Abdul Nazer's case (supra)**, dealt with an issue raised by Registry of the Court that a single memorandum of Regular First Appeal would not suffice against a decree dismissing the suit and decreeing the counter claim. The Registry opined that two separate memorandum of Regular First Appeal need to be filed against the decree in view of **Girija vs. Rajan, 2015 (1) KLT 695**. The Division Bench, by considering in detail the provisions of

Order 8 rule 6A and Order 20 Rule 19 of the Code of Civil Procedure and various judgments on the issue by Hon'ble the Supreme Court as well as the Kerala High Court has held, quoted thus:-

“Filing of separate appeals against the case and counter claim is only a procedural aspect which has not been specifically provided in the Code. What is contemplated is only an appeal against the decree and where case and counter claim are disposed of by a judgment in the same suit followed by a composite decree, there is only one decree and not separate decrees as in the case of decrees being drawn in respect of suits disposed of by a common judgment. In such circumstances, insisting for a separate appeal for a suit and counter claim by the same party will only cause unnecessary hardship and create unnecessary procedural hurdle to advance justice. So I am agreeing with the conclusion arrived by my brother that single appeal will lie against case and counter claim and only separate court fee will have to be paid for the respective claims and that will be sufficient.”

In **Harbans Singh and others' case (supra)** relied upon by this Court in **Sukhdev Singh's case (supra)**, there were two separate suits which were consolidated and were decided by a common judgment and in those circumstances, it was held that two separate appeals were required to be filed against the decrees passed in the suits.

Counsel for the appellants has failed to cite any judgment of Hon'ble the Supreme Court that where a suit and a counter claim has been

decided by a common judgment and a composite decree has been prepared, two separate appeals are required to be filed to challenge the judgment in suit as well as in counter claim even if there is one decree drawn by the court. In this view of the matter, contention raised by counsel for the appellants that since the respondents did not file two appeals against the judgment and decree passed by the trial court, the appeal was liable to be dismissed by invoking the principle of res judicata is not meritorious and accordingly rejected.

This brings the court to merits of the case particularly decision of counter claim of the defendants on the basis of demarcation report prepared by local commission appointed by the trial court.

Before advertng to counter claim, it is pertinent to mention that counsel for the respondents has pointed out that there is no evidence adduced by the appellants that respondents-defendants have constructed a wall in land comprising any khasra number claimed to be owned by the plaintiffs-appellants. He would state that the respondents-defendants have neither raised construction of a wall nor intend to raise construction or encroach any part of land belonging to the plaintiffs. On the contrary, he would argue that suit was filed by the plaintiffs in order to justify/legalize the encroachment made by them on land comprising khasra No. 138, admittedly, owned by the respondents-plaintiffs.

Counsel representing the plaintiffs-appellants has half heartedly conceded that the defendants have not constructed any pucca wall at the points depicted in the site plan nor have encroached upon killa No. 11/9 (khad gadha). He has also failed to point out any materials on record to

substantiate their plea that respondents-defendants intended to raise construction over their land. In the given circumstances, judgment of the first Appellate Court dismissing suit of the plaintiffs for grant of permanent injunction is liable to be affirmed and ordered accordingly.

Coming to counter claim filed by the respondents-defendants, in view of site plan Ex.D1, the plaintiffs have encroached upon the area of khasra No. 138 shown in dotted lines with red colour, marked by letters 'ABGFED'.

Indisputably, the appellants filed an application dated 21.7.2004 for appointment of local commission with direction to visit the spot and give existing state of affairs regarding measurement of plot of defendants and existing walls from point to point. Counsel for the defendants before the trial court made an endorsement raising no objection if commission is appointed for demarcation of land. The trial court vide order dated 23.7.2004 appointed revenue Tehsildar to carry out demarcation of the suit property, after giving notice to both the parties on or before 30.7.2004 and fee of the local commission was ordered to be borne by the appellants-plaintiffs. The local commission issued two notices Ex. D1 and D2A. Vide Ex. D1, the local commission informed the parties for conducting demarcation on 18.11.2004 at 10 a.m. In the second notice Ex. D2A, the date was fixed for 24.11.2004 at 10 a.m. There is overwriting in date in the second notice but date has been correctly recorded as 'choubis' (24) in Hindi. Similarly, there is overwriting in the date in demarcation report beneath the signatures of local commission i.e. Tehsildar but there is no overwriting in the date beneath the signatures of Kanungo and Patwari.

The appellants filed objections against report of the local commission. As has been rightly argued by counsel for the respondents-defendants, there is no such objection raised by the appellants that either the local commission did not conduct demarcation at the spot or the demarcation was conducted on a date other than 24.11.2004. That being so, overwriting in the date in the two documents assumes no significance much less to reject report of local commission as was sought by the appellants-plaintiffs and accepted by the trial court.

The appellants-plaintiffs raised certain objections with regard to non-fixing of pucca points and jhandis at the time of demarcation. These objections of the appellants are contrary to what has been recorded in the demarcation report that gives a detailed account qua fixing pucca points and then ascertaining other points from pucca points. The appellants did not call upon the local commission to appear in the witness box for cross examination to bring home their contention raised in the objections or to challenge correctness of the facts recorded in the report with regard to fixing pucca points, jhandis etc. Counsel for the appellants, during the course of hearing, has failed to make any submissions much less meaningful that demarcation conducted by the local commission is either not in consonance with the instructions issued by the Financial Commissioner or the rules framed by the High Court of Punjab and Haryana. In this view of the matter, I find it difficult to accept contention of the appellants that the first Appellate Court committed an error much less perversity by setting aside findings of the trial court or relying upon report of the local commission to accept counter claim preferred by the respondents-

defendants and to hold that the appellants have encroached upon a part of khasra No. 138 as depicted in the report and site plan prepared by the local commission. That being so, I do not find any reason to interfere in the well considered judgment of the Court in Appeal.

In view of what has been discussed hereinbefore, finding no merit, the appeal fails and is accordingly dismissed with costs. As the appeal has been decided on merits, applications for condonation of delay in filing and refiling the appeal are of academic relevance only.

(Rekha Mittal)
Judge

3.7.2019

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes/No