

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

RSA No.855 of 2016 (O&M)

Date of decision : 06.02.2019

Sukh Dev (deceased) through his LRs and others

...Appellants

Versus

Dhani Ram

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kul Bhushan Sharma, Advocate for the appellants.

Mr. Suman Jain, Advocate for the respondent.

ANIL KSHETARPAL, J. (ORAL)

Defendants-appellants are in the Regular Second Appeal against the judgment and decree passed by the learned First Appellate Court reversing the judgment of the trial Court.

In the considered view of this Court, the following substantial questions of law arise which needs consideration by this Court:-

- 1) Whether the suit filed by the plaintiff can be decreed on the basis of the alleged admissions of the defendants which factually do not exist?
- 2) Whether the onus to prove its case lies upon the plaintiff and in absence of any cogent evidence, even prima facie to discharge that onus, was the Court justifies in shifting the onus?

The plaintiff-respondent filed a suit for granting decree for permanent injunction restraining the defendants from demolishing the suit property or any part of it and from taking illegal and forcible possession from the plaintiff and for injuncting the defendants from raising any illegal construction. Plaintiff also prayed for a decree for mandatory injunction directing the defendants to restore the boundary wall at point AB and AE to

its original position.

Plaintiff claimed that he is owner of the plot situated within the abadi of village and he has constructed 7 feet boundary wall. He claimed that the length of the plot is 104 feet.

Defendants contested the suit and pleaded that there is a proper record prepared in the village namely *Shijra Khasra Paimaish Abadi*, according to which the property of the plaintiff is comprised in Ahata No.117 has length of 72 feet and not 104 feet as claimed by the plaintiff.

It was further pleaded that the defendants, who are owners in possession of Ahata No.116-adjoining plot, are owners in possession of remaining part of the property beyond the length of 72 feet.

Plaintiff only produced a layout plan prepared by the Draftsman-PW1 and examined in evidence three witnesses including Draftsman PW1. Dule Ram when appeared in the evidence admitted that in Village, *Shijra Khasra Paimaish Abadi* has been prepared.

Learned trial Court, on appreciation of the evidence and after noticing that *Shijra Khasra Paimaish Abadi* of the village has not been produced, dismissed the case. However, the learned First Appellate Court has reversed the judgment on two grounds, first that the defendants have admitted the case of the plaintiff and second that the defendants have failed to produce the evidence that what is the length of his plot i.e. comprised in Ahata No.116. For coming to conclusion that the case of plaintiff has been admitted, the Court has extracted para 1 of the written statement, which is again extracted as under:-

“It is submitted that Nohra of the plaintiff is part of Ahata No.117, Ghar No.148. The length of Ahata No.117 and Ghar

No.148 is only 72 feet and not 104 feet. The plaintiff has wrongly mentioned it as 104 feet in the plaint. The area beyond 72 feet in length is in the possession of the defendants as the adjoining land comprising of Ahata No.116, Ghar No.147 belongs to defendants.”

The Court has also extracted para 2 of the written statement which is also extracted as under:-

“The pucca room and khore of the plaintiff as shown in the site plan is not denied.”

It is apparent from the reading of the aforesaid paragraph that the defendants have nowhere admitted the claim of the plaintiff.

Learned First Appellate Court has also relied upon the admission made by DW1 Bhajan Lal who has stated that on the northern side, there is a *rasta shareaam*, northern side is a street, existence whereof is not disputed.

There is no admission that it is the plaintiff who is in possession or he is owner thereof.

Learned trial Court framed the following issues:-

- “1. Whether the plaintiff is owner in possession of the suit property and is entitled to injunction, as prayed for? OPP*
- 2. Whether the suit is not maintainable in the present form? OPD*
- 3. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD*
- 4. Whether the plaintiff has concealed the material facts from the Court? OPD*
- 5. Relief.”*

Learned First Appellate Court has not recorded any finding that the plaintiff is owner of the property in dispute. First Appellate Court has recorded the finding on the basis of so called admissions which are result of

misreading of the pleadings and the evidence that the possession of the plaintiff is admitted by the defendants.

Learned First Appellate Court has further erred in recording a finding that the defendants have failed to prove their case. It is well settled that the plaintiff is required to stand on his own legs. The onus to prove that the plaintiff is owner in possession i.e. issue No.1 was on the plaintiff, therefore, the onus could not be shifted unless the plaintiff discharges its onus. In the present case, it is not the finding of the First Appellate Court that the plaintiff has discharged his onus. In fact, from the reading of the judgment passed by the First Appellate Court, it is apparent that the First Appellate Court remained under impression that there is admission of the defendants to the case of the plaintiff which is factually incorrect.

A word of caution. Dispute is only with regard to the property which is beyond the length of 72 feet. Ownership of the plaintiff qua Ahata No.117 with respect to the length upto 72 feet is not disputed.

In view of the aforesaid, judgment passed by the learned First Appellate Court cannot be sustained and hence, set aside.

The substantial questions of law as framed earlier are answered in favour of the appellants and against the respondents.

Regular Second Appeal is allowed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

06.02.2019

Pawan

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No