

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

RSA-3960-2014(O&M)

Date of decision:-1.11.2019

Ayodhya Parshad and another

...Appellants

Versus

Ishwar and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Nishant Arya, Advocate
for the appellants.

Mr.Sandeep K. Sharma, Advocate
for the respondents.

H.S. MADAAN, J.

In nutshell, the facts of the case are that plaintiffs Ishwar, Dinesh and Thandi Ram, residents of village Pehrawar, Tehsil and District Rohtak had brought a suit against the defendants Ayodhya Parshad and his son Inder Mani of their village seeking a declaration that encroachment by the defendants over the street in question

measuring 14' x 56', which was left amicably by the parties is illegal, without any right and title; in addition to that seeking mandatory injunction directing the defendants to remove the encroachment in question.

As per the version of the plaintiffs, the parties to the suit are owners in possession of plots comprised in Khewat No.224, khatoni No.254, Rect. and Killa Nos.44/2(6-18), 53/29(2-11), 53/30(2-13), 53/38(0-18), 53/39(0-15), 53/40(0-15), 53/41(015), 53/42(0-15), 53/43(0-15), 53/44(0-15) measuring 17 kanals 10 marlas; in a family settlement arrived at between the parties, the plots were partitioned in equal shares and they had raised construction over their share; from killa No.53/29, a passage having dimensions 14' x 56' was left amicably by all the plot holders for their ingress and egress and to connect the main passage instead of using long way of *phirni* to reach their plots from the village; the plaintiff No.3 has his electric wire, water pipe and window towards that piece of land but the defendants being head strong persons have constructed a *kotha* therein forcibly and without any right or title; the plaintiffs had complained about the said encroachment to the police of Police Station Sadar, Rohtak but instead of taking any positive action, the police had initiated security proceedings under Sections 107/151 Cr.P.C. against defendant No.2 only; when the defendants refused to accede to the requests of the plaintiffs to remove the encroachment

from the passage in question, they filed a suit in question before the Civil Court at Rohtak.

On being put to notice, both the defendants appeared and filed written statement contesting the suit *inter alia* raising preliminary objections that the suit was not maintainable; that the plaintiffs had not approached the Court with clean hands; that the suit was not properly valued for the purpose of Court fees and the suit was bad for non-joinder and mis-joinder of the necessary parties. On merits, the defendants admitted that the suit land was jointly owned and possessed by the parties. According to them, the suit land was partitioned and plaintiffs had to hand over the possession to the answering defendants; the defendants are owners in possession of the suit property since the time of their forefathers; the plaintiff No.3 has wrongly opened a window towards house of answering defendants. The answering defendants denied that they have encroached upon any part of the street. According to them, they have constructed their room being owner in possession of the suit land. They admitted that security proceedings under Section 107/151 Cr.P.C. were initiated against defendant No.2 but it was contended by them that as decided in the village Panchayat, both the parties would get the suit land demarcated, the plaintiffs did not do so and rather filed the suit against them. Refuting the remaining assertions in the plaint, the defendants prayed for dismissal of the suit.

On the pleadings of the parties, following issues were framed:

1. Whether the plaintiffs are entitled to the relief of declaration as prayed for? OPP.
2. If issue No.1 is proved, whether the plaintiffs are entitled to the relief of mandatory injunction as prayed for? OPP.
3. Whether the suit of the plaintiffs is not maintainable in the present form? OPD.
4. Whether the present suit is bad for mis-joinder and non-joinder of necessary parties? OPD.
5. Whether the plaintiffs have concealed true material facts from this Court and if so, its effect? OPD.
6. Whether the suit of the plaintiffs has not been correctly valued for the purpose of Court fees? OPD.
7. Relief.

Both the parties were afforded adequate opportunities to lead their evidence.

After hearing the learned counsel for the parties, the trial Court decided issues No.1 and 2 in favour of the defendants and against the plaintiffs, issues No.3 to 6 in favour of the plaintiffs and against the defendants. Resultantly vide judgment and decree dated 6.9.2012 the suit of the plaintiffs was dismissed with costs by the trial Court.

Feeling aggrieved by the said judgment and decree, the plaintiffs filed an appeal in the Court of District Judge, Rohtak, who vide judgment and decree dated 8.7.2014 accepted the appeal, set aside the judgment and decree passed by the trial Court and the suit of the plaintiffs was decreed and defendants were directed to remove the encroachment from the land in dispute within two months from the date of passing of the decree.

Being dissatisfied with the judgment and decree passed by Additional District Judge, Rohtak, the defendants have filed the present regular second appeal before this Court, notice of which was issued to the respondents-plaintiffs, who put in appearance through counsel.

I have heard learned counsel for the parties besides going through the record.

The parties are not at variance as regards the property having been partitioned between them though a family settlement. As per the version of the plaintiffs, the disputed site was left as a passage in the said family settlement, whereas the defendants are denying this fact. The trial Court has non-suited the plaintiffs mainly for the reason that no documentary evidence with regard to family settlement was there and land was shown to be joint in the revenue record, therefore, the plaintiffs have been unable to prove their case.

I find that the trial Court did not give thorough

consideration to the matter so as to determine as to whether the site in dispute was left as a passage by the parties or not. Whereas the First Appellate Court of learned District Judge, Rohtak has properly appreciated the factual as well as legal position while coming to the conclusion that the disputed site was in fact left as a passage. He has taken note of the fact that house of plaintiff No.3 is situated just adjacent to the disputed site in the northern side and the windows and ventilators of such house open towards the disputed site. This fact along with another fact that electric and water supply to the house of plaintiff No.3 is through this site is admitted by the defendants. The explanation rendered by the defendants that it was so done by the plaintiff No.3 with their consent was rightly not accepted by the First Appellate Court observing that if it was exclusive property of defendants, they would not have allowed plaintiff No.3 to lay water and electricity lines through that piece of land and to open windows and ventilators of his house towards that site. Examining the matter minutely, learned District Judge, Rohtak has observed that the size of all the plots carved out is almost equal i.e. 300 to 350 square yards, whereas the total area of the disputed site is only 85 square yards and its length is about 55 feet, which correspond with the length of the other plots, whereas the width is only 14 feet and the width of all the other plots is around 40 feet, which again suggest that it was left as a passage and not as a plot. Therefore, finding merit in the case of

the plaintiffs, the suit of the plaintiffs was decreed.

Learned District Judge, Rohtak has rightly set aside the judgment of the trial Court, which was not sustainable showing lack of application of a judicious mind.

No substantial question of law arises in this appeal.

Therefore, I do not find any merit in the present appeal and do not see any reason to disturb the legal, valid and well reasoned judgment passed by the District Judge, Rohtak.

The appeal stands dismissed accordingly.

1.11.2019
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No