

RSA-652-2022 (O&M)

Sr. No.111

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

RSA-652-2022 (O&M)

Date of decision: 25.01.2023

Parveen Kumar

...Appellant

Vs.

Satbir and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Sumit Sharma, Advocate
for the appellant.

ARUN MONGA, J. (ORAL)

CM-1899-C-2022

This is an application for permission to lead additional evidence.

Heard.

No grounds for interference are made out at this belated stage as no cogent reasons have come forth for not doing the needful either at the trial stage or even before the First Appellate Court.

RSA-652-2022 (O&M)

For convenience, parties herein are addressed as per the recitals before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts below, defendant No.1 (appellant herein) is in second appeal before this Court assailing the trial Court judgment and decree dated 18.09.2017, as upheld by learned First Appellate Court vide its judgment and decree dated 06.12.2021.

3. Briefly stated, facts as noticed by Courts below are that plaintiff Satbir filed a Civil suit for damages to the effect that appellant be directed to pay damages amounting to Rs.1,12,840/- for the loss suffered by him due to illegal construction of basement by appellant.

3.1. Plaintiff is owner of Plot No.2, measuring 8.5' x 116.3' by way of a lease, upon which plaintiff had constructed a shop-cum-residence by spending a huge amount and defendant No.1 is also owner of the adjoining plot No.1 as a lessee. Municipal Committee, Uchana is true owner of these properties and allotted the same for constructing the shops on the ground floor and residential house on the first floor i.e. shop-cum-residence.

3.2. As per terms and conditions of lease agreement, no one could construct basement, but defendant No.1 in violation of the terms and conditions of lease agreement, constructed basement unlawfully, due to which premises of plaintiff have got damaged, resulting in great financial loss and mental injury. Plaintiff caused legal notice dated 17.02.2014 to compensate the loss and damage caused to him, but to no avail.

4. Upon notice, defendant No.1-appellant appeared and filed written statement taking preliminary objections regarding maintainability, cause of action jurisdiction, proper Court fee and estoppel.

4.1. On merits, it is submitted that plaint is incorrect as no damage was caused to the building of the plaintiff-respondent No.1 due to construction of house of answering defendant and the cracks in the building, if any, were prior to the construction of the house of defendant No.1.

5. Based on the rival pleadings, following issues were framed:

1. Whether the plaintiff is entitled for compensation for the wrong committed by defendants on the grounds mentioned in the plaint? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiff has no cause of action to file the present suit as alleged? OPD
4. Whether plaintiff is estopped by his own act and conduct? OPD
5. Whether suit is false and frivolous? OPD
6. Whether civil court has no jurisdiction to try the present suit? OPD
7. Whether suit is bad for want of proper court fee?OPD

8. Relief

6. The parties to the suit adduced their oral as well as documentary evidence in support of their pleadings and to discharge their respective onus as per the issues, *ibid*.

7. On appraisal of evidence vis-à-vis pleadings, issue No.1 was decided in favour of the plaintiff-respondent No.1, whereas issues No.2 to 7 were disposed of being not pressed by defendant No.1 and consequently, the suit of plaintiff-respondent No.1 was decreed with costs.

8. Aggrieved, defendant No.1-appellant preferred first appeal which was dismissed by learned First Appellate Court.

9. Learned First Appellate Court below dismissed the appeal, resulting in instant Regular Second Appeal before this Court.

10. In its judgment, learned First Appellate Court, *inter alia*, observed as under:

“xxxx

xxxx

$$xxxx$$

xxxx

16. In order to prove his contention, plaintiff himself appeared into the witness box as PW1 and adduced his evidence by way of affidavit Ex. PW1/A, wherein he has reiterated the contents of his plaint. Plaintiff has also examined PW2 Kuldeep Gupta, Civil Engineer who has inspected the spot and prepared the Inspection and Damaged report Ex. P2 and site plan Ex P3.

The perusal of the report Ex.P2 shows that it has been specifically mentioned therein that in the southern direction Mr. Parveen Kumar is constructing a residential and commercial building. He has constructed basement towards the northern direction adjoining the house of Satbir. The basement has been constructed without any technical supervision by Mr.Parveen Kumar. The earth has been excavated without providing any precautions. Thus, the adjoining wall has got cracked from many places. The CC flooring has also got cracked and has been settled down. The roof battens are also bending down from their actual position. The building is damaging day by day and cracks are increasing. The building is being dangerous day by day for the human life. As present the building is in a position which can be repaired.

Shri N.K. Gautam, learned counsel for the defendant No.1 has argued that Ex.P2 Inspection and Report and Ex.P3 site plan are forged and fabricated documents as the same have been prepared in the absence of the defendant, so, the same cannot be relied upon.

Although, it is true that there is nothing mentioned in the report that if any notice etc. has been given to the defendant no.2 at the time of inspection by PW2 Kuldeep Gupta, Civil Engineer. However, PW2 Kuldeep Gupta was not the Local Commissioner appointed by the Court to inspect the spot and give his report, so, he is not supposed to inspect the spot only in the presence of the defendant No.1. Moreover, if it appears to the defendant no.1 that the report of PW2 Kuldeep Gupta, Civil Engineer is forged and fabricated and no such damage has been caused to the building of the plaintiff by the act of the defendant No.1, then he was at liberty to get examined the building either by himself or through a Local Commissioner by moving an application before the learned trial court, but he has not taken any such step, which requires to draw an adverse inference against him. Even PW2 Kuldeep Gupta has been cross-examined at length by defendant no.2 and nothing incriminating could come out which could shatter or destroy his testimony. Even further, defendant no.1 while appearing as DWI has admitted in his cross examination that he has not taken permission from the Municipal Committee for construction of basement and that legally any basement cannot be constructed without permission of the Municipal Committee. Further, DW2 Raj Kumar, who has appeared on behalf of the defendant No.2 has stated in his cross-examination that defendant no.1 has not taken permission before the construction and as per the laws of Municipal Committee, before constructing basement, certificate is required to be taken from the Engineering Department of Municipal Committee. Even defendant No.2 has also not examined any Mason etc. who has constructed his basement to show that sufficient precautions were taken at the time of constructing basement. Hence, the contention of learned counsel for the defendant No.1 is not tenable.

In view of the above discussion, plaintiff has been able to establish that due to the act of the defendant No.1 damage has been caused to his shop.

17. Further, as per the Inspection report Ex.P2, total loss in the building has been shown as under:-

1. Brick work foundation and plinth of cracked wall laid in cement mortar 1:7 cost @ Rs. 382 15% cum Premium 350%
 $105'' \times 10'' = 7787.5$ sq. feet or
 22.28 cum-8516.69
Premium-29808.41
2. Providing new CC flowering
 $105' \times 14'$ sq. feet or 136.56 sqm
=7374-00
Premium = 27285
3. Providing cement plaster on the cracked wall with first flooring
 $105' \times 20' \times 2'' = 4200$ sq. feet or 195.09 sqm
=2477.64
Premium =8052.33
Total =112839.17

The total loss in the building is Rs.1,12,840/-

As already discussed, PW2 Kuldeep Gupta, Civil Engineer who has prepared report Ex P2 has been cross-examined at length, but

nothing incriminating could come out which could shatter or destroy his testimony. There is also nothing on record which could suggest that loss assessed by PW2 Kuldeep Gupta, Civil Engineer is exaggerated in any manner.

18. No other point/issue is argued or pressed upon by learned counsels for the parties before this Court.”

11. Learned counsel for defendant No.1-appellant strenuously argues that he was impleaded as party merely because his mother is a lessee of the property of respondent No.2-Municipal Committee, Uchana. He further submits that otherwise also he lives separately and only his younger brother is living in the building in question on first floor.

12. I have heard learned counsel and perused the judgments of both the Courts below. To my mind, on first flush, the argument of learned counsel seems to be attractive but the same when seen from the record, it appears to be an afterthought in the second appeal. However, neither at the time of filing of the written statement nor even subsequent thereto at the time of filing of the first appeal any such stand was taken. In the premise, having once acquiesced to the jurisdiction and having decided to contest the suit on merits, thereafter having undergone the entire trial and leading of evidence by respective parties, where the appellant was at liberty to establish his defense, as has been pleaded now, it is too belated at this stage to stage a volte face and take a diabolic stand against record of learned trial Court as well as of learned First Appellate Court.

13. Resultantly, no fault can be found with the findings rendered by learned trial Court as affirmed by learned First Appellate Court since the same were based on cogent evidence adduced by plaintiff. Furthermore, it is not the case of appellant that the fact of his mother being lessee and owner of the property has come to the knowledge of appellant at the time of filing of the second appeal.

Having known this fact throughout, it is too late to turn around and take such defense at this stage.

14. Having perused the impugned judgments, my considered opinion is that the submissions made before the Courts below were duly considered and repelled by recording sound and sufficient reasons consistent with record and the applicable law. I am inclined to agree with the same. There seems no substance in the submissions that the impugned judgments were passed based on conjectures and surmises.

15. Judgments under challenge have been rendered after due and correct appreciation of record including the evidence adduced by the parties.

16. In the premise, there seems no perversity or illegality in the concurrent findings of facts returned by the Courts below. No interference is thus called for to disturb the said concurrent findings.

17. Furthermore, no question of law, much less substantial one, a *sine qua non* for entertaining regular second appeal, is involved herein, for exercise of appellate jurisdiction of this Court under Section 41 of the Punjab Courts Act read with Section 100 of the Civil Procedure Code.

18. As an upshot of my preceding discussion, this appeal is dismissed, being bereft of any merit. Resultantly, both the impugned judgments and decrees passed by learned Courts below are upheld.

19. Pending application/s, if any, shall also stands disposed of.

20. No order as to costs.

(ARUN MONGA)
JUDGE

January 25, 2023
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Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No