

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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RSA No.2834 of 1993
Date of Decision: 25.01.2023

Daya Chand and others

... Appellants

Versus

Kanhiya Lal (Deceased) through LRs

... Respondent

CORAM: HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. M.L. Sarin, Senior Advocate,
with Mr. Ritesh Aggarwal, Advocate,
for the appellants.

Mr. Adarsh Jain, Advocate and
Ms. Kamaldeep Kaur, Advocate,
for the respondent.

MANISHA BATRA, J.

1. The present appeal has been preferred by the defendants-appellants against the judgment and decree dated 01.10.1993 whereby the First Appellate Court dismissed the appeal of the defendants-appellants against the judgment and decree dated 26.11.1991 passed by the Court of Additional Senior Sub Judge, Palwal decreeing the Civil Suit No.RBT/484 of 1989 filed by the plaintiff-Kanhiya Lal (now dead and represented through LRs). The epitome of the facts, relevant for the purpose of present appeal and emanating from the record is that the plaintiff -Kanhiya Lal had

filed suit for permanent injunction on the averments that he along with his brother Sarupa was co-owner in possession of a gair mumkin gait (plot) comprised in Khewat/Khatoni No.60/76 Khasra No.136 measuring 3 kanal 9 marlas situated within the revenue estate of Village Sihol, Tehsil Palwal (hereinafter to be mentioned as disputed property). Both of them had raised construction of their residential houses over the disputed property which was shown with letters ABCD in the site plan annexed with the plaint and the boundaries and measurement of which were mentioned in detail in para No.2 of the plaint. It was pleaded that in northern side of the disputed property, the gait of the defendants comprised in Khasra No.284 was existing. The same was lying vacant. The defendants had demolished a part of the wall forming part of the property of the plaintiff and shown with letters B M in the site plan, before filing of the suit and were also bent upon encroaching upon the disputed property towards the western side of their property and raising construction of a wall in the portion P B forming part of property of the plaintiff. The plaintiff requested them not to do so but in vain. The plaintiff, therefore, prayed for restraining the defendants from interfering in his possession over the disputed property and from raising wall in the eastern portion of the same. He also made an alternative prayer to the effect that if he was found to be in possession of any area of property not owned by him, then he be declared to have become owner of the same by way of adverse possession.

2. In response to the notice, the defendants appeared and filed joint written statement raising preliminary objections as to maintainability and cause of action. On merits, while admitting that the plaintiff and his brother

Sarupa were owners of the property comprised in Khasra No.136, it was denied that they had raised any construction over this property or that they were in possession of the same. It was asserted that the measurements of the plot had wrongly been given by the plaintiff therefrom. No boundary walls in the disputed property nor any construction was raised over the same. It was submitted that no wall was existing in between the plots of the parties nor any such wall was demolished and infact, the defendants were raising construction over the land owned by themselves and had not tried to encroach upon the property belonging to the plaintiff. While controverting the remaining averments, dismissal of the suit had been prayed for.

3. The plaintiff filed replication controverting the pleas taken in the written statement and re-asserting those in the plaint. On the pleadings of the parties, the following issues were settled by learned trial Court vide order dated 04.09.1989:-

1. Whether the plaintiff and his brother are the owners in possession of the suit property? OPP.
2. Whether a portion of the wall shown as BM in the site plan attached with the plaint has been demolished by the defendants and they are trying to make further encroachment? OPP.
3. Whether the suit is not maintainable? OPD.
4. Whether the defendants are entitled to special costs? OPD.
5. Relief.”

4. The parties adduced evidence in support of their respective assertions. The plaintiff-Kanhiya Lal himself stepped into the witness box as PW-3 and examined two more witnesses namely, PW-1 Lekh Raj and PW-2 Brahm Dutt, Advocate besides relying upon documentary evidence in

the form of Ex.P-3, report of Local Commissioner i.e. Brahm Dev, Advocate as appointed by learned trial Court, Ex.P-1 memo of presence of parties as prepared by the Local Commissioner and Ex.P-2 rough site plan prepared by him at the spot. Apart from this, documents Mark A and Mark B, Ex.PW3/1 to Ex.PW3/13 were produced in evidence.

5. On the other hand, the defendants examined two witnesses namely, DW-1 Sh. Parshadi Lal and DW-2 Narain Singh, father of minor defendants No.2 to 4. In documentary evidence, they produced Exs.D1 to D5. No rebuttal evidence had been adduced. On appreciating the evidence led by the parties and on considering the contentions, the learned trial Court decreed the suit vide judgment and decree dated 26.11.1991 thereby restraining the defendants from interfering into the possession of the plaintiff over the disputed property. Civil Appeal No.140 of 1993 filed by the defendants had been dismissed by the learned First Appellate Court vide judgment and decree dated 01.10.1993.

6. Learned counsel for the appellants-defendants strenuously argued that the impugned judgment and decree as passed by learned First Appellate Court was liable to set aside as a grave error had been committed by it by dismissing the appeal filed by the defendants. On one hand, the learned First Appellate Court had observed that the respondent-plaintiff had failed to produce any convincing evidence on record to prove that the appellants had demolished any portion of wall of his property and had also rejected the evidence produced by the respondent by giving a finding that there was no evidence to show that the demarcation report of land of the appellants was wrong but on the other hand, it granted a decree of injunction in favour of

the respondent merely on the basis of surmises, conjectures and presumptions. The findings as given were based on misreading of evidence and were against the record. No evidence had come on record to prove that there was any interference or threat of interference in the property of respondent on the part of the appellants and the discretionary relief of injunction had been given only on the basis of bare pleading in the plaint which was not proved by any cogent and convincing evidence. Hence, it was urged that the impugned judgment was liable to be set aside, the appeal deserved to be accepted and further that suit filed by the respondent-plaintiff was liable to be dismissed.

7. Per contra, learned counsel for the respondent argued that the findings given by the Courts below were well reasoned. No ground had been made out to interfere with the concurrent findings of fact as recorded by the learned trial Court as well as learned First Appellate Court. While submitting that appeal was devoid of any merit, it was stressed that the same was liable to be dismissed.

8. It is well settled principle of law that the High Court in Regular Second Appeal cannot interfere with the findings of fact recorded by the First Appellate Court and can only interfere into the judgment and decree of the Courts below, if it finds that substantial questions of law arise in the same. In view of contentions raised, this Court is of the considered view that the following substantial questions of law can be formulated in this Regular Second Appeal for consideration:-

- i) Whether the evidence led by respondent-plaintiff *de hors* evidence as to demarcation of disputed property could be

considered to be sufficient to prove his case?

ii) Whether the relief of permanent injunction which is an equitable and discretionary relief could be granted to the respondent-plaintiff on the basis of material produced on record.

9. Due deliberations have been given to the contentions as raised by learned counsel for both the parties and record has also been minutely scrutinized. It is undisputed between the parties that respondent along with his brother Sarupa was owner of the property in Khasra No.136 which was claimed to be the disputed property and had raised construction of residential house on the same whereas the appellants were co-owners of the plot comprised in Khasra No.284 abutting the plot of the respondent from its eastern side. The learned First Appellate Court had observed that infact the dispute between the parties was with regard to the exact line of separation of properties comprised in Khasra Nos.136 and 284 respectively and they had taken conflicting stand with regard to actual physical location of these properties. On going through the material placed on record, this Court is of the opinion that the learned First Appellate Court had made observations to that extent on proper appreciation of the record. To prove his claim that the appellants had demolished the wall existing over the property of the respondent and was trying to encroach upon the disputed property, the respondent had mainly relied upon the report of Local Commissioner i.e. PW-2 Brahm Dutt, Advocate who on being appointed by learned trial Court had visited the spot and had given report Ex.P3 with regard to existing position of the property comprised in Khasra No.136. He had also prepared Ex.P2 rough site plan of the disputed property. A perusal

of report Ex.P3 reveals that PW-2 had simply reported that a 4 feet high wall was existing on the portion shown with letters D to E in the site plan Ex.P2 and a stone made wall up to plinth level was existing on the point B C. He had further reported that construction work of house of appellants was going on the spot. This witness had obviously not conducted demarcation of the property which he had visited and, therefore, though his report could be relied upon for the purpose of proving as to what was existing over the property which was visited by him, however, the same did not help the respondent in proving that the entire property which was visited by him was infact part of land comprised in Khasra No.136. Therefore, on the basis of report Ex.P3, it was not established that the appellants-defendants had encroached upon any portion of property owned by the respondent-plaintiff or were trying to do so or that the site plan Ex.P2 was infact relating to property bearing No.136.

10. Further, the self serving statement of the respondent himself also cannot be stated to be sufficient and convincing in this regard. In his sworn deposition, he simply deposed that the appellants-defendants wanted to take illegal possession of his property. It was not stated by him that the appellants had demolished any wall existing over his property or that they had encroached upon any area. It was also not deposed by him as to what particular overt act had been done by the appellants-defendants which amounted to interference on their part in his property. No particular date, month and year when such encroachment was tried to be made was mentioned by him. Moreso, the pleadings in the plaint and the testimony of this witness were silent on the point as to which particular area of property

owned by the respondent was tried to be encroached upon by the appellants. The respondent also did not make any effort to get the demarcation of the disputed property conducted from some revenue official to prove that the wall shown with letters B C was part of land comprised in Khasra No.136. As such, the identity of property shown in the site plan Ex.P2 as prepared by the Local Commissioner and site plan Ex.PW3/13 as relied upon by the respondent-plaintiff himself was not established to be the part of property comprised in Khasra No.136 and, therefore, the observations made by learned First Appellate Court that description and identity of the disputed property could not be safely fixed in terms of the site plan being filed by the parties deserve to be affirmed. However, since the learned First Appellate Court had still observed that the plaintiff was entitled to relief of injunction, therefore, it is to be seen as to whether the findings so given were based on proper appreciation of the material placed on record or not?

11. After analyzing the evidence led by the parties before learned trial Court and going through the pleadings, this Court is of the opinion that the findings given by learned First Appellate Court that the respondent was entitled to relief of injunction do not deserve to be upheld due to the reasons that when once, it was observed that the identity of the property shown in the site plan of the respondent was not established to be the property comprised in Khasra No.136, then the learned First Appellate Court was required to see that the relief of injunction was not to be granted only on mere asking. The respondent was required to establish that the appellants were infact causing obstruction in his possession over property bearing Khasra No.136 and threats were extended by them to his lawful possession.

On the basis of simple pleading in the plaint that the appellants had demolished a portion of wall existing on point B C, the case of respondent was not proved. It was for him to establish that the appellants were in fact causing obstruction in his possession and threats were given by them to his lawful possession. It is trite law that an injunction to restrain the defendant from interfering in possession of the plaintiff can be issued only on proof of actual interference or threat of interference and not in the absence thereof. The power to grant injunction is extraordinary power vested in the Court to be exercised with care and circumspection taking into consideration the facts and circumstances of a particular case. The party seeking relief of injunction is required to make honest disclosure of all relevant statements of fact. Otherwise, it amounts to abuse of process of the Court. Reliance in this regard can be placed upon the observations made by High Court of Karnataka in **R.G. Janthakal v. Bharat Parikh & Co. and another**, 1981 (1) Kant. L.J. 365. The respondent, however, failed to produce evidence of such nature on record which could be considered to be sufficient to make out a case that he was entitled to just, equitable and discretionary relief of permanent injunction. Moreover, he is even shown to have taken an alternative plea in the plaint that he had acquired rights of ownership over the disputed property by way of adverse possession. No evidence whatsoever had been led by him to show as to how this plea was available to him. Rather on the contrary by taking such plea, he is shown to have admitted himself to be in possession of such property which was not actually owned by him and this fact gives rise to an inference that in fact it was he who wanted to be in possession of some part of the property either

owned by the appellants or someone else and had filed suit for permanent injunction with that oblique motive. The Courts below did not take these points into consideration while granting relief of injunction in favour of the respondent. As such, the impugned judgment and decree as passed by learned First Appellate Court calls for interference by this Court and substantial questions of law as to grant of discretionary relief of permanent injunction by the Courts below have certainly arisen in this case. The findings as given by learned First Appellate Court are, therefore, liable to, be vitiated. They were recorded on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein. Therefore, it will be within our jurisdiction to deal with the issue which comes within the ambit of substantial question of law. With these observations, the findings as given by learned First Appellate Court are reversed. Consequently, the suit filed by the respondent-plaintiff is dismissed. The appeal filed by the appellants-defendants is allowed and impugned judgment and decree is set aside.

12. All miscellaneous application(s), if any, also stand disposed of.

25.01.2023
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(MANISHA BATRA)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No