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(2014) 3 RCR(Civil) 974

High Court Of Punjab And Haryana At Chandigarh

Case No: R.S.A. No. 4993 of 2012 (O&M)

Surender APPELLANT

Vs

Umrao Singh RESPONDENT

Date of Decision: April 22, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27, Order 6 Rule 17

Citation: (2014) 3 RCR(Civil) 974

Hon'ble Judges: Rakesh Garg, J

Bench: Single Bench

Advocate: Rajesh Narang, Advocate for the Appellant; Silak Ram Hooda and Pradeep P. Chahar, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Rakesh Garg, J.
This is plaintiffs'' second appeal challenging the judgments and decrees of the Courts below whereby suit of the plaintiffs for permanent injunction filed against the defendants was dismissed by the trial Court vide judgment and decree dated 7.1.2011 and further appeal against the said judgment and decree of the trial Court was also dismissed by the first appellate Court vide judgment and decree dated 16.10.2012. As per the averments made in the suit, plaintiff/appellants are co-sharers in the suit property and they have constructed their houses in the suit property and are residing since long. According to the appellants, the defendants in order to grab their property, in connivance with the Sarpanch of the Gram Panchayat, wanted to carve out a Nali in the Eastern side of Killa No. 6 illegally and forcibly and thus, necessity arose to file the instant suit.

2. On the other hand, defendants No. 1 to 28 filed their joint written statement submitting therein that it were the plaintiffs who had the intention to grab the property of the defendants. According to the defendants, property of the plaintiffs and defendants adjoins each other and the defendants after getting the suit property demarcated on 15.2.2007,

got constructed a pucca boundary wall on their land and in between the property of the plaintiffs and that of the defendants and thus, the question of encroaching upon the land of the plaintiff or making any Nali over the same does not arise. It was further averred that the defendants were in actual, physical and continuous possession of the property of their ownership, on which, they have constructed their residential houses.

3. Defendant No. 29 in its written statement alleged that the land in dispute is adjacent to the Firni towards the Eastern side and the Firni vests in the Gram Panchayat and is being used for common purposes. The Gram Panchayat wants to dig out a Nala through the Firni in order to drain out the rainy and dirty water of the village for the benefit of the village community. The plaintiffs under the garb of present suit, want to obstruct the development work of the Gram Panchayat illegally and forcibly.

4. Replication was filed by the plaintiffs controverting the stand of the defendants.

5. From the pleadings of the parties, following issues were framed:-

"1. Whether the plaintiffs are entitled to the relief of permanent injunction with respect of the suit property as detailed in the plaint? OPP

2. Whether suit of the plaintiff is not maintainable in the present form? OPD

3. Whether the suit is bad for mis-joinder of necessary parties because Gram Panchayat has been made as defendant unnecessarily? OPD

4. Whether the suit is liable to be dismissed because of the concealment of material facts? OPD

5. Whether the plaintiffs have no locus-standi and cause of action to file the present suit? OPD.

6. Whether the civil court has got no jurisdiction to entertain and try the present suit? OPD

7. Relief."

6. Parties led evidence in support of their respective claims.

7. After hearing counsel for the parties and perusing the evidence on record, the trial Court decided issue No. 1 against the plaintiffs and issues No. 2 to 6 were decided against the defendants. Resultantly, the suit was dismissed with costs. While dismissing the suit, the trial Court observed as under:-

"10. After going through the entire evidence led by both the parties and after considering the rival contentions, it is amply clear that the property of the plaintiffs and the defendants adjoins to each other. It is also not disputed that a local commissioner got appointed by the defendants has visited the spot and demarcated the suit property at the spot. It is also

proved from the evidence of the parties that after the demarcation of the properties by the local commissioner a boundary will was constructed by the defendants at the spot in accordance with the demarcation report dated 15.02.2007. The claim of the plaintiffs that the boundary wall was constructed by the defendants at the spot after the receipt of notice of the present suit is not substantiated from any cogent evidence on the file. Even the plaintiffs have not made any efforts to get the suit property demarcated so as to prove that the boundary wall raised by the defendants was in the land owned and possessed by the plaintiffs. So the contention of the learned counsel for the plaintiffs that the relief in the present suit be moulded to a decree for possession is not tenable in the absence of specific evidence to show any encroachment by the defendants on the property of the plaintiffs. Some discrepancies pointed out in the report of local commissioner by the learned counsel for the plaintiffs are not such so as to discard the same in toto particularly when the plaintiffs themselves had made no efforts to get the suit land demarcated.

12. More so the alleged drain was proposed to be constructed on the boundary of the properties of the parties along side firni (circular road) of the village and the plaintiffs have no right to retrain the defendant gram panchayat from constructing the drain in the firni of the village for passage of dirty and rainy water of the inhabitants of the Village, which is certainly a development work for the welfare of the Village community. Furthermore, any claim of the plaintiffs on the property where the drain was proposed to be constructed if alleged to be not belonging to the gram panchayat would oust the jurisdiction of this court as the civil court cannot entertain the suit for adjudicating the vesting or non-vesting the property in the gram panchayat. Consequently, now when the boundary wall stand already constructed in between the property of the plaintiffs and defendants there is no question of any interference from any of the parties and the plaintiffs have no right to seek any relief against the defendants. So the plaintiffs cannot drive any benefit from Mahabir and Another Vs. Surta and Others, , Kishan Swarup Vs. Mukandi Lal and Another , relied upon by their learned counsel."

8. Feeling aggrieved from the aforesaid judgment and decree of the trial Court, the plaintiffs preferred an appeal before the first Appellate Court which was also dismissed. While affirming the findings of the trial Court, the lower Appellate Court referred to the admission on the part of PW-1 Baljit, wherein he has admitted that a Local Commissioner had visited the spot and thereafter, the respondents constructed a wall between their land and the land owned by defendants and thus, both the parties were having their separate possession. The lower Appellate Court further relied upon the demarcation report (Ex. DW 4/A) of Tara Chand, Naib Tehsildar, which indicates that there was no illegal encroachment in Killa No. 13/6 and 7 and illegal encroachment was upon killa No. 111. According to DW-4 Tara Chand, the demarcation was done after identifying three pucca points and after consulting the revenue records in the presence of the parties.

9. Still not satisfied, the plaintiffs have filed the instant appeal submitting that following substantial questions of law arise in this appeal for consideration of this Court:-

(i) Whether the demarcation report dated 15.02.2007 (Ex. DW 4/A) has been prepared according to the rules and orders of Punjab and Haryana High Court as well as instructions issued by Financial Commissioner?

(ii) Whether the said demarcation report, which has been prepared without perusing the field book, Aksh Sizra, Musavi can be sustainable in the eyes of law?

(iii) Whether the said demarcation report, which is not related to the suit land and has not been prepared by virtue of any order passed in the present litigation, and that too at the back of plaintiffs can be relied upon to ascertain the boundaries as well as possession of suit land?

(iv) Whether the judgment and decree of the first appellate court is sustainable without deciding the application under Order 41 Rule 27 C.P.C. as well as under Order 6 Rule 17 C.P.C. moved by the plaintiffs, during the pendency of first appeal?

(v) Whether the plaintiffs/appellants are entitled to amend the plaint and to lead additional evidence qua the documents, the most of which have come into existence after the decision of suit by the Ld. Trial Court?

(vi) Whether the rights of plaintiffs/appellants, who are village folks and rustic, can be allowed to be jeopardized for the lapse on the part of their counsel, due to lack of proper advice?

10. Along with this appeal, the appellants have also filed an application i.e. CM No. 13920-C of 2012 for allowing them to lead additional evidence. According to the appellants, the boundary of the land comprising rectangle No. 13 Killa No. 14/1 (western side) is actually 37 karams, however, the same was wrongly stated to be 28 karams in the plaint and this fact is supported from the Field Book and Aksh Shijra which have been placed on record of this appeal as Annexures A3 and A4 and they have come to know that the land comprised of rectangle No. 13 Killa No. 14/1 is owned by them, whereas their ownership was being shown of Rectangle No. 13, Killa No. 14/2 and in this regard, a Farad badar was entered by the Patwari which was sanctioned vide order dated 9.3.2011.

11. It is the further case of the appellants that these facts were brought to the notice of lower Appellate Court by moving an application dated 14.2.2012 under Order 6 Rule 17 CPC and under Order 41 Rule 27 CPC, seeking amendment of the plaint as well as leading additional evidence qua the said facts, but the same was not taken into account while deciding the appeal, which has caused great injustice to the plaintiff-appellants.

12. It is the further case of the appellants that the suit property was got demarcated by him through Sadar Kanungo, who gave his report dated 22.8.2011 (Annexure A-8), wherein it has been specifically stated that measurement at the spot is not tallying with the revenue records and the land underneath the Firni was in illegal possession of certain

persons, which has resulted into reducing the area owned by the appellants, because the Gram Panchayat after leaving the illegally occupied area, has included the area owned by the plaintiffs into the Firni and the said fact is proved from the Annexure A-9 and thus, the impugned judgments and decrees which are based upon the demarcation report, which stands rebutted, is liable to be set aside.

13. At this stage, it may be noticed that all the documents i.e. Annexures A-4, A-5, A-7, A-8 and A-9, as mentioned in the application for leading additional evidence, have come into existence only after dismissal of the suit vide judgment and decree of the trial Court dated 7.1.2011. Moreover, the said documents are of no help to the appellants, as according to the said facts, the land comprised in Rectangle No. 13 Killa No. 14/1 is owned by them whereas they have filed the instant suit with regard to the land comprising Killa No. 13/14/2. It is a matter of record that no amendment of the plaint was allowed in favour of the appellants and thus, the documents produced by them are of no help to them, especially in view of the fact that they have not raised any grievance with regard to his prayer for amendment in the plaint. It may further be noticed that though the appellants had moved an application for leading additional evidence before the first Appellate Court, yet it is a matter of record that the appellants did not raise any argument before the first Appellate Court on the basis of facts, as mentioned in the application, for leading additional evidence as well as for amendment of the plaint at the time of arguments before the first Appellate Court.

14. It is not the case of the appellants that such an argument was raised and the same was not noticed and in view of the aforesaid fact, the only inference which can be drawn is that even the appellants have not found it worthwhile to press their application for leading additional evidence for amendment of the plaint before the first Appellate Court, having not raised any issue before the first Appellate Court, on the basis of the aforesaid facts, appellants cannot be permitted in the instant appeal to raise such an argument again on the basis of the application for leading additional evidence filed before this Court. Thus, prayer for leading additional evidence is declined.

15. Not only this, a perusal of the aforesaid applications would show that even the plea raised with regard to amendment of the plaint is totally vague and has not been substantiated in any manner.

16. No other argument is raised.

17. In view of the aforesaid and keeping in view the findings recorded by the Courts below, this Court finds no merit in this appeal.

18. Thus, no substantial question of law arises in this appeal. Dismissed.