



IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA

RSA No. 516 of 2007

Judgment reserved on: 24.10.2016

Date of Decision: 28th October, 2016.

Surinder Mohan Appellant.
Versus
Ramesh Kumar & Anr. ... Respondents.

Coram:

The Hon'ble Mr. Justice Sandeep Sharma, Judge.

*Whether approved for reporting?*¹ Yes.

For the Appellant : Mr. Deepak Kaushal, Advocate.

For the Respondents: Ms. Shalini Thakur, Advocate.

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 30.8.2007, passed by learned District Judge, Sirmaur, District Nahan, H.P., affirming the judgment and decree dated 25.10.2005, passed by learned Civil Judge (Senior Division) Rajgarh, District Sirmaur, H.P., in Civil Suit No.81/1 of 2004, whereby suit for injunction filed by the plaintiff was dismissed.

2. In nutshell, facts of the case are that present appellant(hereinafter referred to as the plaintiff) filed suit seeking relief of permanent prohibitory injunction restraining the defendants(hereinafter referred to as the respondents)

Whether reporters of the local papers may be allowed to see the judgment?

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from raising construction or changing the nature of the land comprised in khata/ khatauni No.72min/116min, khasra Nos.1093/1022/1017, measuring 13 biswas situated in village Johana, Tehsil Pachhad, District Sirmaur, H.P (hereinafter referred to as the suit land). Plaintiff averred in the plaint that on 20.8.2004, defendants with mala-fide intention to raise construction over the suit land started digging the suit land with JCB Machine and in order to level the same for raising construction thereon without the consent of the plaintiff. Plaintiff further averred that since suit land is joint between the parties, the plaintiff being co-sharer is owner of every inch of the suit land till the same is legally partitioned by metes and bounds. Plaintiff further averred in the plaint that the suit land is precious land since it falls in front of Shimla-Dehradun road and defendants solely with a view to grab the best portion of the suit land has resorted to illegal construction over that portion of the land. In view of the aforesaid background, plaintiff filed suit for injunction against the defendants.

3. Defendants by way of filing written statement refuted the claim put forth on behalf of the plaintiff on the grounds of maintainability, locus standi, cause of action and misrepresentation of the facts. Defendants also denied the case of the plaintiff on merits by disputing the status of the plaintiff being co-sharer in the suit land. Defendant specifically

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averred that there is old Abadi which belongs to them and they are raising construction of a dwelling house over which the old Abadi/house was situated. Defendants specifically denied that the suit land is joint between the parties, rather defendants claimed that plaintiff preferred the present suit with mala-fide intention in order to harass them.

4. Record reveals that the plaintiff did not file any replication and as such, averments contained in the written statement stood un-rebutted.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP.
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the plaintiff has no locus-standi to file the present suit? OPD.
4. Whether the plaintiff has no cause of action to file the present suit? OPD.
5. Relief:-

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, dismissed the suit of the plaintiff vide impugned judgment and decree dated 25.10.2005.

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7. Feeling aggrieved and dissatisfied with the impugned judgment dated 25.10.2005, passed by learned trial Court, appellant/plaintiff filed an appeal under Section 96 CPC in the Court of learned District Judge, Sirmaur, H.P, which came to be registered as Civil Appeal No.18-CA/13 of 2007/2005, however fact remains that learned District Judge, vide impugned judgment and decree dated 30.8.2007, dismissed the appeal preferred on behalf of the plaintiff/appellant and upheld the judgment passed by learned trial Court. In the aforesaid background, the present appellant-plaintiff approached this Court by way of Regular Second Appeal, praying therein for quashing and setting aside the impugned judgment passed by both the Courts below.

8. This Regular Second Appeal was admitted on the following substantial questions of law:-

- “(1) Whether the land which is described as Shamlat land in revenue record can be used by only one co-owner without there being any partition of the land?.
- (2). Whether the land described as Shamlat over which every villager/right holder having common rights can be used by an individual for the construction of his personal house which is obviously not for common purpose?
- (3). Whether an individual can be said to be in possession of a Shamlat land without placing on record any evidence to this effect that the land has been partitioned and particular piece of land has been allotted to him?”.

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9. Mr. Deepak Kaushal, learned counsel representing the appellant, vehemently argued that the judgment passed by both the Courts below are not sustainable as the same are not based on correct appreciation of the evidence available on record and as such, same deserve to be quashed and set-aside. He further contended that both the Courts while non suiting the plaintiff have miserably failed to appreciate the evidence adduced on record by the plaintiff in support of his claim in its rights perspective, as a result of which, erroneous findings have been returned by both the Court and great prejudice has been caused to the plaintiff. Mr. Kaushal, further argued that Courts below failed to appreciate the fact that the land in question is "Shamlat Deh" and every co-owner has right over the "Shamlat land" and same can only be used for common purposes. He further stated that since every co-owner has right to use the "Shamlat land", one individual cannot be allowed to use the "Shamlat land" for his individual purpose. In the present case, without there being legal partition, defendants resorted to construction over the suit land and as such, judgments passed by both the Courts below deserve to be quashed and set-aside.

10. Mr. Kaushal, while concluding his arguments, strenuously argued that both the Courts below have committed an error of law by deciding all the issues together and both the

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Courts have given findings qua all the issues contrary to the documents placed on record. Mr. Kaushal, further contended that suit land is classified as "Shamlat land" and have been kept by the villagers for common purposes, right to use common land cannot be given to any individual by infringing the rights of the other co-owners of the "Shamlat land". In this regard, he invited the attention of the Court to the jamabandis placed on record to demonstrate that since the land in question is "Shamlat land", it is not known/understood that on what basis defendants started raising construction over the portion of the suit land for personal purpose without ascertaining the extent of their share. In the aforesaid background, Mr. Kaushal, prayed for decreeing the suit after setting-aside the judgment and decree passed by both the Courts below.

11. Ms. Shalini Thakur, learned counsel representing the respondents, supported the judgment and decree passed by both the Courts below. Ms. Thakur, vehemently argued that bare perusal of the impugned judgment passed by both the Courts below, suggest that same are based upon correct appreciation of the evidence available on record and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. With a view to substantiate aforesaid argument, she specifically invited the attention of the Court to the judgment passed by both the

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Courts below to demonstrate that the Courts below have dealt with each and every aspect of the matter very meticulously and has returned concurrent findings of fact as well as law and as such, this Court has no occasion to differ with the concurrent findings returned by both the Courts below. Ms. Thakur, further contended that this Court has very limited power to re-appreciate the evidence when both the Courts below have returned concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in *Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264.*

12. I have heard learned counsel for the parties and have gone through the record of the case.

13. In nutshell, it is admitted case of the parties that suit land is "Shamlat Deh" is used as Abadi and the same has not been partitioned by metes and bound. The defendant No.1, who purchased a portion of Abadi land from the defendant No.2, also became co-sharer over the suit land by virtue of sale deed. Until the land is partitioned by metes and bound the defendant No.1 cannot appropriate the land to his exclusive use to the disadvantage of the appellant/plaintiff. Plaintiff/appellant, who claimed himself to be joint owner of the suit land claimed that the suit land is not legally partitioned and as

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such, defendants cannot be allowed to raise construction in the suit land, whereas defendants claimed that suit land is not joint between the parties, rather Abadi is situated in the suit land, which is now converted to new construction by dismantling old house existing over the suit land. Plaintiff in support of his contention placed on record certified copy of jamabandi for the year, 2002-03 Ex.PW1/A, perusal whereof clearly suggests that the suit land is recorded as “**Shamlat Deh Hasab Rasad Khewat**”. In the column of remarks, it has been clearly reflected that defendant No.1, Ramesh Kumar son of Sh. Pratap Singh, has purchased the share of one of the possessor of the suit land namely Narayan Dutt. The total area of the suit land has also been depicted/ reflected to be constructed/ built up area. But careful perusal of Ex.PW1/A, nowhere reflect the name of plaintiff recorded either in the column of ownership or possession of the suit land.

14. Though, in Ex.PW1/B i.e list of share holders of the suit land, name of the plaintiff has been recorded as one of the shareholder in mauza, Johana, but interestingly, plaintiff nowhere claimed in the plaint that there exists any constructed area over the suit land, which is in his possession, whereas defendants by way of placing on record ample documentary evidence Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that the suit land is

built up area for the last so many years, which was further purchased by present defendant from one co-sharer namely Narayan Dutt.

15. Plaintiff primarily filed suit by placing reliance on the jamabandi for the year, 2002-03 Ex.PW1/A and the Farist Malkann (list of owners) Ex.PW1/B as recorded "Shamlat land" on the record. Plaintiff specifically placed reliance upon the document Ex.PW1/B, to demonstrate that he has a right in the shamlat land, but at the cost of repetition, it may be reiterated that though there is mention of the name of plaintiff/appellant as one of the right holder in the list of owners Ex.PW1/B in the Shamlat land, but there is no such reference of his being in possession of land described in the jamabandi Ex.PW1/A. Close reading of Ex.PW1/A, clearly suggests that the suit land has been recorded as "Gair Mumkin Abadi" and as per entry in the column of remarks (Kafiyat), two biswas of land out of aforesaid "Gair Mumkin Abadi" has been shown to be sold by defendant No.2 namely Narayan Dutt, who was admittedly co-sharer in the suit land, in favour of defendant No.1 on 15.6.2004. Similarly, shares of the other shareholders in respect of the suit land have been specifically mentioned in column No.5 of Ex.PW1/A, shown in the jamabandi, referred hereinabove. Interestingly, there are no pleadings that entries as reflected in Ex.PW1/A are illegal and as such, not binding on

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the rights of the plaintiff. Similarly, there are no pleadings in respect of the other shareholders including defendant No.1 as mentioned in column No.5 of the said jamabandi as illegal and not binding on the rights of the plaintiff, whereas defendants in written statement filed before the trial Court specifically in para No.2 claimed that “ there is an old Abadi which belongs to the defendants and they want to raise construction of dwelling house in the place of this Abadi and old house. The plaintiff has filed the present suit with mala-fide intention and only with a view to harass the defendants.” Aforesaid specific averments contained in the written statement have not been controverted in any manner by the plaintiff by way of replication or by way of ocular evidence led on record before the Court below. Careful perusal of the plaint filed by the plaintiff, clearly suggest that he filed the suit simplicitor for permanent prohibitory injunction without there being any challenge to the correctness of the revenue entries, perusal whereof clearly suggest that suit land is “Gair Mumkin Abadi”, which has been further sold by defendant No.2 being its co-sharer in the suit land in favour of defendant No.1 on 15.6.2004.

16. Apart from this, as has been discussed hereinabove, shares of the shareholders in respect of the suit land stands mentioned in column No.5 of Ex.PW1/A. Similarly, this Court during the proceeding of the case had an occasion

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to peruse the entire evidence led on record by the parties, perusal whereof clearly suggest that plaintiff was not able to prove that there is no Abadi over the suit land, which is admittedly entered as "Shamlat Deh Hasab Rasad Khewat", rather plaintiff by stepping into the witness box stated that name of defendant No.2 has been wrongly incorporated in the column of possession in respect of the suit land and he started digging the land on 20.8.2004 but the same was rightly not considered by the Courts below since no such pleas, as have been discussed hereinabove, were incorporated in the plaint. It is well settled that in the absence of specific pleadings in the plaint, evidence, if any, led in that regard may not be required to be looked by the Court while deciding the controversy.

17. Apart from this, this Court had an occasion to peruse the documents placed on record by the defendants, especially copies of jamabandis for the year, 1967-68 Ex.DW1/B, 1972-73 Ex.DW1/C, 1977-78 Ex.DW1/D and 1992-93 Ex.DW1/E, perusal whereof clearly suggest that plaintiff or his predecessor-in-interest were not in physical possession of the suit land or part thereof at any point of time, rather documents referred hereinabove, clearly suggest that predecessor-in-interest of Narayan Dutt, defendant No.2 had been coming in possession of the suit land. Similarly, the old revenue record, as referred hereinabove, i.e. jamabandis ,

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clearly reflects that the suit land is built up area for the last so many years. Plaintiff Surinder Mohan himself admitted that the suit land is recorded as "Abadi Deh" and said "Abadi Deh" is duly recorded in the revenue record since 1972. If the deposition of plaintiff is examined juxtaposing, averments contained in the plaint itself falsify the claim of the plaintiff/appellant that the suit land is jointly owned and possessed by the co-owners. In his cross-examination, he admitted that defendant No.2, Narayan Dutt sold the share in the suit land in favour of defendant No.1 and he has not obtained any demarcation of the suit land. Defendants by leading cogent and convincing evidence in the shape of documentary evidence were able to prove on record that the suit land is "Abadi Deh" and there upon built up structure exists, hence the version put forth on behalf of the plaintiff, which was not at all proved by the plaintiff by leading cogent and convincing evidence, was rightly rejected by the Courts below. Similarly, perusal of statement of PW-2, Vijay Kumar adduced on record by the plaintiff, nowhere suggests that he was able to prove the contents of the plaint, rather careful perusal of his statement leads to the conclusion that he did not know anything with regard to suit land because in his cross-examination, he himself admitted that he has no landed property in village Johana and he was working as Safai

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Karamchari in Tehsil Office, where plaintiff was patwari, whereas, defendant No.1, Ramesh Kumar while deposing before the Court specifically stated that the suit land is constructed portion, which he purchased from defendant No.2, Narayan Dutt. He further stated that old house was situated in the suit land, which was now being reconstructed.

18. DW-2, Narayan Dutt, supported the version put forth on behalf of DW-1, Ramesh Kumar, who categorically deposed that he sold his share in the suit land in favour of defendant No.1. He further stated that defendant No.1 is constructing new house on the same place where his old house was in existence. At the cost of repetition, it may be again stated that aforesaid factum of existence of old house as categorically mentioned in para-2 of the written statement was nowhere refuted by the plaintiff either in the shape of replication or by way of leading cogent and convincing evidence before the Court.

19. Similarly, DW-3, Parkash Chand, supported the version of DW-1 and DW-2, who categorically stated that plaintiff has no concern in the suit land. This Court also perused the cross-examination conducted on these witnesses, which nowhere suggests that plaintiff was able to shatter the testimonies of these witnesses, who unequivocally stated that DW-2 sold constructed portion to defendant No.1. One thing

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which also emerged from the reading of the plaint that the plaintiff nowhere made mention, if any, with regard to the constructed portion over the suit land, which otherwise appears to be correct after appreciation of the documentary evidence as well as oral evidence led on record by the defendants. Defendants placing reliance upon Ext.DW1/B, Ex.DW1C, Ex.DW1/D and Ex.DW1/E were able to prove on record that the suit land is built up area for so many years but plaintiff nowhere claimed in his plaint that there exists constructed portion over the suit land, rather, he claimed that he alongwith his family members and defendants were owners in possession of the suit land described in the jamabandi for the year, 2002-03 and there is no mention, if any, with regard to the built up area of the land referred hereinabove. Whereas defendants by leading cogent and convincing evidence in the shape of Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that the suit land is built up area and construction, if any, by defendant No.1 is being raised upon the same. Though, plaintiff termed revenue record reflecting defendant No.1 in the ownership of the suit land as illegal and wrong but same plea was rightly not considered by the courts below since there is /was no challenge, if any to the entries made in the revenue record.

20. Now coming to the argument having been raised by the learned counsel representing the plaintiff with regard to nature of the land i.e. Shamlat land. It is undisputed as per Ex.PW1/A that present plaintiff is one of the co-sharer in the shamlat land but that cannot be sufficient ground to conclude that the plaintiff had an cause of action for filing the suit against the defendants, who specifically proved on record that he purchased the specific portion of land from defendant No.2. Learned court below rightly came to the conclusion that since plaintiff specifically failed to challenge the status of the defendant No.2 being owner of the suit land to the extent of two biswas of land, who further sold the land to defendant No.1, suit filed by the plaintiff cannot be accepted.

21. Apart from above, status of defendant No.2 being owner of the suit land has not been specifically questioned and denied by the plaintiff and as per revenue record placed on record, it stands duly proved on record that "Gair Mumkin Abadi" exists on the suit land. Similarly, perusal of depositions made by DW-2 and DW-3 suggest that constructed portion of the land was sold in favour of defendant No.1, meaning thereby specific portion of "Abadi" was purchased by defendant No.1, who on the said old Abadi started raising new construction by demolishing the old construction. Since, plaintiff failed to prove his physical

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possession, qua the Abadi owned and possessed by the defendants, Court below rightly not granted the discretionary relief of injunction in his favour.

22. Conjoint reading of evidence led on record, compel this Court to come to the conclusion that defendant No.1 successfully proved on record his exclusive possession over the suit land purchased by him from defendant No.2. It is well settled that co-owner, who is not in possession of any part of the property, is not entitled to seek injunction against another co-owner, who has been coming in exclusive possession of the common property, unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. Since, in the present case, plaintiff was not able to prove his possession over the suit land being co-owner, his plea of making of construction or improvement by defendants on the alleged joint property may not be sufficient to conclude that he was being ousted from the common holding of the parties. There cannot be any dispute that Shamlat land recorded in the revenue record is used commonly by all the co-owners and all the villagers/right holders have common rights to use the same. Similarly, there cannot be any exclusive possession of "Shamla land" without there being partition among the right holders having common rights over the Samlat land. But in the present case, it stands

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duly proved on record that suit land i.e. "Gair Mumkin Abadi Hasab Rasad Khewat" is used as Abadi and in the column of remarks defendant No.1 namely Ramesh Kuamr has been shown as purchaser of share of one of the co-sharers/ possessor of the suit land namely Narayan Dutt. Similarly, it stands duly proved on record that the suit land sold by defendant No. 2 in favour of defendant No. 1 was constructed built up area. Whereas, name of plaintiff has been nowhere recorded either in the column of ownership and possession of the suit land. Revenue record placed on record in the shape of Ext.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E, clearly establish on record that suit land is built up area of the last so many years and as such, there is no illegality and infirmity in the findings returned by both the Courts below that defendant No.1 purchased share of defendant No.2 in the suit land. Since, plaintiff/appellant could not establish his case legally before the Courts below, his prayer for injunction against the defendants was rightly rejected by the Court.

23. This Court sees no irregularity and infirmity, if any, in the judgments passed by both the Courts below, rather same are based upon correct appreciation of the evidence available on record. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference,

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whatsoever, in the present matter. Since, both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in *Laxmidevamma and Others vs. Ranganath and Others*, (2015)4 SCC 264, herein below:-

“16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained.”

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24. Consequently, in view of the detailed discussion made hereinabove, present appeal fails and same is dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

October 28, 2016
(shankar)

(Sandeep Sharma)
Judge

High Court of HP