IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No.90 of 1999
Reserved on: 16.5.2007

Date of decision:

Shri Ajit Lal & ors. Appellants.

Versus

Savita and another. Respondents.

Coram

The Hon'ble Mr. Justice V.K.Ahuja, J.

Whether approved for reporting[1]*?*

For the appellants: **Mr.G.D.Verma,Sr. Advocate, with Mr.Romesh Verma, Advocate.**

For the respondent: **Mr. Bhupender Gupta,Senior Advocate, with Mr. Janesh Gupta, Advocate. Respondent No.2.**

V.K.Ahuja, J.

This is a Regular Second Appeal filed by the appellants against the judgment and decree of the Court of learned District Judge, Shimla dated 2.11.1998 vide which the appeal filed by the respondents against the judgment and decree of the Court of learned Sub Judge Ist Class Court No.4 dated 19.8.1994 dismissing the suit of the respondents for permanent injunction as against the appellants was allowed and the suit of the respondents for permanent injunction as well as for mandatory injunction was decreed as against the appellants.

[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

Briefly stated, the facts of the case are that the respondent No.1, as plaintiff, filed a suit for permanent prohibitory injunction as well as for mandatory injunction as against the appellants who were impleaded as defendants. Plaintiff No.1 pleaded that she was owner in possession of the suit land comprised in Khasra No.3/1 measuring 4 biswas and Khasra No.3/2 also measuring 4 biswas. The defendants were allegedly tenants of one Asha Ram residing in Servant Quarter adjacent to the suit land. It was alleged that the husband of the plaintiff remained away from Shimla and defendants encroached upon the suit land by raising unauthorized construction of 2-3 sheds approximately over 1-1/2 biswas of land without any right.

Defendants pleaded that they are tenants under Asha Ram in Servant Quarter and the land adjacent to it was in their possession for the last 40 years. They specifically denied having made encroachment on the land of the plaintiff. They pleaded that they have raised the construction over land under their tenancy. However, in the alternative, they pleaded that if the construction is found having been made on the land of the plaintiff, they have become owner by way of adverse possession over the same.

The learned trial Court held that the defendant has not perfected his title by way of adverse possession. It was held that since the plaintiff has failed to prove the particular portion of the suit land which has been encroached upon by the defendants, therefore, this relief of permanent injunction as well as mandatory injunction was declined. On appeal, the learned District Judge reversed the findings of the learned trial Court and granted the

relief of permanent injunction as well as mandatory injunction and held that the identity of the suit property was not disputed.

I have heard Shri G.D.Verma, Sr. Advocate assisted by Mr. Romesh Verma, counsel for the appellants and Mr. Bhupender Gupta, Sr. Advocate assisted by Mr. Janesh Gupta, Advocate for respondent No.2 and have gone through the record of the case.

The submissions made by the learned counsel for the appellants were that the reasons given by the learned trial Court in declining the relief of injunction in favour of the respondents were not given by the learned District Judge while reversing the findings. It was also submitted that the decree in question was not executable since respondents have not been able to establish on record the extent of encroachment. It was also pleaded that the learned first appellate Court had not given its findings in regard to Court fee as well as valuation which was required to be given. It was also submitted that the appeal filed by respondent No.2 was not competent since the original plaintiff No.1 sold a part of the suit property. It was further submitted that the relief of mandatory injunction cannot be granted which is discretionary relief and the plaintiff ought to have filed the suit for possession and as such the judgment and decree passed by the learned first appellate Court is liable to be reversed.

On the other hand, the learned counsel for the respondent No.2 submitted that the appeal preferred before the learned District Judge was maintainable since the original plaintiff No.1 sold a part of the property to plaintiff No.2 and the application filed by respondents under Order 22 Rule 10-A was allowed and the appeal

in question was maintainable before the learned District Judge. In regard to Court fee and valuation, it was submitted that these issues were not pressed before the learned trial Court and as such, no fresh findings were required to be given by the learned first appellate Court. In regard to the identity of the land or that the decree was not executable, it was submitted that there is a report of the Municipal Corporation and the order passed, which clearly proves the extent of the encroachment made by the defendants over the suit land and since the defendants have not claimed any right that the construction has been raised by them over the land in their possession or claimed any right in the suit land, therefore, the relief of mandatory injunction was rightly granted which cannot be denied as against a wrong doer who has not established any right over the suit land. It was further submitted that a person who has in violation of the municipal bye-laws, raised construction over the land belonging to another person without any right cannot claim that the suit for possession should be filed by the owner and the relief of mandatory injunction by way of demolition cannot be granted. In regard to identity of the land, it was further submitted that the application filed for amendment of the plaint or for appointment of a Local Commissioner was rejected by the learned first Appellate Court holding that the material on record was sufficient to establish the identity of the land and, therefore, there is no merit in the appeal filed by the appellant and no substantial question of law arises for re-appraisal of the evidence.

To substantiate his submissions, the learned counsel for the appellant has relied upon the following decisions.

The decision in ***Gujarat Bottling Co. Ltd. & Others*** v. ***Coca Cola Company & others*** (1995) 5 Supreme Court Cases 545 was relied upon in which, their Lordships had referred to the term "Interlocutory Injunction" and grant of it and the factors to be considered in exercise of discretion. The facts of the case are different and are not applicable to the present facts.

The decision in ***Sunil Kumar and another*** v. ***Ram Parkash and others*** AIR 1988 SC 576 shows that the facts were different and the question involved of granting of relief of permanent injunction against father, a Karta of joint family intending to alienate house property for legal necessity. It was held that the suit for permanent injunction alienating property by a co-parcener was not maintainable.

The decision in ***The Muncipal Corporartion of Delhi*** v. ***Suresh Chandra Jaipuria and another*** AIR 1976 SC 2621. The observations made in para 11 are relevant and are being reproduced below:

> "The plaintiff filed a suit for permanent injunction against Municipal Corporation, Delhi on the ground that the assessment of house tax had proceeded on an erroneous basis. The trial Court and the appellate Court refused to grant interim injunction to restrain the Corporation from realizing the sum as the plaintiff could not make out a prima facie case. The High Court interfered with the concurrent findings and granted relief.
>
> Held, that the interference by the High Court with the concurrent findings was unjustified as the Court had overlooked the principles governing interference under Section 115, Civil P.C."

On the other hand, the learned counsel for the respondents had relied on the decision in ***Hero Vinoth(minor)*** v. ***Seshamal*** (2006)5 Supreme Court Cases 545. It was held by their Lordships of Hon'ble Apex Court that entirely a new point raised for the first time before High Court is not a question involved in the case unless it goes to the root of the matter. It was held that it will depend on facts and circumstances of each case whether a question of law is a substantial one and involved in the case or not. The paramount overall consideration being to strike a judicious balance between the indispensable obligation to do justice and the impelling necessity of avoiding prolongation of life of any lis.

Coming to the arguments advance by learned counsel for the parties, it is clear that the learned first appellate Court had given detailed reason for disagreeing with the findings recorded by the learned trial Court that the relief of mandatory injunction cannot be granted or as well as for permanent injunction since the identity of the land was not established by way of Tartima. The reasons have been given by the learned Ist Appellate Court and there is merit in the submissions made in this regard. In regard to the plea that the relief of mandatory injunction cannot be granted and the plaintiff should be advised to file the suit for possession, there is no merit in the submissions made by the learned counsel for the respondent that once it was proved that defendants had raised construction over the suit land which is adjacent to the land in their possession as a tenant and over which they have no right, the relief of injunction can be granted. In the present case, the relief of mandatory injunction was claimed by the plaintiff and in case it was

justified in the facts and circumstances of the case, the plaintiff cannot be non-suited on the ground that he should have filed the suit for possession or he should file a fresh suit for possession. Therefore, the relief of mandatory injunction in appropriate cases can be granted and it is not necessary for the plaintiff to have filed the suit for possession or that the suit should be dismissed at this belated stage.

Coming to the identity of the suit land, the defendants firstly had not claimed that they have raised the construction over the suit land belonging to the plaintiff and in the alternative only they claimed that in case they have raised the construction over the suit land they have become the owner by adverse possession. The plea of adverse possession was not there in favour of the defendants since they never admitted the title of the plaintiff over the suit land but claimed the relief in the alternative only. The defendants never asserted that they have raised the construction over the land which is a part of their tenancy but also took the plea of adverse possession over the suit land in case it is proved that the suit land belonged to the plaintiffs. Thus, there are concurrent findings of both the Courts below and even the trial Court had concluded that the defendants had failed to prove their adverse possession over the land which findings were affirmed by the learned first appellate Court and there are no reasons on record for re-appraisal of the evidence which findings are liable to be affirmed.

Coming to the plea that the identity of the suit land was not established in the absence of Tartima as observed by the learned trial Court. The learned first appellate Court had given sound

reasoning for holding that the area in possession of the defendants by raising construction stands proved and it is not necessary that it should have been proved by a separate Tartima or any other such evidence. The decree in question cannot be said to be inexecutable since the relief of mandatory injunction has been granted in favour of the defendants to hand over the vacant possession of the land and in case he fails to do so, the decree has to be executed through process of Court and whatever construction is found to have been raised over the suit land, is liable to be removed. Moreover, a perusal of the record shows that proceedings were initiated as against defendants for the encroachment made by them over the suit land and there is statement of PW-3 Thakur Dass Chauhar, J.E. of Municipal Corporation Shimla who proved the report Ex.PW-3/B Map Ex.PW-3/C and the order Ex.PW-3/A. It was observed by the learned first appellate Court in para 21 of the judgment that the report Ex.PW-3/B is dated is 14.11.1991 and can legitimately be inferred that the Dharas in question were constructed not long before the preparation of the said report. It was also observed that the report was prepared on the complaint of Shanta Walia PW-1, that the aforesaid rooms had been constructed on Khasra Nos.3/1 and 3/2 therefore, the assistance of this report can also be taken in execution of the decree for mandatory injunction as and when required to be executed through process of Court and apart from that whatever construction is found existing over the suit land having been raised by the defendants, is liable to be removed. In case the defendants had raised the plea that part of this

construction was on their land then only it was necessary to have it on record a Tartima proving the exact nature of construction which have been made over the suit land and on the other land in their possession, which is not so in the present case.

A prayer was made by the plaintiffs for amendment of the plaint as well as for appointment of a Local commissioner which was declined by the learned first Appellate Court and whatever steps were required to be taken by the plaintiffs to establish the identity of the land, have been taken and they cannot be non-suited only on the ground that the identity of the specific area along with its dimensions of land in possession of the defendants, have not been proved.

In regard to the plea that the appeal was not competent since the land has been transferred during pendency of the appeal to plaintiff No.2 the application filed before the learned first appellate Court by one Kapil Dev Sood under Order 20 Rule 10, who was appellant No.2 before the first appellate Court, was allowed and he was impleaded as appellant/plaintiff and the appeal therefore was maintainable having been filed by the appellants.

On a perusal of the record of the case and on consideration of the arguments advanced, no case is made out for re-appraisal of the evidence and the evidence cannot be again discussed and re-considered by this Court sitting in second appeal until and unless it was proved on record that there has been miscarriage of justice or some relevant evidence was not considered by the Courts below, which is not so in the present case. Therefore, there is no merit in the appeal filed by the appellants which deserves dismissal. One

month's time is given to appellants to vacate the land in their possession failing which the decree can be executed through process of the Court taking the assistance of PW-3/c and getting the possession through revenue agency i.e. Kanungo for demarcation of the land under encroachment.

The appeal is dismissed. However, the parties are left to bear their own costs.

31st May, 2007 (V.K.Ahuja)
(SDS)