

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

RSA No. 289 of 2008.

Reserved on : 24th October, 2018.

Decided on : 31st October, 2018.

Panna LalAppellant/defendant.

Versus

Mehar ChandRespondent/plaintiff.

Coram:

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

*Whether approved for reporting?*¹ Yes.

For the Appellant: Mr. G.R. Palsra, Advocate.

For the Respondent: Mr. Lakshay Thakur, Advocate.

Sureshwar Thakur, Judge.

The plaintiffs' suit for rendition of a decree, for permanent prohibitory injunction hence stood dismissed by the learned trial Court, and, the aggrieved plaintiff preferred an appeal, therefrom, before the learned First Appellate Court, whereon, the latter Court rendered a verdict, hence, decreeing the plaintiff's suit. The

¹ Whether reporters of the local papers may be allowed to see the judgment?

defendant is aggrieved therefrom, hence, through the instant appeal cast a challenge thereon.

2. The brief facts of the case are that the plaintiff filed a suit for permanent prohibitory injunction with the averments that the land comprised in Khewat Khatauni No. 492/649 to 653, khasra Nos. 1835, 1836, 1843, 1844, 1846, 1837, 1840, 1839, 1841 and 1845, kita 11, measuring 207.63 sq. meters, situated in mauja Tarna/366/5, Tehsil Sadar, District Solan, H.P. is recorded in the joint ownership and possession of the plaintiff, defendant and other co-sharers. It has been averred that the plaintiff has purchased the land measuring 8.65 sq. meters and mutation to this effect has been entered. The defendant has also purchased share of Smt. Sheela Devi, Rima Devi and Geeta to the extent of 6.49 sq. meters and mutation to this effect has also been attested in favour of the defendant. The suit has land is alleged to have not been partition in due course of law. According to the plaintiff, the defendant w.e.f. 7.4.2004 started

making the plot over the joint property in order to raise construction of house without getting the land partitioned and without the consent of the plaintiff and other co-sharers. There is also no approval of the plan from the Municipal Council, Mandi. The defendant was requested number of times but all in vain. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections of maintainability, cause of action etc. On merits, the description of land is admitted. It is averred that the plaintiff constructed two rooms in the month of July-August, 2004 by covering more area than purchased area. The defendant has purchased old Katchha house from Sheela Devi etc., and when plaintiff started construction adjoining to the said Katchha house, the same was damaged due to rainy water. The defendant felt necessity to repair the said house and necessary construction was done by the defendant which was completed on 20.8.2004. The defendant is co-owner and

has got every right to use his share which is in the shape of katchha house already built and to protect the same.

The defendant denied other averments contained in the plaint.

4. The plaintiff filed replication to the written statement of the defendant, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction?OPP.
2. Whether the suit is not maintainable? OPD.
3. Whether there is no cause of action in favour of the plaintiff?OPD.
4. Whether the plaintiff is estopped due to his own act and conduct?OPD.

5. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by the plaintiff/respondent herein before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the defendant/appellant herein, has instituted the instant Regular Second Appeal before this Court, wherein he assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, on 25.06.2008, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether there is misreading of oral as well as documentary evidence of the parties by the First Appellate Court, especially, the document Ex.PA, Jamabandi and statements of DW1 to DW3, which has materially prejudiced, the case of the appellant?
2. Whether the respondent is not entitled for equitable relief of injunction, as the respondent has not come with clean hands and has suppressed the material facts, while instituting the suit against the appellant?

Substantial questions of Law No.1 and 2:

8. The parties at contest, as, disclosed by the jamabandi appertaining to the suit land, jamabandi whereof is embodied in Ex.PA, are, joint owners-in-possession of the suit property. The defendant had purchased 6.45 square meters of the suit land, from, one Sheela Devi, Rima Devi and Geeta Devi, and, in consonance therewith hence mutation No.1502 stood attested. The plaintiff's share in the suit land is uncontrovertedly, borne, in an are of 8.65 square meters.

The plaintiff has instituted a simplicitor suit, for injunction hence for restraining the defendant, from, raising construction, upon, the undivided suit property, given his prior thereto not obtaining, the, consent of all the co-owners therein. Apparently, the relief of injunction is an equitable relief, (i) and, when the principle of co-ownership, is, anvilled on the principle of unity of title, and, community of possession, inhering in all recorded co-owners, (ii) principle whereof, uncontroversly hence inheres, the, canon of joint ownership, (iii) thereupon, till partition by metes and bounds, of, the joint estate occurs, or the requisite consent is meted, vis-a-vis, the co-owner raising construction, upon, the undivided suit property, (iv) hence, the relief of injunction, as, prayed for by the aggrieved co-owners, is, to be bestowed upon him, unless, the excepting therewith principle thereof, is, evidently, proven, principle whereof, is, comprised in the parameter (a) the aggrieved co-owner evidently not raising any construction, upon, any portion of the

undivided suit property; (b) in the co-owner, raising construction, upon, the undivided suit property, his raising construction thereon rather evidently beyond his share therein, or evidently, upon, a valuable portion thereof, hence, jeopardizing the right of the aggrieved co-owner, in, the undivided suit property.

9. The learned trial Court, had, on perusal of the evidence on record, has, concluded (i) that for want of adduction, of, firm evidence by the plaintiff, (ii) that in the defendant raising construction, upon, the undivided suit land, his raising it, beyond his share therein, (iii) or his raising construction, upon, a valuable portion of the undivided suit property, hence, jeopardizing the rights, of, the plaintiff thereon, hence, declined the equitable relief to the plaintiff, (iv) significantly, with the plaintiff rather completing construction, upon, the undivided suit property. However, the learned First Appellate Court, has reversed the aforesaid findings, merely, on the anvil of (a) during the course of inspection, it being noticed that

in the defendant raising construction, his encroaching, upon, a path, used by the plaintiff, to, ingress into or egress from his abode; (b) of the defendant raising construction unauthorizedly and without obtaining prior thereto, the, requisite sanction from the Municipal Committee, (c) and, the suit land remaining unpartitioned, hence, till occurrence, of, partition thereof, the defendant being amenable for being permanently injunctioned, from, his interfering, upon, any part of the undivided suit land.

10. The afore conclusion, and, inferences, drawn by the learned First Appellate Court, are, *per se* shaky, and, infirm, (a) given the purported inspection carried, of, the suit property, whereat, it was noticed, that, the defendant was raising construction purportedly, upon, a common path, used for ingress into, and, egress by the plaintiff, *vis-a-vis*, his abode, being not supported by credible documentary evidence, (b) comprised in the revenue officer concerned being associated thereat, and,

his making a valid demarcation, of, the suit land; (c) the controversy appertaining to the defendant, in, raising construction upon the undivided suit property, his hence making encroachment, upon, any path, being, palpably beyond pleadings, rather hence being discardable. Furthermore, the factum of the defendant raising construction, upon, the suit land, without, his obtaining, the, requisite approval from the Municipal Committee, would not per se entitle the plaintiff to claim the relief of injunction, importantly when the defendant hence would face, the, apt ill-consequence(s).

11. Be that as it may, the defendant had espoused in the written statement, qua his raising construction within the area purchased by him, and, the defendant's evidence, comprised in the depositions of DW-1 and DW-2, is in complete corroboration therewith. Since, as aforesated, for the plaintiff to succeed in obtaining, the, equitable relief of injunction, he was enjoined to usurp, the, probative vigour of the afore evidence adduced, by

the defendant, and, when best evidence in respect thereof, (a) is, comprised in valid measurements, and, demarcation, being carried on the spot, whereafter, clear emanations erupting, vis-a-vis, the defendant, in, raising construction, upon, the undivided suit property, his exceeding his share in the undivided suit property, (c) and, his raising construction upon an valuable portion of the suit land. However, the aforesaid evidence remained unadduced. Consequently, the mere factum of the suit property remaining yet undismembered, and, the further fact that thereupto, each of the co-owners, holding apt entitlement(s) to use every inch of the undivided suit property, unless, consent is meted to the defendant concerned, is, however, hence proven to be subject, to, the afore trite excepting therewith principles, conspicuously, with the plaintiff evidently completing construction, over, his share in the suit property, (ii) and with the defendant evidently, in, raising construction, upon, the suit property, his not exceeding, his share

therein, (iii) and, his not raising construction, upon, any valuable portion of the undivided suit property. In aftermath, the equitable relief, of injunction as prayed for by the plaintiff, was, aptly declined by the learned trial Court, whereas, the learned First Appellate Court in affording the relief of injunction rather has committed a gross illegality.

12. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court being not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Substantial questions of law No.1 and 2 answered in favour of the appellant and against the respondents.

13. In view of above discussion, the instant appeal is allowed. Consequently, the judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 76 of 2007 is set aside, whereas, the

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judgment and decree rendered by the learned trial Court upon Civil Suit No. 204/04 is affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

**(Sureshwar Thakur)
Judge.**

**31st October, 2018.
(jai)**