

Before Tejinder Singh Dhindsa, J.

HAMIR SINGH,—Appellant

versus

SURJIT SINGH AND OTHERS,—Respondents

RSA No.5095 of 2011

2nd January, 2012

Code of Civil Procedure, 1908 - S. 100-Second Appeal-Neither natural nor inherent rights but substantive statutory right regulated in accordance with law-Second Appeal cannot be decided on merely equitable grounds - Concurrent finding-Cannot be disturbed by the High Court in exercise of powers under Section 100 CPC, even if findings erroneous.

Held, That while examining the scope of a second appeal by the High Court under Section 100 of the Code of Civil Procedure, it has been repeatedly held by Hon'ble the Supreme Court that such right is neither a natural nor an inherent right. Being a substantive statutory right, the same is regulated in accordance with law. A second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts cannot be disturbed by the High Court in exercise of powers under section 100 of the Code of Civil Procedure, even if, such findings are erroneous. It is not advisable for the High Court to substitute its own opinion for the opinion of the first appellate court unless the conclusions so drawn are without any evidence whatsoever.

(Para 8)

D.S. Malwai, Advocate, *for the appellant.*

TEJINDER SINGH DHINDSA.J (ORAL)

(1) The plaintiff-appellant is in second appeal before this Court having been unsuccessful in both the courts below.

(2) The plaintiff-appellant filed a suit seeking permanent injunction restraining the defendants from encroaching upon any part of the passage as described in the heading of the plaint and for further restraining the

defendants from obstructing the plaintiff-appellant or any member of his family from using the passage in dispute. It was pleaded that land comprised in khasra no.345 (3-3) and khasra no.346 (6-1) was owned in equal shares by one Partap Singh to the extent of half share and the remaining half share was owned in equal shares by the daughters of Jeoni widow of Harditta. The aforementioned persons orally partitioned such property about 22/23 years back, whereby daughters of Jeoni got 4 bighas 11 biswas out of khasra no.345 min (1-16) and khasra no.346 min(2-15) and came into possession of this land as exclusive owners and it was pleaded that they had access to such land through the paha in khasra no.361. On the other hand Partap Singh got 4 bighas and 13 biswas of land comprised in khasra no.345 min (1-7) and khasra no.347 min (3-6) and came into separate possession of such abadi area at that point of time. It was averred that the plaintiff-appellant had purchased 17 biswas of land vide registered sale deed dated 6.11.1984. Possession of the same was delivered to the plaintiffappellant at the spot and he constructed his house thereupon. Earlier such house was being used by the plaintiff-appellant for agricultural purposes, tethering of cattle and parking of his tractor-trolley and other agricultural implements and partly was being used for his residence. It was pleaded that the passage in question is the only passage for ingress and exit and there is no other passage available to him. The house of the defendants/respondents is situated on the north of the house of the plaintiff-appellant as also that of one Harpal Singh and for entry and exit of the defendants-respondents, there is a paha depicted in khasra no.361. It was pleaded that the defendantsrespondents have forcibly fixed a gate and have started using the passage in dispute and open space adjacent to the house of Harpal Singh illegally and forcibly. The case set up by the plaintiff-appellant was that it was necessary to retain the passage in dispute having width of 23 feet 9 inches and which would have its opening on the phirni. The defendants-respondents were threatening to encroach upon the passage of the plaintiff-appellant and it was under such circumstances that the suit had been instituted.

(3) Upon notice, written statement was filed, wherein it had been admitted that khasra nos.345 and 346 have been jointly owned by Partap Singh and Jeoni in equal shares and further there had been an oral partition thereof. It was, however, denied that daughters of Jeoni got 4 bighas and

11 biswas land and Partap Singh got 4 bighas and 13 biswas land as sought to be contended by the plaintiff-appellant. The stand of the defendantsrespondents was that both Partap Singh and Jeoni got 4 bighas and 12 biswas each in oral partition. Defendant no.1 took a stand in the written statement that he along with the family is in possession of 2 bighas and 12 biswas of land which was purchased from the daughters of Jeoni. In the site plan the plaintiff had shown passage out of which he wants to encroach upon 14 feet and 6 inches into 14 feet by 3 inches, although the passage actually is of 9 feet 6 inches (2 karams), which is already existing and leading to the house of the plaintiff-appellant from the main path. It was pleaded that the plaintiff-appellant had no right to the 23 feet land claiming it to be a "Rasta". It was asserted that 14 feet 3 inches into 63 feet passage is part and parcel of the 4 bighas 12 biswas of land, owned by defendant no.1. All other averments were denied on merits.

(4) Upon the pleadings of the parties, following issues were framed:-

- “1. Whether there exists passage as detailed in the heading of the plaint as well as shown in yellow colour in the site plan placed on file by the plaintiff?OPP.
2. If issue no.1 is proved, whether the plaintiff is using above passage for ingress of his house?OPP
3. Whether the plaintiff is entitled to injunction as prayed for? OPP
4. Whether the suit is not maintainable in the present form?OPD
5. Whether the plaintiff has no locus standi or cause of action to file the suit?OPD
6. Whether this court has no jurisdiction to try this suit?OPD
7. If defendant no.2 is minor and has not been properly sued if so its effect?OPD
8. Relief.”

(5) Upon appreciation of evidence the Additional Civil Judge (Sr. Divn.), Nabha dismissed the suit vide order dated 2.9.2009. Being dissatisfied, plaintiff-appellant filed civil appeal before the Additional District Judge,

Patiala and vide impugned judgement and order dated 13.9.2011 the first appellate court has dismissed the appeal and affirmed the findings recorded by the trial court.

(6) I have heard learned counsel appearing for the plaintiff-appellant at length.

(7) The relief of injunction is undoubtedly a discretionary relief. The plaintiff-appellant himself admitted that land measuring 9 bighas 4 biswas comprised in khasra nos.345 and 346 were jointly owned in equal shares by Partap Singh and Jeoni. It is also the case of the plaintiff-appellant that daughters of Jeoni got 4 bighas 11 biswas of land and came into possession of such land as exclusive owners. The plaintiff-appellant relied upon site plan Ex.P-2. The house of the defendants-respondents namely Surjit Singh and his wife Surjit Kaur is depicted on the back side, where the passage of 14 feet and 3 inches in width is shown leading to the house of the defendant through the main road. The plaintiff-appellant has claimed passage to his house having width of 23 feet 9 inches. No evidence was led by plaintiff-appellant before the courts below to prove such fact. The defendant-respondent's stand is that such area of 23 feet 9 inches is in fact partitioned in two parts. 14 feet 3 inches is the passage exclusively meant for the defendant-respondents and the remaining 9 feet 6 inches is the passage for the house of Harpal Singh as also the plaintiff-appellant. The house of Harpal Singh is also on the same street and it comes before the house of the plaintiff-appellant. The plaintiff-appellant had purchased the property vide sale deed dated 6.11.1984 executed by Raghbir Singh and Harmel Singh. The plaintiff-appellant had not purchased any specific land but he had purchased shares from Raghbir Singh and Harmel Singh. There is no reference of any passage as claimed by the plaintiff-appellant. It is noticed by the first appellate court that Harmel Singh, one of the vendors had appeared in the witness box as DW-3 and had deposed that the passage leading to the house of Surjit Singh, defendant-respondent is 14 feet 3 inches and the passage for the house of plaintiff-appellant as also of Harpal Singh has a width of 9 feet six inches. Still further, Harpal Singh, who admittedly has his property adjoining to that of plaintiff-appellant also appeared as DW-1 and supported the version of the defendant-respondent. The first appellate court has drawn a logical inference and conclusion that as such Harpal Singh would be directly effected by the outcome of the suit. In the eventuality of the passage

being held as 23 feet 9 inches as claimed by the plaintiff-appellant, Harpal Singh himself would be benefitted but inspite of that he had deposed against his own interest by supporting the claim of defendant-respondent. Upon appreciation of evidence the courts below have concluded that the plaintiff-appellant has failed to prove the passage as claimed by him. Consequently, the relief of injunction has been declined.

(8) While examining the scope of a second appeal by the High Court under Section 100 of the Code of Civil Procedure, it has been repeatedly held by Hon'ble the Supreme Court that such right is neither a natural nor an inherent right. Being a substantive statutory right, the same is regulated in accordance with law. A second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts cannot be disturbed by the High Court in exercise of powers under section 100 of the Code of Civil Procedure, even if, such findings are erroneous. It is not advisable for the High Court to substitute its own opinion for the opinion of the first appellate court unless the conclusions so drawn are without any evidence whatsoever. The Hon'ble Supreme Court in case of **Mst. Sugani versus Rameshwar Das & Anr.** reported as (1), observed as under:-

“24. It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 CPC. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of law. In exercise of the powers under this section the findings of fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled

(1) 2006 (4) RCR (Civil) 319

before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts however erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. This Court in Sri Chunilal v. Mehta and Sons Ltd. v. Century Spg. & Mfg. Co. Ltd. (1962 Supp (3) SCR 549) held that:

“The proper test for determining whether a question of law raised in the case in substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

25. *It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last court of fact. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal, when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible. One drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the*

conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.”

(9) No question of law much less substantial question of law arises for determination in the present second appeal.

(10) The appeal must fail and is, accordingly, dismissed.

Appeal dismissed.

S. Gupta

Before Tejinder Singh Dhindsa, J.

DROPADI AND OTHERS,—Appellants

versus

SUKHDEV RAJ KHANNA AND OTHERS,—Respondents

RSA No.4783 of 2009

12th January, 2012

Code of Civil Procedure, 1908 - Usufructuary mortgage- No time limit fixed for redemption- Right to redeem or recover possession would accrue to mortgagor not from date of mortgage but on the date mortgagor pays or tenders to mortgagee the mortgage money Mortgage cannot be extinguished by unilateral act of mortgagee - 2008(1) Civil Court Cases 414 (P & H) (FB) Ram Kishan v. Sheo Ram applied.

Held, That the starting point for purposes of limitation to redeem usufructuary mortgage does not start to run on the date of mortgage but will arise on the date where the mortgagor pays or tenders to the mortgagee or deposits in the Court the mortgage money or the balance thereof. Clearly, the right to redeem or recover possession where no time limit is fixed for redemption would accrue to the mortgagor not from the date of mortgage