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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH****CRM-M-18061-2020
Date of Decision: 13.08.2024****KISHNA & ANOTHER****... Petitioners****Versus****SUB DIVISIONAL MAGISTRATE HODAL & ANOTHER****...Respondents****CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI**Present: Mr. Abhilaksh Grover, Advocate
for the petitioners.Mr. Deepak Grewal, DAG, Haryana
for respondent No.1.Mr. Keshav Pratap Singh, Advocate
for respondent No.2.

JASJIT SINGH BEDI, J.

The prayer in the present petition under Section 482 Cr.P.C. is for quashing of the order dated 01.05.2015 (Annexure P-3) passed by the Sub Divisional Magistrate, Hodal in Application No.36/SDM dated 06.04.2015 registered under Sections 145/146 Cr.P.C. in case titled as *Salim Versus Kishna & another* whereby the Court has directed that possession be handed over to applicant/respondent No.2-Salim and the Revisional Order dated 12.02.2020 (Annexure P-5) passed by the Addl. Sessions Judge, Palwal in CRR-86/2016 dated 18.06.2016 titled as *Kishna & another Vs. Salim* whereby the revision petition filed by the petitioner was dismissed.

2. The brief facts of the case are that respondent No.2-Salim filed a suit on 21.08.2009 for mandatory and permanent injunction against the

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petitioners and others wherein he admitted the possession of the defendant (therein) upon the suit land.

3. The Civil Court, Hodal vide judgment and decree dated 31.10.2014 dismissed the suit of the respondent No.2/plaintiff on the grounds of maintainability and further gave a finding that defendant No.1 (therein) (present petitioner party) was already in possession of the suit land before respondent No.2 (herein) had come into the picture and therefore, there was no encroachment upon the suit land. The copy of the judgment dated 31.10.2014 is attached as Annexure P-1 to the petition. The relevant extract of the said judgment is as under:-

15. Onus to prove this issue was on the plaintiff but nothing has been stated by the plaintiff, as to how the present suit is maintainable. In para no.3 of the plaint itself, it has been mentioned by the plaintiff that the defendant no.1 had raised construction over killa No. 13/1 of rect. No.69, to the extent of 150 sq. yards, two years back, in the absence of the vendor of the plaintiff. By this, plaintiff meant to say that the Defendant no.1 was in possession of the suit land, since the time of its precious owner i.e. namely Smt. Dropti Devi d/o Smt. Jamuna Devi. Plaintiff has purchased the suit land, detailed in para no.1 of the plaint, vide sale deed dated 16.04.2009 (Ex.P1) and has filed the present suit on 21.08.2009. Defendant no.1, Narain Singh, is in possession of the suit land, before plaintiff purchased the same vide Ex.P1. Hence the plaintiff should have filed a suit for possession, instead of filling the present suit for mandatory injunction, Defendant no.1 has not encroached the suit land, when the same was in the ownership of the plaintiff. Therefore, in this situation, a suit for possession is maintainable, rather a suit for mandatory injunction. Plaintiff has a better alternative

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remedy to avail, instead of filing the present suit for mandatory injunction. Section 41(h) of the Specific Relief Act, provides that:

(41) Injunction when refused: An injunction cannot be granted:

(1).....

(h) when equally efficacious remedy can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust.

16. Since the defendant no.1 was already in possession of the suit land, before the plaintiff purchased the same vide sale deed Ex.P1, no suit for mandatory injunction is maintainable. Hence, the issue regarding maintainability of the suit is hereby decided in favour of the defendants and against the plaintiff. Judgments cited by the plaintiff are not applicable to the facts and circumstances of the present case.

RELIEF:

17. Since the suit of the plaintiff is held to be not maintainable, on the ground that the defendant no.1 has not encroached the suit land, the present suit is hereby dismissed, with no order as to cost. Decree-sheet be prepared accordingly and file be consigned to the record room after due compliance.

4. The respondent No.2 filed an appeal against the aforementioned judgment and decree dated 31.10.2014 on 13.11.2014 before the Addl. District Judge (1), Palwal and the said appeal of respondent No.2 came to be dismissed vide judgment dated 19.07.2016. The copy of the said judgment dated 19.07.2016 is attached as Annexure P-2 to the petition. The relevant extract of the said judgment is as under:-

22. In the case in hand plaintiff has pleaded that the encroachment made by the defendants two years ago in the absence of his vendor, but this fact has not been mentioned in the sale deed, secondly, the plaintiff has failed to examine his vendor to prove this fact that construction took place two years

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ago in her absence, it has been held by our own Hon'ble High court in 2005 (2) CCC-554 (P&H). In demarcation there is encroachment, suit for mandatory injunction is maintainable.

23. As per pleadings of the plaintiff that the defendants have encroached upon the portion of the suit land before his purchase, then the plaintiff was required to file a suit for possession instead of filing suit for mandatory injunction. In Santa Singh versus Gurdial Singh, 2002 (1) RCR 834 (P&H), construction old one, suit for mandatory injunction is not maintainable. In that scenario also, suit is not valued properly for the purpose of court fee and jurisdiction and accordingly, issue no.3 is decided in favour of the defendants and against the plaintiff.

24. No mileage can be derived from the case law cited by learned counsel for the appellant, being on distinguishable facts and not applicable on the facts and circumstances of the case except Ramesh B. Desai (Supra).

25. In the wake of above discussion, the plaintiff has failed to prove the encroachment, made by defendant no.1 and, therefore issue no.1 has been decided against the plaintiff, issue no.3 in favour of the defendants. Issue no.2 has already been decided by learned trial court against the plaintiff, findings on issue no.2 is hereby affirmed and upheld.

26. No other point worth of consideration has been argued or pressed by the learned counsel for both the parties.

27. For the foregoing discussions and reasons recorded above, in cumulative effects of circumstances, instant appeal is devoid of merit and the same is hereby dismissed without any order of costs. Decree sheet be drawn accordingly. File be consigned to the record room after due compliance.

5. No further appeal has been filed against the judgment dated 19.07.2016 (Annexure P-2).

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6. Meanwhile, while the civil litigation was pending, the respondent No.2 initiated proceedings under Sections 145/146 Cr.P.C. against the petitioner and others and vide impugned order dated 01.05.2015 the SDJM, Hodal allowed the application erroneously on the grounds of the alleged ownership without determining the issue of possession. Interestingly, the Civil Court had already found that the petitioner and others were in possession of the suit land. The relevant extract of the order dated 01.05.2015 (Annexure P-3) is as under:-

Thus, it is proved that the applicant is the owner in possession of the disputed land. In the end, the application of the applicant is allowed by accepting the permission on the disputed land and Naib Tehsildar Hasanpur is directed that the illegal possession of the respondents be removed and the possession be handed over to the applicant.

7. The petitioner assailed the order dated 01.05.2015 on 18.06.2016 and vide order dated 12.02.2020 (Annexure P-5) the Addl. Sessions Judge, Palwal dismissed the revision petition of the petitioner and further gave a finding on the ownership of the suit land without considering or determining the issue of possession on the date of the application.

8. The orders dated 01.05.2015 (Annexure P-3) and 12.02.2020 (Annexure P-5) are under challenge in the present petition.

9. The learned counsel for the petitioner contends that proceedings under Sections 145/146 Cr.P.C. were not maintainable when the parties were in the midst of civil litigation. The impugned orders were liable to be set aside because they were based on the purported adjudication of the possessory and ownership rights whereas the Executive Magistrate was to

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ascertain the issue/factum of possession as on the date of the application or two months prior thereto. In the instant case, there had neither been any determination on the issue of possession nor was there any finding to fortify the belief that there was any likelihood of breach of peace. In fact, parallel litigation ought not to have been initiated under Section 145 Cr.P.C. once the Civil Court was seized of the matter. The Civil Court had already come to a categorical finding that it was the defendants (petitioner party in the present petition) who were already in possession of the suit land. Therefore, no effective orders could have been passed in proceedings under Sections 145/146 Cr.P.C. which dealt with the factum of possession only. Reliance is placed on the judgments in the cases of *Ram Sumer Puri Mahant Vs. State of UP, 1985(1) RCR (Criminal) 278*, *Mahant Ram Saran Dass Vs. Harish Mohan & another, (2001) to SCC 758*, *Shanti Kumar Panda Vs. Shakuntala Devi, 2004 AIR (Supreme Court) 115*, *Baljinder Singh Vs. Sub Divisional Magistrate Ludhiana West and others, CRM-M-287-2016, decided on 13.11.2019* and *Radha Charan & others Vs. State of Haryana, CRM-M-56024-2023, decided on 10.05.2024*.

10. On the other hand, the learned counsel for the State counsel along with the counsel for respondent No.2 have not disputed the legal position as narrated above but state that as there was likelihood of breach of peace the impugned orders had been passed.

11. I have heard the learned counsel for the parties.

12. A perusal of the material on record would show that a civil suit had been filed for mandatory and permanent injunction against the

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petitioners and others by respondent No.2. The said suit was dismissed with a finding that it was the petitioners' side (defendants in the civil suit) that were in possession. The said finding was upheld by the Appellate Court. Once the factum of possession and right to possess both have been adjudicated upon by the appropriate Civil Court, the question of initiation of proceedings under Sections 145/146 Cr.P.C. does not arise. It may be reiterated here that proceedings under Sections 145/146 Cr.P.C. pertain to the factum of possession of a party and not the right to possess which is to be determined by the Civil Court. In this case, as has already been mentioned above both the right to possess and the factum of possession have been held to be in favour of the petitioners.

13. In view of the aforementioned discussion, I find considerable merits in the present petition. Therefore, the order dated 01.05.2015 (Annexure P-3) passed by the Sub Divisional Magistrate, Hodal and order dated 12.02.2020 (Annexure P-5) passed by the Addl. Sessions Judge, Palwal stand quashed.

(JASJIT SINGH BEDI)
JUDGE

13.08.2024

JITESH

Whether speaking/reasoned:- Yes/No**Whether reportable:- Yes/No**