

In the High Court of Punjab and Haryana at Chandigarh

R.S.A.No. 769 of 1988
Date of decision: 18 .2.2015

Sita Devi through LRs.

.....Appellant

Versus

Tirath Ram and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Vikas Mohan Gupta, Advocate,
for the appellant.

Mr. Som Nath Saini, Advocate
for respondents No.1 and 2.

Mr.C.L.Sharma, Advocate,
for the added respondent- Mangal Singh.

Raj Mohan Singh, J.

1. Defendant is in appeal against concurrent judgment and decree passed by the Courts below in a suit for possession filed by the plaintiff, which was decreed by the trial Court vide judgment and decree dated 8.9.1984 and maintained in appeal by the Additional District Judge, Jalandhar vide judgment and decree dated 31.8.1987.
2. Learned counsel for the appellant sought to argue the present appeal on the following substantial questions of law:-

“1. Whether the First Appellate Court was justified in dismissing the application under Order 41 Rule 27 CPC,

especially when the applicant wanted to summon Civil Nazar along with the judicial record ?

2. Whether revenue entries can be relied upon regarding 'Gair Mumkin' land falling in the urban area ?

3. Whether on deposit of money in pursuance of a decree for possession by way of pre-emption and withdrawal of such amount by the judgment debtor, there is divesting of ownership ?

4. Whether in the absence of any demarcation report, as per law, it can be held that the encroachment has been made ?

5. Whether findings of the Courts below are vitiated on account of non consideration of material oral and documentary evidence on record ?

3. Before advertng to aforesaid substantial questions of law, few facts are relevant to be mentioned. Plaintiff Tirath Ram and another filed suit for possession of 1 kanal 4 marlas of land bearing khewat No.238, khatauni No. 268 khasra Nos. 45/14/2/1 (0-10) and 17/1 (0-14) after removal of *malba* from the suit land situated in village Chomon, Tehsil and District Jalandhar as per jamabandi for the year 1980-81. Plaintiffs claimed that they are owners of the suit land on the basis of inheritance and the defendant, whose land was situated adjoining to the land in question, made a trespass after demolishing the wall 'AB' illegally and had erected a wall 'CD' by encroaching upon the land of the plaintiffs.

4. Defendant contested the suit on all customary pleas and

stated that she became owner of the suit property on account of her husband having pre-empted the land in suit No.142 of 1957 for possession by way of pre-emption against father of the plaintiffs namely Basant Ram. The suit was decreed on 1.8.1957 and Basant Ram after receiving the amount had delivered the possession to the husband of the defendant before 30.8.1957.

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

“1. Whether the plaintiff is owner of the property in dispute ? OPP

2. Whether the defendant is in possession as owner of the property in dispute by pre-emption decree or adverse possession ? OPD

3. Whether the suit is beyond limitation ? OPD

4. Relief.

6. Both the parties led evidence. Trial Court decreed the suit after finding the plaintiffs to be owner of the property in question. The property of the defendant proved to have khasra No. 45/17/3 (8-13) and 18/1 and were situated adjoining to the suit land. The report of PW-3 Sant Ram, patwari, dated 28.8.1982 (Ex.PW-3/1) proved that the defendant had encroached upon the land of the plaintiffs. The entry of the report was made in the *roznamcha* and the property of the defendant was found adjacent on the western side of the property in question. The statement of the patwari was considered by the trial Court and on the basis of revenue record and the oral statements of the witnesses, trial Court held that the defendant had

made encroachment over the suit land and also observed that the defence of the defendant in the context of her possession on the basis of pre-emption decree was wholly unsustainable as the decree was conditional subject to payment of ₹ 3,000/- and in case husband of the defendant failed to deposit the said amount, it was ordered that the suit would have been dismissed. No evidence came on the issue whether the decreed amount was ever deposited by the defendant at any point of time. Defendant stated that the amount was given to the father of the plaintiffs in their house at Chomon but no receipt was executed or produced by the defendant except the bald statement in cross-examination, but in her statement defendant stated that this amount as ordered in the decree was given then and there to the father of the plaintiffs as per his demand but she took a somersault in cross-examination and stated that this amount was given by her husband to the father of the plaintiffs at their kothi in village Chomon. The statement of the defendant was found to be contradictory by the trial Court. The suit was decreed and the said judgment was upheld by the lower Appellate Court.

7. In the present regular second appeal, learned counsel for the appellant has argued that the only point for decreeing the suit of the plaintiffs was taken to be the non fulfilment of condition of pre-emption decree by the defendant. Passing of pre-emption decree was not disputed but its non compliance was the core issue between the parties. Learned counsel has argued that the factum of deposit of ₹ 3,000/- before 30.8.1957 was sought to be proved by leading additional evidence on record with the help of record of Nazir and the

prayer was wrongly declined and the same challenge has been made along with the appeal with a prayer to allow the additional evidence in the form of producing record of Nazir. Before embarking upon merits of the case, this plea of additional evidence needs to be considered with reference to other attending circumstances.

8. Admittedly, the old record of the pre-emption suit stood burnt. No proof of deposit can be proved by adverting to the record of said decree of pre-emption. DW-2 Mohinder Pal, Record Keeper, has appeared in the case and has deposed about the record being burnt and non availability of the same cannot advance the plea of deposit of pre-emption amount on that front. Secondly, the factum of passing of pre-emption decree was never given effect in the revenue record. The revenue record available in the present case does not show the factum of passing of pre-emption decree and execution thereof in any remarks column of the revenue record viz. jamabandis from 1971 onwards. Thirdly, the prayer for additional evidence as made before the lower Appellate Court can be tested in terms of order dated 28.9.2005 passed by this Court, which reads as under:-

“A decree for possession by way of pre-emption was passed in favour of the husband of Sita Devi appellant and against Basant Ram, father/ predecessor-in-interest of respondents No.1 and 2. The dispute between the parties is with regard to the deposit of pre-emption money in compliance with that decree.

Learned counsel for the appellant had placed on record along with an application for additional evidence, a

certificate purporting to have been issued by the Treasury Officer, Jalandhar, to the following effect:-

“the amount of ₹ 200/-, ₹ 600/- and ₹ 2,400/- has been deposited by Sh.Dev Barat on dated 4.5.1957 and 20.8.1957. These amounts have been incorporated as pre-emption money in this office record against RD No.217, 218 and 1264. The payment has already been made, the balance amount comes to rs NIL.”

Before deciding the application for additional evidence, learned counsel for Tirath Ram and Ram Parkash respondents is directed to file affidavits of Tirath Ram and Ram Parkash respondents, stating as to whether they or their predecessor-in-interest had withdrawn the pre-emption amount or not.”

9. Learned counsel for the appellant has relied upon some record of deposits in the Treasury Office, Jalandhar. In the prayer for additional evidence before the lower Appellate Court, reference was made to the record of Nazir of the Court, whereas, while arguing the present appeal, reference was made to some deposit entries made before the Treasury Office, Jalandhar. The order dated 28.9.2005 was subject to the affidavits filed by Tirath Ram and Ram Parkash-respondents in the context whether they or their predecessor-in-interest had ever withdrawn the pre-emption amount or not. In purported compliance of the aforesaid requirement, order dated

1.3.2006 passed by this Court is necessary to be highlighted :-

“Mr.S.N.Saini, Advocate, states that he does not represent respondents No.1 and 2 but, inadvertently, his presence is being recorded as their counsel, for the last some dates. He is counsel for Paramjit Bains who vide order dated 7.10.2002 was allowed to watch his interest and could also address arguments. His presence be, therefore, henceforth recorded for Paramjit Bains only. He further states that Tirath Ram and Ram Parkash respondents had died long back.

Mr.S.N.Saini, Advocate, has placed on record an affidavit of Sant Ram, General Attorney of Paramjit Bains, and copy thereof has been supplied to learned counsel for the appellant who seeks adjournment to go through the same and further states that in the meantime she would take further necessary steps also as she has come to know about the death of Tirath Ram and Ram Parkash, today only.”

There is nothing on record to show that the amount in question was ever received by the aforesaid persons.

10. Since property of the plaintiffs vis-à-vis the adjoining property of the defendant were clearly demarcated by the evidence on record and the pre-emption decree was never complied with. The distinct prayers made for adducing additional evidence would be an exercise in futility in terms of production of additional evidence at appellate stage. Therefore, the prayer for additional evidence on such a fishing premise cannot be allowed particularly when record of

pre-emption suit already stood burnt. Pre-emption decree was never given effect in the revenue record and there is conflicting stand whether record of Nazir is required to be proved or record of Treasury Officer, Jalandhar is required to be produced in order to fetch a contingent information on the factum of deposit of the amount. The far fetched information would lend nowhere for want of necessary corroboration by the opposite party. Even if two views can be considered as possible then the view in favour of vendee has to be taken to defeat the piratical right of pre-emption.

11. In view of aforesaid, question of law No.1 as framed is answered to hold that the first Appellate Court was justified in dismissing the application under Order 41 Rule 27 CPC particularly when the events as aforesaid made out no plausible stand of the appellant. The contradictory stand taken at different stages would led the appellant nowhere particularly in view of the record being burnt. Question Nos.2 and 3 do not arise at all for want of evidence. The demarcation report in view of report submitted by the patwari negates question No.4. The patwari has appeared and has been cross-examined, therefore, no veracity can be found with the aforesaid assertion and consequently, question No.4 is answered in favour of the respondents. Question No.5 does not arise at all as the findings recorded by the Courts below cannot be held to be vitiated on account of any non consideration of evidence. Therefore, question No.5 is answered in favour of the respondents.

12. Mangal Singh was ordered to be impleaded as respondent No. 3 vide order dated 14.2.1995 passed in CM No.

3542-C of 1994. The argument raised by learned counsel for the appellant with reference to order dated 7.10.2002 is totally unfounded as in order dated 7.10.2002, CM No.2139-C of 2001 filed by Sant Ram as attorney of Sh.Paramjit Bains was considered and it was observed that the application was filed during pendency of the appeal and Paramjit Bains had purchased the land on 16.9.1999 from Ram Parkash through his attorney and as such the sale was opined to be hit by the principle of *lis pendence*. The concept of *lis pendence* was observed in the context of CM No.2139-C of 2001 and therefore, it has nothing to do with the impleadment of Mangal Singh as defendant No.3, who was already impleaded vide order dated 14.2.1995 passed in CM No.3542-C of 1994.

13. Since no question of law worth cognizance is involved in the present appeal, the same is totally devoid of merits and is dismissed as such.

(RAJ MOHAN SINGH)
JUDGE

February 18, 2015
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