

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Regular Second Appeal No.1062 of 2010 (O&M)

Date of decision: 21.5.2015

Uma Singla and another

... Appellants

Versus

The Chhachhrauli Harijan Co-Op & Farming Soc. Ltd. and another

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.C.B.Goel, Advocate,
for the appellant.

Mr.G.C.Shahpuri, Advocate,
for respondent No.1.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

This is defendants' second appeal. The dispute relates to a piece of land measuring 3138 square yards falling within the municipal limits of Chhachhrauli, District Yamunanagar as described in the written statement. The property once vested in Raja Himmat Sher Singh of erstwhile Kalsia State who was owner of the plot. During the minority of the Raja, the Deputy Commissioner, Ambala was appointed as his guardian vide order of the Guardian Court dated 6th August, 1971 passed by learned Senior Sub Judge, Ambala in case titled *Collector, Ambala v. General Public*. Shri Prem Sarup was appointed as Administrator of the estate of the minor Ruler of

Kalsia and acting on behalf of the Collector, Ambala sold 3138 square yards out of the total suit property to the 1st defendant Jasmer Kaur wife of Tejinder Singh vide sale deed dated 24.7.1972 for a consideration of Rs.5,400/-. The possession was delivered to the vendees on the spot and Jasmer Kaur and her husband Tejinder Singh, the 1st and 2nd defendants became owners in possession of the suit property. The plot in question was earlier declared as one of the private properties of the Ruler of Kalsia and Nalagarh as per Government letter No.P.PC/71/05-P dated 20th April, 1949 issued by the Deputy Secretary, Home Department, PEPSU, Patiala. The list of private properties attached with the order contained the suit property purchased by the 2nd defendant which was known as *feelkhana* [Elephant house]. Jasmer Kaur and Tejinder Singh (presently dead) had in their lifetime sink a tubewell and erected cow-sheds on a part of the property, some portion of which was leased out by them to the 3rd defendant, namely, Suresh and another person who have constructed their house in the portion leased out to them. The assessment register in the Municipal Committee, Chhachhrauli records Jasmer Kaur as owner in possession of the property. The adjoining land housed the Chhachhrauli Harijan Cooperative and Farming Society Limited, Chhachhrauli falling in land bearing khewat No.670 min, Khatauni No.872, Khasra No.138/1 comprising 27K-14M of land situate in the revenue estate of village Chhachhrauli, District Yamunanagar.

When disputes erupted with the neighbours the Society acting through Som Nath vide resolution dated 4th July, 1999 instituted Civil Suit No.1130 of 5th November, 1997/25th October, 2005 praying for a decree of

permanent injunction restraining the five defendants arrayed in the suit including Tejinder Singh and Jasmer Kaur as 1st and 2nd defendants whose names were deleted by Court order after their death pending litigation. The Society prayed for a restraint order against the defendants from interfering in the peaceful possession of the land of the plaintiff-Society as described in the plaint.

The suit was contested by the defendants by filing written statements. The statement of their case in brief with respect to land measuring 3138 square yards has been narrated above. Parties went to trial on the 5 issues struck by court, of which, issues No.1 and 3 were material to the adjudication of the trial on the moot point as to who was owner in possession of the suit property and whether plaintiff or the 1st defendant and other defendants claiming through Jasmer Kaur defendant No.2. There is no doubt that the *feelkhana* measuring 3138 square yards is integrated with the suit property as described in the plaint, upon which, the suit was filed.

It was the case of the plaintiff-Society that during the pendency of the suit filed in 1997, that the defendants had encroached over a portion of the suit property over which they had no right, title or interest. Therefore, a decree for mandatory injunction was also sought directing the defendants to remove structures built on the portion of the disputed property. To the contrary it was the case of the defendants that out of khasra No.138/1, 3138 square yards land was owned and possessed by the defendants through the sale deed executed in favour of Jasmer Kaur in the year 1972. Parties led extensive oral and documentary evidence in support of their respective cases including jamabandis for the year 1990-91, Khasra Girdawaris for the

year 1996-97 and other jamabandis relating to the year 1955-56, scribed in Urdu and host of other documentary evidence brought on record by both the sides.

The question before the trial Judge was whether there was any encroachment by the defendants over the land of the plaintiffs.

The plaintiff led evidence that as per jamabandi for the year 1990-91 Ex.P4 the Provincial Government was the owner of Khasra No.138/1 and the same is now in possession of the plaintiff-Society. The land belonging to the Provincial Government was Nazul land which was transferred by certificate to the plaintiff-Society after deposit of installments of sale consideration to settle landless Harijans. Ex.P6 is the mutation No.1344 which is based on sale deed dated 8th November, 2003 transferring the property from Provincial Government to the plaintiff-Society with land coming to vest in the plaintiff-Society. The plaintiff-Society produced Ex.P7 being a Khasra Girdawari from October, 1996 to March, 1997 which shows that in the year 1977 when the suit was brought, it was the plaintiff-Society who was in possession of the suit property. There can be no doubt that the plaintiff owned the property described in the sale deed dated 8th November, 2003. There is also no dispute that the parcel of land measuring 3138 square yards out of the entire suit property belonged to Jasmer Kaur by the sale deed dated 27th July, 1972 in her favour. Therefore, the ownership and possession of the land measuring 3138 square yards was prior in point of time to when the plaintiffs came upon their land. There is also no dispute that Jasmer Kaur was owner in possession and further sold the land to Sahib Singh and Uma Singla as per sale deeds dated 3rd March, 2004 Ex.D13.

However, the friction starts and rests on a fact that in the sale deed in favour of Smt.Jasmer Kaur, the area of the land has not been mentioned nor the length or breadth of the plot sold and in the sale deed mention is of the *feelkhana*. However, the plot is shown to be bounded as follows : -

North 217' plus 135'	Ancestral land of defendants no.1 and 2 and provincial land of Govt.
South 339'	Circular road
East 147'	20' wide passage leading towards Chhachharauli town
West 10'	Fields of vendor.

It is this *feelkhana* and its exact location which is the rub in the appeal and the bone of contention between the parties. In order to identify the land by demarcation, a Local Commissioner was appointed as per order dated 21st February, 2006 passed by Tehsildar Chhachhrauli for demarcating the *hathi-khana*. On 20th April, 2006 DW4 Kabul Chand was appointed to be the Local Commissioner to conduct the demarcation of Khasra No.138/1 after giving notice to the parties concerned. The demarcation rules were stated to have been followed as reported in the affidavit of Kabul Chand DW4/1.

It may not be necessary to go into the details of the oral testimonies of the witnesses recorded which have been considered an appreciated by the Courts below in reaching their conclusions. Nevertheless, learned trial Judge held that there was no doubt that the plaintiff-Society owned and possessed Khasra No.138/1 and the defendant would have no right to interfere in their possession which entitled the party to a permanent

injunction.

The learned trial Judge perused Ex.D/2A which is a *Khatauni paimaish* of the year 1963-64 which revealed that Khasra No.138/1, 1106 and 439 had been consolidated and converted into Khasra No.138/1 with ownership vesting in the provincial Government.

Similarly, Ex.D22/A was read which is a *Khatauni Istemal* of *Mauza Chhachharauli*. The document revealed that khasra No.1765/1106 and 439 was *Gair Mumkin hathi-khana*. Ex.D24 was a list of private properties of ruler of Kalsia, one of which was *feelkhana* used as an elephant enclosure. This *hathi-khana* belongs to Raja Himmat Sher Singh and the sale of the *hathi-khana* to the 2nd defendant was protected by Court order and a valid registered sale deed which was executed by the Administrator on behalf of the minor ruler for onward sale to Jasmer Kaur on 24th July, 1972. The *hathi-khana* was a private property of the Raja who did not surrender it to the Government of India nor was compelled to. In the absence of description of the property *hathi-khana* in the sale deed of 1972, the Court was helpless to place its finger on the exact nature and description of land which fell beneath the *hathi-khana* and how was the *hathi-khana* identifiable in specific dimensions in Khasra No.138/1, which is a huge chunk of land.

Learned trial Judge was correct in thinking that the suit was not a title suit but one seeking a simple injunction based on possession as at the time of institution of the suit and to examine whether any portion of the suit property described in the plaint has been encroached by the defendants during the pendency of the suit. The Court examined the contents of the

report of the Local Commissioner appointed as per order dated 12th February, 1998 which deserves to be reproduced since it was not relied upon by the first appeal court as spelling any rights in unidentified land: -

“Accordingly I after duly informing the parties visited the spot on 27.2.98. Both the parties were present there. Ch.Zora Singh, Advocate was also with me at the time of my inspection of disputed land. The disputed land was identified by the defendant no.3 and other parties and after identification of the property in dispute, I prepared rough site plan and presence sheet there, which are attached herewith the report and my observations regarding existing construction are as under : -

That the suit property is situated on Chhachhrauli Bilaspur road, which is bounded as under : -

North : - Agricultural land of Harijan Co-op Society
South : - Bilaspur Chhachhrauli Road
East :- Pucca road leads towards main bazar
West : - Property of others

In the eastern side of disputed property there is boundary wall and in this boundary Mango trees are standing which are said to be of Tajinder Singh. There is also tubewell and cowshed in this boundary wall. Adjoining to cowshed and tubewell, the popular trees are standing and towards west side of these popular trees, there is a pucca room and shuttering material like sand and Bajri were also lying there and this area is said to be in the possession of Suresh Kumar, defendant no.3. After this towards the west side of this room and shuttering material, there is residential house of Parwari and then residential house of Mam Chand and then shops of Mam Chand which are fully shown in the rough site plan prepared by me.”

The report revealed that on the date of the visit of the Local Commissioner, shuttering material was lying on the disputed property. The Court read the cross-examination of PW1 Karnail Singh in this context which testified that a room was constructed thereat in the year 1999 after

encroaching on the area. Even the Local Commissioner, when he made a visit to the spot in February, 1998 mentioned in his report that there was a cowshed, tubewell and a room at the spot, meaning thereby, that the defendants were in possession of the part of khasra No.138/1 at the time of filing of the suit which was instituted in the year 1997 and, therefore, the trial court held that plaintiff has failed to show that the defendants had raised construction during the pendency of the suit. In this way, learned Civil Judge [Junior Division], Jagadhri vide her judgment and decree dated 4th September, 2009 protected the plaintiff by a permanent injunction restraining the defendants from interfering in the peaceful possession of their property but placed a rider by excluding the land under possession of the defendants. The plaintiff was found not in possession over the disputed part of khasra No.138/1 on the date of the suit. Therefore, mandatory injunction was refused for demolishing the structure. It is noteworthy that issues No.2 to 4 were dealt with in para. 24 of the judgment and it is recorded therein that during the arguments, the defendants did not press those issues. Thus, they were decided against the defendants. A reading of the judgment of the learned trial Court shows that much was left unsaid and what we are left with at the end of the judgment is confusion, the crucial findings remaining vague.

In appeal to the learned Additional District Judge, Yamunanagar at Jagadhri instituted on 25th September, 2007, the Court reconstructed the path to justice by removing vagueness in the judgment and decree of the trial Court. The Court extensively dealt with the evidence both oral and documentary including examining the matter from several angles

including adverting to the provisions of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. Learned first appeal Court took pains to read in extenso Ex.P5 being the certificate of Nazul land to vest in the plaintiff-society. He read mutation No.1344 Ex.P6 by which ownership of the land was changed in the revenue record in favour of the plaintiff-society. The Court took stock of the sale deed dated 24th July, 1972 Ex.D15 where the Collector, Ambala acting in his capacity as guardian of Raja Himmat Sher Singh had sold the *hathi-khana* bounded on the North by cultivated land of the Provincial Government and *bara* of Dharam Singh; south by circular road; East by 25 feet wide passage to city and west by fields of the seller in favour of 1st defendant-Jasmer Kaur. He examined the site plan Ex.P15/A of the *hathi-khana* attached with the sale deed and found that the dimensions and the total area of the plot so sold was mentioned. The visible lacuna left in the sale deed between the Collector, Ambala and Jasmer Kaur was the absence of mention of khasra number/s in the sale deed. Therefore, the Court correctly shifted the onus on the defendant that they had to prove that the *Hathi Khana* forms a part of khasra No.138/1. To discharge their burden to prove the location of land, the defendants had tried to prove by the consolidation proceedings in the form of *Khatauni Paimaish* Ex.D21; *Khatauni Istemal* Ex.D22 and the list of private properties of Raja Kalsia.

However, the *Khatauni Paimaish* Ex.D21 proved that Khasra No.138/1 was carved out of Khasra No.169/437, 1714/1683, 1740/436, 1106 and 439 while *Khatauni Istemal* Ex.D22 proved that in khasra No.1106 measuring 02 Bighas – 02 Biswas and Khasra No.439 measuring

02 Bighas – 07 Biswas, there existed a *gair mumkin hathi-khana*.

Learned counsel for the defendants before the first appeal Court had argued that *feelkhana* or *hathi-khana* fell amongst the properties of the Raja Kalsia and was mentioned as part of Khasra No.1106 and 439 owned by Raja Kalsia but was wrongly merged in Khasra No.138/1.

Learned counsel tried to articulately draw the attention of the appeal Court to Ex.D22-*Khatauni Istemal* to contend that the nature of land comprised in Khasra No.1106 and 439 was mentioned as *gair mumkin hathi-khana* which means that it was not an agricultural land and since *chakbandi* [consolidation] could only be in respect of agricultural land, then the very act of taking *hathi-khana* into account for the purpose of consolidation was bad in law and would have no effect on the right, title or interest of Raja Kalsia which was subsequently transferred to the 2nd defendant by virtue of sale deed Ex.D15. The appeal Court did not buy the argument and correctly so. The Court to the contrary took the view that merely because *feelkhana* is mentioned as one of the properties of Raja Kalsia, it does not necessarily mean that *hathi-khana* mentioned in Ex.D21 and Ex.D22 is one and the same property. In Ex.D22, no specific khasra numbers of the *feelkhana* have been mentioned which land was merged in khasra No.138/1 as a part of Khasra No.1106 and 439. The burden then was on the defendants to prove that *hathi-khana* which was a part of khasra No.1106 and 439 and was in the ownership of Raja Kalsia at the point when the consolidation of holdings took place in the year 1963-64. To crease out this difficulty in reading the documents, no revenue record was placed by the defendants to prove the issue. The Court held that merely on the strength

of Ex.D24, it cannot be said *hathi-khana*, which was a part of the aforesaid two khasra numbers, was owned by Raja of Kalsia. The Court also found no clarity from the record as to what khasra numbers were allotted to Raja of Kalsia in lieu of *hathi-khana*. To understand the implications of those unironed creases in the case, the Court went on to examine the provisions of the Consolidation Act, 1948 which provides for compulsory consolidation and to prevent fragmentation of agriculture holdings and to assign land for common purposes. The duty of the Consolidation Officer as per rule 7 of the rules of 1949 framed under the Act were gone into by the lower first appellate Court and how would re-partition exercise be prepared and upon what documents in the preparation of a scheme of consolidation could they be based. The Court read Section 21 and 44 of the Consolidation Act which provides procedure for correction by revenue officers hearing objections and the bar of jurisdiction of Civil Courts as regards matters arising under the Act, respective to the aforesaid two provisions of law.

The first appeal Court observed that even if the land of *hathi-khana* was included in the scheme of consolidation, it would still not confer jurisdiction in the Civil Court. In fact, the remedies under the Act were indeed availed by the aggrieved parties as would be evident from Ex.P8 which is the order passed by the Director Consolidation. The Court held that assuming that *hathi-khana* was the property of the Raja of Kalsia but no longer remained so as during the consolidation, as it became part of khasra no.138/1 which was allotted to the provincial Government in 1962-63. A sale deed Ex.D15 was executed on 24th July, 1972. The Court astutely deduced that at the time of sale, Raja of Kalsia was not owner of the land

comprised in khasra No.138/1. Hence, he was not competent to transfer the right, title or interest therein. By that time, Government had entered into an agreement dated 8th October, 1963 with the plaintiff-society for selling the land to the society for use of its Harijan members. The appeal Court found from the jamabandi for the year 1963-64 Ex.D28 that even at that time, it was the plaintiff-society which was in possession of land in khasra No.138/1. Therefore, the Court rightly held that recital in the sale deed Ex.D15 between Collector, Ambala and Jasmer Kaur showing that the possession of land sold had been delivered to Jasmer Kaur, was meaningless when there was no evidence of surrender of possession by the plaintiff-society on any part of land belonging to them out of khasra No.138/1. This is how mutation Ex.P6 records the plaintiff-society as owner in possession of the land. There is nothing wrong with these entries. The Court concluded correctly that the plaintiff-society is owner in possession of the entire land comprised in khasra No.138/1 and that the sale deed Ex.D15 does not confer any right, title or interest in favour of the defendants in respect of any portion of khasra No. 138/1. In the absence of proof of surrender of a part of land comprising in khasra No.138/1, no right to land can be detected from the aforesaid khasra numbers in favour of the defendants-appellants.

The only star argument of the defendants seeking to rebut the entries in the revenue record was by the aid of report Ex.D1 of Shri Joginder Singh Sagri, Advocate who was appointed as Local Commissioner. Learned trial Court unwisely relied upon this report which has been undone in appeal which is an expression of the correct position in law. It is well settled that the evidence cannot be gathered through the aegis of the Local

Commissioner and right, title or interest to property be made dependent on his work to make the report. Though presumption of truth is attached to revenue record but it is rebuttable. A Local Commissioner's report cannot be used to rebut the presumption with respect to the mutation based on a transaction involving none other than the Government settling landless Harijans through a cooperative society and farming society on the land. The appeal Court pointed out in para. 28 of the judgment that there has been a failure on the part of the trial Court to notice the deposition of the Local Commissioner when produced in the witness box as DW1 which discredits the authenticity of his work. The appeal Court read the deposition and found that the witness was not in a position to say as to which khasra number was inspected by him. He was not even in a position to say as to whom on behalf of the plaintiff-society was present when he inspected the spot. Such a report could not have been given any weightage as it was carried out behind the back of the plaintiff-society even if some worth could be attached to it. The appeal Court ruled out the site plan Ex.D3 from consideration and for good reason. Learned trial Judge had fallen in error in excluding the land it conceived to be under possession of the defendants and wrongly issued a double edged injunction decree. The appeal Court set aside the vague reasoning of the trial Court as it found them not legally sustainable.

Merely because the plaintiff-society had failed to file objections to the report of the Local Commissioner before the trial Court did not estop them from challenging the same before the appeal Court. A report which is stillborn requires no propping up or approval by virtue of absence of an objection to the report preferred in the trial court. Therefore, the appeal

Court correctly distinguished the decision of the Orissa High Court relied upon by the defendants in **Ambika Charan Misra v. Anadi Charan Samantaray and another**; 2002 (2) Civil Court Cases 216. The decision was not based on the report of the Commissioner alone since the Court had faulted other evidence as well led before the lower courts. It could never have been the intention of the Orissa High Court to place the report of the Local Commission at the level of the gospel truth. Mere presence of cowshed, tubewell, room etc. on a part of the land would not lead anywhere to make a firm statement of fact especially when the land beneath the structures is not properly identified. Therefore, mere existence of structures should not have swayed the mind of the trial Court by the actual situation prevailing on the suit land. To which I may add that appearances can be deceptive.

The appeal Court rightly proceeded to hold that when the plaintiff-society alleges that a part of the land was encroached upon by the defendants by taking advantage of the summer vacations of 1999, it has to be believed that any encroachment made during the pendency of the suit can be ordered to be removed by mandatory injunction. On these premises, the judgment and decree of the learned trial Court was set aside and the appeal was accepted with costs. The suit was decreed and the defendants stand restrained from interfering in the possession of the plaintiff-society over the suit land bearing khasra No.138/1, the identity and boundaries of which was not in dispute. The findings on issue No.1 recorded by the learned trial Court have been rightly modified holding that the plaintiff-society, i.e. the appellants before the Court *a quo*, who are presently the respondents, are

the exclusive owners in possession of the land comprised in khasra No.138/1 and the construction made *pendente lite* is liable to be removed and the land restored to the true owner by removing all constructions and accretions raised therein.

Having heard Mr.C.B.Goel, learned counsel for the appellant and Mr.G.C.Shahpuri for the respondent-society, I would decline this appeal. The view of the first appeal Court found is sound in law and within the margins of the facts of the case established on the evidence adduced and hence are endorsed. Nothing more can be added to the reasoning of the learned Additional District Judge at Jagadhri in reaching the conclusions on the issues involved. No question of law, much less a substantial one, arises in this appeal or any of the four proposed questions of law framed in para. 14 of the Grounds of Appeal which are misconceived, nor are worth detaining the scrutiny of this Court any further than thus far on its second appeal side. However, they are reproduced below for reference to match them with the reasoning of the first appeal Court as noticed above: -

- “(i) Whether the decree for mandatory injunction passed by the Additional District Judge directing to remove the encroachment can legally be sustained when there is no evidence worth the paper to prove that the defendant/appellants have made any encroachment over the property in possession of the plaintiff/respondent?
- (ii) Whether the judgment and decree of the lower appellate Court is perverse being on non-consideration of the evidence on record and misreading and misconstruction of the evidence?
- (iii) Whether the lower appellate court was justified in discarding the report of the local commissioner when no objection to the same had been filed by the plaintiff/respondent?

(iv) Whether in the facts and circumstances of the present case the judgment and decrees of the courts below are sustainable in law when the appellants are in possession of their property which had been sold by a registered sale deed dated 24.7.1972 by the Deputy Commissioner as guardian of the Raja?”

The appeal to stand dismissed.

(RAJIV NARAIN RAINA)
JUDGE

May 21, 2015
Paritosh Kumar