

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

**Regular Second Appeal No.3117 of 2009 (O&M)
Date of Decision: March 22, 2016.**

Partap Singh and another

.....APPELLANT(s).

VERSUS

Ishwar Singh and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Argued by : Mr. Vikram Punia, Advocate
for the appellant (s).

Mr. Alok Jain, Advocate
for the respondents.

SURINDER GUPTA, J.

This is second appeal against the judgment passed by the Civil Judge (Senior Division), Sonipat, decreeing the suit of the plaintiffs and directing the defendants to remove the construction in the shape of wall at line AB and CD as shown in the site plan and further restraining the defendants from encroaching upon or raising any construction in the area of street.

Case of the plaintiffs, in brief, is that site shown with red colour in the site plan (Ex.P4) is a street no.781 running from north to south in the immediate west of plot No.236/1. Width of the street is 15 feet and this street gets connected with street No.782 in the north and 780 in the south.

Plot No.236/1 belonging to plaintiff and in the east of this plot, there is plot No.236/2 belonging to defendants. Earlier, plot No.236/1 and 236/2 were comprised of one plot bearing khasra No.236 but it was later on bifurcated into two plots by way of partition as per the decree passed in partition suit No.294/1979 decided on 16.04.1983. Later on, defendant tried to take forcible possession of plot No.236/1 and plaintiff filed a suit for permanent injunction which was decreed against the defendants on 03.08.1991, and defendants were restrained from dispossessing the plaintiffs from plot No.236/1 and street and some vacant area of abadi deh lying in the west of the disputed street. Plaintiffs filed execution petition to take possession of plot No.236/1 from the defendants and in those proceedings, Bhagwan Dass, retired Kanoongo was appointed as local commissioner with the consent of both the parties who submitted his report in July, 1992 confirming the above plea raised by the plaintiff. Another local commissioner was appointed to find out the existing position and he submitted his report on July 18, 1992. Thereafter, the defendants removed the southern wall of plot No.236/1 and delivered access to the plaintiffs to their plot No.236/1 through street No.780 towards south. Plaintiffs constructed eastern wall of their plot No.236/1 and the western side is lying vacant. The defendants have blocked the street bearing No.781 by constructing two walls AB and CD and have also threatened to raise wall at the line BC without having any legal right. They were requested to remove the wall but in vain. Hence, this suit.

The defendants(appellants) contested the claim of plaintiffs inter-alia pleading that the suit pertains to street No.781, which vests in

Gram Panchayat and proceedings under Section 7 of Punjab Village Common Land (Regulation) Act, 1961 were already pending in the Court of Assistant Collector 1st Grade, Sonipat, as such, civil Court has got no jurisdiction to adjudicate the matter in controversy. The locus standi of the plaintiffs to file the suit for and on behalf of other inhabitants of the village, was also challenged. They have dragged the defendants (appellants) into unnecessary litigation. Bhagwan Dass, local commissioner was appointed in execution proceedings by the executing Court to demarcate plot No.236. While submitting his report, he did not take into consideration site plan of *abadi deh* and the defendants filed objections against the report of local commissioner. No second local commissioner was appointed to locate plot No.236/1. The plaintiffs have raised eastern wall of their plot No.236/1 at wrong place. Wall AB and DC were constructed in the year 1979 because actual location of their plot no. 236/2 is at the place where they have constructed these walls. The defendants who are owners of plot No.236/2 are within their right to make any construction over the same. The land marked as ABCD in the site plan is part of plot No.236/2.

On appraisal of evidence, learned Civil Judge (Senior Division), Sonipat recorded the findings as follows:-

(i) Plot No.236 was jointly allotted to the parties to the suit and in partition proceedings decided on 16.04.1983, plot No.236/1 was given to plaintiffs and plot No.236/2 was given to defendants. Plaintiffs had taken possession of plot No.236/1 in February, 1989.

(ii) The plaintiffs filed the suit for injunction which was decreed against defendants on 03.08.1991 and in execution proceedings, defendant

handed over possession of plot No.236/1 to plaintiffs.

(iii) During execution proceedings, Shri Bhagwan Dass, retired Kanoongo was appointed as local commissioner, who after inspecting the spot, submitted his report dated 18.07.1992.

(iv) On southern side of plot No.236/2 owned by defendants, there is street No.780 and there is another street on the eastern side of their plot. The area of plot No.236/2 is 467 square yard but at the spot by encroaching upon other land, defendants are in possession of 1063 square yards of land.

(v) The report of local commissioner Ex.P5 and site plan Ex.P6 shows the existence of passage No.781 towards western side of plot No.236/1.

(vi) Report (Ex.D5) shows the existence of street No.781 at the spot and this document was placed on record by the defendants.

Learned Civil Judge (Senior Division), Sonipat decreed the suit of plaintiffs and defendants were directed to remove the construction raised in the shape of wall at line AB and CD in the site plan (Ex.P4) filed by the plaintiffs and defendants were restrained from raising any construction on any area of the street in dispute.

Appeal filed by the appellants-defendants against the said judgment was dismissed by first appellate court.

I have heard learned counsel for the parties and gone through the paper book and record of the Courts below with their assistance.

Learned counsel for the appellants-defendants has argued that an application was filed before the lower court seeking appointment of local commissioner, but that application remained undecided. It is very material to

appoint a local commissioner to verify the exact location of plot No.236 and street bearing No.781. The Court has relied upon the report of local commissioner appointed in execution proceedings between the parties. As the existence and location of the plot of plaintiffs and street bearing No.781 is in dispute, this fact could be resolved only by appointing a local commissioner in the suit and not by relying on the report of Local Commissioner appointed in execution proceedings particularly when he was not appointed to demarcate plot No.236/1 and street No.781. He has requested that a fresh local commissioner be appointed for the just decision of the dispute in this case.

Learned counsel for the respondents has argued that there is no dispute regarding existence and identity of the disputed passage or the location of plot No.236/1. The joint plot bearing No.236 was divided between the plaintiffs and defendants. The share which came to the plaintiffs was given number 236/1 while the defendant got plot No.236/2. The appellant took forcible possession of plot no.236/1 after the passing of decree of permanent injunction restraining him from interfering in possession of plaintiff over this plot. Local Commissioner was appointed to locate khasra no.236/1 and its surrounding locations, as such, his report is very material and relevant in the case and that is why the appellant did not press the application filed by him seeking appointment of Local Commissioner before trial court or even in appeal before first appellate court.

In order to understand the dispute, it will be relevant to refer to

the plea taken by the appellants-defendants in the written statement

regarding existence of street No.781. In para No.1 of the written statement '*On Merits*', the defendants have admitted the existence of street No.781 on the west of plot No.236/1 owned by plaintiffs. It was also admitted that the said street connects streets No.780 and 782. However, they denied that the location of street No.781 on the place as shown in the site plan (Ex.P5) filed by the plaintiffs. The appellants-defendants also admitted the existence of plot No.236 in the shape of one single plot which was later bifurcated in plots No.236/1 and 236/2. In partition of the above plot, plaintiff got share of plot numbered as 236/1 and defendants were allotted portion of plot No.236 which was numbered as 236/2. As per admission of defendant/appellant plot No.236/1 abuts street No.781. The plaintiffs have their access through this street for plot no.236/1. About the right of user of this street by other villagers the defendants challenged the competence of plaintiffs to file suit on their behalf.

Appellant Partap Singh while appearing as DW1 has stated that he had not encroached upon the area of plot No.236/1 or street No.781. He has stated that on major portion of plot No.236/1 has been encroached by someone else. Plaintiffs instead of taking action against those persons, are involving the appellants in unnecessary litigation. About the wall ABCD and D to C, he alleged that it was constructed in the year 1979, at the time of partition of **plot no.236 and wall AB and CD are part of plot No.236/2**. In support of his contention, he has produced on record following documents:-

Ex.D1: Copy of order dated 15.01.2000 passed by Civil Judge (Junior Division), appointing local commissioner to ascertain whether the pucca shed constructed in plot No.236 was outside plot No.236/1.

- Ex.D2: Copy of application filed by decree-holder i.e. plaintiffs seeking appointment of local commissioner.
- Ex.D3: Report of local commissioner,
- Ex.D4 Copy of order dated 31.03.1997 passed by Additional Civil Judge (Senior Division), Sonipat in execution No.855 filed by plaintiffs against defendants-appellants.
- Ex.D5: Report of local commissioner dated 13.07.1997, appointed by the executing Court vide order dated 31.03.1997.
- Ex.D6: Application for appointment of local commissioner dated 12.02.1999.

A look at the documents relied by the appellants-defendants would show the existence and location of plot No.236/1 and street No.781.

Firstly, I take the statement of Partap Singh appellant-defendant who while appearing as DW1 has stated that land shown as ABCD in site plan (Ex.P5) is part of plot No.236/2. In order to verify the above statement of appellant, a reference can be made to the report (Ex.D5) given by local commissioner, which shows that street No.781 is towards western side of plot No.236/1. Plot No.236/2 is on the eastern side of plot No.236/1, meaning thereby that in between street No.781, which is 15 feet wide and plot No.236/2, there is plot No.236/1. As per the site plan (Ex.P5), the walls AB and CD have been raised by the defendants to block 15 feet wide street which, in no manner, can be part of plot No.236/2 as this portion is not connected with the land of plot No.236/2. Site plan Ex.P6 attached by the local commissioner with his report also support this contention. This proves that in between the land covered by walls AB and CD and plot No.236/2, there is plot No.236/1, as such, the walls AB and CD are not part of plot No.236/2. To counter the above site plans, defendants have not placed on

file any site plan of his own, showing the location of plot No.236/2 and walls AB and CD. The evidence produced by the plaintiffs in this manner, is un rebutted. While appearing as DW1, defendant Partap Singh had admitted the location of plot No.236/2 on the eastern side of plot No.236/1. He admitted that on eastern side of plot No.236/2, there is street which is also shown in the site plan Ex.P5, Ex.P6 and Ex.D5. He admitted that on western side of plot No.236/1, there is street No.781 which is 162 feet long and 15 feet wide.

Though the appellant had taken the plea that plaintiff had taken possession of plot No.236/1 and someone else has encroached upon his area but while appearing as DW1, he admitted that he had delivered possession of plot No.236/1 to plaintiffs after demolishing his southern wall. The statement of appellant-defendant No.1 was recorded by learned Civil Judge in the proceedings on application for attaching his property for non-compliance of the order dated 19.08.1996. In his statement, he had stated that he will demolish 23 feet of southern wall adjoining street No.780 to give possession of plot No.236/1 to Ishwar Singh and others and he shall also not have claim over the passage of three feet.

A local commissioner, Bhagwan Dass was appointed by the executing Court, who inspected the spot on 29.06.1992. Appellant No.1 along with others was present at the time of demarcation. The local commissioner also located street No.781 on the western side of plot No.236/1. The site plan(Ex.P6) prepared by him shows the location of the street at the spot. Ram Saran, Advocate, who was also appointed as local

street No.781 which is 15 feet wide on the western side of plot No.236 (which was later on bifurcated into 236/1 and 236/2) and 605.

From the above evidence and admission by the defendant that there is street No.781 on the western side of plot No.236/1, a fact supported by the local commissioners in their reports and also proved from the record produced on file, it is evident that the plea taken by the appellants-defendants that walls AB and CD are part of plot No.236/2 is false on the face of it and has been rightly discarded by the Courts below.

The entire stress of learned counsel for the appellant is on the fact that learned Civil Judge (Senior Division), Sonapat has not appointed a local commissioner to demarcate and locate plot No.236/1, 236/2 and street No.780, 781 and 782. As per my discussion above, the location of plot No.236/1 and street No.781 is clear even from the statement of appellant-defendant No.1 while appearing as DW1. The defendants have not produced any evidence to refute the site plan produced by the plaintiffs and other evidence on record. He has not even placed on record any site plan to show location of street No.781 and plot No.236 as per his version, meaning thereby, he admitted the location of plot No.236/1 and street No.781 as shown by the local commissioners and in the site plan (Ex.P5). This appears to be the reason that the appellants-defendants did not press this application seeking appointment of Local Commissioner during final arguments before learned Civil Judge. It is, however, a fact that this application remained undecided but the appellants appear to be satisfied with their not pressing this application, as in the grounds of appeal before the first Appellate Court,

this plea was never raised that the application for appointment of local

commissioner remained undecided. Once the appellants have given up this plea before the first Appellate Court, it cannot be raised in this second appeal. Even otherwise, in view of the direct, credible and cogent evidence coupled with admission of appellant, the application is without merit. The possession of plot No.236/1 was given by the appellants-defendants after removing 23 feet wall themselves. This signifies that he was satisfied about the location of plot No.236/1 and now stood debarred from alleging that the location of plot No.236/1 is at some other place than at the site which was handed over by them to the respondents-plaintiffs.

In view of the above facts and circumstances, I find no reason or circumstances calling for appointment of another local commissioner when two local commissioners had already been appointed.

On perusal of the paper book and judgments of the Courts below, I find no legal or factual infirmity therein, calling for any interference.

No substantial question of law requiring determination arises in this appeal, which has no merits.

Dismissed.

March 22, 2016.
Sachin M.

(SURINDER GUPTA)
JUDGE