

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

**RSA No.3392 of 2010 (O&M)
Decided on: 19.05.2016**

Fakir Chand

....Appellant

Versus

Haryana State through Collector, Bhiwani and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. Mani Ram Verma, Advocate
for the appellant.

Mr. Subhash Chander, DAG, Haryana.

- 1. Whether Reporters of local papers may be allowed to see the judgment?*
- 2. To be referred to the Reporters or not?*
- 3. Whether the judgment should be reported in the Digest?*

REKHA MITTAL, J.

The present appeal has been directed against the consistent findings recorded by the Courts below whereby suit filed by the appellant and his co-plaintiff – Daya Nand was ordered to be dismissed.

The appellant along with Daya Nand filed a suit for possession of land measuring 04 kanals on the premise that they are owners in possession of the land, detailed in Para 1 of the plaint. In the year 1973-74, Public Works Department (in short 'PWD') had carved out the road from village Dinod to village Dhani Mahu and encroached upon their (plaintiffs) land measuring 04 kanals without getting the same acquired or payment of compensation.

The respondents/defendants contested the claim with the averments that the land in dispute is not ownership of the plaintiffs. At the time of *Chakbandi* (consolidation), a passage of 06 *Karams* i.e. 33 feet had been left from Dinod to Dhani Mahu from Rectangle No.235 between Killa Nos. 18, 19, 20 and not between Khasra No. 234. The road is located in village Dinod Hadbast No.26. Thereafter, the District Board constructed 12 feet wide *pucca* road and remaining land of the road had been encroached by the plaintiffs and other persons since long. The road now vests in PWD and the department wants to repair the road.

The learned trial Court accepted claim of the plaintiffs in regard to ownership of the suit land but rejected their prayer for possession primarily on the ground that the plaintiffs did not examine the official who had prepared the demarcation report Ex.P-1 and thus, the demarcation report Ex.P-1 is not admissible in evidence. The First Appellate Court concurred with the findings of the trial Court on both the counts with regard to the plaintiffs having proved their ownership of the suit land but failed to prove the demarcation report Ex.P-1.

Counsel for the appellant has submitted that the plaintiffs filed an application for deposit of diet money to examine Sh. Rati Ram Girdawar from the office of PWD, Bhiwani along with demarcation report dated 10.06.2005. The Court did not issue any process for summoning of the witness but on the contrary, closed the evidence vide order dated 28.09.2005. In the appeal before the Additional District Judge, Bhiwani an application was filed under Order 41 Rule 27 read

with Section 151 CPC for additional evidence and the application was dismissed by the Appellate Court on 13.01.2010, the day the appeal preferred by the plaintiffs was also ordered to be dismissed. It is further argued that as the application for additional evidence was dismissed simultaneously with dismissal of the appeal, there was no occasion with the appellant to challenge the order dated 13.01.2010 by way of revision before this Court. It has been argued with vehemence that the First Appellate Court while disposing of the application has held that there are enough documents on file which are sufficient to arrive at a right conclusion and the Court can adjudicate upon the matter effectively even in absence of abovesaid witness but on the other hand, dismissed the appeal primarily on the ground that the plaintiffs/appellants have failed to prove the demarcation report Ex.P-1. It is further argued that keeping in view the observations made by the First Appellate Court in the order dated 13.01.2010, dismissing application for additional evidence, the judgment and decree passed by the Court in appeal cannot be allowed to sustain and liable to be set-aside. According to counsel, Rati Ram Girdawar who conducted the demarcation and prepared the demarcation report Ex.P-1 is still alive and it would be in the interest of substantial justice if the judgment passed by the First Appellate Court is set-aside and the appellant is allowed one opportunity to examine Sh. Rati Ram Girdawar to prove the demarcation report Ex.P-1.

Counsel for the respondents has submitted that the plaintiffs filed the application for deposit of diet money on 29.07.2005

after availing number of opportunities for adducing evidence. Thereafter, they did not bother to ensure presence of Rati Ram Girdawar for his examination. After evidence of the plaintiffs was closed by order of the Court on 28.09.2015, the case remained pending before the trial Court for more than one year. The plaintiffs neither filed an application for additional evidence nor challenged the order dated 28.09.2015 vide which the evidence was closed. The application for additional evidence was filed in December, 2009 in the appeal instituted in December, 2006. It is vehemently argued that keeping in view conduct of the plaintiffs/appellant in failing to initiate action at an appropriate stage of the proceedings and allowing the order closing their evidence to attain finality, the appellant cannot be allowed to reopen the case after lapse of more than 10 years.

I have heard counsel for the parties, perused the paperbook and the original records.

Be that as it may, it is an admitted position of the case that the plaintiffs/appellant failed in their effort to seek possession of 04 kanals of land proved to be owned by them and alleged to be encroached upon by the Government of Haryana by raising construction of a road for their failure to prove the demarcation report Ex.P-1 prepared by Rati Ram Girdawar appointed by Assistant Commissioner, Gr. II. It is also a matter of record that the plaintiffs filed an application for deposit of diet money for summoning Rati Ram Girdawar as a witness before the trial Court though there was delay on part of the plaintiffs in filing that application. The learned trial Court closed

evidence of the plaintiffs without giving them an opportunity to examine Sh. Rati Ram Girdawar. There is nothing on record suggestive of the fact that the Court ever issued any process for summoning of Rati Ram Girdawar as a witness. The plaintiffs neither challenged the order closing their evidence by the trial Court nor filed an application for adducing additional evidence. However in the appeal, an application was filed for adducing additional evidence that came to be dismissed by the Additional District Judge, Bhiwani vide order dated 13.01.2010 and the appeal was also disposed of vide judgment of even date. The Appellate Court in the concluding lines of order dated 13.01.2010 whereby application for additional evidence was dismissed has held, reads thus:-

“While deciding this appeal it is to be seen that whether the defendants have encroached upon the land of the plaintiffs. From perusal of the main file, it is clear that there are enough documents on file which are sufficient to arrive at a right conclusion. The Court can adjudicate upon the matter effectively even in the absence of above said witness (Sh. Rati Ram Girdawar). Hence, in these facts and circumstances, at this stage, the appellants cannot be allowed to examine the said witness.”

Despite these observations made by the First Appellate Court while disposing of the application, the appeal has been dismissed for failure of the plaintiffs/appellant to prove the demarcation report Ex.P-1. In view of the observations made by the First Appellate Court dismissing the application for additional evidence and the findings recorded in the judgment, it is difficult to reconcile the contradictory

findings recorded by the Court below. Counsel for the respondents has not disputed that examination of Rati Ram Girdawar was essential to prove the demarcation report Ex.P-1, basis of claim of the plaintiffs/appellant that land of their ownership measuring 04 kanals has been encroached upon under the road that now belongs to the Department of Public Works, Haryana.

Order 41 Rule 27 CPC empowers the Appellate Court to permit adducing of additional evidence if the case falls within the purview of any of the three contingencies envisaged under Rule 27. Clause (a) and (b) of Rule 27 CPC, relevant in the present context, reads as follows:-

“Production of additional evidence in Appellate Court –

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) x x x x x x x x x, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.”

Keeping in view the facts and circumstances discussed hereinbefore, the Appellate Court committed a serious error and should have permitted the plaintiffs/appellant to produce additional evidence in

the interest of substantial justice. In this view of the matter, it would be expedient in the interest of justice that the judgment and decree passed by the Appellate Court is set-aside and the matter is remitted to the Appellate Court for decision of the appeal afresh after permitting the appellants therein to examine Rati Ram Girdawar as a witness.

In view of what has been discussed hereinabove, the appeal is partly allowed, the judgment and decree passed by the Appellate Court is set-aside. The appellant is permitted to examine Rati Ram Girdawar by way of additional evidence but subject to the condition that he would ensure presence of the witness on the date to be fixed by the Appellate Court, at his own responsibility and would be entitled to only one effective opportunity for the purpose. The additional evidence shall be recorded by the Appellate Court itself. In case the appellant examined Rati Ram Girdawar by way of additional evidence, the respondents shall be at liberty to rebut the additional evidence by getting one effective opportunity in regard thereto. The Appellate Court shall put its best endeavour to dispose of the appeal expeditiously.

19.05.2016
yakub

(REKHA MITTAL)
JUDGE