

**RSA No.4832-2014**

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

**RSA No.4832-2014 (O & M)**

**Date of Decision: 10.02.2016**

Surjit Singh

... Appellant (s)

Versus

Punjab State through Collector, Ludhiana and others

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH  
DHALIWAL**

- |                                                                                |            |
|--------------------------------------------------------------------------------|------------|
| 1) Whether Reporters of the local papers may be allowed to see the judgment ?. | <b>YES</b> |
| 2) To be referred to the Reporters or not ?.                                   | <b>YES</b> |
| 3) Whether the judgment should be reported in the Digest ?                     | <b>YES</b> |

Present: Mr. Aditya Jain, Advocate,  
for the appellant.

Mr. B.S.Cheema, DAG, Punjab.

**Paramjeet Singh Dhaliwal, J. (Oral)**

The appellant herein was plaintiff before the Court of first instance i.e. Additional Civil Judge (Sr. Divn.), Ludhiana who filed suit for possession in respect of land measuring 8 kanals comprised in khasra No.136//17/1/2, 23/3, 24/2/1, 139//3/2/1, 4/1, 254/2, 311 khewat No.63, khatauni No.63. The said suit has been dismissed vide impugned judgment and decree dated 27.09.2012. As against the judgment and decree passed by the Court of first instance, first appeal filed before learned Additional District Judge, Ludhiana has also been dismissed

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vide impugned judgment and decree dated 15.04.2014 thereby affirming the judgment of the court of first instance.

For convenience sake, hereinafter, reference to parties is being made as per their status in the plaint.

The detailed facts are already recapitulated in the judgments of the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that the plaintiff filed a suit for possession and injunction with the averments that his father-Prithvi Singh was owner of land measuring 8 kanals, situated within the revenue estate of village Jamalpur Awana, Tehsil and District Ludhiana, as fully mentioned in head-note of plaint. During his life-time, he executed a registered will dated 31.07.1968 in favour of the plaintiff and his mother-Gurnam Kaur and after death of Prithvi Singh @ Pirthi Singh, the plaintiff and his mother became owners of the suit property. Smt. Gurnam Kaur expired on 17.01.2009 and during her life-time, she also executed a legal and valid Will dated 28.02.2008 in favour of the plaintiff. The defendants have no right in the suit property but have illegally encroached upon it without consent of the plaintiff. The plaintiff requested them to vacate and hand over the possession of the suit property to him, but to no avail. Hence, suit was filed.

Upon notice, the defendants resisted the suit and filed written statement taking various preliminary objections. It was pleaded that the suit property still stood in the name of Prithvi Singh in the revenue record. The defendants have never encroached upon any part of

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the suit land. Other averments in plaint were denied and dismissal of suit was prayed for.

On the basis of pleadings of parties, the Court of first instance framed following issues:

- “1. *Whether the plaintiff is entitled to possession of the suit land as prayed for?OPP*
2. *Whether the plaintiff is entitled to permanent injunction restraining the defendants from giving the possession of the suit property to any other person except the plaintiff?OPP*
3. *Whether the plaintiff is entitled to permanent injunction restraining the defendants from alienating the suit property or raising any construction over the suit land as prayed for?OPP*
4. *Whether the suit is not maintainable?OPD*
5. *Whether the plaintiff has no locus standi to file the present suit?OPD*
6. *Relief.”*

In this regular second appeal under Section 100 CPC, the appellant has challenged the concurrent findings recorded by both the courts below. Along with the appeal, learned counsel for the appellant moved CM No.11342-C-2014 under Order 41 Rule 27 read with Section 151 CPC seeking permission to lead additional evidence by way of demarcation report (Annexure A-1) which was conducted during the pendency of first appeal.

Before I deal with the merit of this second appeal, it would be appropriate to first decide CM No.11342-C-2014 which has been

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moved before this Court under Order 41 Rule 27 read with Section 151 CPC for leading additional evidence by way of demarcation report dated 29.05.2013 which was carried out by the revenue authorities at the instance of the appellant during the pendency of first appeal. However, perusal of records shows that the plaintiff did not move any application for leading additional evidence before the first appellate court. It is not open to any party, at the stage of appeal, to bring fresh evidence and call upon the other side to admit or deny the same and any such attempt is contrary to the requirements of Order 41 Rule 27 CPC. In this regard, reliance can be placed upon ***Malayalam Plantations Ltd. vs. State of Kerala*** AIR 2011 SC 559. There are no pleadings in plaint with regard to the document (Annexure A-1) now sought to be adduced by way of additional evidence being a subsequent evidence, therefore, the evidence, if allowed to be led would be beyond pleadings and cannot be taken into consideration. As such, the application for leading additional evidence is dismissed.

Learned counsel for the appellant has referred to following substantial questions of law formulated in the grounds of appeal for consideration by this Court:

- (i) *Whether the impugned judgments are wrong, illegal, perverse and based on misreading of evidence?*
- (ii) *Whether the plaintiff is entitled to relief of permanent injunction as prayed for?*
- (iii) *Whether the plaintiff is entitled for possession as prayed for?*

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- (iv) *Whether both the courts below have misread and misinterpreted the evidence led by the appellant which is sufficient to decide the controversy raised by the plaintiff, thus, the findings returned by the courts below are perverse and against the facts and circumstances of the case?*
- (v) *Whether the case of the appellant can be thrown out on the basis of minor discrepancies in the statement of the witnesses and honest discrepancies are bound to be occur due to the passage of time in a true case thus the findings of the courts below are liable to be reversed?*

I have heard learned counsel for the parties and perused the record.

When the case was taken up for preliminary hearing, learned counsel for the appellant made an oral prayer to withdraw the suit with liberty to file afresh on the same cause of action or subsequent cause of action, as the suit of the plaintiff had failed on the technical ground of non-production of demarcation report. Notice of motion was only issued to the limited extent of withdrawing the suit with permission to file afresh.

In view of the arguments addressed by learned counsel for the parties, following substantial questions of law arise for consideration of this Court:

- (i) *Whether on oral request, in regular second appeal being continuation of suit, permission to withdraw the said suit can be granted to file a fresh suit on the same cause of action?*

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- (ii) *Whether the appellant-plaintiff is entitled to any other relief in view of the demarcation report (Annexure A-1) being a subsequent event which give rise to fresh cause of action?*

Both the substantial questions of law are taken up together.

Admittedly, the ownership of suit land vested in Prithvi Singh @ Pirthi Singh (deceased), father of the plaintiff as per jamabandi (Ex.P5) and ownership rights by way of inheritance have been mutated in favour of the plaintiff vide mutation Nos.15694 and 15362 and the plaintiff has been recorded as owner in possession of suit land in the revenue records. The suit has failed only on the ground that there is no demarcation report to prove the extent of encroachment. In absence of demarcation report, it cannot be concluded that the defendants have encroached upon any part of the disputed property. Admittedly, the defendants also do not claim possession over the suit land of the plaintiff and denied the alleged encroachment by them. The defendants also did not dispute the title of the plaintiff. It is the case of the defendants that they have not encroached upon any part of the suit land. Keeping in view the stand of the defendants that they have not encroached over the suit land, the suit has been dismissed on the technical ground of non-production of demarcation report. In these circumstances, this Court examines the substantial questions of law raised above.

Order 23 Rule 1 CPC reads as under:

**“ORDER XXIII- WITHDRAWAL AND ADJUSTMENT OF SUITS**

***1 . Withdrawal of suit or abandonment of part of claim—***

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*(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

*Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*

*(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.*

*(3) Where the Court is satisfied,—*

*(a) that a suit must fail by reason of some formal defect, or*

*(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*

*it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject- matter of such suit or such part of the claim.*

*(4) Where the plaintiff—*

*(a) abandons any suit or part of claim under sub-rule (1), or*

*(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),*

*he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

*(5) Nothing in this rule shall be deemed to authorise the*

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*Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.*

Sub-rule 1 of Order 23 CPC mandates that at any time after the institution of a civil suit, the plaintiff may as against all or any of the defendants, abandon suit or abandon a part of his claim. The conjoint reading of Sub-rule 3 of Order 23 CPC along with Sub-rule 1 makes it clear that under Sub-rule 3, a court can accord permission if it is satisfied that a suit must fail by reason of formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject matter or a part of claim.

In the present second appeal, the plaintiff-appellant failed before the trial Court as well as appellate court on the ground of failing to properly plead encroachment by defendants and produce demarcation report in evidence to indicate extent of encroachment. The title of the plaintiff over the khasra numbers is not in dispute. Moreover, the defendants are also denying any encroachment over the suit land of the plaintiff. It means that in view of the subsequent demarcation, the plaintiff has an independent fresh cause of action.

Although, the defect pointed out does not apparently appear to be a formal defect, but on the basis of subsequent demarcation, the plaintiff can claim for withdrawal of the suit with a liberty to file fresh suit on the same cause of action or this Court may allow the suit to be withdrawn with liberty to file on the fresh cause of action on the basis

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of subsequent demarcation report (Annexure A-1) for which application for additional evidence was moved in this Court which has been dismissed on the ground as mentioned hereinbefore. This Court is duty bound to discharge the duty mandated under the provisions of the CPC after taking into consideration all relevant aspects including desirability of permitting the plaintiff to start a fresh round of litigation on the same or fresh cause of action regarding the same subject matter.

Sub-Rule 3 of Order 23 provides that where the Court is satisfied that a suit may fail by reason of 'some formal defect' or that there are 'other sufficient grounds' for allowing the plaintiff to institute a fresh suit for the same subject matter, the Court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit with a liberty to institute a fresh suit in respect of the same subject-matter on the same cause of action. The words 'formal defect' must be given a wide and liberal meaning, and must be deemed to connote the other kinds of defect which do not affect the merits of the case. It is well settled that appeal being a continuation of suit, the provisions of CPC as applicable to civil suit can be considered in appeal.

The Hon'ble Supreme Court in ***Baniram and others vs. Gaiind and others*** AIR 1982 (SC) 789 held as under:

*“We heard Mr. Phadke, learned counsel for the appellant for some time. After the discussion, at a certain stage, a contention was advanced by Mr. Phadke on a particular, point, in the case and he conceded that it was not the case pleaded in the plaint.*

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*At this stage Mr. Phadke wishes to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Having considered the fact that non-pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, we consider it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit as stated hereinabove. We accordingly grant the permission subject to the condition that the appellant shall pay Rs. 1,000/- by way of costs in this Court within two months from today in addition to any costs paid already under the orders of the High Court.*

*2. As the suit has been withdrawn this appeal becomes infructuous and stands disposed of accordingly, C.M.P. 5669/81 also stands disposed of. Order accordingly.”*

Taking into consideration that suit has been dismissed for want of proper pleadings regarding alleged encroachment by the defendants as well as failing to lead evidence of extent of encroachment and confirmation of the same in first appeal, this Court is of the opinion that the said defect can be treated as a formal defect in view of the law laid down in ***Baniram's case (supra)***. Even if the same is not treated as a formal defect, still in view of the stand of the defendants that they have not encroached upon any part of the suit land belonging to the plaintiff, the suit itself should have been dismissed as not maintainable.

In view of above discussion, it is held that at this stage of

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second appeal which is in continuation of the suit, on oral request, permission to withdraw the suit can be granted with liberty to file afresh on the same cause of action in view of Sub-rule 3(b) of Order 23 CPC as the demarcation report (Annexure A-1) being a subsequent event gives rise to fresh cause of action. Both the substantial questions are answered accordingly.

In view of the above discussion, the instant regular second appeal also does not survive. Notwithstanding disposal of this appeal for the reasons stated above, the plaintiff will be at liberty to take recourse to filing of fresh proper suit, if so advised, in the light of subsequent event of demarcation (Annexure A-1) which is annexed with the application for additional evidence before this Court or any other fresh demarcation.

Consequently, the appeal stands disposed of in the aforementioned terms.

Costs made easy.

**10.02.2016**

parveen kumar

**(Paramjeet Singh Dhaliwal)**  
**Judge**