

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

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SAO No. 41 of 2014

Date of decision: 11.01.2016

Charanjit Singh

..... Appellant

Versus

Gulshan Kumar and others

..... Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

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Present: Mr. H K Aurora, Advocate
for the appellant

Mr. AS Syan, Advocate
for the respondents

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

Rekha Mittal, J.

The present appeal lays challenge to the order dated 31.03.2014 passed by the Additional District Judge, SBS Nagar, whereby the appeal preferred by respondents Gulshan Kumar and Rakesh Kumar has been allowed, the judgment and decree dated 11.01.2010 passed by the Additional Civil Judge (Senior Division), Nawanshahr vide which the suit for possession filed by appellant Charanjit Singh was partly decreed for possession of two shops held to be in illegal occupation of respondents No. 1 and 2 (defendants No. 2 and 3 in the original suit) as well as portion newly constructed in the open courtyard behind two shops has been set aside and the matter is

remitted to the trial Court for adjudication afresh after getting the proper demarcation by a revenue official.

Charanjit Singh-appellant/plaintiff filed the suit against Harbans Lal and others for joint possession of the suit property, detailed in the head-note of the plaint on the premise that Mehar Singh, father of the appellant and defendants No. 4 to 7 (not a party in the present appeal) was the owner of the suit property which was purchased in an open auction and the sale was confirmed by the Court and sale certificate was issued in favour of Mehar Singh. At the time of preparation of the site plan for the purpose of getting the suit property attached and its consequential sale for realizing of the decretal amount, Labu Mal, the decree holder, inadvertently intermixed the boundaries of the property in dispute. He got mentioned railway road on the northern side instead of western side; Sadhu Singh on the western side instead of northern side; Basant Singh on the western side instead of southern side and another Sadhu Singh on the southern side instead of Kehar Singh and Bhagat Singh. The property in dispute is the same which was attached and sold in public auction, therefore, Mehar Singh became owner in possession of the suit property. Mehar Singh rented out northern portion consisting of two rooms, a bathroom and kitchen to Harbans Lal (*pro forma* respondent) in the year 1972-73 and the remaining property was rented out to different tenants. Respondent No. 3 was regularly paying rent to Mehar Singh till his death. It is further averred that in lieu of services rendered by the appellant and due to love and affection, Mehar Singh executed a legal and valid Will dated 14.01.1990 in favour of the appellant regarding his entire estate and a probate was obtained by the

appellant from a competent court of United Kingdom, on the basis whereof, he has become absolute owner of the suit property. The other tenants, occupying other portion of the disputed property vacated the same in his absence. The respondents (defendants No. 1 to 3) took advantage of absence of the appellant and took forcible possession of the property, vacated by other tenants and respondent No. 3 started denying status of the appellant and himself put a tenant under the appellant in the suit property. Respondents No. 1 and 2 started claiming that they have purchased the suit property. The appellant denied execution of any such sale deed as propounded by respondents No. 1 and 2 with the averments that the same is a sham and fictitious transaction and respondents No. 1 to 3 are in illegal and unauthorized possession of the suit property for the past about two years.

Respondent No. 3 (defendant No. 1) filed his written statement challenging maintainability of the suit; suit being not properly valued, bad for mis-joinder of parties and challenged jurisdiction of the Court to try the suit. All material averments of the plaint in regard to ownership of Mehar Singh or creation of tenancies in respect of the suit property have been denied with a prayer for dismissal of the suit with costs.

Respondents No. 1 and 2 filed written statement contesting claim of the appellant and controverted the allegations in regard to his entitlement to seek possession of the property in question.

The learned trial Court framed issues, permitted the parties to adduce evidence in support of their respective claims and after

bestowing its consideration to the materials on record and rival submissions made by counsel for the parties, partly decreed suit of the appellant and he was held entitled to recover possession of two shops in illegal occupation of Gulshan Kumar and Rakesh Kumar, described in the site plan, Ex. P49, in red colour situated on the railway road Banga as well as portion newly constructed in open courtyard behind two shops.

Feeling aggrieved against the judgment and decree passed by the learned trial Court, Gulshan Kumar and Rakesh Kumar preferred an appeal which has been disposed of by the Additional District Judge, SBS Nagar vide impugned order dated 31.04.2014.

During pendency of appeal, Gulshan Rai filed an application under Order 41 rule 27 read with Section 151 of the Code of Civil Procedure (in short, 'CPC') for appointment of local commission to conduct demarcation at the spot and submit a report if the demised premise falls in khasra No. 1135 and 1135/1. It is averred that the property in dispute bears khasra No. 1135 and the same is not ownership of Mehar Singh. The factual position as to whether the demised premises bears any khasra number or not can be ascertained by appointing a revenue official as local commission for demarcating the suit property.

The appellant filed reply to the application and opposed the prayer for appointment of local commission as it would not serve any purpose.

The appellate Court decided the application for appointment of local commission in favour of respondent Gulshan Kumar with the

observations that the real dispute between the parties is regarding situation, description and identification of the suit property. It is the case of the appellant himself that at the time of preparation of the site plan for getting the suit property attached and its consequential sale for realisation of the decretal amount by Labhu Mal, he intermixed boundaries of the property in dispute. It was further noticed that respondents No. 1 and 2 (appellants therein) have alleged that sale certificate in favour of Mehar Singh does not pertain to the property in question. It was held that for just and proper decision of the controversy, the appointment of local commission is necessary.

On the basis of allowing the application of respondent No. 1 for demarcation of the property in question, the appellate Court accepted the appeal, set aside the impugned judgment and decree and remitted the case to the learned trial Court with a direction to appoint a revenue official to conduct demarcation and make a report if the suit property falls in khasra no. 1135 and 1135/1. It was further directed that on receipt of demarcation report, if there are any objections, the trial Court may decide the same, in accordance with law and then decide the case afresh within six months from the first date of hearing.

Feeling dissatisfied with the judgment passed by the first appellate Court, the present appeal has been preferred by appellant/plaintiff Charanjit Singh.

Counsel for the appellant, Mr. H K Aurora, would urge that the appellate Court did not advert to the materials on record and the findings recorded by the trial Court on the basis thereof, therefore, the judgment passed by the Court in appeal, setting aside the judgment and

decree passed by the trial Court cannot be allowed to sustain. It is further argued that there was no need to appoint a local commission nor any demarcation of the suit property can be conducted as the suit property now falls within the municipal area of Nawanshahr. Counsel would submit that even if the appellate Court wanted any report on the basis of demarcation of the property in question, it was enjoined upon the appellate Court to get such a report and thereafter decide the appeal on the basis of materials on record as well as the report, if any, submitted by the local commission. He vehemently argued that remand of the case in the present circumstance does not fall within the purview of Order 41 Rule 23 and 23-A CPC, therefore, the judgment passed by the learned appellate Court is liable to set aside.

Counsel for the contesting respondents has supported the judgment passed by the appellate Court with the submissions that as there is a serious dispute between the parties in regard to boundaries and identification of the property in question, when otherwise as per the case of the appellant himself that the boundaries were intermixed in the site plan submitted for the purpose of attachment and sale of the property in execution of a decree passed in favour of Labhu Mal and the property was purchased by Mehar Singh, the predecessor in interest of the appellant in Court auction, demarcation of the property in question by a revenue official is required for proper and just decision of the case, therefore, no fault can be found in the impugned judgment.

I have heard counsel for the parties, perused the records and find that the contentions raised by the appellant are meritorious.

The Court in appeal did not consider and appreciate the

merits of the case in view of the findings recorded by the learned trial Court. Even if the appellate Court either on the basis of application filed by one of the respondents or otherwise, was of the opinion that demarcation of the suit property is required to clear any ambiguity in regard to boundaries/identification of the suit property, the Court in appeal should have appointed a local commission, sought report on the basis of demarcation and thereafter, decide the appeal in the light of evidence on record as well as report of the local commission, if any. The mere fact that the appellate Court thought it fit to appoint a local commission for the purpose of demarcation of suit property, could not be a valid reason for it to set aside the judgment and decree in its entirety and remand the matter to the trial Court for adjudication afresh. It appears that the appellate Court escaped its obligation to decide the appeal on merits and preferred to shift the burden on the trial Court for deciding the case afresh without examining the findings that were recorded by the trial Court on a detailed consideration of the entire matter in view of the disputed questions of fact as well as the various judgments referred to by respective counsel for the parties. This Court does not expect from the appellate Courts, manned by senior judicial officers to prolong the litigation by adopting a callous and casual approach and remand the case to the trial Court without correctly appreciating the provisions of Order 41 rule 23 CPC. In this view of the matter, I have no hesitation to hold that the judgment passed by the appellate Court, setting aside the judgment and decree passed by the trial Court and remitting the matter for adjudication afresh cannot be allowed to sustain.

To be fair to the appellant, counsel for the appellant has raised an issue to assail the order in regard to appointment of local commission for the purpose of demarcation. There is no denial that there is a serious dispute between the parties in regard to the boundaries and identification of the property in question. That being so, no fault can be found in the order passed by the appellate court in seeking demarcation of the property by a revenue official in order to examine if the property in dispute is a part of khasra no. 1135 and 1135/1. As has been noticed hereinbefore, the said demarcation report, if any, can be considered by the appellate Court itself for decision of the appeal, in accordance with law.

In view of what has been discussed hereinabove, the appeal is partly allowed, the judgment dated 31.03.2014 passed by the appellate Court setting aside the judgment and decree dated 11.01.2010 passed by the learned trial Court and remitting the matter to the trial Court for decision afresh, is set aside. The appellate Court is directed to decide the appeal on merits by taking into consideration the evidence adduced by the parties, the findings recorded by the trial Court as well as the report of the local commission, if any, submitted on the basis of demarcation at the spot.

No order as to costs.

(Rekha Mittal)
Judge

11.01.2016
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