

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

RSA No.6873 of 2016
Date of decision :03.08.2017

Balwant Singh

...Appellant

Versus

Sarabjit Singh

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. N.S. Dandiwal, Advocate
for the appellant.

ANIL KSHETARPAL, J. (Oral)

Defendant is in appeal against judgment passed by learned
District Judge, Moga.

Plaintiff had filed a suit for possession of land measuring 2
kanals 17 marlas out of Khasra Nos.242//10/3 in village Smadh Bhai, Tehsil
Baghapurana, District Moga.

It is the case of the plaintiff that the total area of the land bearing
Khasra Nos.242//10/3 is 4 kanals 17 marlas. Plaintiff further pleaded that he
has constructed a house in an area of 2 kanals 17 marlas on northern side.
Plaintiff had sold remaining vacant land i.e. 2 kanals to the defendant on
northern side vide registered sale deed dated 02.08.2000 and delivered
possession thereof to the defendant.

Plaintiff further asserted that defendant had filed a civil suit
No.547 of 2005 against Dalip Singh, father of the plaintiff as also against the
plaintiff etc., which was dismissed and the first appeal filed by the defendant
was also dismissed on 18.01.2011. Defendant took illegal possession of the
house which is constructed on the northern side. Plaintiff has prayed for
decree of possession.

Defendant contested the suit. It was pleaded that entire constructed house does not falls in Khasra Nos.242//10/3 and only a small constructed portion of the house falls in Khasra No.242//10/3.

Learned trial court dismissed the suit on the ground that specific dimensions and specific boundaries of the property sold to the defendant has not been given. Learned court further held that since no demarcation of property is carried out, therefore, it is not a position to pass a decree of the possession.

Plaintiff has filed appeal and the learned First Appellate Court after re-appreciating the evidence has decreed the suit filed by the plaintiff while accepting the appeal.

Before the First Appellate Court, plaintiff had filed an application under Order 41 Rule 27 for permission to lead evidence to produce sale deed dated 02.08.2000 executed by plaintiff in favour of defendant. Application was allowed. After taking the aforesaid sale deed into consideration First Appellate Court accepted the appeal.

I have heard learned counsel for the appellant. Learned counsel for the appellant has claimed that parties had become co-owners, therefore, plaintiff could only file a suit for partition. It has further been contended by the counsel for the appellant/defendant that Court has not followed the procedure as prescribed under Order 41 Rule 28 CPC.

I have considered the submissions of learned counsel for the appellant and with his able assistance has gone through the paper book. However, I am unable to agree with the learned counsel for the appellant.

It is not in dispute that plaintiff had sold 2 kanals of the land on southern portion out of Khasra No.242//10/3 vide sale deed dated 02.08.2000.

On the northern side plaintiff had constructed a house. Therefore, learned

counsel for the appellant is not correct in submitting that the parties had become co-owner in the entire land. If an individual, exclusive owner, sells to another, some portion of land identified with boundaries, the purchaser does not become the co-owner with the vendor. In the sale deed, it has been specifically stated that defendant has been sold southern portion.

Further it is not in dispute that defendant-appellant had filed suit No.547 of 2005 against plaintiff and his father. The suit was with respect to northern portion of the property in which house has been constructed. The suit was dismissed. Appeal was also dismissed vide judgment dated 18.01.2011. Therefore, once the defendant has lost in the previous litigation with respect to same property, now the submission of learned counsel for the appellant cannot be accepted.

Learned counsel for the appellant has further submitted that First Appellate Court has committed an error in not following the procedure prescribed under Order 41 Rule 28. Order 41 Rule 28 is extracted as under:

“28. *Mode of taking additional evidence* -

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.”

Order 41 Rule 28 provides that whenever additional evidence is allowed to be produced, the Court below may either take such evidence or direct the Court from whose decree, the appeal is preferred or any other subordinate Courts, to take such evidence and to send it to the Appellate

sale deed, therefore, the First Appellate Court allowed the party to lead additional evidence. In fact the sale deed is the one, executed by the plaintiff in favour of defendant. Genuineness of this document is not being disputed by the defendant. In these circumstances, in my opinion the First Appellate Court has not committed any error in admitting the additional evidence.

Finding no merit in the present appeal, the same is dismissed.

03-08-2017
sheetal

(ANIL KSHETARPAL)
JUDGE

Whether Speaking/reasoned : Yes
Whether Reportable : No