

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

RSA No.1818 of 2017 (O&M)
Date of Decision: May 17, 2017

Kirpal Singh Hans

..Appellant(s)

Versus

Inder Prastha Cooperative House Building Society Ltd.

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Deepak Girotra, Advocate
for the appellant.

Mr. Sandeep Gahlawat, Advocate
for the caveator/respondent.

ANITA CHAUDHRY, J.

CM NO.4416-C-2017
CM NO.6472-C-2017

For the reasons set out in the applications, same are
allowed as prayed for and accompanying documents (Annexure A-1
to A-3) are allowed to be taken on record.

RSA No.1818 of 2017

This is the defendant's second appeal aggrieved by the
judgments passed by both the Courts below.

It would be necessary to first give the facts. Inder
Prastha Cooperative House Building Society filed a suit against the
defendant seeking directions to him to remove the encroachment on
the portion marked by letters ABCD shown in the site plan by red
colour. It was pleaded that the defendant was a member of their

Society and he was allotted plot no.7 in block no. M measuring 417 sq. yards and he had illegally encroached over the road and had constructed his garage and a lawn. It was pleaded that a case under Section 102/103 of the Cooperative Societies Act had been filed and it was transferred to the Assistant Registrar Cooperative Society, Jhajjar which held that the case was not covered under those Sections and they filed an appeal which was decided in 2008 and they were asked to approach the Civil Court for removal of the encroachment.

The defendant took the plea of limitation, jurisdiction and that notice under Section 124 of the Act had not been given. It was specifically pleaded that he was given possession of 517 sq. yards though the allotment was for 417 sq. yards. It was pleaded that he had paid Rs.75,000/- to the then President Shri. S.P. Sharma and with the consent of the owner of property no. M-6 he took possession. It was pleaded that no receipt was issued. The defendant further claimed that he had constructed his property in 1992 and he was in possession of an area measuring 517 sq. yards. It was averred that there was no Rasta between plot no. M-6 and M-7. The plea of adverse possession was also raised.

The plaintiff produced the copy of the resolution, site plan, the possession certificate, copy of the agreement and some more documents and the Civil Court found that the allotment in favour of the defendant was only with respect to an area measuring 417 sq. yards. It also noted that the dimensions of the plot and the boundaries

had been shown in the possession certificate Ex.P-3, which tallied with the site plan filed by the plaintiff and it was a case of encroachment. The issue of limitation and notice was decided in favour of the plaintiff.

Aggrieved by the judgment, the defendant filed an appeal raising the same pleas. He also filed an application for additional evidence seeking permission to examine two witnesses i.e. the Tehsildar, Rohtak and an official from the Municipal Corporation, Rohtak to show that the property was situated in Panchwati Cooperative House Building Society and the plaintiff Society had no concern and were not the owners and the property was part of Killa No.167/7/1, 7/2. After seeking a reply of the respondent, the Appellate Court dismissed the application vide order dated 04.01.2017 holding that the defendant wanted to wriggle out of the admission made in the written statement and wanted to take a new plea and he could not allowed to lead evidence beyond the plea and the evidence was not necessary to decide the controversy on merits. The findings recorded by the lower Court were upheld. It was observed that the best evidence could have been the document to show that he had paid the additional amount and the statement of the owner of plot no. M-6 but that evidence was missing and the appellant had failed to prove that he had purchased additional land and the disputed area was a street between plot nos. M-6 and M-7 and the appellant had encroached over the property.

I have heard the counsel for the appellant and the caveator. The record had been summoned.

The submission of the appellant is that the application filed for additional evidence was wrongly dismissed and the allotted plot existed over Khasra no.167/7/1 and 7/2, which was owned by Panchwati Cooperative Society and not by the plaintiff society and the plaintiff was not the owner and he had been cheated and a complaint was given to the police. It was urged that the appellant was in possession of the property since 1991 and he had raised construction some time in 1992 and the fact regarding defect in title came to the notice of the appellant only recently and therefore, he had moved an application for additional evidence. It was urged that the additional evidence was necessary and since the plaintiff was not the owner, therefore, he had no right to file a suit.

The submission on the other hand is that the parties have been litigating prior to 2008 and they had approached the Registrar of the Cooperative Society and no such objection was taken nor could have been. It was urged that the allotment was made with respect to 471 sq. yards and there is no other allotment in favour of the appellant and the dimensions and the boundaries are given in the possession later and the appellant was asserting his right by adverse possession meaning thereby accepting their ownership and he could not be permitted to lead additional evidence as it was contrary to the stand in the written statement and the purpose was only to delay the case and nothing more.

The issue regarding title of any particular khasra number was never raised by the defendant. The suit had been filed in 2009 when the matter was before the Appellate Court then an application for additional evidence was filed. The respondents in their reply had explained that though the ownership of the particular khasra number was shown to be of Panchwati Society but the land had been transferred to the respondent-society under the Haryana Cooperative Societies Rules and the appellant could not raise new plea or patch-up the weak point in appeal.

In *Union of India Vs. Ibrahim Uddin & Anr.* in Civil Appeal No.1374 of 2008, decided on 17.07.2012, the question whether additional evidence can be allowed at the time of hearing of the appeal on merits was considered and it was held that the true test is whether the Appellate Court is able to pronounce judgment on the material before it without taking into consideration the additional evidence. Para nos.27 & 28 of the judgment read as under:-

“27. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the

appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

28. *It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101)."*

The appellate Court had considered all the aspects and had rightly dismissed the application. The appellant wanted to make a totally different case with a view to delay the disposal. Order 41 Rule 27 CPC does not entitle the Appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment. It does not entitle the Appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words evidence cannot be let in to remove a lacuna. The application was rightly dismissed.

Both the Courts below had correctly examined the evidence. The allotment in favour of the appellant was with respect to 471 sq. yards. He admits that he is in possession of the area more

than his allotment. He has been unable to prove that any allotment had been made of excess area or that he had paid any extra amount. The encroachment is shown in the site plan. No evidence was led by the defendant to show that he had completed his construction in 1992. The respondent had raised the issue before the Assistant Registrar/Cooperative Society for almost a decade ago. They were advised to approach the Civil Court for removal of the encroachment.

I see no infirmity in the findings recorded by both the Courts below. The findings are affirmed and the appeal is dismissed in limine.

(ANITA CHAUDHRY)
JUDGE

May 17, 2017

sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No