

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

RSA No.6287 of 2014 (O&M)
Date of decision : 01.08.2017

Devender and others

...Appellants

Versus

Parkash Devi and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Navneet Singh, Advocate for the appellants.

Mr. K.C. Rajput, Advocate for the respondents.

ANIL KSHETARPAL, J. (ORAL)

CM-15046-C-2014

This is an application for bringing on record the legal representatives of deceased and permission to file appeal.

Application is allowed, subject to just all exceptions.

CM-15047-C-2014

For the reasons mentioned in the application, the delay of 150 days in filing the present appeal is condoned.

Application stands allowed.

Main Case:

The defendants are appellants before this Court in the present Regular Second Appeal.

The plaintiffs filed a suit for declaration and permanent injunction claiming that the plaintiffs are owner in possession of the half share of the land described in the plaint. It was further asserted that the revenue entries were continuing in the name of Hukam Chand son of Jug Lal in the column of cultivation who died on 04.11.1984. Therefore, obviously the entries of possession in the revenue record are erroneous. It was further pleaded that the defendants, who are legal heirs of Hukam Chand, wants to take forcible possession.

The defendants appeared and took a stand that the defendants are in possession of the property after the death of their father namely Hukam Chand. The Revenue Officials did not correct the entries, however, the possession of the plaintiff was strongly denied.

The learned trial Court after appreciating the evidence available on the file recorded a finding of fact that plaintiffs have not been able to prove their possession. The oral evidence of the witnesses examined is contradictory in nature. The finding recorded by the learned Trial Court is extracted as under:-

“7. Both these issues are taken together being interconnected and just to avoid the repetition of the words. The onus to prove these issues was on the plaintiff and in order to prove these issues, the plaintiff has examined Partap as PW1, who has tendered his affidavit Ex.PW1/A and reiterated the facts mentioned in the plaint. Similarly PW2 Bijender tendered his affidavit Ex.PW2/A and reiterated the facts mentioned in the plaint. PW1 Partap in his cross-examination has deposed that he has not visited the fields since 1993 and has further denied the tendering of affidavit by him in the court

today or earlier. DW1 Dharambir tendered his affidavit Ex.DW1/A and further reiterated the facts mentioned in the written statement and deposed that he along with his brothers are owner in possession over the suit property and earlier his father used to cultivate the suit land. In order to prove the case, the plaintiff has not tendered any documentary evidence showing that he is owner in possession over the suit property to the extent of ½ share and revenue entries in the name of dead persons are liable to be corrected. The plaintiff tendered documents Ex.P1 to Ex.P3 in rebuttal evidence, but such documents can not be taken into consideration because once a party on whom burden of proof lies complete his evidence, he can not be allowed to lead evidence in rebuttal, further more, keeping in view the fact that these documents were well in the knowledge of the plaintiff at the time of concluding his evidence and no such permission in regard to leading additional evidence was sought from the court. On the other hand, perusal of documents Ex.D1 khasra girdawari for the year 1974-75 shows that fore-fathers of defendants namely Hukam Chand and Kanhiya are shown in possession over the suit property. Further perusal of khasra girdawari Ex.D2 for the year 1979-1980 shows that the fore-fathers of defendants are in possession of suit property and suit property is shown as Chahi. A perusal of jamabandi for the year 1984-1985 Ex.D3, 1989-1990 Ex.D4, 1994-95 Ex.D5, 1999-2000 Ex.D6, 2004-2005 Ex.D7 and Khasra Girdawari for the year 2002-2005 Ex.D8 and Khasra Girdawari for the year 2005-2010 Ex.D9 shows that the fore-fathers of defendants were in possession over the suit property and suit property is shown as Chahi. A perusal of Section 44 of Punjab Land Revenue Act 1887 shows that presumption of truth is attached to the entries contained in jamabandi and where oral evidence led by parties are evenly balanced than reliance has to be placed on entries in revenue

record and a person who pleads to the contrary of revenue record and failed to rebut the presumption, than Court is left with no other option except to place reliance on the revenue record. An adverse entry or wrong entry in revenue record may be due to mischief committed by some petty revenue official in making a fictitious entry and same should be got rectified and failure to obtain rectification on the part of plaintiff, then he must suffer by presumption of truth attaching to entry in jamabandi. Further perusal of documentary evidence available on file Ex.D1 to Ex.D9 shows that possession of fore-father of plaintiff and there is no evidence on the file to show how and under what circumstances possession was surrendered by defendants to the plaintiffs and there is presumption of continuity as regard to possession of defendants over the suit property. A further perusal of Section 110 Indian Evidence Act shows that a person who is in possession of property is presumed its owner unless a person starts with presumption of title in his favour and it is for the other side to show that former's possession is not evidence of title and he has a superior title in himself and correction of Khasra Girdawari can be corrected as per provisions of para 9.9 of Land Record Manual and only an application be filed for correction of entries before the competent officer. Taking into consideration over all facts and circumstance of the case as well as admissible and relevant evidence available on the file, I am of considered view that the plaintiff has failed to prove both issues in his favour and accordingly both these issues are decided against the plaintiff.”

The plaintiffs filed an appeal before the First Appellate Court.

The learned First Appellate Court has reversed the judgment passed by the learned trial Court. The First Appellate Court in para Nos.13 and 14 records as under:-

“13. The appellants examined two witnesses namely Partap and Bijender (appellant No.3) and submitted some documents. On the contrary respondents examined RW-1 Dharambir (respondent No.4) and tendered some documents. The witnesses of the appellants have submitted in chief that the appellants are in possession over the suit property. In cross-examination, however, the stand with regard to sowing of crop in the land is not in consonance with each other. PW1 has stated that PW2 has sown rice i.e. Jiri whereas PW2 has stated that he has to sow the crops, which certainly constitutes contradiction in their respective stands. The counsel for the respondents has submitted that this state of affairs constitutes an admission in favour of the respondents with regard to possession over the suit property, besides, the appellants have never dispossessed the respondents who inherited the tenancy rights from their forefathers. As regards the oral evidence of the respondents the only witness i.e. DW1 Dharambir has been examined, who in chief examination has reiterated the averments mentioned in the written statement to the effect that after the death of their predecessor-in-interest they have been coming in possession as owners. They could not get corrected the revenue entries which are still continuing in favour of their predecessor-in-interest namely Hukam Chand and Tarkha. He, however, did not explain as to how and in what manner they are in possession over the suit property, so, in this way, oral evidence adduced by the parties is not sufficient to conclude that whether the appellants or the respondents are in possession over the suit property in other words the case needs to be disposed of on the basis of the documentary evidence.

14. As per the revenue record viz. Jamabandi Ex.D1 to

Ex.D7, the appellants are owners whereas Hukam Chand s/o Jug Lal s/o Tirkha and Tirkha s/o Sukh Ram are in the column of possession as Gair Marusi, the Khasra Girdawaries Ex.D8 and Ex.D9 too mention Hukam Chand and Tirkha in the column of possession, Ex.P1 and Ex.P2. Death certificates have proved that Tarkha had died on 14.05.1970 and Hukam Chand had died on 04.11.1984.”

After recording para Nos.13 and 14, the Court discusses precedents referred to by the counsel for the parties in para Nos.15, 16 and 17 of the judgment and thereafter in para No.18, the Court has concluded as under:-

“18. So, as per the aforementioned discussion, the appellants have proved that they are owners of the land in dispute though by virtue of oral evidence both the witnesses of the appellants have taken contradictory stand with regard to the possession of the appellants over the property in dispute but the respondents have not adduced sufficient evidence with regard to their possession. It is specifically stated by the appellant No.3 while appearing as PW2 that some times, the respondents got succeeded in trespassing the suit property and cutting the crops cultivated by the appellants but it has been specifically stated by him that such action of the respondents is in the wake of the entries in the column of possession in the names of dead persons, in these circumstances, it is concluded that the appellants have succeeded to prove that they are owners of the property in dispute and the respondents cannot interfere in the property in the wake of entries in the names of dead persons.”

On reading of the aforesaid conclusion drawn by the Court in para No.13, 14 and 18, it is clear that the First Appellate Court has not decided the first appeal in accordance with the provision of Order 41 Rule

31 of the Code of Civil Procedure. Hon'ble Supreme Court in the judgment reported as *2017(1) Civil Court Cases, 657 (SC)* has held that First Appellate Court being last Court of fact must culled out the point for determination and take a decision thereof by giving the reasons for the decision and the relief to which the parties are entitled to. Para Nos.11 to 15 of the aforesaid judgment reads as under:-

“11. As per Order XLI Rule 31 CPC, the judgment of the first appellate court must explicitly set out the points for determination, record its reasons thereon and to give its reasonings based on evidence. Order XLI Rule 31 CPC reads as under:

“Order XLI Rule 31: Contents, date and signature of judgment. – *The judgment of the Appellate Court shall be in writing and shall state –*

a. the points for determination;

b. the decision thereon;

c. the reasons for the decision; and

d. where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is propounded be signed and dated by the Judge or by the Judges concurring therein.”

It is well settled that the first appellate court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties.

12. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings

*supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in **Vinod Kumar v. Gangadhar** (2015) 1 SCC 391, it was held as under:-*

*“12. In **Santosh Hazari v. Purushottam Tiwari** (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)*

“15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

*The above view has been followed by a three-Judge Bench decision of this Court in **Madhukar v. Sangram** (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.*

*13. In **H.K.N. Swami v. Irshad Basith** (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3)*

“3. The first appeal has to be decided on facts as well as on

law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.”

14. *Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)*

15. *Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)*

“3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state: (a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. *The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and*

record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)”

I have heard learned counsel for the parties at length and with their able assistance gone through the record of the case.

A reading of the judgment passed by the First Appellate Court would prove that even after noticing that the witnesses of the appellant had taken a contradictory stand with regard to the possession of the plaintiff-appellant, the findings of possession has been reversed on the ground that the respondents have not produced any sufficient evidence to prove their possession.

In these circumstances, following substantial questions of law arise in the present case:-

1. Whether the plaintiffs have to stand on their own legs and prove their case?
2. Whether the entry in the revenue record continuing in the name of tenant who has died would lead to the presumption that the heirs of the tenant are not in possession of the land?

The plaintiffs were required to prove their case. Onus of proving issue No.1 was on the plaintiff. The findings returned by the First Appellate Court is very sketchy. The learned First Appellate Court has not chosen to advert the findings of the learned trial Court and arrive at a conclusion that the findings recorded by the trial Court was erroneous. The learned First Appellate Court was hearing the first appeal.

The learned First Appellate Court in para No.13 of the judgment criticized both the witnesses examined on behalf of the plaintiff and concluded that oral evidence of the plaintiff is contradictory. However, thereafter the learned First Appellate Court went into totally different direction.

Thereafter, the learned First Appellate Court while recording a finding in para No.18 after criticizing the evidence led on behalf of the plaintiff shifted the onus to prove the possession on the defendants and thus accepted the appeal. The entire approach of the learned First Appellate Court was clearly erroneous. The First Appellate Court did not adhere to the provision of Order 41 Rule 31 CPC.

In view of the discussion made above, the question No.1 is answered against the plaintiffs-respondents as the plaintiffs failed to prove their possession on the land by leading cogent evidence.

The First Appellate Court committed error in shifting the onus to prove the possession on the defendants. A bare look at the issues framed by the trial Court would show that the onus to prove that the plaintiffs are entitled to permanent injunction was on the plaintiffs. The issues as culled out by the trial Court are as under:-

“1) Whether the plaintiff is entitled for permanent injunction, as prayed for? OPP

*1(A) Whether entries in the revenue record on the name of dead person is liable to be corrected or not? OPP
(Additional issues framed on 05.09.2012)*

2) Whether the suit of the plaintiffs is not maintainable in the present form? OPD

3) Whether the plaintiff has no locus standi to file the present suit? OPD

4) Whether the plaintiff has not come to the court with clean hands & has suppressed the material facts from the Court? OPD

5) Whether the suit is barred by time? OPD

6) Whether the present suit is barred by principle of res-judicata? OPD

7) Relief.”

A look at the issues would also further prove that no issue with regard to ownership of the plaintiffs was framed. The defendants had not claimed the ownership over the property. The defendants had only claimed that they are in possession of the suit property after death of Hukam Chand, their predecessors-in-interest. The plaintiffs themselves had pleaded that earlier the land was in possession of Hukam Chand. However, after death of Hukam Chand, revenue entries are continuing in the name of Hukam Chand. There is no evidence available on the file to prove that Hukam Chand or his legal heirs were ever dispossessed. Rather, the evidence as discussed by the Courts below clearly shows that it is the defendants who continue to be in possession. The learned trial Court has discussed the documentary evidence placed on the file in the form of jamabandi for the years 1984-85 Ex.D3, jamabandi for the years 1989-90 Ex.D4, jamabandi for the years 1994-95

Ex.D5, jamabandi for the years 1999-2000 Ex.D6, jamabandi for the years 2004-05 Ex.D7 and khasra girdawri for the years 2002-05 as Ex.D8. Khasra Girdawri for the year 2005-10 as Ex.D9 proved that the property continue to be in possession of predecessor-in-interest of the defendants. The suit property was shown to be *Chahi* and not *Roshli* as claimed by the plaintiffs. As per Section 44 of the Punjab Land Revenue Act, 1887, the entries in the revenue record have a presumption of truth.

In view of the discussion made above, question No.2 is answered against the respondents and it is held that merely because tenant has died and entry continues in the name of tenant who has died, the Courts cannot draw inference that heirs of the tenant who has died are not continuing in possession.

As noticed, the trial Court did not frame any issue with regard to the ownership of the plaintiff and, therefore, I have not adverted to the aforesaid fact.

The judgment of the learned First Appellate Court is set aside and that of the trial Court is restored.

However before concluding a word of caution, the plaintiffs would be at liberty to take appropriate proceedings before the competent Court for possession of the land after proving their ownership and entitlement.

Accordingly, the present Regular Second Appeal is allowed.

01.08.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No