

SAO No.13 of 2017 (O&M)

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

Sr. No.113

**SAO No.13 of 2017 (O&M)
DECIDED ON: January 27, 2017**

GENERAL MANAGER, NORTHERN RAILWAYS & ORS.

..APPELLANTS

VERSUS

KASHMIR KAUR

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE JASPAL SINGH

Present: Mr. Puneet Jindal, Senior Advocate with
Ms. Shreya Vasistha, Advocate,
for the appellants.

JASPAL SINGH, J.

CM No.1591-CII of 2017

In view of the averments made in the application, the same is
allowed and delay of 06 days in filing the present appeal is condoned.

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By virtue of the present second appeal against order, appellants
have challenged the Judgment/Order dated July 29, 2016 passed by learned
Additional District Judge, Amritsar, whereby the judgment and decree dated
March 11, 2015 passed by learned Additional Civil Judge (Sr. Divn.) Baba
Bakala Sahib, District Amritsar has been set aside and the case has been

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remanded back to the trial court with further direction to appoint Tehsildar, Baba Bakala or any other competent official as Local Commissioner and to decide the matter afresh on merits.

2. The contention of the learned counsel for the appellants is that on February 06, 2010 respondent-plaintiff filed a suit for permanent injunction restraining the appellants-defendants from interfering into her peaceful possession and making any kind of encroachment upon the land measuring 06 Kanals 14 Marlas fully detailed and described in the head note of the plaint.

3. During the pendency of said suit, the respondent-plaintiff herself filed an application under Order XXVI Rule 9 CPC for appointment of Local Commissioner, which was allowed vide order dated July 08, 2014 with a specific direction to the Local Commissioner to visit the spot. Though, he submitted his report but it was set aside being not in accordance with the specific directions given by the court i.e. to demarcate the suit property bearing Khasra No.446 and that whether appellants-defendants have encroached upon any portion of said khasra number by laying a metaled road.

4. Feeling aggrieved, another application under Section 151 CPC was filed by respondent-plaintiff seeking direction to Sh. Joga Singh, Kanungo to re-visit the spot and to prepare the site plan but that application was dismissed by learned trial court vide order March 07, 2015.

5. The said suit was disposed of vide judgment and decree dated March 11, 2015 passed by learned Additional Civil Judge (Sr. Divn.) Baba Bakala Sahib, District Amritsar. An appeal was filed by the plaintiff-

respondent before the learned Additional District Judge, Amritsar dated April 07, 2015, which was allowed and resultantly, judgment and decree passed by the trial court was set aside. The suit was remanded back to the trial court with direction to appoint Tehsildar, Baba Bakala Sahib or any other competent Revenue Official as Local Commissioner with a direction to demarcate the suit land in accordance with law and then to afford opportunity to each party to lead their evidence and then to decide the suit afresh on merits. Against the said order, appellants-defendants have approached this court by way of instant appeal.

6. While assailing the impugned judgment/order, it has been contended by learned counsel for the appellants that lower appellate court has failed to consider the relevant fact that the respondent-plaintiff had earlier moved an application under Order XXVI Rule 9 read with Section 151 CPC seeking appointment of the Local Commissioner before the trial court which was allowed vide order dated July 08, 2014. However, second application moved by the respondent-plaintiff before the trial court for the appointment of fresh Local Commissioner was dismissed. Since, the report furnished by the Local Commissioner was not in accordance with the specific directions given by the court it was ignored and disbelieved by the trial court. Neither the demarcation conducted by the Local Commissioner was in accordance with rules and instructions issued by the Financial Commissioner nor any site plan was prepared by him at the time of his visit. Thus, it was not rightly taken into consideration by the trial court. Otherwise also, the respondent-plaintiff has to stand at her own legs and cannot take the advantage of the weakness of the defence. Moreover, the

appointment of Local Commissioner is otherwise not legally justified which would be nothing but render assistance to a particular party to collect the evidence. Learned counsel for the appellants has further argued that the learned lower appellate court has travelled beyond its jurisdiction and scope while remanding the matter under Order XLI Rule 23 CPC. The relevant Order XLI Rule 23 CPC reads as under:-

“Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suit, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.”

7. As per the provisions referred to above, there was no reason to set aside the impugned judgment & decree and to remand the case for fresh decision. At the most, the lower appellate court could have called for the report of the Local Commissioner or the report from the trial court for the decision of appeal and then should have proceeded with the disposal of appeal. As such, the present case does not fall within the purview of any of the parameters laid down in the aforesaid provisions.

8. While concluding the arguments, which has been submitted by learned counsel for the appellants that taking the case of the appellants from

angles, the impugned order is not sustainable. As such, impugned order is liable to be set aside.

9. After bestowing due considerations to the aforesaid submissions made by learned counsel for the appellants/defendants and scrutinizing the judgment and order dated March 11, 2015, this court is of the considered view that the impugned order does not call for any interference by this court being legally and factually justified.

10. Undoubtedly, a Local Commissioner was appointed by the learned trial court on the basis of an application moved by the respondent/plaintiff vide order dated July 08, 2014 with a specific direction to demarcate the suit property i.e. Khasra No.446, situated within Revenue Estate of Village Budha Theh, Tehsil Baba Bakala and to report regarding the fact whether defendants have encroached upon any portion thereof by laying a metalled road thereon, with further direction to visit the spot after giving prior notice to the parties in person or through Chowkidar of the village, on any suitable date w.e.f. July 16, 2014 to July 18, 2014. The parties were further directed to arrange their respective videographers. Not only this, even the Local Commissioner was also directed to start demarcation from middle of old Railway Line which leads from Delhi to Amritsar and is situated towards G.T. Road side or in the alternative, to start demarcation from some pacca point. The Local Commissioner Joga Singh, Kanungo visited the spot, conducted the demarcation and submitted his report, regarding which, the objections were raised and a specific issue was framed. Ultimately, the court came to the conclusion that Sh. Joga Singh, Kanungo did not demarcate the disputed property in accordance with the

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rules/law as well as the instructions issued time to time by the Financial Commissioner (Punjab). Thus, no option was left with the lower appellate court except to appoint a fresh Local Commissioner. Otherwise also, in view of the setting aside of the report of the Local Commissioner in toto and the controversy involved between the parties, the matter could not have been adjudicated upon effectively and judiciously in the absence of the setting aside of the impugned judgment & decree. The controversy involved in this lis is whether the appellants/defendants have encroached upon the property belonging to the respondent/plaintiff and for the decision thereof only the report of Local Commissioner is the foundation. Thus, there was no other option or alternative with the lower appellate court except to set aside the impugned judgment & decree and to remand the case to the trial court for appointment of the Local Commissioner for the demarcation of the suit property and then to decide the matter afresh. Thus, this court is of the considered view that impugned judgment and decree dated July 29, 2016 does not suffer from any infirmity or legal flaw.

11. In the light of what has been discussed above, instant appeal stands dismissed.

12. No order as to costs.

January 27, 2017

Ankur

**(JASPAL SINGH)
JUDGE**

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No