

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

RSA No.1586 of 1993

Zorawar Singh

....Appellant

Versus

Ram Chand and Ors.

....Respondents

Date of Order: 06.3.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. D.S Sobti, Advocate for the appellant.

None for the respondents.

AMIT RAWAL, J (ORAL)

Plaintiff-appellant is in appeal against the judgment and decree dated 26.4.1993 vide which the appeal filed by the defendants-respondents against the judgment and decree dated 15.9.1992, rendered by Sub Judge, Ist Class, Phillaur, decreeing the suit of the plaintiff, has been accepted by the lower Appellate Court while reversing the findings of trial Court

Plaintiff-appellant instituted a suit for permanent injunction restraining the defendants from forcibly using any portion of the suit land comprised in Khewat No.287, Khatoni No.365, Khasra Nos.58//4 (3-3) situated in the revenue area of village Panj Ghera, Tehsil Phillaur, District Jalandhar as per jamabandi for the year 1987-88, on the premise that he was/is in lawful possession of the suit land as tenant and was regularly depositing the rent to the Govt. owner. The respondents-defendants, who were dealing with the business of carrying sand from the river bed and the suit land is at a distance of about 2 killas from the said river bed. On

15.7.1989, an agreement was entered between the parties whereby it was agreed that the defendants would not be permitted to use the land of the appellant-plaintiff. Since the defendants wanted to deviate from the agreement much less took advantage by misinterpreting the wording of the agreement, hence the aforesaid suit was filed.

The suit was contested by defendant Nos.1 to 3 by filing joint written statement controverting the assertions made in the plaint. It was stated that there was concealment of material facts as there was/is three karams wide path, which passes through the disputed land. One Sukha Singh, brother of the applicant filed a suit before the Sub Judge, Ist Class, Phillaur, which was dismissed as withdrawn on 26.11.1991, therefore the suit was barred by the doctrine akin to res judicata. It was also concealed that the path entered from G.T Road into land in possession of P.W.D, Punjab and further passed through the land in possession of Pritam Kaur wife of Ram Chand, present defendant. The land comprised of khasra No.49//17/2 24 and further entered into the disputed land and after passing through the disputed land, it enters in khasra No.1//4,7,14,16,25 and then entered into the land in possession of Sadhu Singh son of Shankar Singh.

On the basis of pleadings of the parties, the trial Court framed the following issues:

- “1. Whether plaintiff is entitled to the injunction prayed for? OPP*
- 2. Whether suit is liable to be dismissed under Order 7 Rule 11 CPC? OPD*
- 3. Whether suit is liable to be dismissed under Order 23 Rule 1 CPC? OPD*
- 4. Relief.”*

In order to prove their case, plaintiff examined Bishan Singh as

PW2 and Kulwant Singh as PW3 besides appearing himself as PW1. He also brought on record certain documents including jamabandi for the year 1987-88 as Ex.P2 and subsequent khasra girdawaris as Ex.P3.

On the contrary, defendants relied upon application dated 6.11.1991 for correction of Khasra Girdwari as Ex.DW3/A and report of the Kanungo as Ex.DW3/B.

On the basis of evidence and other material placed on record, the trial Court decreed the suit of the plaintiff. Feeling dissatisfied, the defendants filed the appeal, which has been accepted by lower Appellate Court by holding that the agreement dated 15.7.1989 was not related to the suit land as it did not refer to the land which was owned by the Provincial Government much less there was sufficient evidence on the file that there was a passage proceeding from north to south in Khasra No.49//17/2 and 24/2, which adjoins khasra No.58//4 in dispute.

Learned counsel for the appellant submitted that the judgment and decree passed by lower Appellate Court is result of misreading and non-advertence to the documentary evidence on record. The appellant was a tenant of Provincial Government, which fact is verified from the copy of latest jamabandi for the year 2012-13. The fact of the matter is that the plaintiff had been a tenant and no person without the consent can enter the premises or use passage for the purpose of carrying on own activities. As per jamabandi for the year 1987-88 as Ex.P2, it was amply proved that the plaintiff had been in possession of the suit land and therefore his possession was liable to be protected and can be only disturbed by resorting to the provisions of law. In support, he has relied on a judgment of Hon'ble Supreme Court reported as **Rame Gowda Vs. M. Varadappa Naidu (D)**

by LRs & Anr 2004(1) SCC 769. He submitted that the report of the Kanungo cannot be relied upon since it was prepared at the back of the appellant-plaintiff and therefore the same could not be looked into. Any temporary arrangement or use of the area before the property was leased out cannot be allowed to be perpetuated as the plaintiff had been inducted as tenant w.e.f 1987-88.

The contesting respondents in this appeal are respondent Nos.1 to 3 whereas service on respondent Nos.4 & 5 were already dispensed with vide order dated 25.1.2018.

It is evident that the contesting respondents represented through Advocate, however on the date of admission, dispossession was stayed on 09.12.1993 by this Court. But, thereafter nobody appeared for them. Appeal pertains to the year 1993. Accordingly, I proceed to decide the appeal in the absence of the respondent counsel.

After hearing learned counsel for the appellant and appraising the paper book, I am of the view that there is merit in the submissions made by learned counsel for the appellant. Concededly, the appellant-plaintiff had brought on record the fact that he was in possession of Khasra Nos.58//4 (3-3). During the course of arguments, a copy of jamabandi for the year 2012-2013 was produced on record to show the appellant-plaintiff is in possession of the suit land as a tenant with the Provincial Government. The point to be considered by this Court is as to whether the judgment and decree passed by the lower Appellate Court vide which the findings recorded by trial Court has been reversed, suffers from illegality much less perversity.

The trial Court noticed the fact that the report of Kanungo was

not correct since no rule or regulations were followed much less three other pucca points required to be taken had been for the purpose of ascertaining the existence of the passage. Even otherwise, the report of the Kanungo could not have been in deviation with the x-sajra (Ex.P4) i.e cloth map. Once the parties had entered into an agreement, nobody could be allowed to continue to pass through the land for indefinite period as certain rights were granted to the plaintiff by virtue of tenancy. If at all the defendants had any grievance, they could file counter claim or could have, while taking contract of mining, taken permission from the concerned Department for using passage but cannot be permitted to forcibly enter into the occupation of the premises, be that as it may be owner or occupant much less tenant. The focus of the lower Appellate Court have been only on the report of the Kanungo, which was prepared in the absence of the appellant-plaintiff.

In my view, non-appearance of the contesting respondents perhaps may be one of the reasons that they may not be interested to pursue the matter since it shall entail unnecessary expenses.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and**

others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262 on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29]” “27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India.

This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned, the judgment and decree passed by the lower Appellate Court is set aside and the judgment and decree passed of the trial Court is restored. However, it is made clear that in case parties have already compromised the matter then nothing survives for execution. If otherwise, the natural consequences of the judgment and decree passed by the trial Court, confirmed by this Court, shall follow. The second appeal is allowed in the above terms.

March 06, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No