

RSA-1188-1992 (O&M)

1627

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

RSA-1188-1992 (O&M)

Date of decision : 11.12.2018

Amar Singh and another

... Appellants

Versus

Bakhtawar Singh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Ms. Kashika Kaur, Advocate
for the appellants.

None for the respondents.

AMIT RAWAL, J.

The short point involved in the present regular second appeal is whether the respondents-plaintiffs could be granted possession of 1 marla of land bearing Khasra No.669, allegedly in unauthorized occupation of the defendant.

The plaintiff instituted the suit claiming to be owner of plot measuring 14'6" x 16'x10" measuring 1 marals out of Khasra No.669(0-3), as per the jamabandi for the year 1982-83. It was alleged that the defendant had forcibly occupied the one marla of land. The demarcation proceedings were carried out by the revenue authorities, therefore, sought the possession.

The defendant opposed the suit by alleging that the suit property was purchased by the defendant Amar Singh from Dula Singh for a consideration of ₹4,000/- and the possession was delivered. Dula Singh purchased the same from Lachhman Singh for a sum of ₹2800/- and both

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Dula Singh and Lachhman Singh executed the affidavit, in this regard. The construction of the property, in dispute, was done in the presence of the plaintiff.

From the pleadings of the parties, the trial Court framed the following issues:-

1. *Whether the plaintiffs are estopped to file this suit by their own act and conduct? OPD*
2. *Whether the suit in the present form is not maintainable? OPD*
3. *Whether the suit is properly valued for the purposes for court fee and jurisdiction? OPD*
4. *Whether the plaintiffs are entitled to the relief of possession as prayed for ? OPP*
5. *Relief."*

The plaintiffs in support of their case examined four witnesses and brought on record various documents, whereas the defendant examined four witnesses and tendered in evidence many documents.

The site plan (Ex.P1) prepared by the draftsman was placed on record, even the testimony of Member Panchayat, where defendant No.1 was requested to hand over the possession, for, it is not decipher when the defendant had taken the forcible possession.

The trial Court dismissed the suit on the premise that the defendant was in possession of the suit property in view of the consideration and affidavit executed by Dula Singh and Lachhman Singh. However, the lower Appellate Court reversed the findings by rejecting the affidavit being transfer of plots, in the absence of the registration.

Ms. Kashika Kaur, learned counsel appearing on behalf of the appellant-defendant submitted that suit of the respondent-plaintiff was

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liable to be dismissed only on the short point as the plaintiffs miserably failed to prove encroachment, for, no demarcation report has been brought on record.

There is no representation on behalf of the respondent despite service.

The appeal is of the year 1992, therefore, I proceed to decide the appeal on merits.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts and of the view that the judgment and decree of the lower Appellate Court in laying focus on the contents of the affidavit being not admissible in evidence, would pale into insignificance as it was obligatory upon the plaintiffs claiming possession on the basis of the encroachment by way of demarcation. Demarcation report has not seen the light of day. It is not discernible that as to how and under what circumstances, the defendant was in encroachment or otherwise. The identity of the property, thus, remained a mystery. There would have been force, had the defendant had taken the plea of adverse possession.

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 V/s. 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 substantial questions of law. The Constitutional Bench of

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Hon'ble Supreme Court held that the decision in **"Kulwant Kaur and others V/s. 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*

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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 facts, the judgment and decree of the lower Appellate Court is not sustainable in the eyes of law and the same is hereby set aside and that of the trial Court is restored.

Resultantly, the present regular second appeal is allowed.

11.12.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**