

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

**RSA No.1849 of 1991 (O&M)
Date of Decision.20.07.2018**

Dhan Singh (deceased) through LRs

.....Appellants

Vs

Tej Pal Singh

.....Respondent

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. O.P. Sharma, Advocate
for the appellants.

Mr. Rajesh Dhankar, Advocate
for the respondent.

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AMIT RAWAL J. (ORAL)

The appellant-defendant is in regular second appeal against the judgment and decree dated 27.04.1991 whereby the suit of the respondent-plaintiff claiming possession of the suit property from the appellant-defendant dismissed by the trial Court, had been decreed by the lower Appellate Court.

Succinctly, the fact which emanates from pleadings of the parties are that respondent-plaintiff instituted the suit for possession of the plot measuring 113 sq. yards shown by letters ABCD in the site plan attached with the suit, on the premise, that the disputed plot was ancestral property and came to the share of the plaintiff's father after partition of the joint Hindu family property. The plot was allocated and registered house No.59 in the record of the Municipal Committee. The plaintiff in the month of September, 1987 dismantled his *kutcha* (temporary) room on the plot constructed

by his father to make it *pakka* (permanent) but in the absence of the plaintiff, defendant trespassed into the plot and forcibly took possession on 18.09.1987. The defendant did not have any right and title on the aforementioned suit property and therefore, possession of the same was sought by filing the suit on 20.10.1987.

The defendant contested the suit averring that the plaintiff did not have any title in the suit property as the site in question was within the boundary wall of the house and not a separate property of plaintiff. Parties belong to one family but they were separate for the last 40 years and Tejpal and his father Preetu, Bhartu and Deep Chand had their own shares in the house within the boundary wall of Dehri Panna. The site in question was not within the Dehri Panna and therefore, they could not seek possession by coining a story of alleged dispossession, despite showing proof of title/ownership.

Since the parties were at variance, the trial Court framed the following issues:-

“1. Whether the plaintiff is the owner of the suit land?

OPP

2. If issue No.1 is proved, whether the defendant has illegally entered into the possession over the suit land?

OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Whether the suit is not within time? OPD

5. Whether the suit has not been property valued for the

purpose of court fees and jurisdiction? OPD”

The respondent-plaintiff in support of the aforementioned pleadings appeared himself as PW1 and examined one Captain Risal Singh as PW2. On the other hand, defendant appeared himself as DW1 and produced one Moti Ram, Draftsman as DW2 and Meenu as DW3. The site plan Ex.P1 along with assessment register Ex.P2 was placed on record by the plaintiff whereas defendant placed on record site plan as Ex.D1.

The trial Court on the basis of preponderance of evidence found that plaintiff failed to discharge the onus in proving ownership as well as forcible dispossession and dismissed the suit. The appeal laid before the lower Appellate Court resulted into decreeing of the suit. While reversing the finding of the trial Court, reliance was laid upon the assessment register.

Mr. O.P. Sharma, learned counsel appearing on behalf of the appellant submitted that the judgment and decree of the lower Appellate Court suffers from illegality and perversity as the respondent-plaintiff failed to discharge onus in terms of provisions of Section 101 of the Indian Evidence Act. It was incumbent upon the respondent-plaintiff to produce on record proof of ownership and for proving the possession purportedly on the land belonging to him, disputed property ought to have been demarcated through a competent authority either before filing of the suit or during pendency of the suit and having failed to do so, the suit was correctly dismissed by the trial Court. The assessment register does not confer title as the identity of the property was in dispute. The plaintiff miserably failed

to lead any evidence with regard to identity of the property and therefore, the lower Appellate Court abdicated and misdirected in decreeing the suit.

Per contra, Mr. Rajesh Dhankar, learned counsel appearing on behalf of the respondent-plaintiff submitted that the lower Appellate Court being the last court of fact and law after examination of oral and documentary evidence not only found the respondent-plaintiff as owner of the property but also found that defendant was in illegal possession of the same. The assessment register in the year 1978-79 proved the respondent-plaintiff to be owner of the property bearing No.59 situated at Dehri Gate, behind octroi post. The property has been described as one *kutcha* (temporary) room, which fully supported the case of the plaintiff as his father Preetu had constructed the *kutcha* (temporary) room. Ex.PX, copy of the assessment register for the 1978-79 pertained to House No.60 owned by Dhan Singh consisting of two rooms and a verandah. There is nothing on file to disbelieve the correctness of the aforementioned entries as there was no litigation between the parties in the year 1978-79. The lower Appellate Court also believed the statement and cross-examination of Captain Risal Singh, PW2 and as per the site plan Ex.P1 and D1, which correctly depicted the position at the spot and in view of the testimony of the witnesses, it was found that there was no dispute to the identity of the property, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below and of the view that there

is force and merit in the submissions of Mr. Sharma on account of following reasons:-

- (i) The lower Appellate Court did not notice that defendant denied the ownership and title of the plaintiff and it was incumbent upon the plaintiff to prove title. Entry in the assessment register are only for the purpose of collecting tax levied by the Municipal Committee and does not confer title, therefore, the lower Appellate Court erred in heavily relying upon the assessment register while decreeing suit of the plaintiff.
- (ii) The plaintiff failed to place on record any material qua title or taken assistance of revenue expert or local commissioner to get the property demarcated.
- (iii) Site plans Ex.P1 & D1, in my view, would not lead to culmination of decretal of the suit, for, they had been prepared by the Draftsmen on the instructions of the plaintiff and defendant respectively. The lower Appellate Court in order to verify the actual position could have *suo motu* appointed local commissioner. In my view, respondent-plaintiff failed to discharge onus, much less, burden for seeking possession of the disputed property. The case would have been different, had the defendant taken the plea of

adverse possession as it tantamount to admitting the title of the adverse party i.e. plaintiff.

The suit was filed in the year 1987 but no steps were taken by the plaintiff to launch criminal proceedings by submitting any complaint. On the other hand, defendants had taken plea of jointness of the property. The best possible evidence i.e. the revenue record has been withheld from the notice of the Courts below and of this Court, therefore, in such circumstances, finding of the trial Court dismissing the suit should have been upheld.

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.

As an upshot of my finding, the judgment and decree passed by the lower Appellate Court suffers from illegality and perversity and is hereby set aside. Consequently, the judgment and decree of the trial Court is restored.

The second appeal is allowed.

(AMIT RAWAL)
JUDGE

July 20, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No