

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

**RSA No.458 of 1991 (O&M)
Date of decision:07.03.2018**

Ujjagar Singh and others

... Appellants

Vs.

Prem Singh (since deceased) through Lrs

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Raj Kumar Gupta, Advocate
for the appellants.

Mr. N.S.Diwana, Advocate
for the respondent.

AMIT RAWAL J.

The appellant-defendants are in Regular Second Appeal against the judgment and decree dated 18.02.1991 rendered by the Additional District Judge, Patiala, whereby, judgment and decree dated 19.01.1989 passed by the Sub Judge I Class Rajpura Camp Fatehgarh Sahib dismissing the suit of respondent-plaintiff, has been reversed, in essence, suit for permanent injunction has been allowed.

Before adverting to the arguments of learned counsel representing the parties to the lis, it would be apt to give brief facts of the case.

The respondent-plaintiff instituted a suit for permanent injunction restraining the defendant-appellants, their servants and agents

from interfering into peaceful possession over the suit property mentioned at letter 'X' at site plan and as well as from forcible dispossession by giving the description of the property as follows:-

“X” Abadi situated in village Narsingpura (Kharodan)

Tehsil Fatehgarh Sahib and bonded as below:-

East : House of the plaintiff.

West : Gate & Phirni.

North : Abadi of Karora Singh & Karnail Singh.

South : Passage and Abadi of Karnail Singh.”

on the premise that suit property was situated in front of house of the plaintiff on the western side, who was in peaceful, actual and continuous possession of the same since 1958 by using the same for sitting, sleeping and placing dung-cakes. The defendants being hot headed persons threatened to interfere in his peaceful possession, necessitating him to file the aforementioned suit.

The suit was contested by the defendants by raising the objections, wherein, it was stated that defendant no.1-Amar Singh son of Ram Singh, Sucha Singh son of Ralla Singh and Hazura Singh son of Ram Singh were in actual physical possession of the suit property as they had sown barely crop. It was denied that suit property was covered by boundary wall and installation of the pillars, much less plaintiff was never in possession of the suit property. Defendant no.1-Ujjagar Singh and Amar Singh had already filed a suit for permanent injunction against the respondent-plaintiff, who was defendant in the suit in which restraint order

was passed from interfering into peaceful possession as present suit was gross abuse of process of Court. The respondent-plaintiff filed replication to written statement and denied the fact that aforementioned persons had sown barely crop, whereas, it was stated that wall on the southern side of the suit property was still in existence, though some portion of the same was demolished and report to this effect was lodged with the police. It was averred that defendant-Amar Singh had no connection with the same.

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

“1. Whether the plaintiff is in possession of the property in suit and is entitled to the injunction prayed for? OPP

2. Relief.”

The respondent-plaintiff examined Suraj Bhan, retired Overseer as PW1, Mohinder Singh as PW2, Dalip Singh as PW3 and himself as PW4 and brought on record map Ex.P1 to show the possession.

On the other hand, defendants examined Sucha Singh as DW1, Mohinder Singh-defendant no.3 as DW2, Karnail Sikngh as DW3, Joginder Kumar draftsman as DW4 and Narain Dass DW5 and brought on record the map Ex.D1, Ex.D2 and photograph Ex.D3.

The trial Court on the basis of evidence dismissed the suit by holding that the plaintiff has failed to prove that he was in possession of the suit property, whereas, defendants had been able to prove that Ujjagar Singh, Amar Singh, Hazura Singh were in possession.

The aforementioned judgment and decree was assailed by the

plaintiff before the Lower Appellate Court, vide Civil Appeal No.412 T of 25.01.1989. On examination of the documents on record by relying upon the report of Local Commissioner dated 12.12.1990 appointed by the Lower Appellate Court, decreed the suit. It is in this background of the matter, the appellant-defendants are in Regular Second Appeal.

Mr. Raj Kumar Gupta, learned counsel appearing on behalf of the appellant-defendants submitted that Lower Appellate Court failed to appreciate the averments made in the plaint by the plaintiff which were found to be false as per the statement of the witnesses. The witnesses of the plaintiff failed to prove the possession, much less existence of boundary wall or any pillar. There was a categoric admission of witness that there was no boundary wall exists in the suit property.

On the contrary, the appellant-defendants had placed on record photograph to show that there was no boundary wall or pillar around the suit property but it proved that crops was sown on the land. The Lower Appellate Court erroneously appointed the Local Commissioner to decide the controversy. However, report was not in accordance with the rules and procedure, much less provisions of Order 26 CPC. The respondent-plaintiff was required to lead evidence by discharging the onus and cannot collect the evidence through the testimony of Local Commissioner, rather Local Commissioner, nowhere stated that respondent-plaintiff was in possession of the suit property but mentioned that land in dispute was ploughed by the appellant-defendants which falsified the claim of the respondent-plaintiff, thus, there is mis-direction and illegality. The Lower Appellate Court being

the last Court of fact and law had not adverted to the entire evidence but in a most erroneous and mechanical manner allowed the appeal which was not within the parameters of Section 96 of Code of Civil Procedure, much less, Order 41 Rule 31 CPC, and thus, urged this Court for setting aside the judgment and decree of the Lower Appellate Court.

Per contra, Mr. N.S.Diwana, learned counsel appearing on behalf of the respondent-plaintiff submitted that judgment and decree of the Lower Appellate Court is perfectly legal and justified. The respondent-plaintiff had moved an application bearing No.60-C of 2015 under the provisions under Order 41 Rule 27-A read with Section 151 of Code of Civil Procedure for placing on record certified copies of plaint dated 20.11.1986 and judgment dated 18.9.1989 passed by Sub-Judge Ist Class, Fatehgarh Sahib in case titled as “Amar Singh vs. Prem Singh and others” wherein, present plaintiff and Ujjagar Singh were arrayed as defendants no.1 and 2. Amar Singh plaintiff had admitted that there was a house of plaintiff on east side and vide judgment dated 18.09.1989 the aforementioned suit was withdrawn for the reasons that civil suit filed by Prem Singh was dismissed. The aforementioned documents are essential and necessary for adjudication of the present appeal, in case, the aforementioned documents are allowed be taken on record by way of additional evidence being the judicial record which are per se admissible. The appeal would entail into dismissal. Local Commissioner had proved the case to the hilt showing the possession of the respondent-plaintiff, therefore, rightly so the Lower Appellate Court while exercising the powers of First

Appellate Court decreed the suit. The sit plan prepared by Tehsildar was given credence to earlier site plan, Ex.P1 and Ex.P2 placed on record by the parties which proved that property in dispute was in front of the house of respondent-plaintiff and there was a pond (*chappar*) just adjoining and water outlet at two or three places. The Local Commissioner being Tehsildar gave a specific report that respondent-plaintiff was found in possession of the area for which injunction had been sought. The report of the Local Commissioner was per se admissible and passing reference of the Local Commissioner with regard to ploughing of the land was ignored and thus, urged this Court for dismissal of the appeal.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and of the view that there is force and merit in the submissions of Mr.Raj Kumar Gupta, Advocate.

The application bearing No.60-C of 2015 has been filed under Order 41 Rule 27-A read with Section 151 of Code of Civil Procedure for placing on record certified copies of plaint dated 20.11.1986 and judgment dated 18.9.1989 passed by Sub-Judge Ist Class, Fatehgarh Sahib in case titled as “Amar Singh vs. Prem Singh and others”. The additional evidence is sought to be placed on record by Mr. Diwana, Advocate being judicial record as it would help this Court in adjudication of lis. Mr. Gupta, Advocate has not opposed allowing of the application being order of the Court, therefore, in view of such statement, the application is hereby allowed.

The documents brought on record through additional evidence on behalf of the respondent-plaintiff does not prove the possession of Prem Singh regarding the suit property in a suit filed by Amar Singh against Prem Singh and Ujjagar Singh, who were arrayed as defendants No.1 and 2 in that suit, for, in para 1 of the plaint, it has been stated that plaintiff and defendants no.2 and 3 were in possession of the suit property for the last more than 30 years continuously and uninterruptedly. The plaintiff in the aforementioned suit was nonelse but Amar Singh. Para 1 of the plaint reads as under:-

“1. That the plaintiff and defendants no.2 and 3 are in possession of property mentioned in the heading of the plaint for the last more than 30 years continuously uninterruptedly and as owners, and at present the plaintiffs and defendants No.2 and 3 have sown barely crop in the property in dispute. Previously it was being used by them for tethering their cattle, for storing firewood, toori and parali etc. for sitting and sleeping and for all other domestic purposes.”

In the aforementioned suit, the plaintiffs were Amar Singh, Sucha Singh and defendants No.2 and 3 were Ujjagar Singh and Hazura Singh. The possession of Prem Singh, plaintiff in the present suit, who was defendant no.1 in earlier suit was not admitted, therefore, argument of Mr. Diwana that the aforementioned averment in the suit would prove the possession of the respondent-plaintiff (since deceased) being represented by legal representatives is wholly misplaced and hereby rejected.

The Local Commissioner in his report stated that property in dispute at the time of injunction was ploughed by the appellant-defendants as they had a tractor and *harrow*. It is not a case of either of the parties that it is only after the appointment of the Local Commissioner, the appellant-defendants forcibly occupied the land as no FIR in this regard had been lodged by the respondent-plaintiff. Neither the respondent-plaintiff reported to the Local Commissioner, thus, the findings of the Lower Appellate Court, that it was an attempt by the appellant-defendants after the appointment of the Local Commissioner to take the possession of the land, is conjectural and preposterous. This Court is bewildered to notice such observation recorded by the Lower Appellate Court in the absence of any specific evidence.

The trial Court examined the evidence thread bare and found that photograph Ex.D3 proved the possession of defendants and there was no boundary wall or pillars. On the other side, Lower Appellate Court, was enjoined upon an obligation to refer each and every document but focussed only on report of the Local Commissioner ignoring the other evidence brought on record. Such approach, in my view, is not correct in law, much less would be mis-direction and perversity.

PW2 could not deny that defendants had sown the barley crops in the land so is the statement of Dalip Singh PW3. Both the witnesses aforementioned of the plaintiff have not supported his case, therefore, the findings of the Lower Appellate Court are bereft of reference to the aforementioned evidence. For all the intents and purposes, the present

appeal cannot be said to be devoid of merit.

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 findings, I am of view that Lower Appellate has abdicated in reversing the well reasoned judgment and decree of the trial Court. The same is not sustainable in the eyes of law. The judgment and decree of the Lower Appellate Court is hereby set aside and that of trial Court is restored.

The appeal stands allowed.

(AMIT RAWAL)
JUDGE

March 07, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No