

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

RSA No.3628 of 1998 (O&M)

Hukam Chand, now substituted by Balbir Singh

....Appellant

Versus

Phool Chand and Ors.

....Respondents

Date of Order: 04.5.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Sr. Advocate with
Mr. Amandeep Singh, Advocate and
Mr. Arnav Sud, Advocate.

Mr. I.K Mehta, Sr. Advocate with
Mr. R.K. Dogra, Advocate for the appellant.

Mr. R.S. Sihota, Sr. Advocate with
Mr. B.R. Rana, Advocate for respondent No.1.

AMIT RAWAL, J (ORAL)

CM No.5078-C of 2006

Prayer in the present application under Order 22 Rule 10 read with Section 151 CPC is for substitution of the name of the applicant in place of Hukam Chand.

No reply to the application has been filed.

The law with regard to assignment of right is no longer *res integra*. Moreover, there is categoric averment in the application that the applicant had purchased the right from said Hukam Chand.

After hearing learned counsel for the parties and perusing the contents of the application, the same is allowed as prayed for subject to all just exceptions.

Registry to make necessary corrections in the memo of parties.

RSA No.3628 of 1998

Appellant-defendant Hukam Chand is aggrieved of concurrent findings of both the courts below whereby the suit filed by plaintiff-respondent Phool Chand for injunction has been decreed vide judgment and decree dated 01.06.1990 passed by Addl. Sr. Sub Judge, Palwal and the findings were affirmed in appeal vide judgment and decree dated 15.9.1988 passed by learned Addl. District Judge (II), Faridabad.

In nutshell, the plaintiff-respondent instituted the suit for injunction alleging therein that he had been in possession of the suit property comprised in Khewat/khatoni No.3239/4125, Rectangle No.109, Killa No.10/2 (0-19), 11/1 (1-17) total measuring 2 kanal 16 marlas situated at Palwal as per jamabandi for the year 1981-82 and constructed a boundary wall. The defendants were adamant to interfere with the possession and oust the plaintiff from the suit land without any right.

The suit was contested by the defendants by denying the ownership of the respondent-plaintiff. It was pleaded by the defendants that in fact they were in possession of the suit property vide sale deed dated 09.4.1986 by purchasing the same from the proprietor of Jumla Mushtarka Malkan.

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

- “1. Whether the plaintiff is owner in possession of the land detailed in para no.1 of the plaint?OPP*
- 2. Whether the plaintiff has got no locus standi to file the present suit?OPD*
- 3. Whether the suit is not maintainable in the present form?OPD*

4. *Whether the plaintiff is estopped by his own act and conduct?OPD*
5. *Relief.”*

Respondent-plaintiff in order to prove his case examined PW1 Phul Chand and tendered in evidence Ex.P.1, copy of jamabandi for the year 1981-82, Ex.P2 copy of khasra girdawari, Ex.P3 Copy of khasra girdawari upto 1986, Ex.P4 Mutation, Ex.P5 Copy of mutation, Ex.P.6 Copy of khasra girdawari from 1982 to 1985, Ex.P.7 copy of khasra girdawari for the year 1986-87, Ex.P8 copy of judgment dated 03.11.1982, Ex.P.9 copy of decree sheet dated 03.11.1982, Ex.P10 copy of sale certificate and Ex.P11 copy of khasra girdawari from 1985 to 1987.

On the other hand, defendants examined DW1 Mool Chand, DW2 Ashok Kumar Clerk from the office of Municipal Committee, Palwal, DW3 Sardar, Registry Clerk, DW4 Hira Singh besides himself appearing as DW5. They also brought on record documents Ex.DW3/1, Ex.DW6/1, Ex.DW6/2, Ex.DW6/3 and Ex.DW2/1.

On the basis of preponderance of evidence, the trial Court decreed the suit by granting injunction in favour of the plaintiff restraining the defendants from interfering with the possession of the plaintiff over the suit land. The appeal preferred by the defendant-appellant was dismissed by lower Appellate Court. However, before the appeal could be dismissed, an application for leading additional evidence was also filed by the respondent-plaintiff for placing on record documents Ex.RX (copy of plaint No.670) Ex.RY (copy of statement in the said suit) and Ex.RZ (statement).

Learned Senior counsel appearing for the appellant submitted that the judgment and decrees passed by both the courts below are not sustainable as the same suffers from gross illegality and perversity, for,

there had been misreading and mis-appreciation of oral particularly documentary evidence. In support of his grounds of appeal, an application bearing CM No.5521-C of 2009 has been filed for placing on record Annexures A.1 to A.4 i.e Excerpts of Mutation, copy of khatoni Consolidation of Tehsil Palwal, copy of jamabandi for the year 1974-75 and Municipal record showing the possession to establish that it is the appellant-defendant, who is in possession of the suit property but not the plaintiff-respondent.

Learned counsel for the appellant-defendant further contended that the respondent-plaintiff on 30.11.1963 purchased 1 bigha and 15 biswas of land in Khasra No.3254, which was assigned in new Khasra No.109/1 measuring 2 kanal 11 marlas and 10/1 measuring 6 kanal 0 marla, total 8 kanal 11 marla. Sale Certificate (Ex.P.10) dated 03.1.1964 in this regard was issued in favour of the respondent-plaintiff. It is submitted that vide sale deed dated 09.4.1986, the appellant-defendant purchased the land from the proprietor of Jumla Mushtarka Malkan in respect of Khasra Nos.109//10 (2-19), 11/1 measuring 1 kanal 17 marla total 2 kanal 16 marlas. Respondent-plaintiff in the year 1981 vide Ex.P.8 filed a Civil suit against Subhash and Askaran claiming injunction in respect of suit property measuring 8 kanal 10 marlas by adding the land measuring 2 kanal 17 marlas of the appellant-defendant total 11 kanal 7 marlas. Said suit was erroneously decreed by the trial Court vide judgment and decree dated 03.11.1982, on the basis of which Phool Chand got mutation in his favour. In other words, it was contended that the mutation was not effected as per the revenue record but owing to the judgment referred above. Said mutation was though challenged by the appellant-defendant but the matter was

decided against them. He also referred to application bearing CM No.5521-C of 2009 showing old and new khasra number much less the assignment in favour of the respondent-plaintiff. It was submitted that no document of title except mutation (Ex.P.5) had been placed on record claiming ownership much less injunction qua 2 kanal 16 marlas of land.

No doubt, the defendant had filed the civil suit (Ex.RX) bearing No.670 of 1991 against Nanak Chand, Jatinder, Rameshwar Dayal and Phool Chand in respect of khasra numbers qua land measuring 2 kanal 16 marlas purchased from the proprietorship body by categorically stating in para 4 that defendant Nos.1 & 2 were trying to interfere into the peaceful possession of the plaintiff on the basis of alleged sale deed executed in their favour by Phool Chand. Said suit was compromised basically with the other defendants namely Nanak Chand, Jatinder Singh and Rameshwar and not with Phool Chand and thus the evidence in this regard could not be looked into. The lower Appellate Court being the last court of law is empowered to deal with all the facts where two or more decrees are passed in one suit in terms of Order 41 Rule 33 CPC but all such factors have not been taken into consideration. There is not even a reference of the suit (Ex.RX), which gave the cause of action to the appellant to institute the aforesaid suit, therefore, the findings of the lower Appellate Court are not sustainable. He also prayed for allowing the application moved under Order 41 Rule 27 CPC.

On the other hand, learned counsel for the respondent-plaintiff has drawn attention of this Court to document Ex.RX, Ex.RY and Ex.P2 to contend that once the appellant-defendant Hukam Chand failed to seek declaration and injunction in the suit No.670 of 1991 filed against Nanak

Chand etc wherein Phool Chand was arrayed as defendant No.4, no cause of action arose to file the present appeal. Both the courts below have thoroughly examined all the documentary evidence brought on record by the parties. Concurrent findings of facts cannot be set aside until and unless there is gross illegality and perversity. Neither any explanation has been given by the appellant as to how the aforesaid documentary evidence, sought to be produced by way of application under Order 41 Rule 27 CPC, will render assistance to this Court while adjudicating the lis nor any reason has been shown for said Phool Chand being not diligent in producing such documents in time, therefore the court below could not have drawn presumption in this respect under Section 44 of the Punjab Land Revenue Act.

After hearing learned counsel for the parties and appraising the paper book, I find force in the submissions of learned counsel for the appellant, for, the reason is not the one but many. The lower Appellate Court has not even adverted to the contents of the civil suit (Ex.RX) particularly the contents of para 4 of the same, which gave cause to the appellant to file the present appeal, though the same was thereafter withdrawn. The additional evidence placed on record, in my view, would be essential and necessary for proper adjudication of the lis as old Khasra No.3254 was allocated. Case of the plaintiff was that he had purchased property from the Rehabilitation Department vide sale Certificate dated 03.1.1964 (Ex.P.10) whereas as per jamabandi for the year 1974-75, the suit land was shown as ownership of Jumla Mustarka Malkan. No other evidence has been brought on record to show that the respondent-plaintiff had any point of time, entered into any deal in respect of the property qua

Khasra No.109 Killa No.10/2 (0-19), 11/1 (1-17) total measuring 2 kanal 16 marlas, therefore, the aforesaid documents, in my view, did not carry the presumption of truth as the same were not produced on record through the Revenue Department. It is well settled law that mere marking of exhibit on a document does not dispense with its proof, in the light of judgment of Hon'ble Supreme Court reported as **Sait Tarajee Khim Chand & Ors Vs. Yalamarti Satyam & Ors, 1971 AIR (SC) 1865.**

Be that as it may, in my opinion, it is a fit case where the matter requires to be re-visited by the lower Appellate Court as there is abdication of responsibility in not referring to all the documentary evidence, particularly the additional evidence, which has been placed on record by the appellant, by granting liberty to the parties to prove the same in accordance with law.

In these circumstances, the present appeal is accepted and the judgment and decrees passed by both the courts below are set aside. The matter is remitted back to the lower Appellate Court to decide the appeal afresh. The appellant-defendant is at liberty to move application for leading additional evidence in terms of Order 41 Rule 27 CPC as per law, which may be replied by the respondent-plaintiff and the same shall be adjudicated upon by the lower Appellate Court. The respondent-plaintiff may also bring on record any other additional evidence, if so desired for proper adjudication of the appeal.

The parties are directed to appear before the lower Appellate Court on 04.7.2018.

The record of the case be sent back to the lower Appellate Court.

The interim stay granted by this Court while admitting the appeal shall continue till the appeal is decided finally.

May 04, 2018
manoj

^(AMIT RAWAL)
JUDGE

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