

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

RSA No.545 of 2012 (O&M)

Date of Order: 11.09.2018

Bimla Devi and others

..Appellants

Versus

**Pt. Mohinder (since deceased) through
his LRs and others.**

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sudhir Rana, Advocate,
for the appellants.

Mr. Lalit Yadav, Advocate,
for the respondents.

ANIL KSHETARPAL, J(Oral)

Plaintiffs-appellants are in the regular second appeal against the concurrent findings of fact arrived at by the courts below, dismissing suit filed by the plaintiffs for declaration and possession of the property in dispute.

Plaintiffs filed a suit claiming that the plaintiffs and Om Parkash were co-owners of ancestral property which is residential in nature and in partition property shown in the red colour in the lay out plan attached fell to the share of plaintiffs whereas the property shown in yellow colour had fallen to the share of Om Parkash. It was further pleaded that the plaintiffs came to know when they visited the village on 20.04.2003 that defendants have encroached upon certain part of the house and a passage.

Defendants contested the suit, pleaded that they are owners in possession of the property for the last more than 100 years and the area demarcated 'ABCDEF' is a private passage being used by them.

Defendants further took a stand that predecessor of the

plaintiffs, namely, Kaniya and Kedar had donated the property to Pandit Basti Ram, grandfather of the defendants more than 100 years back. Defendants in order to establish their old possession also relied upon the fact that two electricity connections installed in the house, one in the name of defendant no.1 and other in favour of defendant no.3. It was further pleaded that the plaintiffs or their ancestors shifted out of the village Islampur more than 100 years back and never returned back. It was further pleaded that ancestors of the plaintiffs have also donated similar house to Pandit Dalip |Ram.

Learned trial court on appreciation of evidence held that donation by the predecessors of the plaintiffs in favour of the predecessors of the defendants is proved and therefore the facts as pleaded in the suit filed by the plaintiffs are factually incorrect and as such is liable to be dismissed. However, learned court partly decreed the suit and directed the defendants to remove encroachment over the passage.

Appeal filed by the plaintiffs was also dismissed. Learned first Appellate court further noticed that Bimla plaintiff-appellant no.1 when appeared in witness box has admitted that they are residing in Delhi for long time. Learned first appellate court also noticed that the defendants have produced the official from the electricity supply company to prove that electric connection was installed in the house in question in favour of defendant no.1 in the year 1975, whereas other electricity connection was installed in the name of other defendants on 02.08.1986. The court further held that the defendants have produced on record ration card as well as receipt of the Chulha Tax to prove their possession.

Learned counsel for the appellants submitted that donation of

the land in favour of Brahmin (Pandit) would fall within the definition of gift and since gift cannot be made without a registered document, therefore, defendants have no right, title or interest in the property. However, learned counsel has over looked that the relevant provisions of the Transfer of Property Act which were enforced in all the municipal areas of State of Punjab for the first time only on 24.04.1935. In the present case, both the courts have found that the aforesaid gift/donation is before 1935.

Learned counsel for the appellants further submitted that originally the property was owned by 5 persons and Kedar Nath and Kaniya predecessors of the plaintiffs were not only co-owners. However, when learned counsel was called upon to show from the pleadings that this fact was pleaded, he admitted that these facts have not been pleaded in the trial court but in the grounds of appeal before the first appellate court such ground was taken.

In the considered view of this court, unless a fact is pleaded and thereafter proved by leading evidence, the party cannot be permitted to make out a new case for the first time in appeal.

Learned counsel for the appellants apart from it could not draw attention of the court to any perversity or misreading or non reading of substantive evidence by the courts below.

In view thereof, this court does not find any good ground to interfere with the concurrent findings of fact arrived at by the courts below.

The regular second appeal is dismissed.

September 11, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No