

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

107

RSA No.5126 of 2015 (O&M)

Date of decision: 23.01.2018

Gurnek Singh

..... Appellant

Versus

Surjit Kaur and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Malkeet Singh, Advocate
for the appellant.

Mr. Sarju Puri, Advocate
for the respondents.

ANIL KSHETARPAL, J.

CM-12259-C-2015

Delay in re-filing is condoned and the application is allowed.

CM-12260-C-2015

Application is under Order 41 Rule 27 for proving the report submitted by the Local Commissioner after demarcating the land on 05.10.2012. The application would be discussed while dealing with the main appeal.

Main Case

Plaintiff-appellant-Gurnek Singh is in regular second appeal against the concurrent finding of fact arrived at by the Courts below.

In the considered opinion of this Court, following substantial questions of law arise for consideration:-

1. Whether a report submitted by the Local Commissioner appointed by the Court under Order 26 Rule 9, Code of Civil

Procedure in the suit can only be admitted in evidence if the Local Commissioner appears in the witness-box or such report being part of the Court file, need no formal evidence before it is taken into consideration by the Court?

2. Whether the Court is justified in dismissing the suit on a ground which is neither part of the pleadings nor any issue has been framed thereupon.

FACTS

Plaintiff filed a suit for possession of the property measuring 2 kanals and two marlas comprised in Khasra No.20//8/2/2, 107 in Khata No.282/394 situated in the abadi of village Chuharpur, District Nawanshahr. It is the case of the plaintiff that he and his brothers are co-owners in the suit property. However, defendants No.1 to 3 who were totally strangers as they are neither co-owners nor co-sharers and having no concern with the suit property have taken over forcible and illegal possession of the same and raised construction on some portion of permanent nature.

Defendants No.1 to 3 contested the suit, apart from formal objections, they pleaded that the property in dispute is part of ancestral house of the defendants and they have been residing in the house/property in dispute since the time of their fore-fathers. It was pleaded that Gurnek Singh is owner of only two marlas of land as per the revenue record whereas the remaining property belongs to defendants No.4 to 6.

Since the dispute which required adjudication was to the extent of encroachment as alleged by the plaintiff and disputed by the defendants, therefore, the Court during the pendency of the suit appointed a Local Commissioner under Order 26 Rule 9, CPC. The Local Commissioner, a revenue official visited the spot and carried out the demarcation and

submitted his report dated 05.10.2012 reporting that defendant No.1 has encroached upon one marla of land and defendant No.2 has encroached upon one kanal and two marlas.

Both the Courts dismissed the suit filed by the plaintiffs on two grounds:-

- (i) Report of the Local Commissioner has not been proved by examining the Local Commissioner in evidence.
- (ii) As per the revenue record, the land is owned by the Panchayat Deh and hence, plaintiff has no locus to file the suit.

Now the stage is set for considering the question of law.

Question No.1

- (i) *Whether a report submitted by the Local Commissioner appointed by the Court under Order 26 Rule 9, Code of Civil Procedure in the suit can only be admitted in evidence if the Local Commissioner appears in the witness-box or such report being part of the Court file, need no formal evidence before it is taken into consideration by the Court?*

The Local Commissioner is appointed by the Court under Order 26 Rule 9, CPC to carry out local investigation. The Local Commissioner is basically an official of the Court who has been directed to carry out the local investigation and submit a report. Such report is not required to be proved by examining the Local Commissioner in the evidence. Report of the Local Commissioner is part of the Court file and required to be considered by the Court without any formal proof. Any of the parties having objection to the report can file the objections and summon such Local Commissioner to be examined in the Court. The report of the Local Commissioner cannot be excluded from consideration on the ground that Local Commissioner has not been examined in evidence.

As this Court had found that the report of the Local

Commissioner is part of the Court file and is to be considered by the Court without any formal proof, therefore, the application for additional evidence is rendered redundant.

Hence, the finding of both the Courts below on this aspect is clearly erroneous, perverse and required to be set aside. Question No.1 is answered in favour of the appellant.

Question No.2

(ii) *Whether the Court is justified in dismissing the suit on a ground which is neither part of the pleadings nor any issue has been framed thereupon.*

In this case, it was not a case of any party that the land belongs to the Gram Panchayat. Still further, the trial Court had not framed an issue on title of the property. The issues framed by the trial Court are extracted as under:-

- “1. Whether the plaintiff is entitled to the possession of the suit property as claimed?OPP*
- 2. Whether the plaintiff is barred by his act and conduct to file the present suit as alleged?OPP*
- 3. Whether the suit is within time?OPP*
- 4. Whether the site plan produced by the plaintiff is incorrect? If so its effect?OPD*
- 5. Relief.”*

Still further, a careful perusal of the revenue record, copy whereof has been shown by learned counsel for the appellant, it is clear that the land is recorded as Panchayat Deh under Gurnek Singh and others 'Malguzar'. Malguzari is a permissive possession/short tenancy. Malguzar literally means a person who collect the revenue either on his behalf or on behalf of others and deposit the same. On the other hand, the defendants have claimed that they are owners in possession of the property from the time

of their ancestors. The defendants failed to produce any evidence on record to prove such assertion. Even the Local Commissioner, a revenue official has reported that defendant No.1 has encroached upon one marla of land and defendant No.2 has encroached upon one kanal and two marlas.

However, at the same time, it must be noticed that when Gurnek Singh-appellant appeared in the witness-box, he admitted that he is in possession of the remaining land being 'Malguzar' and encroachment from his share is only to the extent of two marlas.

In view of this evidence available on the file and in absence of any issue on the title of the property, the Courts below committed a material irregularity in dismissing the suit on the ground that as per the revenue record, Gram Panchayat is the owner of the property. At the cost of repetition, it is not even the case of the defendants that the property is owned by the Gram Panchayat. Anyhow, this Court is not recording any finding declaring the appellant to be owner. However, since the plaintiff has a right in the property in the capacity of Malguzar, therefore, the plaintiff was entitled to maintain a suit for possession against the defendants who failed to prove any right, title or interest in the property. Hence, question No.2 is also answered in favour of the appellant.

In view of the discussion made above, the judgments passed by the Courts below are set aside and the appeal is allowed to the extent of two marlas of land i.e. share of the plaintiff.

Regular Second Appeal is allowed.

23.01.2018

Dinesh Bansal

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned
Whether Reportable

Yes / No
Yes / No