

RSA-681-1987 (O&M)

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

RSA-681-1987 (O&M)

Date of decision : 17.01.2019

Arjun Singh and others

... Appellants

Versus

Subhan Khan (deceased) through LR's and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. H.S. Bhullar, Advocate
for the appellants.

Mr. Alok Jain, Advocate
for respondent No.1.

Mr. Athar Ahmed, Advocate
for respondent No.2.

AMIT RAWAL, J. (ORAL)

The present regular second appeal is directed against the judgment and decree dated 30.01.1987 rendered by the lower Appellate Court, whereby the appeal of the defendants against the judgment and decree dated 31.03.1986, has been allowed, in essence, the suit of the plaintiff, had been dismissed.

The plaintiff instituted the simpliciter suit for injunction restraining the defendants from interfering into and taking peaceful possession and from making any construction on the plot bearing No.EP-490 or any part of it, on the premise that Chhote Lal had purchased the land from the Custodial Department in open auction on 28.03.1960 and became

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owner and remained in possession of the same till his death in the month of April, 1980. Plaintiff No.1 to 4 being the sons and the plaintiff No.5 being widow of Chhote Lal, inherited his estate including the plot, whereas the defendant No.1 being strong person, wanted to usurp the portion of the plot by force on the points 'BODI', shown in red colour in the site plan attached with the plaint. When the defendants refused to give possession, despite repeated requests, a cause of action accrued in favour of the plaintiff to file the suit accompanied by an *ad interim* application.

The defendants opposed the suit by raising numerous objections including the preliminary qua maintainability and on merits, it was denied that the plaintiffs were in possession of the plot. The property shown by the plaintiff by the letters 'ABCDEFGH' did not form part and parcel of plot No.490, as on the contrary, it was a part and parcel of khasra No.144/33, situated in the revenue estate of Ferozepur Jhirka, which was in possession of the defendants as lessee from the Punjab Wakf Board.

The plaintiff in support of his case examined himself as PW1, Nanu Ram as PW1/1, Brahamanand as PW2, Arjaun Dass as PW3 (again) and brought on record various documents i.e. allotment receipt, certified copy of site plan issued by the Rehabilitation Department showing measurement and its boundaries, etc., whereas the defendants examined Bhawani Dass, Naib Tehsildar as DW1, Siri Ram Gupta, Secretary M.C., Ferozepur Jhirka as DW2, Sher Mohammad, Rent Controller, Punjab Wakf Board as DW3, Chand Khan as DW4 and Subhan Khan as DW5 and tendered in evidence many documents including sanctioned plan obtained by Chhote Lal from the concerned Custodial Department.

The trial Court after noticing the entire evidence, decreed the

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suit. However, the lower Appellate Court, in one paragraph, without advertent to all the documents allowed the appeal.

It would be apt to reproduce the relevant portion of the judgment of the lower Appellate Court, which reads as under:-

"7. I find from a perusal of the record that after the plaintiff respondents had completed their evidence, an application dated 7.5.1982 was made saying that it was essential to find out as to whether the disputed land was part of plot No.EP 490 or was part of Khasra No.144/33. The appellant submitted a reply to this application saying that the respondent did not place any material on the file for demarcation of land and that demarcation could not be carried out unless relevant record was made available. Any how the court directed demarcation and the Local Commissioner found that the property in question was part of Khasra No.144/33. It was also observed by the Local Commissioner that it was not possible to demarcate plot No.EP-490 because the relevant data was not made available to him. The learned Trial Judge felt that the Local Commissioner was required to demarcate plot No.EP 490 and since he did not do so, reliance on his report was not proper. It, therefore, follows that the court failed to place any reliance on the report of the Local Commissioner. What else thus was available to the court on the record to hold that the property in dispute was identified with Plot No.EP-490?. In this behalf, learned counsel for the plaintiff-respondents stated that the only evidence was the statement of his client. That was not certainly enough to reach the conclusion of identification. In this situation the finding of the court below that the disputed property was part of plot No.EP-490 is not sustainable and is hereby set aside."

The provisions of Order 41 Rule 31 of the Code of Civil Procedure enjoins an obligation upon the lower Appellate Court to

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determine the points of determination and referred to each and every documentary evidence. The reference of the documents noticed by this Court, had not been adverted to by the lower Appellate Court except the report of the local commissioner examined by the defendants. Such an approach of the lower Appellate Court, in my view, is non-application of judicial mind, being the last Court of fact and law. Accordingly, the judgment and decree dated 30.01.1987 is not sustainable in the eyes of law being erroneous and fallacious. The same is hereby set aside and the matter is remitted to the lower Appellate Court to decide the appeal afresh in accordance with law as expeditiously as possible preferably within a period of six months from the date of the receipt of the certified copy of this order.

The parties or through their counsel are directed to appear before the lower Appellate Court on 18.02.2019.

Photocopy of the records be sent back.

However, I cannot remain oblivious of the fact that there is an interim order dated 09.04.1987, therefore, the same is ordered to be continued till the decision of the appeal.

With the aforesaid observations, the present second appeal is disposed of.

17.01.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned **Yes/ No**

Whether Reportable **Yes/ No**