

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

RSA No.4340 of 2015 (O&M)

Date of decision:18.01.2019

Daulat Ram (since deceased) through LRs ... Appellant

Vs.

Ramesh Chand and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. K.S.Cheema, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

The appellant-plaintiff is in Regular Second Appeal against the dismissal of the suit for possession filed against the defendants of having encroached the land described in para 4 of the plaint which was objected to by the defendants by not specifying the averments in para 4 and 8 of the written statement.

It was averred that prior to filing of the suit, demarcation report was conducted which established the encroachment as referred. During the pendency of suit, the person who had demarcated the land could not prove the same in the absence of the record as he retired, necessitating the plaintiff to submit an application for appointment of the Local Commissioner which was dismissed by the trial Court, vide order dated 18.11.2013 and ultimately, the suit was also dismissed.

The appellant-plaintiff assailed the judgment and decree of the trial Court including the order declining the application for appointment of the Local Commissioner as per the provisions of Order 43 Rule 1-A CPC. The Lower Appellate Court dismissed the application by noticing the fact that revision petition was not filed and dismissed the appeal on the premise that plaintiff failed to discharge the onus qua alleged encroachment.

Mr. K.S.Cheema, learned counsel appearing on behalf of the appellant-plaintiff submitted that in view of peculiar facts and circumstances of the case, particularly when suit was proceeded by a demarcation report and it could not be proved as explained above. The application should not have been dismissed and the Lower Appellate Court should have alive to the situation. In support of the aforementioned contention, relied upon the findings rendered in para 4 to 6 of the judgment rendered by the Hon'ble Supreme Court in **Haryana Waqf Board Vs. Shanti Sarup and others 2008(8) Supreme Court Cases 671.**

I have heard the learned counsel for the appellant-plaintiff and appraised the judgments and decree as well as record of both the Courts below. For the sake of brevity, para 4 and 8 of the plaint as well as of written statement read thus:-

Para 4 and 8 of plaint

“4. That in the middle of suit land bearing khasra no.384, 386 there is a one khata no.385 of the defendants is situated and on account of this the defendants made encroachment of 0k 15m

out of khata no.384 towards Northern side about land measuring 0 k 6 marla and land measuring 0 kanal 7 marlas towards Eastern side out of the khata no.386 and further 0 kanal 2 marlas out of the suit land without any right or title over the suit land.

8. That the plaintiff even for his satisfaction and defendants has taken demarcation of the suit land on dated 7.11.2009 on the vide order of Nayab Tehsildar Talwara in the presence of respectable person of the vill. Those have duly signed on the demarcation report in which the report of demarcation out of the suit land done by the defendants is also mentioned. The copy of demarcation report on dated 7.11.2009 is attached herewith and copy of jamabandi for the year 2006-07 is attached herewith.

Para 4 and 8 of written statement

4. That para no.4 of the plaint is wrong and denied. The story put forth in this para is totally false. The plaintiff has concealed the actual facts and concocted a false story only to make a ground for the present suit.

8. That para no.8 of the plaint is wrong and denied. The story regarding the demarcation is totally false, no demarcation has been ever effected in the presence of the answering defendants.”

On plain and simple reading of the aforementioned pleadings, encroachment averred in para 4 of the plaint, had not been emphatically denied but vaguely denied and not as per the provisions of Order 5 Rule 8 CPC. The factum of demarcation report brought on record as Mark A has also not been in dispute. In such circumstances, the Lower Appellate Court ought to have allowed the application. The judgment and decree of the Lower Appellate Court being the last Court of fact and law, thus not only suffers from illegality, rather is within the realm of perversity.

For the sake of brevity, paragraphs 4 to 6 of the judgment cited (supra) read as under:-

“4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 of the CPC.

5. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before

the trial court was wrongly rejected.

6. *It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land.”*

It would be a farcical exercise in calling upon the respondents as the plaintiff has not been able to avail the statutory remedy in accordance with law.

The judgment and decree of the Lower Appellate Court is hereby set aside. The matter is remitted to the Lower Appellate Court to decide the same afresh keeping in view the observations made hereinabove and as per the provisions of law after affording opportunity of hearing to other side.

Resultantly, the regular second appeal is disposed of.

(AMIT RAWAL)
JUDGE

January 18, 2019
savita

Whether Speaking/Reasoned
Whether Reportable

Yes/No
Yes/No