

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**1. SAO No. 75 of 2014 (O&M)
 Date of Decision: 16.05.2019**

Gurdev Singh

...Appellant

VERSUS

Gurpreet Singh and others

...Respondents

2. SAO No. 76 of 2014 (O&M)

Gurdev Singh

...Appellant

VERSUS

Gurpreet Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Vaibhav Sehgal, Advocate
 for the appellant.

 Mr. S.S. Panag, Advocate
 for respondents no. 1 to 6 and 8 to 10.

SURINDER GUPTA, J. (Oral)

Heard.

2. Suits filed by appellant-Gurdev Singh and Ajaib Singh (Civil Suit No. 156 of 24.04.1989) and Kishan Singh (Civil Suit No. 446 dated 11.09.1990) were decided by Civil Judge (Junior Division), Ludhiana by common judgment dated 23.11.2010. Against that judgment two separate appeals were filed by Kishan Singh (since deceased) now represented by his legal heirs.

3. In suit filed by Gurdev Singh, he had sought declaration that plaintiffs are owners of the land measuring 7 *bighas* 0 *biswa* 1 *biswansi* situated in village Dolon Kalan, *tehsil* and district Ludhiana by way of prescription as defendants have lost equity of redemption. Plaintiff in that

suit also sought the relief of injunction to restrain defendant no. 1 from taking possession of suit land in execution of decree dated 21.04.1975 passed by Sub Judge Ist Class, Ludhiana.

4. Kishan Singh in his suit sought declaration that judgment dated 12.12.1989 passed by Collector, Ludhiana in Misc. Revenue case no. 7/1989 of village Dolon Kalan is illegal, null and void and he is entitled to seek redemption of land mortgaged as per mortgage deed dated 05.06.1956.

5. Learned trial Court decreed the suit filed by Gurdev Singh and another and dismissed the suit filed by Kishan Singh. In two separate appeals filed against judgment and decree of learned trial Court, Kishan Singh sought dismissal of the suit filed by Gurdev Singh and decree *qua* his right to seek the redemption of suit land.

6. Learned Ist Appellate Court vide order dated 30.09.2014 remanded both the cases to learned trial Court on the ground as follows:-

“19. Perusal of impugned judgment and decree and record, this court is of the opinion that in this case, the point regarding possession over the suit property is very material. Gurdev Singh and Ajaib Singh, Successors-in-interest of Gurnam Singh claimed that land measuring 7B0B-1B, being ½ share out of land measuring 14B-0B-2B was mortgaged with their father, by lawful owner Sardara Singh and equity of redemption has since been lost, therefore, they have become owner of the said land. They claimed the possession of suit land through Bachan Singh claiming that Bachan Singh was tenant under them in the suit land and this fact was denied by

the appellant. As per version of appellant, Bachan Singh had filed a civil suit against Kishan Singh that he is in possession of land measuring 14B-0B02B and he could not be dispossessed and this was the very land of which Gurdev Singh and others claimed mortgagee to the extent of ½ share and they claimed possession through Bachan Singh . However,in the said suit he also claimed injunction and also filed an application under order 39 Rule 2-A CPC . However,the suit as well as the said application U/O 39 Rule 20A CPC was dismissed by the court of Mrs. Ravi Inder Kaur, the then Ld. Civil Judge (Jr. Div.), Ludhiana vide judgment dated 10.3.2007. Bachan Singh, then filed two appeals, one against main civil suit and other against the order passed on the petition under order 39 Rule 2 -A CPC. However,both the appeals were dismissed on 10.8.2011 by Sh. Mohd. Gulzar, the then Ld. Addl. Distt. Judge and there was finding given by the court of Sh. Mohd. Gulzar, the then Ld. Addl. Distt. Judge, Ludhiana that Bachan Singh has failed to prove his possession over the suit land. Therefore, the said factor is very relevant for adjudication of the appeals in question which was not discussed by the Ld. Lower Court at the time of adjudication of matter through impugned judgment and decree. The application moved by the appellant for additional evidence was dismissed by the Ld. Lower

Court. The said order is not valid and reasoned order and the same also requires to be looked into. Since the possession of land in dispute is a vital/crucial factor for deciding the case in hand along with other factors and the appellant/defendant has only sought production of copy of the judgments delivered by Mrs. Ravi Inder Kaur, the then Ld. CJJD, Ludhiana in the civil suit filed by Bachan Singh and petition u/o 39 Rule 2-A CPC and further ,copy of judgment and decree of court of Sh. Mohd. Gulzar , the then Ld. Addl. Distt. Judge, Ludhiana through application under order 41 Rule 27 CPC. It is pertinent to mention here that the said evidence was not earlier available to the appellant as Sh. Mohd. Gulzar, the then Ld. Addl. Distt. Judge, Ludhiana passed the judgment on 10.8.2011.

20. *Further perusal of decree sheet prepared at the time of passing of impugned judgment goes to show that vide judgment dated 23.11.2010 the Ld. Lower Court had disposed of two suits i.e civil suit No.156 of 24.9.1989 titled Gurdev Singh and others Vs. Kishan Singh and others and Civil Suit No. 446 of 11.9.1990 titled Kishan Singh Vs. Ajaib Singh and others, but decree sheet prepared does not mention the cost of civil suit No.446 which is required to be prepared afresh.”*

7. Learned counsel for the appellant has argued that allowing of additional evidence is not a reason for remanding the case. Learned Ist

Appellate Court after allowing additional evidence could either proceed to record the same of its own or direct learned trial Court to record the same and send it for final disposal of the appeal. Documents sought to be produced are certified copies of judgment/order, which are *per se* admissible and against this judgment regular second appeal is pending in this Court. So far as non-assessing of costs in the decree-sheet in the suit filed by Kishan Singh is concerned, the decree-sheet can be amended as per provisions of Section 152 CPC.

8. Learned counsel for the respondents has argued that judgment in the suit and appeal, of which certified copies were permitted to be produced on file, in additional evidence, are very vital for decision of the case, as in that case possession over the suit land was held to be of Kishan Singh. In the event of possession of Kishan Singh over the suit land is held, he remains an usufructuary mortgagee and the same could be got redeemed at any point of time as no period of limitation is attracted for seeking such redemption. Learned Ist Appellate Court has rightly remanded the case with direction to learned trial Court to look into aforesaid documents and decide the case afresh.

9. The question, which arises for consideration in this appeal, is as to whether allowing of additional evidence could be a reason to remand the case and setting aside the judgment of learned trial Court. Order XLI Rule 28 CPC deals with procedure, Ist Appellate Court has to adopt on allowing of additional evidence. The same is reproduced as follows:-

“28. Mode of taking additional evidence - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct

the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

10. It is evident from perusal of aforesaid provision that after allowing of additional evidence, learned Ist Appellate Court may either record the same of its own or direct learned trial Court to record it or send the same to it. Instead of following the procedure, as laid down under Order XLI Rule 28 CPC, Ist Appellate Court adopted a shortcut method to dispose of the appeal by remanding the case. Order passed by learned Ist Appellate Court suffers from legal infirmity and is not legally sustainable.

11. So far as issue of rectification of decree-sheet in the case filed by Kishan Singh is concerned, direction could be issued to learned trial Court to amend the decree and this cannot be a reason to remand the case.

12. As a sequel of my above discussion, I find merit in these appeals and the same are accepted. Order dated 30.09.2014 passed by learned Ist Appellate Court is set aside.

13. Parties through their counsel are directed to appear before the Court concerned/successor Court on 31.05.2019 on which date files of appeals shall be taken on board and proceeded further for final disposal after following the procedure as provided under Order XLI Rule 28 CPC.

May 16, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No