

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

SAO-8-2021(O&M)

Date of decision:-17.8.2021

Ashok Kumar

...Appellant-defendant No.1

Versus

Kewal Krishan and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.M.K. Garg, Advocate for
Mr.Vinod Kumar, Advocate
for appellant.

H.S. MADAAN, J.

Case taken up through video conferencing.

CM-6237-CII-2021

This is an application for placing on record site plan
Ex.P2 as Annexure P2 and statement/affidavit Ex.PW1 and cross-
examination of plaintiff as Annexure P3.

Heard.

The application is allowed, as prayed for and documents

are taken on record, subject to all just exceptions.

SAO-8-2021

This second appeal against order is directed against order dated 28.1.2021 passed by District Judge, Hoshiarpur vide which judgment and decree passed by Civil Judge (Jr.Divn.), Mukerian in favour of plaintiffs Kewal Krishan and Sushil Kumar, who are appellants before that Court, had been set aside and the matter was remanded to Civil Judge (Jr.Divn.), Mukerian with a direction to appoint Local Commissioner to demarcate the property in dispute.

Briefly stated, facts of the case are that plaintiffs Kewal Krishan and Sushil Kumar both brothers, residents of village Fatehpur, Tehsil Mukerian, District Hoshiarpur had brought a suit against defendants Ashok Kumar, Rajnish Kumar and Manjit Singh seeking possession of land measuring 12 marlas 5 sarsahis, out of total land measuring 15 kanals 12 marlas comprising Khewat No.102, Khatoni No.155, Kh.No.94(15-12), situated in H.B. No.598 of village Fatehpur, Tehsil Mukerian, District Hoshiarpur, as per Farad Jamabandi for the year 2005-2006 and further craving for suit for permanent injunction for restraining the defendants from making further encroachment over the suit land measuring 15 kanals 12 marlas as detailed above and from cutting and removing any trees over suit land.

As per the version of the plaintiffs, they are co-sharers in

joint possession of the suit property, whereas defendants No.1 and 2, namely, Ashok Kumar and Rajnish Kumar are owners of adjoining Khasra No.95 and the defendants threatened to encroach upon the suit property of the plaintiffs and they have cut valuable trees standing in the suit property and had been further threatening to cut Mango and Cheel trees from the suit land. Feeling aggrieved, the plaintiffs had filed the suit in question.

On notice, defendants No.1 and 3 had appeared and filed joint written statement, whereas defendant No.2 did not put in appearance despite service and as such was proceeded against ex-parte.

In the joint written statement filed on behalf of defendants No.1 and 3, they had raised various legal objections, on merits denying the averments in the plaint coming up with a version that defendant No.1 is joint owner in possession of adjoining khasra No.95 with which plaintiffs have no concern; that defendant No.1 had never encroached upon the land of plaintiffs; defendants No.2 and 3 have no concern with the suit land or with the adjoining land; the defendants had not cut and removed any tree from the suit land; as a matter of fact trees are standing in the land of defendants in Khasra No.95 and plaintiffs under the garb of the present suit want to cut and remove those trees from the land of defendant No.1. Such defendants prayed for dismissal of the suit.

On the pleadings of the parties, following issues were framed:

1. Whether the defendants have encroached the suit property comprised in Khasra No.94? OPP.
2. Whether the plaintiffs are entitled to the relief of possession as claimed? OPP.
3. Whether the plaintiffs are in settled possession over the property comprised in Khasra No.94 as claimed for? OPP.
4. Whether the plaintiffs are entitled to the relief of permanent injunction as claimed for? OPP.
5. Whether suit is maintainable? OPP.
6. Whether the plaintiffs have got cause of action? OPP.
7. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD.
8. Relief.

The trial Court afforded opportunities to lead evidence to the parties and thereafter gave issue-wise findings. Issues No.1 and 2 were decided in favour of the defendants and against the plaintiffs; issue No.3 was decided in favour of the plaintiffs and against the defendants; issue No.4 was decided in favour of the plaintiffs and against the defendants; issues No.5 and 6 were decided in favour of the plaintiffs and against the defendants and issue No.7 was decided against the defendants and in favour of the plaintiffs. As a result of

issue-wise findings, suit of the plaintiffs was decreed partly qua the relief of settled possession over the property comprised in Khasra No.94 and defendants were restrained from interfering into the peaceful possession of the plaintiffs over the suit property illegally and forcibly, except in due course of law. This was so done vide judgment and decree dated 7.2.2018.

The plaintiffs were aggrieved by the said judgment and decree and they had filed an appeal before the Court of District Judge, Hoshiarpur, who disposed of the appeal vide judgment dated 28.1.2021, vide which judgment and decree dated 7.2.2018 passed by the trial Court were set aside and the case was remanded to the trial Court for deciding the suit afresh after appointment of fresh Local Commissioner, who is to visit the spot for demarcation of the property as per earlier order by giving due notice to both the parties or their attorney or respective counsels; thereafter the trial Court is to examine Local Commissioner in case objections are filed by either party and thereafter the trial Court is to dispose of the case on merits.

Such judgment left the defendant No.1 – Ashok Kumar aggrieved and he has filed the present second appeal.

I have heard learned counsel for the appellant besides going through the record.

The impugned judgment/order passed by the learned District Judge, Hoshiarpur is quite detailed, well reasoned and does

not suffer from any illegality or infirmity and valid reasons for setting aside of judgment and decree passed by the trial Court and remanding the case to it for fresh decision after appointment of Local Commissioner for demarcation and recording his statement in case of filing of objection by either of the parties, have been given. The operative part of the judgment/order is very clear in that regard, which for ready reference is being reproduced as under:

11. I have considered the arguments advanced before me. Plaintiffs have filed suit for possession regarding 12 marlas 5 sarsahis out of khasra no.94 (15-12) situated in village Fatehpur. As per version of appellants/plaintiffs, the defendants encroached upon the aforesaid land who are having their adjoining land bearing khasra no.95. It is further claimed that the defendants have also cut down three of their trees and they are further threatening to cut more trees standing in their property. On the other hand, the defendants no.1 and 3 namely Ashok Kumar and Manjit Singh contested this suit by filing their written statement alleging that they have trees in their own land bearing khasra no.95 (19-8). They have denied the allegations of encroachment and prayed for dismissal of the suit. In the case in hand, Kewal Krishan PW1 one of the plaintiffs stepped into the witness box to prove his own version. He also placed on record copy of jamabandi for the year 2005-06 Ex.P1, copy of Aks Shijra Ex.P2. On the other hand, Rajnish Kumar defendant no.2 who was exparte in the suit, stepped

into the witness box as DW1 to deny the allegations. He has also placed on record copy of jamabandi pertaining to khasra no.95 (19-8) for the year 2005-06 which is Ex.D1. It is matter of record that in the case in hand, as per orders of the court dated 5.8.2013 Local Commissioner was appointed with the directions to demarcate the khasra no.94 and 95 and to submit his report. As per the record, Local Commissioner conducted demarcation on 6.10.2014 and detailed demarcation report showing encroachment is Ex.P6 and Ex.P7. The copy of Aks Shijra depicting demarcation in blue and red colour is Ex.P5. It is matter of record that defendants filed objection dated 9.12.2014 and the reply to this objection is dated 12.2.2015. Learned trial court as per zimni order dated 12.3.2015 passed order to decide the objections at the time of finial arguments. As per impugned judgment dated 7.2.2018, the report of Local Commissioner was discarded on the ground that notice was not served upon Ashok Kumar and the demarcation was not conducted from three pucca points and ultimately dismissed the suit filed by the plaintiffs seeking possession of 12 marlas 5 sarsahis of land.

I have considered the aforesaid facts of the present case. Local Commissioner was appointed by the orders of the court. He was duty bound to demarcate the property as per rules by giving notice to the contesting parties. As per the attendance sheet, the presence of Ashok Kumar is not marked. Only Rajnish Kumar DW1 is marked present at serial no.4. It is not established on file

that Ashok Kumar was given notice or he did not appear on the day of demarcation deliberately. Rajnish Kumar is not owner or in possession of khasra no.95. Even it is established on record that demarcation was conducted from pucca Burji situated on the western side of khasra no.95 with the consent of Rajnish Kumar defendant no.2 and Kewal Krishan plaintiff no.1, it will not help their case unless Rajnish Kumar was having any authority to appear on his behalf at that time. The objections to the report of Local Commissioner were filed but no effort was made either by the parties or by the court to summon the Local Commissioner as witness for proper adjudication of the said objections. Once the report of Local Commissioner has been rejected by the trial court on the aforesaid grounds, the matter in controversy has not been decided finally whether there was any encroachment of the land of khasra no.94 or not. Therefore, the case in hand has not been decided on merits. In case the report of Local Commissioner was not proper, it was obligatory to again appoint same or new Local Commissioner for the demarcation of aforesaid khasra number by following the proper procedure. Thereafter, the case should have been decided on merits. While filing the present appeal no application has been filed by the plaintiffs to appoint Local Commissioner.

Although learned counsel for the appellant by referring to statement of PW1 Kewal Krishan has tried to build up a case that as a

matter of fact the plaintiffs had encroached upon the land of defendants and not vice versa and further there is common boundary between land of two parties; the level of land of plaintiffs being higher than that of land of defendants, but statement of a witness is to be seen in entirety and a few lines out of the said statement cannot be picked up and interpreted in isolation so as to give those a different meaning.

Even otherwise, in terms of Section 104 CPC, the maintainability of the present appeal is doubtful. Nevertheless on merits also, I do not see any reason to interfere with the order passed by learned District Judge, Hoshiarpur.

Finding no merit in the appeal, the same stands dismissed.

17.8.2021
Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking: Yes/No

Whether reportable : Yes/No