

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 1423 of 1987 (O&M)

Date of Decision: 30.05.2022

Mulkh Raj (Died) through his LRs and Another

... Appellant(s)

Versus

Balkar Singh (Died) through his LRs

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Keshav Pratap Singh, Advocate
for the appellant(s).

Mr. C.B.Goel and Mr.Rajinder Goel, Advocates
for the respondents.

Anil Kshetarpal, J.

1. While assailing the concurrent findings of fact, arrived at by both the Courts below, the defendants have filed the present appeal.
2. It would be noted here that on 06.08.1987, after hearing the learned counsel representing the parties, the following order was passed:

“It is not in dispute that the original owners of the land which has been purchased by the defendant-appellants and the plaintiff-respondent were the same. The measurements of the land purchased by either of the two parties are clearly mentioned in their respective sale deeds and are also set out in para No.11 of the judgment of the learned District Judge. The question involved is whether by construction of a shop by the appellants they have or have not encroached upon a part of the land of the respondent.

The Local Commissioner on whose report both the Courts below have relied has not based his conclusion on the measurements. Before me learned counsel for the two sides have asserted their respective case.

In the interest of justice and to resolve the controversy once for all, I find it expedient to appoint a Local Commissioner who should carry out the measurements at the spot and by reference to those measurements should make a report whether the appellants have encroached upon any part of the land owned by the respondent or whether the appellants are in possession of land in excess of that which they purchased or whether the respondent is in possession of land less than what he purchased. I appoint Mr. B.R.Mahajan, Advocate as the Local Commissioner and direct him to visit the spot, carry out the measurements with reference to the sale deeds and the measurements mentioned in para No.11 of the judgment of the learned District Judge and to make his report on the above aspects. He shall visit the spot after giving notice to the learned counsel for both the parties within a fortnight from today. The fee of Local Commissioner including his travelling expenses is fixed at Rs.1100/- which shall be paid by the appellants and the respondent in equal shares within one week from today.

To come up on 24.9.1987”.

Pursuant thereto, a report has been submitted, the relevant extract whereof reads as under:

“3. I carried out the measurements with reference to Sale Deeds of both the parties and measurements mentioned in para 11 of the judgment of the learned District Judge. A rough site plan prepared by me of the area in possession of both the parties is enclosed herewith and may be read as part of my report.

4. Both the parties have constructed the area in their respective possession. Area shown as red in the Site Plan is in possession of the Appellants and area shown as blue is in possession of the Respondent. Parties are in possession of the following areas as per the measurement carried out by me at the spot:-

Mulkh Raj and Takhat Singh Appellants.	Balkar Singh Respondent.
North: 67’	North: 33’.4”
South: 33’.9” + 33’.4”	South: 36’.9”
East: 40’.6”	East: 23’.4”
West: 33’	West: 34’.6”

The area of land purchased by the Parties as per their Sale-Deeds is as under:-

Mulkh Raj and Takhat Singh Appellants.	Balkar Singh Respondent.
North: 67’	North: 33’
South: 33 + 34’	South: 36½’
East: 40’	East: 31½’
West: 33’	West: 44’

5. Sh.Balkar Singh Respondent claimed before me that there is no road or street on northern side of the property of

appellants but the road is clearly mentioned on northern side in the boundaries given in their Sale-Deed and its area is given as 16' wide in the plan attached to it.

6. The Appellants have not encroached upon any area owned by the Respondent. The Appellants are in possession of excess area by 6" only on Eastern side but that is not adjoining to the property of the Respondent. The Respondent is in possession of less area by 8'.2" on Eastern side and 9'.6" on Western side then the area purchased by him".

3. The objections to the aforesaid report have been filed by the learned counsel representing the respondent.

4. From the reading of the judgments, passed by both the Courts below, it is evident that the Courts have relied upon the report submitted by the Local Commissioner (Ex.P4) while arriving at a finding that the defendants have encroached upon a certain part of the land belonging to the plaintiff (respondent herein). The trial Court, in para 12 of its judgment, has found that since no objections to the report of the Local Commissioner (Ex.P4) have been made it means that the report is acceptable to the defendant. The defendant has also not led any evidence to prove that at the time of purchase or before getting the property constructed, they got the demarcation carried out.

4. The First Appellate Court has upheld the judgment while observing that there is no overlapping of the properties sold to the plaintiff and the defendants and a careful perusal of the site plan, prepared on 16.05.1977, makes it clear that no shop was constructed on any portion of

the said property, whereas the same Draftsman when he visited the spot on 17.01.1977 found a shop constructed on the northern portion of the property. The report of the Local Commissioner (Ex.P4) and the site plan (Ex.P4/A) show that the defendants have encroached upon certain portion of the respondent’s property and the report of the Local Commissioner has not been challenged by the defendants, hence, it has been considered to have been accepted. The defendants have miserably failed to establish their case that the piece of land underneath the shop in dispute was purchased by them.

5. The First Appellate Court, after examining the sale deeds of the plaintiff and the defendant has compiled the information, correctness whereof is not disputed by the learned counsel representing the parties, which is extracted as under:-

<u>Sale deed Ex.P1</u>	<u>Sale Deed Ex.D1</u>
1. Date of execution: 17.5.77	18.2.77
2. Vendor(s) 1. Banarsi Dass son of Dayal Dass. 2. Ram Gopal son Mohan Lal 3. Munsha Devi Wd/o Mohan Lal 4. Sudarshna Rani daughter of Mohan Lal Numbers 3 and 4 through general attorney Ram Gopal	1. Ram Gopal son of Mohan Lal 2. Smt.Munsha Devi Wd/of Mohan Lal 3. Sudarshna Rani daughter of Mohan Lal Numbers 2 and 3 through General attorney Ram Gopal
3. <u>Property Sold:-</u> Plot Nos. 12, 13, 14, 15 and 16 measuring 139/1/2 sq. yards comprised of Khasra	Plot measuring 272/1/3 sq. yards comprised of Khasra nos. 23//12/2, 133/1 & 18/1

nos. 23//12/2, 133/1 & 18/1 (North 33', sought 36½', East 31½' and West 44')	North 67', South 33'+34' East 40' West 33')
<u>Bounded as:-</u> North: Land of Mulkh Raj South: Gali of Des Raj East: Gali of Bhanu Kishan West: Road Situating in the limits of Municipal Committee, Pehowa	North: Road South: Land of Bhanu Kishan West: Road Situating within the local limits of Municipal Committee Pehowa.
<u>Vendeed:</u> Balkar Singh son of Arur Singh son of Jodh Singh resident of Pehowa	1. Mulkh Raj son of Mool Chand son of Wazir Chand ¾ th share. 2. Takhat Singh son of Mulakh Raj ¼ th share.
<u>Sale Consideration:</u> Rs.8,000/-	 Rs.8,000/-

6. Heard the learned counsel representing the parties, at length and with their able assistance, perused the paper-book as well as whatever record of the trial Court as well as the First Appellate Court was available.

7. On the careful reading of the report (Ex.P4) submitted by Sh.J.C.Dhawan, Advocate, Local Commissioner, on 22.05.1984, it is evident that the Local Commissoiner did not conclude that the appellants have encroached upon certain parts of the property purchased by the defendant. It would be noted here that Sh.J.C.Dhawan inspected the spot on 17.04.1984, whereas his report is dated 22.05.1984. In the lower Court's record, the layout plan prepared by Sh.J.C.Dhawan, Advocate, was not available. The learned counsel representing the appellant has produced a photocopy thereof which does not show that any encroachment was

reported. Thus, it is obvious that both the Courts below have failed to carefully read the report before deciding case.

8. This Court has also seen the objections filed by the respondents to the report of the Local Commissioner approved by this Court. The first objection is that the Local Commissioner has decided the case which is beyond his jurisdiction. In the considered opinion of this Court, such report is not a decision but only a report. It is for the Court to accept or reject such report.

9. The second objection is that the Local Commissioner has, in the report itself, has reported that the area in possession of the respondent (plaintiff) is deficient to the extent of 8 feet 2 inches on the eastern side. It is submitted that the natural corollary is that the appellants have encroached upon the land of the respondent. It would be noted here that on the careful perusal of the rough layout plan prepared by the Local Commissioner, it is evident that on the western side of the plot purchased by the plaintiff as well as the defendant, there is the Ambala road. On the northern side of the plot purchased by the appellants, there is a 16 feet wide road. On the eastern side of the plot there is a street as well as the vacant land. Even as per the layout plan submitted along with the objections, it is evident that the appellants have constructed three shops on the front having frontage of 11 feet each. In fact, all the shops which are either of the plaintiff or the defendant or other owners, have the same breadth i.e. 11 feet. A majority of shops are of 33 feet in length which is the position of the shop constructed by the appellants (defendants). Hence, it is not proved that the appellants have encroached upon the defendant's plot

10. The last objection of the respondents is that the Local Commissioner has failed to measure the site properly. It would be noted here that an experienced civil lawyer of this Court was sent for carrying out demarcation who has demarcated the area from all the possible angles. The report submitted by the Local Commissioner is elaborate, therefore, in the absence of material to the contrary, it would not be appropriate to hold that there was no proper demarcation.

11. Moreover, it would be noted here that the reasons assigned by both the Courts below while decreeing the suit are erroneous. There is no provision for filing objections to the report of the Local Commissioner. The correctness of the report of the Local Commissioner can be questioned at the time of arguments because such report is only an opinion or a piece of evidence which the Court is required to evaluate. Non-filing of the objections cannot result in drawing adverse inference against a party to the litigation.

12. Even the second reason assigned by both the Courts is erroneous. The defendants have constructed the shops after purchasing the plots through the registered sale deeds. The plaintiffs are required to stand on their own legs. Even if the defendants failed to lead evidence to prove that they raised construction on the property without demarcation, the same would not result in drawing the adverse inference against the defendants.

13. The plaintiff came to the Court alleging the encroachment. He was required to prove that fact. It is also evident that on the northern side of the property purchased by the defendants (appellants) there exists a road as per the sale deed.

14. Both the Courts below have also placed heavy reliance on the layout plan attached with the sale deed of the plaintiff. In the considered opinion of this Court, once the defendants are not a party to the sale deed, the same cannot be binding on them.

15. The First Appellate Court has also taken an adverse view of the matter on the ground that the appellants have already constructed one shop probably during the pendency of the suit. In the considered opinion of this Court, such adverse opinion could not be drawn unless the Court comes to a conclusion that there is a violation of the direction of the Court.

16. It is evident that both the Courts below have passed a decree in favour of the plaintiff and against the appellants without any conclusive evidence to prove the encroachment on their part. Before issuing directions for removal of the encroachment, the Courts are required to be certain and definite about the same.

17. Consequently, the judgments and decrees passed by both the Courts below, being unsustainable are set aside while allowing the appeal. The suit filed by the plaintiff shall stand dismissed.

18. The miscellaneous application(s) pending, if any, in both the appeals, shall stand disposed of.

(Anil Kshetarpal)
Judge

May 30, 2022
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No