

In the High Court of Punjab and Haryana, at Chandigarh

Regular Second Appeal No. 292 of 1990 (O&M)

Reserved On: 22.08.2023
Pronounced On: 13.09.2023

Nanak Chand (Since Deceased) through his Legal Representatives

... Appellant(s)

Versus

Om Parkash (Dead) through his General Power of Attorney Sh.Tilak Raj
Sharma (Since Deceased) through his Legal Representatives

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. A.P.Bhandari, Advocate
for the appellant(s).

Mr. Adarsh Jain, Advocate
for the respondent.

Anil Kshetarpal, J.

1. The Regular Second Appeal in the States of Punjab, Haryana and Union Territory, Chandigarh is governed by Section 41 of the Punjab Courts Act, 1918 and not by Section 100 of the Code of Civil Procedure, 1908, as held by a five Judge Bench of the Supreme Court in *Pankajakshi (Dead) through LRs v. Chandrika and Others (2016) 6 SCC 157*.

2. The correctness of the concurrent findings of facts, arrived at by both the Courts below, is assailed in the second appeal by the defendant.

3. In substance, the dispute is with regard to the possession of a plot depicted with letters “ABCDEFGH” in the site plan attached which is comprised in rectangle No. 130, killa No. 14/3/3. The respondent (plaintiff)

claims that he is owner of the property and in the order passed by the Assistant Collector Ist Grade on 19.07.1982 the property in dispute has fallen to his share in the partition proceedings. On the other hand, the defendant claims that the aforesaid property is a part of his house and he has constructed the building to the knowledge of the plaintiff 12 years before the filing of the suit. The defendant also claimed that the plaintiff has wrongly stated that he got the ownership of alleged khasra No.130//14/3 by partition of main khasra No. 14/3 and in any case, he has perfected his title by way of adverse possession. After the parties were permitted to lead evidence, the trial Court decreed the suit on the basis of a report of the Local Commissioner (Ex.P8) according to which the property in dispute is a part of rectangle No. 130, killa No. 14/3/3 which is owned by the plaintiff. The correctness of the aforesaid judgment was challenged by the appellant in the first appeal. During the pendency of the appeal, the appellant has filed the application for permission to amend the pleadings to assert that his house was comprised in old khasra Nos. 4920 and 4921, measuring 11 biswas and killa No. 14/3 of rectangle No. 130 could not be established by the Consolidation/Revenue Authorities. The First Appellate Court not only dismissed the plaintiff's application for permission to amend the pleadings but also dismissed his appeal.

4. Heard the learned counsel representing the parties, at length and with their able assistance, perused the paper-book along with the requisitioned record which is available in the digital the matter mode.

5. In the considered opinion of this Court, the matter is required to be remitted back to the trial Court for deciding afresh. Hence, it would not

be appropriate to discuss the matter elaborately.

6. The primary argument of the learned counsel representing the appellant is to the effect that the Assistant Collector Ist Grade has no jurisdiction to partition the property particularly when it is not only situated within the municipal limits but also is a part of the residential house. The learned counsel submits that the property is situated in the municipal area and the First Appellate court has erred in dismissing the application for permission to amend the plaint. The plaintiff has also not stepped into the witness box to prove his case, therefore, an adverse inference is required to be drawn against him in view of the judgment passed in *Janki Vashdeo Bhujwani v. Indusind Bank Limited (2005) 2 SCC 217*.

7. On the other hand, the learned counsel representing the respondent submits that the litigation is pending for the last 40 years and the concurrent findings have been arrived at. He submits that the partition order has never been challenged and the defendant cannot be permitted to make submissions with regard to the jurisdiction of the Assistant Collector to partition of the land for the first time in the second appeal.

8. The learned counsel representing the parties have also filed their respective synopsis.

9. Undoubtedly, the appellant did not take up the objection regarding the jurisdiction of the Revenue Authorities to partition the land in the suit. However, this matter goes to the root of the case. From the evidence, it is evident that *prima facie*, the land is surrounded by the constructed area including the property in dispute. It is the case of the appellant that in the year 1968, he raised the temporary construction,

whereas in the year 1972, he constructed a pucca house. Moreover, it has also come on the record that the property is located in the residential area of Sub Division Palwal which is now a District Headquarter. Even as per the case of the plaintiff, the defendant is residing in Mohalla Dev Nagar, Railway Road, New Bus Stand, Palwal, where he has encroached upon the area. It is not the finding of the Courts below that the defendant's plea with regard to the construction of the house over the plot in dispute in the year 1972 is incorrect. In these circumstances, the entire basis of the suit filed by the plaintiff vanishes if the order dated 19.07.1982, passed by the Assistant Collector to partition the land is held to be without jurisdiction. Undoubtedly, the plaintiff cannot be taken by surprise. However, at the same time, it is not appropriate to overlook the fact that *prima facie*, there is some substance in the arguments of the learned counsel representing the appellant.

10. A Division Bench in ***Fauja Singh v. Pritam Singh 1993(2) Punjab Law Reporter 335***, after discussing the provisions of the Punjab Land Revenue Act, 1887, held that the jurisdiction to partition the urban property which is covered by the residential houses does not fall within the scope of the jurisdiction of the Revenue Authority Officer. Para 11 of the judgment is extracted as under:-

“11. No doubt, if a particular property is a abadi land and does not fall under the definition of land, the revenue authorities have no jurisdiction to partition the same but in this case, there is no evidence to prove that at the time the land in dispute was ordered to be partitioned by the Revenue Officer, it was abadi land and was not agricultural land The order of partition was passed by the Revenue Officer on 22-9-1970, Exhibit Dll. The suit land at that time was entered in the

revenue papers and it was assessed to land revenue. So, apparently the Revenue Officer, who partitioned the land, had the jurisdiction to partition the same and as such, the order of partition is valid. Before this order could be held to be invalid, the plaintiff, we think, was required to produce evidence which could show that at the time the order of partition was passed, the suit land was not being used for agricultural purposes, but was being used as abadi land. There is, however, no evidence in this behalf nor any such evidence was referred to by the learned counsel for the appellant. Learned counsel for the appellant-plaintiff has simply tried to press into service the written statement filed by defendant No. 1. No doubt, defendant No. 1 in his written statement alleged that the installations and structures on the suit land raised by defendant No. 1 were existing for the last 20 years, but this averment made by defendant No. 1 was not binding on defendant No. 2 who had raised the plea that the suit land had already been partitioned. So, qua defendant No. 2, the plaintiff cannot take advantage of any averment made in the written statement filed by defendant No. 1. The plaintiff was required to produce some evidence which could show that at the time the suit land was ordered to be partitioned, it was no more an agricultural land, but was being used as abadi land. There is, however, no such evidence on the record. That being so it is difficult to hold, simply on the basis of the averments made in the written statement filed by defendant No. 1, that the suit land at the time it was ordered to be partitioned by the revenue authorities, was being used as abadi land. Therefore, the order of partition passed by the Revenue Officer cannot be held to be illegal or invalid.”

11. The jurisdiction of the High Court, while hearing the regular second appeal is limited, however, this Court does not find it appropriate to

the aforesaid facts, this Court has considered it appropriate to permit the appellant to make submissions for the first time.

12. Te plaintiff did not step into the witness box in order to face the cross-examination on the part of the defendants. Furthermore, the appellant's application, filed before the First Appellate Court, for permission to amend the written statement in order to assert that carving out of khasra No.130//14/3/3 was not correct on the part of the Revenue Authorities/Consolidation Authorities. The First Appellate Court has brushed aside this objection only on the ground that the particular subject matter is not covered under the ambit of Civil Court, hence, it cannot delve into that question. In the opinion of this Court, the Civil Court, while deciding a civil suit, particularly a suit for possession on the basis of the ownership, should not avoid to examine the issues which go to the root of the matter. Hence, the observations of the First Appellate Court are erroneous.

13. Moreover, the defendant (appellant herein) was not a party to the partition proceedings. Such order passed by the Assistant Collector Ist Grade would, at the most, be binding on the parties and the appellant is entitled to challenge its correctness.

14. Further, it has come on record that the appellant, from the very beginning, has been disputing the correctness of the demarcation carried out by the Local Commissioner. It is alleged by the appellant that the Local Commissioner has failed to fix three permanent points in different directions, in accordance with the instructions on the subject. It has also been pointed out that the Local Commissioner has carried out the demarcation with the help of rope and not with the help of jareeb or

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measuring tape. This objection made by the appellant has not been examined by the First Appellate Court in a proper perspective. The Court has ignored the objection on the ground that the Court should ordinarily not interfere with any such result of local investigation. In the considered view of this Court, the First Appellate Court could have examined the possibility of appointing another Local Commissioner before ordering the delivery of possession of a part of the appellant's house.

15. Keeping in view the aforesaid facts and discussion, this Court is of the opinion that the matter requires to be remitted back to the trial Court for deciding it afresh after permitting the parties to amend their pleadings and culling out the issues on the basis of the amended pleadings, if any. The parties shall also be granted an opportunity to lead further evidence. The parties, through their learned counsel, are directed to appear before the trial Court on 13.10.2023.

16. With the observations made above, the present appeal is disposed of.

17. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

September 13, 2023

"DK"

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No