

2024:PHHC:074841



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1080-1990 (O &M)

Judgment reserved on : 04.04.2024

Judgment pronounced on: 18.04.2024

PARGAN RAM

.....Appellant

VERSUS

RAM MURTI AND OTHERS

.....Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: Mr. Amit Jain, Senior Advocate with
Mr. Aryaman Thakur, Advocate
for the appellant.

Ms. Radhika Suri, Senior Advocate with
Mr. Sidhant Suri, Advocate
for the respondents.

VINOD S. BHARDWAJ, J.

1. The present Regular Second Appeal has been filed by the defendant against the judgment and decree dated 26.04.1988 passed by the Sub Judge, Ist Class, Phagwara decreeing the suit No.162 and against subsequent dismissal of the appeal by the Additional District Judge, Kapurthala in Civil Appeal No.37 dated 10.05.1988 vide judgment and decree dated 14.03.1990.

2. Briefly the facts of the case are that the respondent-plaintiffs filed a suit for permanent injunction for restraining the appellant-defendants from interfering with the possession of the respondent-plaintiffs over the land bearing Khasra No.631 Khata No.182/365 measuring 8 Kanals, claimed to be used as a grave yard by the inhabitants of the village Bhanoki, Tehsil Phagwara and further seeking injunction restraining the appellant-

defendant from raising any construction or raising a boundary wall around it.

3. The case of the respondent-plaintiff is that they are inhabitants of Village Bhanoki, Tehsil Phagwara and that the above said land comprising in Khasra No.631 was being used by the respondent-plaintiffs and other inhabitants of the village as a grave yard since time immemorial and that an entry had wrongly been recorded in the revenue record reflecting the ownership of the land in the Custodian even though the Custodian had no right or interest in the said suit land. It was further averred that in the Khasra girdawari for the year 1982-83 the area of suit land has been described as 7 Kanals 10 Marlas instead of 8 Kanals and that the appellant-defendant alleged that he had purchased the land from Joginder Singh, Swaran Singh, Ajit Singh and Bakhshish Singh sons of Harnam Singh of village Panchayat Tehsil Phagwara and that the appellants-defendants had no right since the purported vendors had not been conferred with any title over the suit land. Hence, such a document cannot divest the respondent-plaintiff of their right to retain the possession and occupy the suit land for their use and other purposes. The appellant-defendant started interfering in the peaceful possession of the inhabitants/proprietors of the village on the strength of the said document i.e. sale deed thus, compelling the respondents-plaintiffs to institute the suit.

4. The appellant-defendant entered appearance and filed a written statement claiming therein that the respondents-plaintiffs had no right or interest in the suit land and that the said land originally belonged to the Custodian and the same was allotted to Swaran Singh, Joginder Singh, Ajit Singh and Bakhshish Singh sons of Harnam Singh of Village Panchayat, Tehsil Phagwara and that the same was sold to the appellant-defendant by

virtue of registered sale deed dated 01.08.1986 (Ex.D-1). It is averred that the grave yard of Village Bhanoki is situated in land comprised of Khasra No.633 (8-0) and 632/8-0, Khata No.493/950/952 as well as land comprising in Khasra No.1354/6-18. Hence, the respondents-plaintiffs had no concern with the suit land nor there was any grave yard or Samadh therein. The land in question vested in the Custodian and was thereafter allotted to Swaran Singh and others who have executed the sale deed conferring the title and possession of the above said land in favour of the appellant-defendant.

5. Pursuant to the filing of the replication, following issues were framed:-

- “1. Whether the suit is not maintainable in the present form? OPD.*
- 2. Whether the plaintiffs have locus standi to file the present suit? OPP.*
- 3. Whether the plaintiffs are estopped from filing this suit by their act and conduct? OPD.*
- 4. Whether the suit land belongs to the inhabitants of the village including the plaintiffs and is being used as Burial ground as alleged? OPP.*
- 5. Whether the defendant is owner in possession of the suit land? OPD.*
- 6. Whether the plaintiffes are entitled to the injunction prayed for? OPP.*
- 7. Relief.”*

6. In order to prove their respective cases, the parties lead their respective evidence. The respondent-plaintiff examined as many as eight witnesses to substantiate his case. An equal number of witnesses were examined by the appellant-defendant to substantiate his submissions.

7. On consideration of the pleadings, testimony of the witnesses as well as the evidence proved on record, the Sub Judge Ist Class, Phagwara decreed the suit on the strength of the oral testimony and by making a reference to various discrepancies/contradictions in the deposition of the

witnesses appearing on behalf of the appellant-defendant. It was also recorded in a finding to Issue No.5 pertaining to ownership over the suit land that the letter of allotment in favour of Harnam Singh (predecessor-in-interest of Swaran Singh, Ajit Singh, Joginder Singh and Bakhshish Singh) had not been produced or exhibited on record and that in the absence of the document of title being established there is no linkage as to how and under what circumstances the vendors of the respondent-defendant derived title to alienate the said land in favour of the appellant-defendant. It was also noticed that the land has continuously reflected in the record as Banjar Qadim (Khali) and as such there is no element to suggest that the appellant-defendant had been in possession of the same. While decreeing the suit for permanent injunction, the appellant-defendant was restrained from raising any construction or raise a boundary wall around the suit land or demolishing and removing the pucca built samadh therein or ploughing the suit land except through the process of law.

8. Aggrieved of the said judgment and decree, the defendant-appellant preferred an appeal before the District Judge Kapurthala. The above said Civil Appeal No.37 of 10.05.1988 was dismissed vide judgment and decree dated 14.03.1990, hence the present appeal.

9. Learned Senior counsel appearing on behalf of the appellant-defendant has vehemently argued that both the courts have failed to appreciate the evidence correctly and have acted on conjectures and surmises in recording a finding to the prejudice of the appellant-defendant. He contends that there is a misreading of the testimony of the witnesses that were led in evidence and that even though it has been recorded by the Sub Judge Ist Class, Phagwara that DW-7 Sarwan Singh i.e. one of the vendors

of the appellant-defendant had acknowledged that actual physical possession had not been handed over to the appellant-defendant and that a burial ground existed at the spot, however a complete reading of the testimony of DW-7-Sarwan Singh does not suggest the same. There is a specific recital in the cross examination that even though the said witness was residents of different village and had not resided in village Bhanoki, however, the execution of the sale deed as well as handing over of the possession of the land in dispute in favour of the appellant-defendant is admitted by him in the cross-examination. It is further pointed out that the reliance on Ex.PY by the courts i.e. which is a Khasra Girdawari pertaining to the year 1968-1973 and a reflection of an entry which shows a 'Ghair mumkin-Seve Masan' has been placed by the courts whereas the same was only a stray entry in the Khasra-girdawari which was not corroborated by any mutation. Besides, the said entry did not reflect in the subsequent Khasra-girdawaries as well. Being a stray entry the same needs to be ignored unless special circumstances reflecting the mode and manner in which the entry was recorded in the khasra-girdawari is established on record.

10. He has also argued that the jamabandi pertaining to the year 1982-83 Ex.PX reflected the ownership of the vendors of the petitioner and he has also placed reliance upon the sale deed executed in his favour on 1.08.1986 (Ex.D1). It is contended that consequent to execution of the sale deed, an application was moved by the appellant-defendant for sanction of mutation in his favour. The said mutation was contested by the respondent-plaintiff amongst others and that after such contest, the mutation was sanctioned in favour of the appellant-defendant by the Assistant Collector-Ist Grade vide order dated 25.11.1986 (Ex.D-3).

11. Aggrieved of the said order an appeal was preferred by the respondent-plaintiff amongst others before the Collector and vide order dated 13.04.1987 (Ex.D-4) the appeal was dismissed by the Collector. The mutation was challenged no further and it became final. It is also submitted that the Khata Khatoni Ex.D-9 as well as the Khasra girdawaries proved on record from Ex.D-12 and Ex.D-13 pertaining to the year 1983 to 1987 that the land was actually not being utilized as a masan/grave yard. He also makes reference to the jamabandies to contend that the grave yard was actually situated in Khasra No.632 and 633 and that the testimony of the witnesses establishes that Khasra No.631 is adjacent to the said Khasra Numbers which was being used as a grave yard. A reference is thus, made to the judgment passed by Additional District Judge, Kapurthala wherein he has said that on account of the land being adjacent to said Khasra number there is every possibility that a part of Khasra No.631 was also being used by the residents as a grave yard/burial ground. He contends that such a conjectural hypothesis could not be relied upon by the Additional District Judge for defeating the right that had been vested in favour of the appellant-defendant considering that a report (dakhal) had also been recorded in the roznamcha by the Patwari whereby possession of the land in question was handed over to the appellant-defendant on 15.10.1984 by the vendors of the appellant-defendant. The said possession was transferred and such transfer of possession is duly acknowledged by DW-7-Swaran Singh while appearing as a defence witness. Attention is also drawn to Ex. D-11 i.e. Jamabandi pertaining to the year 1982-83 where the delivery of possession in favour of the vendors of the appellant-defendant is duly recorded in Column No.12.

12. It is further contended that the claim of the respondents-plaintiffs cannot be established since they have neither claimed any ownership rights over the land in question nor they have been able to successfully establish that the land was in actual physical possession and/user occupation of the inhabitants of the village including the respondents-plaintiffs herein. It is argued that for seeking a decree of permanent injunction, the respondent-plaintiff was required to establish the use/occupation and enjoyment of the said property by the beneficiaries seeking injunction against the true owner. Further, as the title of the appellant-defendant has not been disputed and no declaration against the said sale deed has been sought coupled with the fact that a contested mutation was sanctioned in favour of the appellant-defendant, the respondent-plaintiff would be estopped from raising any challenge to the right of the petitioner to retain possession and occupation of the land in question. Having failed to establish their possession, the suit for permanent injunction in a representative capacity could not be presented by the respondents-plaintiffs and the same could not have been entertained.

13. Further, argument is advanced by the learned Senior counsel for the appellant-defendant that the locus of the respondents-plaintiffs to institute the suit, (assuming the contention to be correct for the sake of argument and without conceding to the same) would come only in case it is established on record that the land was being used as a burial ground for common purposes. Since the revenue record does not suggest the land having been used for the common purpose as a cremation ground/burial ground and that it was adjoining to the land in Khasra No.632 and 633 that was being used for such purpose, hence, they would not have any right or

title even in a representative capacity to maintain a suit in the present form.

14. It is further argued that along with the suit an application under Order 1 Rule 8 CPC was also moved by the respondents-plaintiffs for instituting proceeding with the suit in a representative capacity and no order was passed on the said application allowing the respondent-plaintiff to pursue the instant suit in a representative capacity.

15. Responding to the above, learned Senior Counsel for the respondent-plaintiff contends that both the courts have concurrently recorded findings in favour of the respondent-plaintiff and that such a concurrent finding of fact would not ordinarily be interfered with by the High Court while entertaining a Regular Second Appeal. She further contends that the entire claim of the appellant-defendant is based on a sale deed executed in his favour dated 01.08.1986. (Ex.P-1) by the vendors-in-interest who are sons of Harnam Singh. She contends that the letter of allotment by the department of Custodian in favour of Harnam Singh, predecessor-in-interest of the vendors of the respondent-plaintiff has not been brought on record. Consequently, the sale deed cannot be presumed to have conferred or transferred any right in favour of the appellant-defendant in the absence of the deed of allotment/the conveyance deed having been brought on record. She further submits that after the institution of the suit a Local Commissioner Roshan Lal, Office Kanungo had been appointed to visit the spot and submit his report. He had visited the spot in the presence of the appellant-defendant as well as his counsel and various other respectables of the village had also assembled. The measurement of the site was undertaken by identifying the pucca points along with Khasra Nos. 632 and 633.

16. As per the report furnished, in Khasra No.631 there was a water logging over an area of 3 Kanals whereas Muddia/grave had been done in an area measuring 5 Kanals as per his report dated 16.08.1986. She contends that the said report would be per se admissible in view of Order 26 Rule 10 CPC since no objection to the said report had been filed by any of respondents. The factual aspect of the land being used for the said purpose as a grave yard thus, stands established.

17. It is also vehemently argued by the learned counsel that assuming for the sake of an argument and not conceding to the factual aspect that the appellant-defendant is the owner of the property, yet, it is required that the appellant-defendant proves to be in established actual physical possession of the land before he can take his possession. The land in question was under the use and occupation of the Gram Panchayat and inhabitants of the village for their common purpose, an appropriate proceedings for seeking possession of the land ought to be instituted. She contends that the matter has remained pending over a period of more than 30 years and at no point of time any suit for seeking possession of the land has been instituted by the appellant-defendant.

18. She further places reliance on Ex.PY which is the Khasra-Girdawari pertaining to the year 1968-1973 wherein an entry has been made to the aspect that the part of Khasra number was being used as a 'ghair mumkin Seve Masan'. It is also argued that the very fact of this land has continuously been reflected as Banjar Qadim and the vendors of the appellant-defendant were residents of village Panchayat and were not in actual physical possession as per the admission by DW-7 Swaran Singh himself, there was no occasion for delivery of any actual physical

possession in favour of the appellant-defendant. She further contends that had an actual possession of the land been taken by the appellant-defendant, there was no occasion as to why the land would have continue to reflect as 'Banjar Qadim' even in subsequent Khasra girdawaries. She further contends that the Khasra girdawari at the best may raise a presumption, however, such a presumption is rebuttable and that the testimonies of the plaintiff witnesses clearly establish that the land in question was being used as a burial ground for times immemorial and that by long and continuous usage by the residents of the village, their possession and utilization stands established and that they are entitled to seek injunction even against the appellant-defendant.

19. She further contends that non recording of a formal order on an application filed under Order 1 Rule 8 CPC would not defeat the institution of the suit and consequent proceedings that have been undertaken by the courts and that the permission to prosecute the suit in a representative capacity would be inherited by in the subsequent conduct and the final adjudication by the courts in favour of the respondent-plaintiff.

20. In rebuttal, learned counsel for the appellant-defendant submits that report of the Local Commissioner is at best a piece of corroborative evidence and a suit cannot be decreed solely on the strength of a report of the Local Commissioner. It is further submitted that the witnesses who have appeared on behalf of the respondent-plaintiff are closely related and that in their own testimony, they fairly conceded that they had no idea that Khasra Nos. 632, 633 were being used as a cremation ground. Hence, the distinction and demarcation between the respective Khasra numbers was not known to the witnesses appearing on behalf of the respondent-plaintiff. Thus, their

testimony cannot be read to establish that Khasra No.631 was infact been used as a cremation ground. He further submits that PW-2-Plaintiff Ram Murti specifically admitted the ignorance about the said Khasra Numbers and their actual utilization. He also contends that the land in question was purchased by the appellant-defendant in the year 1986 and has since then been in litigation. The Khasra Girdawari reflected the land as 'Khali' and that on account of the litigation, he could not put it to a cultivating use. Hence, the same could not be construed as established as proving of fact that the appellant-defendant was not in possession of the land.

21. I have heard learned counsel for the parties and with their able assistance have perused the record.

22. The primary questions that arise for determination in the instant appeal is as to whether the respondent-plaintiff succeeded in establishing his possession over the suit land and as to whether he is entitled to a decree for permanent injunction restraining the appellant-defendant from interfering with the possession of respondent-plaintiff. The foundation of the case of the appellant-defendant is on the ground that they are the subsequent purchasers of the land from successors of Harnam Singh who was allotted the said land by the Department of Custodian. It was also argued that the grave yard of village Bhanoki was actually situated in a different Khasra that was adjacent to the land purchased by the appellant-defendant and that the land in dispute was never used as a grave yard. In support of his case, he has made a reference to the Jamabandi as well as the Khasra Girdawari wherein, except at one place during the year 1968 to 1973 where entry of the Masan is made. There is no other entry in the Jamabandi or Girdawari on the basis whereof it could be held that the land in question was used as a grave yard. It

was vehemently argued that the judgment and decree of the Additional District Judge, Kapurthala is merely based on conjectures and not by recording a finding of fact. Reliance is also been placed on the testimony of defence witnesses-vendor of the appellant-defendant to contend that the actual physical possession of the land had been handed over to the appellant-defendant.

23. Responding to the same, counsel for the respondent-plaintiff has placed heavy reliance on the statements of witnesses and also the documentary evidence to contend that the document whereby the Department of Custodian transfer the land to the predecessor in interest of the vendors of the appellant-defendant have not been brought on record and in the absence of the basis document, the appellant-defendant cannot be presumed to have established his right.

24. I have gone through the testimony of the witnesses lead by the respondent-plaintiff. PW-1 is one Daulti son of Dhana aged nearly 84 years who had specifically deposed that the cremation ceremony of the ancestors was performed in the land in dispute and that the appellant-defendant had no right or interest in the same and the land never vested even in the custodian.

25. The plaintiff-Ram Murti who appeared as PW-2 also reiterated that the land in dispute was used as a Cremation Ground and that there is pucca Matti/Samadh and that the land is in possession of the inhabitants of the village through the 'Adharmi Basti' It was also stated by him that Roshan Lal, Daftar Kanungo was appointed as a Local Commissioner by the Court and he visited at the spot and prepared the site plan. The said witnesses were ignorant about the cremation ground in Khasra No. 632 and 633. PW-5-Parkash Ram also supported the version that the land was used as

a Cremation Ground/Grave Yard. PW-6 Sarwan Singh alongwith PW-7 Jeet Ram and PW-8 Kartaram Ram, all corroborated existence of cremation ground at the said land.

26. On the other hand, the appellant-defendant who happened to be the Nambardar of the Gram Panchayat denied that existence of any cremation ground on the disputed land and that no cremation ever took place on the said land. However, the said witness specifically stated that there are 3 $\frac{3}{4}$ acres of land for cremation of the dead person and that he was not aware of the Khasra numbers of the land where the cremation ground was situated, however, he specifically admitted that there is one Smadh, which is pucca, in the Cremation Ground that had been in existence for last more than 35 years. It was also stated by him that the Cremation Ground is a property of the Panchayat of the village and not of any individual. The said witness admitted in his cross-examination that he does not know the Khasra number of the disputed land. That DW-4-Jaswinder Singh although denied existence of a Cremation Ground in the said land, however, even he admitted that it was about 4 acres which was being used as cremation ground by the residents of the village. DW-6 who was the Namberdar of the village claims that he did not go through the Revenue record and the Khasra number of the suit property or the Khasra numbers of the land where the grave yard is situated. He admitted that he used to reside in an adjacent village but also had named in the witness list of Village Bhanoki. The said witness again admitted that there was a pucca 'Samadh' on the land where Cremation Ground is situated and that the said 'Samadh' was not constructed in the land purchased by the appellant-defendant. DW-7-Swaran Singh-one of the sons of Harnam Singh and Vendor of the property, claims that property was

allotted by the Department of Custodian and was mutated in their favour after death of his father. He claims that he had delivered possession of the property to the appellant-defendant in execution of the sale deed and that there was no grave yard in the land and the same is rather in the adjoining plot. He, however, admitted in cross-examination that he is not a resident of village Bhanoki and used to reside in the Village Panchayat, Tehsil Phagwara alongwith the brothers for last more than 40 years and that he never resided in Village Bhanoki.

27. He rather claimed to be in possession of the order of allotment in the name of his father, however, the same was never adduced. In the subsequent part, it was stated by the said witness that the possession of the land was handed over by them to the appellant-defendant after two days of the sale deed. It was also acknowledged by him in the cross-examination that there is one Samadh but claimed that the same was in an adjoining property.

28. The claim of the appellant-defendant seeking possession rests entirely on the fact that the same sale deed in relation to the suit property was executed by the legal heirs of the allottee of the land in their favour. It also noticed that the letter of allotment by the Department of Custodian in favour of Harnam Singh was never proved before the Court. Reference was made by the appellant-defendant to establish his title only on the entries made in the Revenue record. No satisfactory explanation has been furnished as to why the primary evidence establishing allotment of land in favour of vendor of the appellant-defendant had not been brought on record. Even though DW-7 claimed that the said letter of allotment is in their possession, neither the same was produced nor the appellant-defendant lead any evidence or examine any witness from the Department of Custodian to

establish the factum of allotment of land and dispute in favour of Harnam Singh.

29. Be that as it may, even if the said aspect of allotment is ignored for the sake of arguments, yet, it was incumbent upon the appellant-defendant to establish that possession of the land had been actually transferred in their favour and that they were in actual physical possession. The aspect which is glaring and has drawn attention of this Court is that Harnam Singh and/or his sons never resided in Village Bhanoki and used to reside in Village Panchayat, Tehsil Phagwara. There is no reference to any Revenue record from where it can be derived that the Department of Custodian had actually delivered possession of the above said allotted land in favour of Harnam Singh. The Jamabandis as well as Khasra Girdwaris of the land showed that the same was “Banjar Qadim” even prior to the execution of the sale in favour of the appellant-defendants. No reasons have forthcome as to why Harnam Singh never took cultivating possession of the land after the same was allotted in his favour. It seems highly improbable that an allottee would not utilize the land, if he was in actual physical possession thereof. The Khasra Girdawaris since Sawni 1968 till Rabbi 1972 and the entries even thereafter continue to reflect the land to be ‘Banjar Qadim’ and not being under actual cultivation. Thus, even if the contention of the appellant-defendant is accepted to be correct that the land in question had been allotted to Harnam Singh, however, possession of Harnam Singh and thereafter by his LRs (Vendors of the appellant-defendant) has not been established. At the same time, a perusal of the order passed by the Assistant Collector, 1st Grade, Phagwara on 25.11.1986 (Ex. D3) pertaining to the mutation No. 2606 about the Khasra No. 631 is concerned, it is noted that

the said mutation pertained to ownership over the land pursuant to the sale deed executed by the successors of Harnam Singh. In appeal, it was noticed by the Collector that so far as the issue pertaining to the nature of use of the said land is concerned, the matter is pending before the Civil Court and that the findings recorded by the Civil Court are binding on the Revenue Courts and that the revenue record can always be brought in conformity with the Civil Court, Jurisdiction. It was on the said basis that the report of the Local Commissioner appointed by the Civil Court was not considered by the Revenue authorities at the time of adjudicating the challenge pertaining to the sanction of mutation. It is undisputed that Madian/Samadh had been constructed on the land used for Grave Yard/Cremation ground, however, reliance in this regard was being placed only on the Khasra Girdawari and Jamabandi as per which the said Samadhs had been constructed on Khasra Number 633 and not on 631. Another aspect which is required to be taken into consideration is that the witnesses of the plaintiffs as well as the defendants have all feigned ignorance about the knowledge of the actual Khasra numbers/Killa numbers on which the Cremation Ground is situated and about the land of the appellant-defendant. They have, however, admitted that it was nearly quoted to be 04 acres of land which was being used for the cremation purposes. As per the Khasra Girdawari Ex. D-12 and the other documents brought on record, Khasra No. 632, 633 and 646 were all measuring 08 kanals each and that Khasra No. 631 is 07 Kanal 10 Marla. Thus, the approximate dimension is of nearly 04 acres of land would not be made out, in case as reliance is placed solely on the testamentary representation and the documents referred to by the counsel for the appellant-defendant. It is in the said background that the report of the Daftar

Kanungo as sought by the Court gains significance. The Local Commissioner had submitted his report dated 16.08.1986 as per which up to the date of filing of the suit, there were three graves on the land. The Sub Judge, First Class, Fatehgarh Sahib has placed reliance on the report of the Local Commission as well as the deposition of the witnesses and referred to the said report wherein it was supported that there were pits in 03 Kanals of the area of land comprising in Khasra No. 631 towards the northern side whereas in the remaining 05 Kanals approximate, there were graves and Madis. The said report also stated that the demarcation and inspection of the spot was carried out in the presence of the parties, hence, the said report of the Local Commissioner corroborated the testimony of the witnesses of the parties all of whom were unison that certain Madis/Samadhs had been constructed over the land which was being used as burial ground. The claim of the defenece witnesses was however to the extent that the said Samadhs exist on the other land and not on the land of appellant/defendant, which was, however, not accepted. The relevant extract of the judgment of the Sub Judge, First Class, Phagwara reads thus:

“14. Thus after carefully analysing the statements of the witnesses examined by the plaintiffs, and, after perusing the Revenue record, consisting of inter alia a copy of Khasra girdawari for years 1968-69 to 1972-73 (Ex.PY) and, after perusing an entry in the said copy of khasra girdarwari relating to Swani, 1972, wherein the land in suit has been mentioned as "Banjar Qadim ghair Mumkin -Seve Masan", it not only stands established from this copy of khasra girdawari, and, from the statement Of PW-1, Daulti, PW2. Ram Murti, PW3 Jagar Ram, PW4 Chaian Ram, PW.5 Parkash Ram, PW6 Sarwan, PW7 Jit Ram and FWB Kartara, but also from the statements of DW-1 Hukma Ram, DW-3 Rattan Singh, DW-4 Jaswinder Singh.

DW5, Gursial Singh, DW6 Udham Singh, and, even from the statements of DW-7 Swaran Singh and DW-8 Pargan Ram (defendant), that there does exist a pucca Samadh in the land situated on the Western side of the Cremation ground, which even according to the DW-6 Udham Singh is situated towards the Western side of the village, like the land of Cremation ground, and, that the said Smadh' exists there for the last 14-15 years, It was for the defendant to prove that the land in suit as alleged by them was seperate from the land where the cremation ground exists at the spot, but he has failed to prove so utterly. In this connection, it would be relevant to mention here that vide order, dated 13.8.86, Shri Roshan Lal, a local commissioner was appointed who too submitted his report, dated 16-8-86, supported by a site plan of the land, comprising in khasra Nos. 630, 631, 632 and 322 stating therein that there were pits in 3 kanals of area of land comprising Khasra No.631 (which is suit land) towards the Northern side having rainy water therein, whereas, in the remaining land measuring 5 kanals, there were graves and marries and he inspected the spot in the presence of Ram Murti (Plaintiff), Pargan Ram (defendant) as well as his counsel, Shri Sardha Ram, and, about 10 more respectables of the village, who all signed report of Roshan Lal, which report of the Commissioner and the evidence taken by him is to be read as evidence in the suit and that the same forms part of record according to Rule 10 of Order 26 CPC. As such even from the above said report of the Local Commissioner which is to be originally accepted by the apponting court, unless any inherent defect is pointed out in the said report, it is clear that the land in suit is nothing but a grave yard, and is being used for the common purposes of the village. Moreover, even DW-2 Pritoo, DW-3 Rättan Singh and DW-6 Udham Singh in their separate statements stated that there are three four fields meant for cremation of dead persons in the village and in this respect, from the perusal of Aks Masavi of village Bhanoki as well as map prepared by Sh. Roshan Lal

(Local Commissioner) it evident that the land comprised in Khasra No.631 which was purchased by the defendants from Swaran Singh and others is in between land comprised in Khasra No. 630, 633 and 646 (8-0 each) & is 'Ghair Mumkin' Masan, whereas the perusal of copy of Khasra Girdwari for Swani, 1972 (Ex. PY), too, indicates that the land in suit was shown as 'Ghair Mumkin Save. Masan' and no reasons are forthcoming as to how this entry was changed in the revenue record thereafter without following proper procedure. All the circumstances taken together as discussed above leads me to the only irresistible conclusion that the land in suit which was purchased by the defendant from Joginder Singh and others by means of a sale deed, dated 1.8.86 (Ex.D-1) is nothing but a burial ground meant for dead persons of village Bhanoki and that the same is being used as such for the last about 70 years as deposed by PW-1 Daulati, who, on 7-11-86, on which date his statement was recorded, was of the age of 84 years and as such, there is no question of disbelieving this witness as well. Further, as earlier discussed, the fact that there is a 'pucca built Smadh' in the land in suit has even been admitted by DW-1 Hukma Ram, DW-3 Rattan Singh, DW-4 Jaswinder Singh, DW-5 Gurdial Singh, DW-6 Udham Singh, DW-7 Swaran Singh and DW-8 Pargan Ram (defendant) as well, and, as such, I have no hesitation in holding that the land in suit belongs to the inhabitants of the village, including the plaintiffs, and is being used as a burial ground as alleged; that there is nothing on record to show if the land in suit was ever allotted to Harnam Singh, predecessor-in-interest of Swaran Singh, Joginder Singh, Ajit Singh and Bakshish Singh, who inherited the same after the death of their father (Harnam Singh) or, that if they were competent to alienate the same to the defendant as per terms of the allotment letter, if any, in favour of Harnam Singh (their father which too, has not been produced on record, nor any documentary evidence has been produced showing if Harnam Singh, or after his death Joginder Singh, Swaran Singh, Ajit

Singh and, Bakshish Singh, ever came into possession of the land in suit, or, cultivated the same, or, if Pargan Ram (defendant), cultivated the suit land after its purchase by him by means of a sale deed, (Ex.D1) and, even the entries in this respect in the copy of Khasra Girdwari for the period from 1983-84 to 1986-87 indicate that the and the same was not cultivated by the defendant after its purchase by him land in suit remained vacant upto Sawani 1987., and, accordingly, this issue is decided in favour of the plaintiffs, and, against the defendant holding that the suit belongs to the inhabitants of village Bhanoki (including the plaintiffs) and, against the defendant holding that the suit land belongs to the inhabitants of village Bhanoki (including the plaintiffs) and that the same is being used as a burial ground.”

30. It was also noticed by the trial Court that the appellant-defendant not only failed to produce the document of allotment of land in favour of Harnam Singh, but also failed to establish vesting of possession over the suit land. The rapat roznamcha entry dated 06.11.1984 (Ex-10) relied upon the appellant-defendant only showed that the possession of land measuring 07 Kanals 10 Marlas was delivered to Joginder Singh and others, however, there was no evidence on the basis whereof possession could be shown to have been delivered in favour of the appellant-defendants. Even the subsequent Girdawaris of Sawani 1983 to 1987 also showed the land to be “Banjar Qadim Ghair –Mumkin-Seve Masan” . It was noticed that the Suit was instituted only on 11.08.1986 and had actual physical possession being delivered to the Joginder Singh and others on 06.11.1984, the same would have been put to cultivation during the year 1983-84; 84-85; 85-86 and 86-87. It was thus held that the possession of the land had never been vested with the appellant-defendant. Insofar as the issue of maintainability of the suit in a representative capacity is concerned, the Court specifically recorded

that there would be a deemed permission for suit being entertained in a representative capacity since a final judgment and decree has already been passed by the Sub Judge, First Class, Phagwara. The Appellate Court also noticed the objections raised by the appellant as noticed above and its contentions are recorded as under:-

“5. On the other hand, it is argued by the learned counsel for the appellant that the land was of the Central Govt. of the custodian and they allotted the same to Harnam Singh Ex.D1 no doubt shows that Khasra No. 631 was originally owned by the central Govt. No allotment order was produced by the defendant that the same was allotted to Harnam Singh. It is alleged by Pargan Ram in Para 1 of the written statement on merit that the property in dispute belonged to the Custodian and Custodian allotted the property in dispute to Sarwan Singh, Joginder Singh and Ajit Singh, But document Ex. D11 shows that it was allotted to Harnam Singh which is contradictory to the pleadings. Moreover if any allotment was made by the custodian then allotment order could be procured from the Custodian. But no such order was produced. The document Ex. PX jamabandi for the year 1982-83 shows that Khasra No.631 is owned by Joginder Singh etc. Ex.PY is the Khasra girdawari in which previously Custodian was shown the owner and in 1972, this property was shown as cremation ground. Ex.D1 is the copy of the sale deed by which Pargan Ram purchased Khasra No.631 from Joginder Bingh etc. Ex.D3 is the order of the mutation. Ex.D.4 is the order of the Collector. Ex.D5 is the copy of Sazra Aks which shows that khasra No.631 is adjacent to Khasras No.632 and 633 and it is admitted that Khasra No.632 and 633 are grave yard. So there is every possibility that Khaara No.631 was adjacent to the Khasra No.632. So it was also being used as/a grave yard. So there is every possibility that Khasra No.631 was adjacent to Khasra No.632. So it was also being used as a grave yard since the time

immorial. Ex. D6 is the copy of Musavi Ex. D7 Jamabandi for the year 1982-83 shows that Khasra No.632 and 633 are cremation ground. Ex.D9 also shows these khasra numbers as cremation ground. Ex. D10 is the copy of the report by which the possession was given to Harnam Singh. When the property in dispute was being used as a grave yard for the last more than 20 years, so the question of giving of the possession to Harnam Singh does not arise and this seems to be a paper transaction. Ex.D12 copy of the khasra girdawari shows that Khasra No. 632, 633 and 646 were being used as a cremation ground Ex. D13 is Khasra girdawari regarding Khasra No.631 in which khasra no.631 has been shown as vacant. The possession of Pargan Ram is not shown if Harnam Singh and after his death his sons Joginder Singh etc. were in possession then their possession must have been mentioned. If Pargan Ram was in possession of the property after he purchased the same in 1986 then his possession must have been mentioned in the Khasra girdawari but that was not mentioned. So from the evidence on the record, it is proved that khasra no.631 is being used as a burial ground (grave yard) for the last more than 20 years by the villagers which means that the villagers are in possession of the same and it is not proved that Pargan Ram is in possession of the property or the person from whom he purchased the property remained in possession of the same. No doubt in the revenue record. Khasra No. 631 has been shown the ownership of the Central Govt. and then of Joginder Singh etc. But when the plaintiffs and other villagers of village Bhanoki are using the same as burial ground for the last 20 years without any interruption so they required the right easement. So the appellant can not assert the claim on the property now.

6- Plaintiff-respondents have locus standi to file the suit as it is proved on the record that the property in dispute was being used as burial ground and the plaintiffs are the villagers who are using the same. So they have interest in the property. So they suit is maintainable in the present form and they have

locus standi to file the suit. It is not proved on the file that the defendant is the owner in possession of the suit land. When the plaintiffs and other villagers are proved to be using the land in dispute as grave yard for the last 20 years so they can restrain the defendant from interfering in their possession and also restraining the defendant from making any construction. So the findings of the lower court on all the issues are correct and I affirm the same. No other point was argued.”

31. It is evident that after noticing the said contentions, it was noted by the learned Appellate Court that the evidence did not prove that possession of the suit land was ever vested or transferred in favour of the appellant-defendant while the evidence suggested that the land was used as a burial ground and would thus be in deemed possession of the villagers for common use. As the same was being used as burial ground for more than 20 years without any interruption, the same gives birth to Right of Easement and that such a right cannot be taken away by arbitrary and illegally taking possession of the land. The report of the Local Commission has thus been of much significance.

32. The counsel for the appellant contends that the said report cannot be accepted at this juncture since the Daftri Kanungo, Roshan Lal never appeared in witness box to testify his report and that such a report can only be a corroborative piece of evidence and cannot be substituted for the need for leading evidence, he placed reliance on the judgment of this Court in the matter of **“Fauja Singh versus Resham Singh and others”** reported as **2011 (1) PLR 265 in RSA No. 1718 of 2007**. The relevant Extract thereof reads thus:

“12. There is no dispute with the legal proposition that report of the Local Commissioner can be read in

evidence, particularly when neither party has preferred objections against the report. However, the report of Local Commissioner is neither conclusive nor carries any presumption of correctness. On the other hand, evidentiary value of the report of Local Commissioner has to be assessed by the Court. In the instant case, Local Commissioner was appointed for demarcation of the suit land and to ascertain the factual position at the spot. It is the function and duty of the Court to adjudicate upon as to which party is in possession of the suit property. This adjudicatory function of the Court cannot be delegated to or abdicated in favour of the Local Commissioner. Consequently, merely on the basis of report of Local Commissioner, no finding can be recorded that the appellant is in possession of the suit property. On the other hand, the report of the Local Commissioner stands contradicted and rebutted by the revenue record including jamabandi, which carries presumption of correctness. In addition to it, Local Commissioner has not reported as to on what basis he came to the conclusion that appellant is in possession of the suit property. Besides it, the suit property being taur is a vacant piece of land. Possession over vacant piece of land follows title. As noticed herein above, plaintiffs are co-sharers in the suit property, whereas defendants have no right, title or interest therein. Consequently, plaintiffs are presumed to be in joint possession of the suit property as co- sharers and defendants cannot be said to be in possession thereof. Even stray acts of tethering cattle or storing dung cakes etc. by a stranger do not amount to possession over vacant land nor it tantamounts to dispossession of the owner. In the instant case, it has not even been proved that the appellant tethered his cattle or stored dung cakes etc. in the suit land, but even such acts would not imply that he is in possession of the suit land

nor it would mean that the owners including the plaintiffs have been dispossessed from the suit land.”

33. Without disputing the proposition of law laid down in the above said judgment, the same does not come to the aid of the appellant-defendant. The said judgment in fact held that a report of Local Commission can be read in evidence particularly when neither parties has preferred any objections to the said report and that the decision as regards actual physical possession is required to be undertaken by the Court itself and the same cannot be recorded solely on the basis of the report of the Local Commission. In the present case, both the Courts have recorded a concurrent finding of existence of a burial ground on the land in dispute not just on the basis of the report of the Local Commission but also by examining the testimony of the witnesses and after noticing that the appellant-plaintiff did not lead the primary evidence showing allotment of land in favour of Harnam Singh or delivery of actual physical possession to the appellant-defendant. Reference was also made to the Khasra Girdawaris which showed that the land was vacant/banjar kadin coupled with the testimony of the witnesses of the appellant-defendant also admitting that the area of the cremation ground was nearly 04 acres and that the documentary evidence lead by the appellant-defendant about Khasra No. 632 and 633 only made it to 02 acres and not 04 acres. The area dimension would only be matching after Khasra No. 646 and 638 were considered apart the same. It was in said circumstances that the existence of Samadh/Mariyan in 05 Kanals of land (which was also admitted by the defence witnesses to exist in the burial ground) was noted before recording a finding that the Khasra No. 631 was actually being used by the residents of the village as a cremation ground.

The Courts were also strengthened in their said conclusion by the fact that neither Harnam Singh nor his sons ever resided in village Bhanoki and that they were resident of village Panchayat and they never were claimed actual physical possession of the land and the only document shown was the rapat rojnamcha of 1984 whereby the possession is claimed by them, however, the subsequent Khasra Girdawaris again do not show any actual physical possession which would thus only be a paper entry.

34. Reference is also required to be made to a judgment of Kerala High Court titled as ***“Retnamma and others versus Mehaboob and others”*** passed in ***S.A. No. 202 of 2001***, in relation to the report of the Local Commission who has been appointed by the Court and against which such report no objections have been filed by any of the parties. It has been held by the Kerala High Court that such a report by a Court appointed Local Commissioner which is based on his knowledge can be treated as an evidence and no further corroboration is required. The relevant extract of the said judgment reads thus:

“33. The object of Order 26, Rule 10 Civil Procedure Code is to admit in evidence, the facts reported by the commissioner in his report, of which, he has direct knowledge and thereby, to avoid his examination in court as a witness, to prove all the facts which are perceived by his senses and reported by him in his report. If the Commissioner has seen a fact, he may report such fact seen by him. Such facts will be treated as "evidence" under Order 26, Rule 10 (2) Civil Procedure Code. So, what is intended to be treated as "evidence" are the facts which the commissioner has reported in his report about which, commissioner has direct knowledge.

34. But, the provision contained in Order 26, Rule 10 (2) Civil Procedure Code is not meant for admitting

any thing which is otherwise inadmissible in law, as "evidence". For example, if a commissioner reports any fact on the basis of hearsay, of which he has no direct knowledge, such fact cannot be treated as "evidence", even if he has reported such a fact in the report. The provision contained in Order 26, Rule 10 (2) Civil Procedure Code is not intended to be invoked to admit in "evidence", whatever the commissioner may report, based on hearsay.

35. Hearsay is no evidence and it is hit by Section 60 of Evidence Act. So, facts which are inadmissible in evidence as hearsay cannot be admitted in evidence under the shield of Order 26, Rule 10 (2) Civil Procedure Code, only because such fact is reported by commissioner in his report. Order 26, Rule 10 (2)CPC is introduced in Civil Procedure Code, not with the object of admitting in "evidence", all the facts stated in the report, even if it is otherwise inadmissible in evidence under Evidence Act.

36. Any way, even on a plain reading of Order 26, Rule 10 (2)CPC itself, the plan purportedly prepared by surveyor, which is produced by commissioner along with the commission report cannot be treated as "evidence", under Order 26, Rule 10 (2) Civil Procedure Code. However, if commissioner reports any fact in the commission report relating to the details in the plan, measurement of property, identification of the property etc., or the correctness of the same, on the basis of what he had personally observed in respect of which, the commissioner is competent to give direct oral evidence, such fact or facts which are contained in the report also can be treated as "evidence", by virtue of Order 26, Rule 10 (2) Civil Procedure Code.

37. The commissioner can, of course, refer to the plan and the details shown therein, for explaining any fact which he reports. If the plan is used to explain

certain facts stated in the report, the plan can be treated as part of the report, without which, the report may not be complete. Normally, a surveyor's plan is appended to the report, for explaining the facts contained in the report in a better and easier manner. So, the plan will form part of the report and it can be admitted in evidence only as part of report and not independently, as a "evidence".

35. The sanction of mutation by the authorities also does not come to the aid of appellant-plaintiff since the Revenue authorities themselves said that the issues that are subjudice before the Civil Court are required to be adjudicated by them only. It is also pertinent to point out that as per the procedure prescribed under Order 26 Rule 10, the report of the Local Commissioner alongwith with other evidence shall be taken as evidence and shall form part of the record and that it was open to any of the parties to be objecting to the observation in the report and cross-examine the Commissioner personally in open Court on any aspects of the report. Having not raised any objection to the said report, it may not currently be open to the appellant-defendant to contend that the said report does not reflect the correct factual matrix.

36. Insofar as the contention of the appellant-defendant that injunction cannot be granted against true owner is concerned, I am inclined to reject the said contention firstly on the ground that the primary evidence in the form of allotment of land in favour of Harnam Singh has not been established on record and secondly, also for the reason that an injunction can be granted against a true owner at the behest of the persons who are in established possession of land. The said land is claimed to be used as grave yard by the residents of the village for the last 40-50 years and their right of Easement has been recognized under the law. Thus, a mere claim that a

person has become owner of the land cannot ipso facto take away the possessory rights/rights of user and enjoyment or rights of easement that have accrued in favour of a third party and that they are entitled to seek protection of the said right even against a true owner and seek injunction.

37. It is further well settled position in law that a concurrent finding of fact recorded by two Courts would not ordinarily be set aside by the High Court unless the findings suffer from illegally, perversity or gross-misappreciation of the evidence adduced in law. Once the conclusions drawn are probable and possible conclusions on a rational and reasonable interpretation of the evidence that is brought on record, such judgment and decree would not be set aside by a High Court in Regular Second Appeal.

38. I do not find that the judgments of both the Courts suffer from any such illegality, perversity or impropriety and I am of the opinion that the conclusions drawn not a lien to the evidence available on record.

39. The present appeal is accordingly dismissed. The judgment and decree dated 26.04.1988 passed by Sub Judge, First Class Phagwara in Civil Suit No. 162 of 1986 as upheld by Additional District & Sessions Judge, Kapurthala, in Civil Appeal No. 37 of 1988 vide judgment and decree dated 14.03.1990 is affirmed.

40. All the pending miscellaneous application(s), if any, are also disposed of.

(VINOD S. BHARDWAJ)
JUDGE

APRIL 18, 2024
Vishal Sharma

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No