

(2010) 08 P&H CK 0423**High Court Of Punjab And Haryana At Chandigarh****Case No:** None

Fauja Singh APPELLANT

Vs

Resham Singh and Others RESPONDENT

Date of Decision: Aug. 13, 2010**Citation:** (2011) 161 PLR 265**Hon'ble Judges:** L.N. Mittal, J**Bench:** Single Bench**Final Decision:** Dismissed**Judgement**

L.N. Mittal, J.

Fauja Singh - defendant No. 1, having failed in both the courts below, has filed the instant second appeal.

2. Suit was filed by respondents No. 1 and 2 (plaintiffs) against appellant and Gurcharan Singh - respondent No. 3 herein. The plaintiffs alleged that they along with other co-sharers, are joint owners in joint possession of the suit property, which is a taur measuring ten marlas comprised of khasra No. 182. Defendants have no right, title or interest therein, but they threatened to take forcible possession of the suit property and to raise construction thereon. Accordingly, the plaintiffs sought permanent injunction restraining the defendants from taking forcible possession of the suit property from the plaintiffs and from interfering in their possession thereon and from raising construction over the suit property.

3. Defendant No. 1-appellant inter alia pleaded that he is in settled possession of the suit property as owner and in the alternative, he has become its owner by adverse possession. It was denied that plaintiffs are co-sharers or are in joint possession of the suit property. Defendant No. 1 purchased a house and the disputed taur from Sunder vide registered sale deed dated 01.01.1973 and since then, defendant No. 1 is in possession of the suit property.

4. Defendant No. 2 also contested the suit and denied the averments of the plaintiffs. Defendant No. 2 claimed himself to be in actual possession of the suit property.

5. Learned Additional Civil Judge (Senior Division), Phagwara, vide judgment and decree dated 19.07.2005, decreed the plaintiffs' suit. Both the defendants preferred separate appeals against judgment and decree of the trial court. Learned Additional District Judge, Kapurthala, vide common judgment dated 28.11.2006, dismissed both the appeals. Feeling aggrieved, only defendant No. 1 has preferred the instant second appeal.

6. I have heard learned Counsel for the parties and perused the case file.

7. The plaintiffs have placed on record jamabandi Ex.P-X for 1995-96 depicting the plaintiffs and other persons to be co-sharers as well as in joint possession of the suit land. Similar entry exists in khasra girdawari Ex.P-Y. Entry in jamabandi carries presumption of correctness. The said presumption has not been rebutted in the instant case. The plaintiffs are thus proved to be co-sharers in joint possession of the suit property along with other co-sharers. The aforesaid revenue documents also depict that defendants have no right, title or interest in the suit property and are not in possession thereof.

8. Defendant No. 1-appellant claimed to have purchased the suit property from Sunder vide sale deed Ex.D-1. However, said sale deed Ex.D-1 does not help the defendant No. 1-appellant in any manner. Firstly, Sunder himself is not proved to be owner or co-sharer in the suit property. His name also does not figure in the revenue record. Secondly, sale deed Ex.D-1 pertains to a house and not to taur. Thirdly, boundaries of the property sold vide sale deed Ex.D-1 do not tally with the boundaries of the suit property. Fourthly, suit property bears khasra No. 182, whereas no such khasra No. of the property sold vide sale deed Ex.D-1 has been mentioned therein. It is thus manifest that sale deed Ex.D-1 does not pertain to the suit property and therefore, defendant No. 1 neither derived any title nor possession over the suit property through sale deed Ex.D-1.

9. Learned Counsel for the appellant vehemently and emphatically contended that Local Commissioner was appointed by the trial court and the said Local Commissioner visited the spot after issuing notice to the parties and made report that defendant No. 1-appellant is in possession of the suit property. It was consequently contended by learned Counsel for the appellant that appellant is proved to be in possession of the suit property. It was also pointed out that plaintiffs did not even prefer any objections against the report of Local Commissioner. Learned Counsel for the appellant relied on judgment of this Court in the case of Jagdish and Anr. v. Sanjay Kumar and Ors. reported as 2004 (1) CCC 286, wherein also objections had not been raised against report of Local Commissioner. It was held that report of Local Commissioner can be read in evidence even without

appearance of Local Commissioner in the Court. Reliance has also been placed on judgment of this Court in the case of Prem Sagar v. Darbari Lal and Anr. reported as 2000 (2) CCC 606, wherein it was held that Local Commissioner appointed to see the factual position at site cannot be said to have created evidence for either party. Lastly, reliance has been placed on judgment of this Court in the case of Kewal Singh and Ors. v. Kanti Pal and Ors. reported as 2001 (1) CCC 65, wherein it was observed that if the dispute is as to who is in possession of the suit property, there is nothing wrong in relying on the report of the Local Commissioner.

10. On the other hand, learned Counsel for respondents No. 1 and 2 contended that report of the Local Commissioner cannot be relied upon to give finding that appellant is in possession of the suit property. It was contended that Local Commissioner has not disclosed as to how he arrived at the conclusion that appellant-defendant No. 1 is in possession of the suit property.

11. I have carefully considered the rival contentions.

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.

13. Judgments cited by Counsel for the appellant have no applicability to the facts of the case in hand. In the case of Kewal Singh (supra), question of temporary injunction was involved. At that stage, *prima facie* case has to be seen and for this purpose, report of Local Commissioner can certainly be relied upon. However, for arriving at a definite finding at the time of final decision of the suit, report of Local Commissioner alone cannot form the basis of recording finding as to which party is in possession of the suit property. Moreover, if there is other evidence as well, the same also has to be taken into consideration along with report of Local Commissioner. In the instant case, even after taking into consideration the report of Local Commissioner coupled with other evidence on record, it can be safely concluded that the plaintiffs are co-sharers in joint possession of the suit property and defendants including the appellant are not in possession thereof. In the case of Prem Sagar (supra), the question was whether the rented premises had not been used for continuous period of four months by the tenant, because his eviction under the Rent Act was sought on this ground. For this purpose, Local Commissioner was appointed to ascertain the factual position at the spot. In this context, it was observed that it could not be said that Local Commissioner had created evidence. This observation in the said case has no applicability to the instant case. The Local Commissioner in that case reported about factual position at the spot and not regarding possession of either party. In the case of Jagdish (supra), the question was whether the demised premises had become unfit and unsafe for human habitation. Local Commissioner had been appointed to report about the condition of the demised property. The question was whether without presence of Local Commissioner in the Court (as witness), his report could be read in evidence. The answer was that report of Local Commissioner could be read in evidence. There can be no quarrel with this legal proposition. However, how much weight is to be attached to the report of the Local Commissioner is a different matter and it depends upon the facts and circumstances of each case and also on the other evidence on record. Moreover, report of the Local Commissioner regarding condition of the suit property or factual position at the spot stands on different footing than the report of the Local Commissioner as to which party is in possession of the suit property.

14. Both the courts below, after analysing and appreciating the evidence including the report of the Local Commissioner, have come to concurrent finding of fact that plaintiffs are joint owners in possession of the suit property and defendants are not in possession thereof. The said finding is perfectly justified and is supported by cogent reasons and cannot be said to be perverse or illegal warranting interference in second appeal. No question of law, much less substantial question of law, arises for determination in the instant second appeal. The appeal lacks any merit and is accordingly dismissed.