
(2009) 09 SHI CK 0008
In the High Court Of Himachal Pradesh

Smt. Kanta Dhir and Anr

APPELLANT

Vs

Smt. Meera Sehgal and Another

RESPONDENT

Date of Decision : 08-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27

Citation : (2009) 3 ShimLC 9

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—This Regular Second Appeal is directed against the judgment and decree dated 9.5.2001, passed by the learned Additional District Judge, Solan in Civil Appeal No. 11-S/13 of 1998.

2. Brief facts necessary for the adjudication of this Regular Second Appeal are that the respondent-plaintiff (hereinafter referred to as "the plaintiff" for convenience sake) filed a suit for perpetual injunction, stating therein that she is owner in possession of land (hereinafter referred to as "the suit

3. Whether reporters of local papers may be allowed to see the judgment? Yes. land" for convenience sake) comprised in Khata/ Khatauni No. 86/132, Khasra No. 163 measuring 42 Square meters, situated in Mauja Kather Solan, Tehsil and District Solan, H.P. as per Jamabandi for the years 1986-1987 and adjoining the suit land is the land of appellants-defendants (hereinafter referred to as "the defendants" for convenience sake) bearing Khasra No. 162 which has been leased to them by the Municipal Committee, Solan over which the defendants have constructed a two storeyed structure. It has been further pleaded that the defendants have encroached upon a portion of the suit land. The suit was contested by the defendants. Their stand is that the land was leased out in their favour to the extent of 75 Square meters by the Municipal Committee, Solan and the construction has been raised on the leased land. The trial Court dismissed

the suit on 27.2.1998. The plaintiff preferred an appeal before learned Additional District Judge, Solan. He allowed the same on 9.5.2001. The Regular Second Appeal has been preferred against the judgment and decree dated 9.5.2001. The Regular Second Appeal has been admitted on the following substantial questions of law:

1. When the plaintiff failed to examine her as her own witness in support of her claim in suit, has not the lower appellate Court below acted beyond its jurisdiction to accept the statement of attorney to grant relief on in admissible evidence and not to draw adverse inference against the plaintiff as envisaged under the provisions of Evidence Act?

2. Whether the lower appellate Court exceeded its jurisdiction in entertaining the application filed by plaintiff for appointment of local commissioner, without satisfying the provisions of Order 41 Rule 27 of the Code of Civil Procedure?

3. Whether the lower appellate court had no jurisdiction to grant the decree for mandatory injunction in absence of any admissible evidence, depicting the nature and extent of the offending structure, as well as without considering the question of awarding compensation instead of demolition?

4. Whether the judgment and decree of lower appellate Court is opposed to the provisions of Order 20 of the Code of Civil Procedure, directing the trial Court to assess the value of suit for the purposes of Court fee and jurisdiction?

5. Whether the lower appellate Court wrongly rejected the objections of the defendants filed against the report of local commissioner, which was inadmissible in evidence being not in consonance with law and procedure?

4. Primarily, Mr. Bhupender Gupta, learned Senior Advocate has advanced arguments on substantial question of law No. 5. He has vehemently argued that the judgment and decree passed by the first appellate Court is not sustainable in the eyes of law. He has vehemently argued that the first appellate Court has wrongly relied upon the report of the Local Commissioner Ext. OW-1/A. According to him, the report has been prepared by the Local Commissioner in contravention of the procedure prescribed by the Financial Commissioner as recorded in the Himachal Pradesh Land Records Manual. He further contended that the objections raised by the defendants to the Local Commissioner's report have wrongly been rejected.

5. Mr. Ajay Kumar, Advocate has supported the judgment and decree passed by the first appellate Court.

6. I have heard the learned Counsel for the parties and have gone through the record carefully.

7. Since all the substantial questions of law are interconnected, the same have been taken up together for discussion to avoid repetition of evidence.

8. The plaintiff has moved an application for appointment of Local Commissioner

under Order 26 Rule 9 read with Section 151 of the CPC to demarcate the land of the parties to determine whether the defendants have encroached upon the suit land or not. The defendants filed reply to the application. The first appellate Court considered the application on 20.7.1999. He appointed Tehsildar, Solan as Local Commissioner to carry out the demarcation strictly in accordance with the High Court Rules and Orders, instructions of the Financial Commissioner and as per the Himachal Pradesh Land Code Manual. The Local Commissioner submitted the report to the first appellate Court. The defendants filed objections to the report of the Local Commissioner, Shri Subhash Saklani. It was, inter alia, contended in the objections that the Local Commissioner has not identified three pucca points as per the instructions issued by the Financial Commissioner. The learned first appellate Court passed a detailed order in objections No. 1S/ 11 of 2001 on 9.5.2001. He affirmed the findings of the Local Commissioner, i.e., OW-1/A and the objections were rejected being devoid of force.

9. The Local Commissioner had appeared as witness before the first appellate Court. He has deposed that he had demarcated the land in presence of both the parties on 20.6.2000. He further deposed that the report Ext. OW-1/A was written and signed by him. He has recorded the statements of the parties as Ext. OW-1/B, Ext. OW-1/C and Ext. OW-1/D. According to him, the defendants have encroached 9 square meters of land. He has categorically deposed that he had identified two permanent points, but third point was not available. The Local Commissioner has to demarcate the land on the basis of available record. The learned Additional District Judge, Solan has come to right conclusion that in case some Karu-Kans are not readable in the Akash Musabi, area can be traced out by way of applying scale. It is true that normally the instructions issued by the Financial Commissioner are required to be complied with while carrying out the demarcation. However, in case there is practical difficulty, as in the present case since the third pucca point was not available, the demarcation can be carried out on the basis of two permanent points by applying scale. The Local Commissioner has heard the parties at the time of carrying out inspection and recorded their statements. The learned first appellate Court has rejected the objections preferred by the defendants by a self contained order. The additional issues were framed by the first appellate Court to the following effect on 20.9.2000 as under:

1. Whether the report of Local Commissioner is liable to be set aside as alleged? OPO.

2. Relief. P.W.-1 Shri Vineet Sehgal is the Special Power of attorney of plaintiff. He has placed on record copy of Special Power of Attorney, i.e., Ext. PW-1/A. According to him, the encroachment was made by defendants over the suit land on 4.4.1990. He has placed on record a copy of Fard Ext. PW-1/B of Khasra No. 163 and Tatima Ext. PW-1/C. Similarly, Shri Jugal Kishore has appeared in the witness box and has deposed that Kanta Devi is his wife and he is Special Attorney. He has placed on record the copy of Special Power of Attorney Ext. R-1. He has deposed that the demarcation was conducted in his presence, but it was

not conducted from permanent points.

10. Mr. Gupta has placed reliance on Radha Soami Satsang Beas through Shri Madan Gopal Singh v. State of H.P. and Anr. ILR 1984 (H.P) 317 and Hari Dass and Ors. v. State of H.P. 1996(2) Sim. L.C. 370. There is no quarrel with the proposition that in normal circumstances, if three pucca points are available, the demarcation is required to be carried out after identifying three pucca points. However, in case as is in the present case one pucca point was not available, the demarcation has rightly been carried out on the basis of two permanent points. The Tehsildar, as noticed above, while appearing as witness has testified that third pucca point was not available. The defendants have failed to prove that in what manner the report furnished by the Local Commissioner is bad in law in the absence of there being 3rd pucca point available. There is no infirmity in the order passed by the first appellate Court whereby Local Commissioner was appointed to carry out the demarcation of the suit land. The defendants were permitted to file objections to the report of the Local Commissioner. The objections preferred by the defendants have been rejected by the first appellate Court by a self contained order. Since the defendants have encroached upon the land, the demolition order passed by the first appellate Court was justifiable and there was no need for awarding compensation as argued by Mr. Bhupender Gupta, learned Senior Advocate. The suit has been rightly valued

11. Accordingly, in view of the observations made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed. No costs.