

+ **RSA 300/2007**

HARI KISHAN Appellant
Through: Mr. V.P. Katiyar, Adv.

SHRI SHIV NARAIN
Through: Mr.Ashish Middha, Adv. with
Mr. Shashank Prabhakar, Adv.

CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- ## JUDGMENT

RSA 300/2007 and CM APPL.16430/2007 (stay)

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Site Plan’ forming part of property No.593, situated in Gali Chhawalian, Najafgarh, New Delhi. Houses of the plaintiff and defendant are adjacent to each other. Defendant started constructing a house on his plot and intended to fix six beams in the wall of the plaintiff for construction of the house. It was pleaded that appellant had no right, title or interest in the said wall. The said suit was duly contested by the appellant.

2. Trial Court vide its judgment and decree dated 4.11.2004 while declining the relief of permanent injunction to the plaintiff, restrained the defendant from making any hole beyond 9 inches on the common wall between the said two properties.
3. Aggrieved by the said order of the Trial Court, respondent filed first appeal before the Additional District Judge (A.D.J.). The said appeal was disposed of by the Appellate Court in terms of its order contained in para 9 of the impugned judgment dated 23.08.2007.
4. Aggrieved by the said order of the ADJ, appellant has filed this appeal raising a substantial question of law, “*Whether the Appellate Court can reverse the judgment and decree of the lower court by brushing aside the document and evidence produced during the trial*”

and the specific admissions made by the plaintiff on the facts.”

5. Formation of question itself suggests that no substantial question of law is involved. The answer to the question is within the question itself. First Appellate Court has every right to reverse the judgment and decree of the lower court on re-appreciation of evidence of the parties produced by them during the trial of the case.
6. During the pendency of the suit and the first appeal, appellant had already constructed the property up to the first and second floor. On 2.7.2007, the Appellate Court passed the following order:-

“It has been agreed to between the parties if the wall of the house of the appellant towards the house of the respondent is found to be 19 inches width at the second floor then the respondent shall be entitled to use 4.5 inches of that wall for carrying out the construction of the second floor. However, if the width of the wall is found to be 9 inches at the second floor then the respondent shall be left with no claim for using the wall of the house of the appellant on their side at the second floor. Both the parties agreed to aforesaid understanding and submit that a local commissioner may be appointed who may measure the width of the wall of the second floor of the property bearing no. 593, Gali Chawlian

Nazafgarh, Delhi. Shri Vinod Kumar, advocate (contact no. 9810085320) is appointed as a Local Commissioner who shall visit the suit property on 12.8.2007 at 12 noon. He may take assistance of Architect who shall submit his report on the next date of hearing which is fixed as 17.8.2007. Fees of the local commissioner are fixed as Rs.8,000/- to be born out by both the parties in equal share and fee of the Architect shall also be born out in equal share. Copy of this order be given to both the parties.”

7. Thus, it is clear that it was with the consent of the parties that a Local Commissioner was appointed to visit the spot, measure the width of the wall of the second floor of the property bearing No.593, Gali Chawlian Nazafgarh, Delhi. The Local Commissioner was authorised to take assistance of an Architect. The Local Commissioner submitted his report dated 16.08.2007 after inspection of the suit property in the presence of the parties. According to his report, the wall adjacent to the property of the respondent was having length of 54 feet and 9 inches, out of which width of the wall from Point A to D as shown in the site plan prepared by the Local Commissioner is about 14.5 inches, whereas the width of rest of the wall is only 9 inches. None of the parties objected to the report of the Local Commissioner.

8. The Appellate Court after considering the report of the Local Commissioner and after understanding the site plan prepared by him, which has also been copied in para 7 of the judgment, held:-

“9. Even otherwise, taking the facts as they are, there is nothing on record which may go to show that the intervening wall was either a common wall or was provided with common at the first floor. In these circumstances, the respondent cannot be said to have any legal right to interfere into the wall belong to the house of the appellant merely because, some holes have been dug by the respondent at some point of time in the wall in question. It was not proved that the respondent has a right to use the said wall or that the wall is a common wall. The respondent has constructed the ground floor and the first floor of the property by using beams and the lanter. He can do so even by raising construction at the second floor or that the third floor. However, for doing so, he cannot use the wall belonging to the appellant as matter of right without the consent of the appellant for the reasons that the appellant even if had constructed the wall on the common portion. He has acquired a right of easement which has become the absolute on account of time lapsed between the date of construction and the filing of the suit therefore, the respondent cannot interfere with the right of the appellant in the wall in question. Moreover, when there is nothing on record to show that the wall is a common wall or the respondent had any legal right to use the same for the purpose of

carrying out construction in his portion. Thus, I allow the appeal to the extent that the respondent shall not be able to use the wall at the third floor even for inserting the gutter to the extent of 9 inches, as has been ordered by the trial court, without permission of the appellant. However, nothing stated herein would have any effect on the construction raised at the ground floor or at the first floor and the appellant shall not cause any interference therein.....”

9. Judgment of the Trial Court as well as of the Appellate Court in no manner can be considered bad in law. Since the Appellate Court fairly considered the fact finding report of the Local Commissioner and other evidence on record while passing the impugned order, the appellant cannot invoke the jurisdiction of this court under Section 100 CPC by filing this appeal.
10. No substantial question of law arises in this appeal. It is pertinent that while disposing of the appeal, the Appellate Court directed the appellant to use wall at the third floor, even for inserting the beams to the extent of 9 inches only, with the permission of the respondent.
11. The judgment is well balanced and the relief of injunction which is an equitable relief has been granted by the Court keeping in mind the

equities of this case based on facts.

12. Hence, appeal being without any merit is hereby dismissed.

(ARUNA SURESH)
JUDGE

MAY 13, 2010
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