

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No.1524 of 2014 (O&M)

Date of Decision: 27.03.2015

Gurmeet Kaur and another

..... APPELLANTS

VERSUS

Anil Kumar and others

..... RESPONDENTS

PRESENT: - Mr. Pritam Saini, Advocate
for the appellants.

Mr. Tarun Dhingra, Advocate
for respondent No.1.

Mr. D.K. Singal, Advocate
for respondent No.2.

CORAM: **HON'BLE MR. JUSTICE SHEKHER DHAWAN**

- 1) Whether Reporters of the local papers may be allowed to see the judgment?
- 2) To be referred to the Reporters or not?
- 3) Whether the judgment should be reported in the Digest?

SHEKHER DHAWAN, J.

This Regular Second Appeal is directed against judgment and decree dated 12.02.2014 passed by the Court of Additional District Judge, Kurukshetra whereby the judgment and decree dated 08.11.2011 passed by Civil Judge (Jr. Divn.), Kurukshetra

was accepted and the findings of the Court of first instance were reversed.

For convenience sake, hereinafter, reference to the parties is being made as per their status in the Civil Suit.

The detailed facts are already recapitulated in the judgments of the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that plaintiff Anil Kumar had filed suit for permanent injunction for issuance of restrain order against the defendants/appellants from raising any construction or installing mobile tower in khasra No.445/3, forcibly and illegally. The plaintiff claimed himself to be owner in possession of said khasra number as a co-sharer. As per plaintiff, the defendants wanted to erect tower on the same without any right, title or interest and, as such, the necessity of the suit. Defendant No.1 contested the suit thereby taking preliminary objections regarding concealment of material facts, locus standi, estoppel, non-joinder of necessary parties.

On merits, defendant No.1 took the plea that they had taken the land on lease measuring 60 feet x 60 feet comprised in khasra No.446/2 from Gurmeet Kaur and Gurdial Singh. On the basis of lease deed dated 31.08.2004,

the construction work had already been completed and the requisite charges were deposited with the Municipal Committee, Ladwa and prayed that the suit be dismissed. Defendant No.1 proceeded against ex parte before the Court of first instance as well.

On separate application under Order 1 Rule 10 of the Code of Civil Procedure, defendants No.3 and 4 were impleaded vide order dated 25.03.2005. The plea was taken by them that mobile tower had already been installed in khasra No.446/2, which was owned by them as they had purchased the said land measuring 11 marlas vide sale deed dated 03.05.1989, land measuring 12 marlas vide sale deed dated 23.04.1981 and land measuring 8 marlas vide sale deed dated 17.07.1985. The plaintiff has no concern with the said khasra No.446/2.

On these facts, the trial Court settled the following issues and the parties were put to trial:

1. Whether plaintiff is entitled to a decree for permanent injunction restraining the defendants from interfering in his peaceful ownership and possession as a co-sharer over the land in dispute and also restraining them from raising the construction of a mobile phone tower on the same? OPP
2. Whether plaintiff has no locus-standi to file and maintain the present suit? OPD

3. Whether plaintiff has not approached the court with clean hands and therefore, he is not entitled to any relief? OPD
4. Whether plaintiff is estopped from filing the present suit by his own act and conduct? OPD
5. Whether suit is bad for mis-joinder of parties? OPD
6. Relief.

Learned Court of first instance, after considering the material and oral as well as documentary evidence available on file decided issue No.1 against the plaintiff whereas issues No.2 to 5 were not pressed and consequently the suit of the plaintiff was decreed.

Being aggrieved of passing of said judgment and decree, the plaintiff/appellant preferred an appeal before the Additional District Judge, Kurukshetra. The first appellate Court accepted the appeal and reversed the findings and suit of the plaintiff for permanent injunction was decreed thereby restraining the respondents/defendants from interfering in the peaceful possession over the suit land or from raising any construction of their transmission tower over land comprised in khasra No.445/3, situated at village Ladwa. The First Appellate Court also issued directions to the defendants to remove the encroachment made over the

disputed land within the period of three months and, as such, defendants No.3 and 4 have come to this Court by way of the present appeal.

The present is Regular Second Appeal and the main point involved is whether there is any substantial question of law involved in the case because both the Courts below have already recorded findings of facts of the case. No substantial question of law was framed at the initial stage. However, law on the point is settled that questions of law can be determined and decided by this Court while deciding Regular Second Appeal. In the case in hand, following substantial question of law is involved:

“1. Whether the Local Commissioner was duly appointed in this case and report of the Local Commissioner can be relied upon to reverse the findings of the Court of first instance.”

At the time of arguments, Mr. Pritam Saini, Advocate for the appellants mainly raised the contention that the Court of First appeal has wrongly recorded the findings without any basis. Although, the Court of First Instance had dismissed the suit of the plaintiff vide judgment and decree dated 08.11.2011 as the plaintiff failed to prove that mobile tower in question was installed in khasra No.445/3. As per learned counsel for the appellants, the onus was lawfully upon the plaintiff to prove that the

tower in question had been installed in khasra No.445/3 but that has not been done. The appellants have been able to prove their ownership and possession over the property bearing khasra No.446/2 and the mobile tower was installed thereon as is evident from the sale deed Exhibits D-11 to D-16. More so, the plaintiff had not disputed the ownership of the appellants over the said land.

As per learned counsel for the appellants, the Civil Suit was originally instituted on 27.12.2004 before the Court of First instance and a specific plea was taken in the written statement which was filed on 03.01.2005 that the construction of tower had already been completed on the land owned by the appellants/defendants. The permission for installing the tower was obtained from the Municipal Corporation.

As per learned counsel for the appellant, khasra No.445/3 was owned by the plaintiff as a co-sharer and khasra No.446/2 was owned by the appellants/defendants. The main dispute was regarding identity of the land. Local Commissioner was appointed in this case, which was against the provisions of law because no revenue official below the status of 'Kanungo' could be appointed as Local Commissioner. Even the report submitted by Local Commissioner is not a valid piece of evidence as the Local

Commissioner had not carried out the site inspection for identifying the disputed land as per settled proposition of law relating to demarcation of land. There is no mention of 'pucca points' and 'Latha'. On this point, reliance was placed upon judgment of this Court in case of **Ram Murti Goyal Vs. Smt. Basant Kaur and others**, 1991 PLJ 147 and this Court observed that as per Order 26 Rule 14 of Code of Civil Procedure and as per provisions of Punjab and Haryana High Court Rules and Orders, Vol.1,Chapter 1-M, the demarcation has to be carried out in accordance with the Rules framed under the Punjab Land Revenue Act and instructions contained in the said chapter relating to "hadd Shikni" cases of Rules and Orders of Punjab and Haryana High Court. More so, demarcation cannot be done properly unless Revenue records, namely, Jamabandis,Field Book, Masavi, Mutations with Tatimas and Aks Latha are seen by the Local Commissioner. However, in the case in hand, the Local Commissioner has not considered these things while conducting the spot inspection and, as such, the report of the Local Commissioner is not a legal piece of evidence whereas the Court of first appeal made the said report of Local Commissioner to be the basis for reversing the findings recorded by the Court of first instance, which was otherwise based on facts of the case, evidence available on

file and correct proposition of law.

Mr. Saini, learned counsel for the appellants raised another contention that if the appointment of the Local Commissioner is without notice of the other party and report is submitted by the said Local Commissioner, his report could not become admissible and cannot be relied upon unless the Local Commissioner is examined in the Court giving adequate opportunity to the other party to cross-examine him. On this point, reliance was placed upon judgment of this Court in case of **Piara Lal Vs. The Liquidator Cooperative Store, Kapurthala**, 2004(2) PLR 464. Accordingly, in the case in hand, the Local Commissioner was never examined but the Court of first appeal reversed the findings of the Court of first instance making the said report of the Local Commissioner to be the basis.

While arguing on these points, Mr. Tarun Dhingra, learned counsel for respondent No.1 took the plea that the appellants are mainly aggrieved of appointment of Local Commissioner. The said order relating appointment of Local Commissioner was challenged before this Court in CR No.695 of 2010 and the said Civil Revision was dismissed vide order dated 10.02.2010 and following observations were made:

“In my opinion, it cannot be denied that the other construction in khasra No.446/2 is not part of the dispute. Hence no error can be found with the order of the learned trial Court declining to give any further direction to the local commissioner.

The second argument of learned counsel for the petitioners is that under the High Court Rules and Orders, a Halqa Patwari cannot be appointed as local commissioner. I am afraid that this belated challenge to the order (after almost 1½ years) cannot be raised, more particularly, since as mentioned above, the petitioners themselves moved an application for seeking further directions to the local commissioner.

Consequently this revision is dismissed.”

As the appointment of Halqa Patwari as Local Commissioner was challenged before this Court and the said matter had already attained finality vide order dated 10.02.2010, the present appeal is not maintainable on the same point.

Learned counsel for the respondents also took the plea that the Local Commissioner was not required to be examined so as to prove his report because the Local Commissioner was appointed by the Court itself and the report of the Local Commissioner was part and parcel of the Court record and is a admissible piece of evidence. On this point, reliance was placed upon judgment of this Court in

the case of **Dalip Singh and another Vs. Smt. Gurdayal Kaur**, 2011(3) PLR 792 and in case of **Raja Ram Vs. Ram Sarup**, 1979 PLJ 12.

Having heard the rival contentions raised by learned counsel for both the parties, this Court is of the considered view that the question regarding appointment of Local Commissioner had already attained finality as the appellants had challenged the appointment of Halqa Patwari as Local Commissioner and this Court while deciding Civil Revision No.695 of 2010 returned specific findings that the contention raised by the appellants was without any basis and the same was dismissed. That way, the appointment of Local Commissioner in this case by the Court of first instance had attained finality and that question cannot be agitated at this stage.

As regards to evidentiary value of report of Local Commissioner, it is settled proposition of law that if Local Commissioner is appointed by the Court in the case, the same has got evidentiary value and the report of Local Commissioner is part and parcel of the Court record and is a admissible piece of evidence. Such a view was earlier taken by this Court in case of **Dalip Singh and another Vs. Smt. Gurdayal Kaur (supra)**.

In the case in hand, there was absolutely no legal

infirmity or impediment before the Lower Appellate Court from relying upon the said report of Local Commissioner only because the Local Commissioner was not examined. The said report of the Local Commissioner was part and parcel of the Court file and was relevant and admissible piece of evidence. Thus, no fault could be found with the same.

Taking the case from other angel that the report of Local Commissioner appointed by the Court has to be read in evidence without the same being proved. Any party, who takes exception against the contents of such a report is under obligation to produce the Commissioner in the Court and to establish that the objections raised are well founded unless and until such a course is adopted. Due weight has to be given to a report submitted by the Commissioner. In this case, if at all the appellants were dissatisfied with the report of the Local Commissioner, they should have moved the application before the Court at an appropriate stage to summon the said Local Commissioner as a witness and cross-examine him and confront him with his report so as to bring out some evidence and material before the Court for not placing reliance upon such a report of Local Commissioner but that has not been done in the case in hand.

In view of the above, the substantial question of law framed in this case is answered against the appellants that the appointment of Local Commissioner in this case was in accordance with law and the same matter had already attained finality in this case qua both the parties and there was no illegality while placing reliance upon such a report of Local Commissioner by the Court of first appeal.

Resultantly, the present Regular Second Appeal is without any merit and the same stands dismissed.

(SHEKHER DHAWAN)
JUDGE

March 27, 2015
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