

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

RSA No.2766 of 2013 (O&M)

Date of Decision.27.09.2016

Lal Chand and another

.....Appellants

Vs

Bhagwan Shah and others

.....Respondents

Present: Mr. Johan Kumar, Advocate
for the appellants.

Mr. Sanjeev Kumar Panwar, Advocate
for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

The appellants-plaintiffs are aggrieved of the judgment and decree rendered by the lower Appellate Court whereby the claim of mandatory injunction and consequential relief of permanent injunction has been declined, reversing the finding of the trial Court, decreeing the suit.

Mr. Johan Kumar, learned counsel for the appellants submits that respondents-defendants had encroached upon the property of the appellants-plaintiffs and in this regard invoked the provisions of Section 39 of the Specific Relief Act, 1963 (hereinafter called the Act of 1963) for handing over the possession. The defence in the written statement was that they are in possession of property, much less, raised the construction 50 years back. In alternative, defence of adverse possession was also taken. The ownership has been proved through the copy of jamabandi Ex.P1. The demarcation report has also been proved but the lower Appellate Court has reversed the finding on the premise that report of demarcation had not been examined. He submits that in view of the plea of adverse possession having

been taken, the ownership is deemed to have been admitted. The alleged construction by taking the aid of the provisions of Article 65 of the Limitation Act is again the admission of encroachment. All these factors have not been taken care of.

Per contra, Mr. Sanjeev Kumar Panwar learned counsel appearing for the respondents submits that the finding rendered by the lower Appellate Court does not call for interference as the plaintiff has miserably failed to discharge the onus. No doubt, the plea of adverse possession was taken but the fact remains that the plaintiff has failed to prove the exact area of alleged encroachment, rightly so, the lower Appellate Court being last court of fact and law after examining the evidence reversed the finding of the trial Court, thus, urges this Court for dismissal of the appeal.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submission of Mr. Johan Kumar, learned counsel appearing for the appellants, for, it was categorically pleaded that 20 sq. yards is encroached by the defendants. The defendant while filing the reply did not dispute the aforementioned area but taken up the plea of having raised the construction 50 years back and the plea of adverse possession, much less, plea of licence has been taken. Both the pleas are mutually destructive to each other.

There is no force in the submission of Mr. Sanjeev Kumar Panwar, learned counsel appearing for the respondents, that the local commissioner was not appointed by the Court. The demarcation report can be sought by the parties even before filing of the suit. No doubt the report has been placed on record in the absence of the author but in view of the pleadings of the parties, it was sufficient for the lower Appellate Court to

concur with the finding rendered by the trial Court. The lower Appellate Court being last court of fact and law should have examined the evidence threadbare by taking into consideration the pleadings of the parties.

No doubt, this Court on earlier occasions had been framing the substantial questions of law while deciding the appeal but in view of the *ratio decidendi* culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213** wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, whether provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC was not correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back and therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

For the foregoing reasons, I am of the view that the finding rendered by the lower Appellate Court is perverse and fallacious and the same is accordingly set aside. Resultantly, the judgment and decree passed by the trial Court is restored and the second appeal is allowed.

(AMIT RAWAL)
JUDGE

September 27, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No