

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

RSA No.933 of 2017 (O&M)

Date of decision : 21.08.2017

Narender

...Appellant

Versus

Sudershana Devi and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sanjay Mittal, Advocate for the appellant.

ANIL KSHETARPAL, J.

The defendant is in Regular Second Appeal against the judgment passed by the First Appellate Court dated 20.10.2016.

The plaintiffs-respondents had filed a suit for permanent injunction restraining the defendant-appellant from causing any loss or damage to the disputed common wall situated in between the properties of the plaintiffs and defendant. Further prayer was made that the defendant be restrained from reducing the thickness of the common wall. It was pleaded by the plaintiffs that the settlement was arrived at between the plaintiffs and defendant on 10.06.2006 and it was agreed that none of the party shall reduce the thickness of the wall.

The defendant contested the suit and admitted that the disputed wall is joint between the parties. The defendant-appellant further asserted that he is only plastering the wall from his side after removing the old

plaster. He has further submitted that he is not reducing the thickness of the wall in any manner.

In this case, suit was instituted on 26.07.2006. Alongwith the suit, a prayer was made by the plaintiffs to appoint the Local Commissioner who shall report about the existing position. The learned Court appointed Sh. Rambir Bhardwaj, Advocate as Local Commissioner. Sh. Rambir Bhardwaj, Advocate was directed to visit the spot and report about the factual position after inspecting the same. Sh. Rambir Bhardwaj, Advocate was directed to give notice to the parties before inspection. Sh. Rambir Bhardwaj, Advocate visited the spot on 27.07.2006 and reported that the defendant-appellant had closed both the sides of the shops and lot of construction work was going on. The persons present there even refused to accept notice. Thereafter, Local Commissioner sought help from the local police and with the help of the police, the spot was inspected. The photographs were taken and videography was also carried out. The Local Commissioner also reported that son of the defendant-appellant namely Jitender had put his signatures on the spot memo to prove his presence.

The Local Commissioner reported that thickness of the wall has been reduced. He reported that the thickness of the wall has been reduced considerably.

The learned trial Court however dismissed the suit filed by the plaintiffs on the ground that it is not proved by the plaintiffs as to what was the thickness of the wall originally.

The plaintiffs filed appeal. The learned First Appellate Court after re-appreciating the evidence available on the file accepted the appeal

and decreed the suit filed by the plaintiffs.

In this case, record has been summoned and examined.

Learned counsel for the appellant has submitted that before inspection of the site by the Local Commissioner, no notice was given to the appellant. He has further submitted that report of the Local Commissioner is beyond the direction given by the Court. He has further submitted that there is no evidence available on the file to prove that what was the thickness of the common wall originally.

Before I deal with the argument of learned counsel, it would be apt to note here that there are two settlements between the parties available on the record. First settlement is dated 10.06.2006, wherein it is noticed that defendant-appellant is digging a basement and defendant-appellant would not reduce the thickness of the common wall. Apart therefrom, there is another settlement between the parties dated 27.06.2006, wherein it was agreed that the defendant-appellant would dig the basement after living two feet land from the common wall. It was further agreed that the defendant-appellant would compensate the plaintiffs in case any damage is caused to the building of the plaintiffs.

The learned Court had appointed the Local Commissioner vide order dated 26.07.2006. The order passed by the Court is extracted as under:-

“Present:- Sh. D.P. Nandwani, counsel for plaintiffs.

Suit received by assignment. Office report perused. Court fee is correct. Be checked and registered. Alongwith the suit application for appointment of LC as well as stay have been filed. Heard on the application for appointment of

Local Commission. The applicant wants to bring on record the existing position of the site in dispute, so this application is hereby allowed and I hereby appoint Sh. Rambir Bhardwaj Advocate present in the Court as LC, who is directed to visit the spot after serving the prior notice upon both parties and to make the report regarding the existing position of the site in dispute. Fees of Local Commissioner is fixed Rs.700/- which is to be paid by the applicant. Report of LC is awaited for 14.8.2006. LC is directed to take alongwith him photographer and if deems fit take video grapher also to take complete and satisfactory picture of the spot in dispute and work done by respondent. In case respondent create any type of interference. LC shall move application before concerned police official for the help. Applicant/plaintiff shall bear the cost of photographer and if necessary of video grapher.

Notice of the suit as well as injunction application be given to defendant for the date fixed on filing of PF and copy of plaint etc.

CJ(JD) 26.7.06”

A reading of the order would show that the Local Commissioner was directed to visit the site after serving notice to both the parties.

A reading of the report would show that son of the defendant-appellant has duly signed the spot memo. Of course, while signing, he has put a time as 16:32 hours.

Even the notice sent to defendant-appellant is signed by the son of the appellant. A reading of the report would show that the son of the appellant was found present at the spot. However, initially he refused to sign. Thereafter, the Local Commissioner had to take help of the local

police. Therefore, there is no force in the submission of learned counsel that the notice was not given to the defendant-appellant.

Second argument of learned counsel is that report is beyond the direction given to the Local Commissioner. The order appointing the Local Commissioner has already been extracted above. A reading of the order would show that the Local Commissioner was directed to submit the report regarding existing position of the site in dispute. The Local Commissioner was further directed to take alongwith him photographer and videographer so that the complete and satisfactory picture of the spot can be brought on the file. In this case, the Local Commissioner visited the spot and submitted his report. He also filed photographs as well as video of the inspection.

In these circumstances, there is no force in the argument of learned counsel for the appellant that Local Commissioner has acted beyond the direction given by the Court.

Learned counsel for the appellant has further submitted that there is no evidence available on the file as to what was the thickness of the common wall. A reading of the report of the building expert would show that in first part, thickness of the wall is 13.6 inches. It is further clear from the report that above the iron garder, the thickness of the wall was 9 inches whereas below the garder, thickness has been reduced to 4 inches. The learned First Appellate Court has directed the appellant to restore the thickness of the wall to 9 inches. The learned First Appellate Court has arrived at a conclusion on the basis of the evidence available on the file. The learned First Appellate Court has also relied upon the opinion of building expert.

In these circumstances, there is no force in the submission of the learned counsel for the appellant. I do not find any good ground to interfere in the findings of facts arrived at by the Additional District Judge, Rewari.

Regular Second Appeal is dismissed.

21.08.2017

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No