

RSA No.617 of 2004 (O&M)

420

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

**RSA No.617 of 2004 (O&M)
Date of decision : 14.09.2018**

Maman Chand @ Mam Chand and others

... Appellants

Versus

Om Parkash and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. D.D. Gupta, Advocate
for the appellants.

Mr. H.S. Hooda, Senior Advocate with
Mr. C.S. Singh, Advocate
for the respondents.

AMIT RAWAL, J.

The appellants-defendants have assailed the concurrent findings of fact, whereby the suit of the respondents-plaintiffs for partition of the common wall shown as Mark AB to the extent of half share, has been decreed by the trial Court and affirmed by the lower Appellate Court.

Succinctly, the facts which emanate from the pleadings of the parties are that the plaintiff instituted the suit on 24.08.1993 claiming that he is owner of two adjoining shops bearing No.65 and 66, measuring 32' x 50' situated at Pillukhera Mandi. The aforementioned shops were purchased from Lila Wati vide sale deed dated 23.11.1961. Shop No.67 towards the northern side of the shop of the plaintiff was purchased by the defendants vide sale deed dated 26.11.1979. The wall towards northern side

RSA No.617 of 2004 (O&M)

of the shop of the defendants, thus, was a joint wall of the property as it was constructed on the common land of the parties. The slabs and certain other things on the wall were laid by both the parties, which was about 30-35 years' old, therefore, claimed the partition as the defendants did not accede to the request for mutual partition.

The defendants by filing joint written statement contested the suit refuting the claim of the plaintiff viz-a-viz partition. It was averred that the wall, in question, was exclusively owned by the defendants.

Since the parties were at variance, the trial Court framed the following issues:-

1. Whether the parties are joint owners and in possession of the wall shown as AB in the attached site plan if so what are their shares and the plaintiff is entitled for partition of the same? OPP
2. If the wall shown as AB is not capable of being partitioned, whether the plaintiff is entitled for the relief of mandatory injunction as prayed? OPD
3. Whether the plaintiff has no locus standi to file the present suit ? OPD
4. Whether the plaintiff has no cause of action? OPD
5. Whether the suit is not maintainable in the present form? OPD
6. Whether the suit is false, frivolous and the defendants are entitled for special costs? OPD
7. Whether the plaintiff is estopped from filing the present suit by his own act and conduct ? OPD
8. Whether the suit is not properly valued for the purposes of court fee and jurisdiction? OPD
9. Relief.

RSA No.617 of 2004 (O&M)

The plaintiff in support of the aforementioned averments examined two witnesses and brought on record the various documents (Ex.P1, Ex.PZ, Ex.P2/A, Ex.P4, Ex.P5 and Ex.P2). On the other hand, the defendants examined two witnesses and tendered in evidence certain documents.

The trial Court by relying upon the report of the Local Commissioner, who did not conclusively opined that the wall 'ABC' to be joint, passed preliminary decree. The lower Appellate Court reiterated the findings of the trial Court. It is, in these circumstances, the present regular second appeal has been filed.

The present appeal vide order dated 13.12.2004 was admitted and the execution of the decree was ordered to be stayed.

Mr. D.D. Gupta, learned counsel appearing on behalf of the appellants-defendants submitted that both the Courts below have failed to notice that the plaintiff has miserably failed to discharge the onus. No demarcation report has been placed on record to connect the property, in dispute, viz-a-viz particulars in the sale deed to establish that the wall was common. In para 9 of the plaint, it was stated that the defendants had written in their sale deed as Wall 'AB' in their ownership, which was not binding upon the plaintiff. Such a pleading tantamounts to admitting the wall 'AB' in the ownership of the appellants-defendants. The plaintiff has not discharged the onus as per Section 101 of the Indian Evidence Act. Mere mentioning of the wall in the sale deed of 1961 would not clothe the ownership or jointness of the wall, until and unless some direct and cogent evidence is led.

It was next contended that the report of the Local

RSA No.617 of 2004 (O&M)

Commissioner relied upon by the Courts below did not conclusively form an opinion that the wall was joint except it was stated that it was old one, but "seems" to be joint. In such circumstances, the Courts below had no other occasion, but to dismiss the suit.

Per contra, Mr. H.S. Hooda, learned Senior Counsel assisted by Mr. C.S. Singh, learned counsel appearing on behalf of the respondents-plaintiff submitted that the concurrent findings of fact cannot be interfered until and unless there is gross illegality and perversity. The sale deed dated 23.11.1961 (Ex.P1) disclosed the particulars of the wall. The defendants are misconstruing the averments in para 9 of the plaint as the intention behind the pleading by making such assertion was that it was unilateral act of the parties to the sale deed dated 26.11.1979 propounded by the defendants in conferring the wall to be in the ownership of firstly the vendor and then the vendee. No objection to the report of the Local Commissioner (Ex.P4) had been filed or any steps taken to rebut the same. In such circumstances, the plaintiff had proved the jointness of the wall to the hilt. The vendor of the defendants, Badri Parshad, could not show the exclusive ownership of the wall of the defendants, thus, urges this Court for dismissal of the present regular second appeal.

I have heard learned counsel for the parties and appraised the paper book as well as records of the Courts below and of the view that there is force and merit in the submissions of Mr. D.D. Gupta, for, in order to establish the jointness of the wall, it was obligatory/incumbent upon the plaintiff to take necessary steps like demarcation of the land, on which, the wall had been erected by connecting it with the measurements of the property viz-a-viz both the sale deeds *ibid*. Local Commissioner was none-

RSA No.617 of 2004 (O&M)

else, but an Advocate, who did not verify the revenue record for the purpose of effecting the inspection. The report does not conclusively opine that the wall 'AB' was joint, but it has been mentioned that "it seems to be joint". This fact has not been disputed by Mr. Hooda, during the course of the hearing. In such circumstances, there was no occasion for the defendants to seek the assistance of revenue expert as the plaintiff miserably failed to discharge the onus. The objections to the report of Local Commissioner are not required to be filed in view of the *ratio decidendi* culled out by the Division Bench of this Court in **"Balbir Dewan Cold Storage and General Mills Vs. Naveen Chander 1989 PLJ 247"**. Had the report been conclusive, perhaps an occasion would have arisen for the defendants to seek the invocation of the provisions of Rule 10 of Order 26 of the Code of Civil Procedure. For the sake of brevity, Rule 10 of Order 26 CPC reads thus:-

"10. Procedure of Commissioner"

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. -

RSA No.617 of 2004 (O&M)

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

The revenue record was the best clincher for enabling the Court to form an opinion of jointness of the wall and in case of some doubt, the demarcation was the best method in ascertaining the same. No such steps have been taken. The genesis of the judgment and decree of the Courts below particularly of the lower Appellate Court being the last Court of fact and law had been only on the report of the Local Commissioner, which, as noticed above, did not conclusively form an opinion with regard to the jointness.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals 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 V/s. Chandrika and others AIR 2016 SC 1213"**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, 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 and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **"Kulwant Kaur and others V/s. Gurdial Singh Mann (dead) by LRs and others" 2001(4) SCC 262**, on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back.

RSA No.617 of 2004 (O&M)

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in **"Pankajakshi 's case"** (supra) reads thus:-

*"Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled." [at paras 27 - 29] "*

27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already

RSA No.617 of 2004 (O&M)

found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

Keeping in view the aforementioned facts and circumstances, the judgments and decrees of the Courts below are not sustainable in the eyes of law and the same are hereby set aside and the suit of the plaintiff is dismissed.

The regular second appeal is, resultantly, allowed.

14.09.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓
Whether speaking/reasoned **Yes/ No**
✓
Whether Reportable **Yes/ No**