

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

RSA No.1 of 2011

Karan Singh and Ors.

....Appellants

Versus

Hem Kaur

....Respondent

And

RSA No.2939 of 2011

Hem Kaur

....Appellant

Versus

Karan Singh and Ors.

....Respondents

Date of Order: 06.3.2018

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.K. Sharma, Advocate for the appellant.

Mr. Harkesh Manuja, Advocate for the respondents.

AMIT RAWAL, J (ORAL)

This common order of mine shall dispose of aforesaid two appeals arising out of the two suits i.e (i) Civil Suit No.63 dated 18.5.2002/21.3.2009 titled Smt Hem Kaur Vs. Karan Singh and Ors, i.e suit no.1, and (ii) Civil Suit No.64/1 of 8.8.2003/26.3.2009 titled titled Smt Hem Kaur Vs. Karan Singh and Ors, namely suit no.2, since common questions of law and facts are involved in the same.

In suit No.1, the appeal filed by the plaintiff-appellant (Hem Kaur) against the judgment and decree dated 31.8.2009 passed by Civil Judge (Jr Division), Rohtak, dismissing her suit, has been accepted vide judgment dated 18.8.2010 passed by lower Appellate Court whereas concurrent findings have been recorded in civil suit No.2 against the plaintiff-Hem Kaur by both the courts below. Hence, two separate second

appeals have been preferred, one by the defendants and the another by the plaintiff. The facts are being extracted from RSA No.2939 of 2011.

Plaintiff-Hem Kaur instituted civil suit No.2 for possession in respect of suit property measuring 22 sq yards located towards Southern side of the house of plaintiff and vacant possession of said site forming part of House No.1024 described in para nos.2 and 3 of the plaint on the premise that she purchased a plot measuring 212 sq. yards situated at Ambedkar Colony, Rohtak vide registered sale deed No.6494/1 dated 1.3.1983 and thereafter raised construction of house No.1024. Defendant No.2-Sanoj and defendant No.3-Sunita are husband and wife whereas defendant No.1-Karan Singh is the father of defendant No.3-Sunita. . Defendant No.1 had another property adjoining the Southern side of the suit property and while occupying the area, the defendants had illegally encroached upon 22 sq yards of the total area. Despite repeated requests being made, the defendants did not deliver back the possession, necessitating the plaintiff to move an application dated 29.5.2003 to the appropriate Authority for appointment of Local Commission. Said application was allowed and after demarcation of the site in dispute, the Local Commission found illegal encroachment of the area measuring 22 sq yards belonging to the plaintiff.

Afore-mentioned suit was contested by the defendants by raising preliminary objections qua maintainability and locus standi etc. On merits, it was pleaded that the plot adjoining the suit property was purchased by defendant No.1 in the year 1979 and construction was raised over the disputed wall in the year 1982, thus the suit was barred by limitation as that the plaintiff had lost right to recover the property. It was stated that the plaintiff purchased the suit plot in the year 1983 i.e

subsequent to defendant No.1 and therefore, he had no right in respect of the building of wall. Defendant No.2 by filing separate written statement contested the suit and took the plea that defendant No.1 purchased the plot adjoining to the plaintiff in the year 1979 and raised construction over the disputed wall in 1982.

From the pleadings of the parties, learned trial Court framed the following issues:

- “1. Whether the plaintiff is owner of the plot detailed in para no.2 of the plaintiff?OPP*
- 2. Whether the defendants have encroached upon the portion of the house of the plaintiff?OPP*
- 3. If issue no.2 is proved, whether the plaintiff is entitled to get the possession of the encroached portion of the suit property back from the defendants?OPP*
- 4. Whether the suit is not maintainable in the present form?OPD*
- 5. Whether the plaintiff has concealed the material facts from the Court?OPD*
- 6. Whether the plaintiff has no cause of action to file the present suit?OPD*
- 7. Relief.”*

In another suit, namely, suit No.1, plaintiff claimed for permanent injunction restraining the defendants from demolishing any part or portion of the Southern side wall of house of the plaintiff, detailed in para No.1 of the plaint and also from interfering in the possession of the plaintiff over the suit property.

Said suit was contested by the defendants by taking the pleas of maintainability and the limitation etc.

On the basis of aforesaid pleadings, trial Court framed the

following issues:

- “1. Whether the plaintiff is owner in possession over the suit property?OPP*
- 2. If issue No.1 is proved, whether plaintiff is entitled for injunction on the ground as alleged?OPP*
- 3. Whether the present suit is not maintainable in the present form?OPD*
- 4. Relief.”*

Second suit had been dismissed by both the courts below whereas first suit was dismissed by the trial Court but the lower Appellate Court has accepted the appeal while reversing the findings of the trial Court.

In respect of first suit, learned counsel for the appellant-defendants submitted that the lower Appellate Court has not appreciated the evidence on record. The injunction was sought against the defendants for not raising wall or demolishing the wall on the premise that the wall is exclusively owned by her but she has failed to produce any material on record to prove this fact. He submitted that the Appellate Court has relied upon the report of the Local Commissioner which showed the existence of the wall but it did not examine the fact whether it was joint or separate.

Learned counsel for the appellant-plaintiff in civil suit No.2 submitted that the findings recorded by both the courts below particularly lower Appellate Court being the last court of law and facts are wholly erroneous and perverse. It has committed grave error while recording that since the suit of the plaintiff was filed in the year 2003, therefore the same was barred by limitation because the sale deed pertains to the year 1983. The fact of the matter is that there is no limitation in respect of the property of which the person is having the title. The report of the Local Commissioner is per se admissible in terms of Order 26 Rule 10(2) CPC. If

at all the defendants had any grievance, they could have taken permission for cross examination of their witness. He further submitted that the ownership of the property as per sale deed dated 01.3.1983, even if not proved being registered, is per se admissible.

After hearing learned counsel for the parties and appraising the paper book, I am of the view that it is a fit case where the matter requires to be re-visited by the lower Appellate Court. The lower Appellate Court has misread the evidence while recording that since the suit of the plaintiff was filed in the year 2003, therefore the same was barred by limitation because the sale deed pertains to the year 1983. In my view, the Appellate Court was oblivious of the fact that there is no limitation for claiming any title and it ought not have rendered such findings and the focus could have been on the alleged encroachment as title of the plaintiff had not been assailed by any of the adverse parties i.e defendant. Moreover, the report of the Local Commissioner should have been considered on the aspect whether it conformed to the provisions of law or not and not otherwise.

This Court, when a second appeal comes before it, must be facilitated to find out as to whether the first appellate court has properly appreciated the case and has proceeded to decide it independently applying its mind to it and considering the totality of the material evidence placed in the case.

Taking into account the facts and circumstances of the present case, the judgment and decree dated 18.8.2010 passed by learned District Judge, Rohtak is set aside and the matter is remitted back to the lower Appellate Court to decide the appeal filed by the appellant-plaintiff afresh in accordance with law.

Since the impugned judgment has been set aside in the connected case, it shall be in the fitness of things if the judgment and decree of lower Appellate Appellate Court passed in another connected case i.e suit no.2 is also set aside. Ordered accordingly.

Lower Appellate Court is directed to hear both the appeals together and the parties through their counsel are directed to appear before it on 20.3.2018.

In the meantime, status quo with regard to the existence of suit property till the adjudication of the appeal shall be maintained. It is expected that the lower Appellate Court shall decide the appeal within a period of four months from the date of receipt of certified copy of this order.

March 06, 2018
manoj

^(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No