

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

**RSA No.5323 of 2016 (O&M)
Date of Decision:05.12.2018**

Rohtash

....Appellant

Versus

Satbir

...Respondent

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr.Sumit Sangwan, Advocate for the appellant.
Mr.Raman Chawla, Advocate for the respondent.

SUDIP AHLUWALIA, J.(ORAL)

The appeal is directed against the concurrent judgements dated 15.4.2014 and 6.9.2016 respectively passed by the learned Civil Judge (Junior Division), Charkhi Dadri and First Appellate Court Bhiwani in No.CS/3200919/2011, Civil Suit No.919 of 2011 whereby the suit filed by the respondent-plaintiff was decreed and first appeal filed by appellant-defendant was dismissed and the appellant was directed to demolish the boundary wall which he allegedly constructed during the pendency of the suit.

2. After having demolished the previously existing 18 inch thick wall located between the houses of both the parties, a commissioner was appointed by the learned trial court and Advocate-Commissioner so appointed submitted his report to the effect that the wall constructed by the appellant/ defendant appears to be of recent origin meaning thereby that the

same was actually constructed during the pendency of the suit.

The appellant had placed certain photographs on record in the Trial Court but he did not get those to be formally led into evidence. The suit was decreed against him and his appeal preferred against such decree was dismissed by the learned Additional District Judge, Bhiwani vide impugned judgement dated 6.9.2016.

3. It is to be noted that during the pendency of the suit itself, the appellant had filed certain objections against the Commissioner's report on 11.6.2013, but notice of the same was not taken in zimini order on that date. On the adjourned date (13.6.2013), the stay application filed on behalf of the plaintiff-respondent was disposed off and the parties were directed to maintain status quo over the suit property during the pendency of the suit. In the final judgement pronounced by the trial court, reference to the objections against the commissioner's report was simply done away by observing "The learned counsel for the plaintiff has also relied on "Dalip Singh and another Vs. Smt Gurdyal Kaur" 2011 (2) PLR-792, wherein it was held that:-

"Local Commissioner- Appointed by the Court- Objection
filed- Are not maintainable."

4. Thereafter, in the lower Appellate Court the appellant again filed an application under Order 41 Rule 27 CPC seeking liberty to lead additional evidence by way of which he again sought to keep the photographs already placed on record to be formally exhibited. But the said application was dismissed by the Lower Appellate Court on the very date the appeal itself was dismissed vide the impugned judgement (6.9.2016). In this manner the appellant clearly had no way to assail rejection of his

application under Order 41 Rule 27 CPC since alongwith with the same the appeal itself had been dismissed.

5. In the opinion of the Court, the real controversy now boils down to a question whether the wall directed to be demolished by the trial Court is actually located on the land of the appellant himself or whether he has encroached upon any part of the respondent's land in constructing the same although he asserts that the wall constructed by him is distinct and separate from the previously existing wall of 18 inches thickness some portion of which can be still seen to exist in one of his photograph on the contiguous left side of his own wall.

6. In this view of the matter, in the opinion of the Court even leading of photographs into evidence is not likely to finally resolve the actual dispute between the parties. It may be mentioned that the report given by the commissioner was regarding the relative freshness of the wall allegedly constructed during the pendency of the suit and it stated nothing about the land on which the same was constructed. Even otherwise the commissioner appointed by the Trial Court was not a Survey knowing commissioner, but an Advocate who virtually held a local inspection regarding the existing structure on the disputed land.

7. As such the actual requirement is a categorical report regarding ownership of the restricted area of land over which the wall allegedly constructed by the defendant appellant exists, which can only be determined by an expert of the subject. For this purpose a Revenue Officer of the concerned area would be the most appropriate person to hold a fresh commission and submit his report regarding ownership of the land over which the disputed wall exists.

6. With the above observations the matter is remanded back to the learned lower Appellate Court to appoint a competent officer in terms of this order who shall, thereafter, hold a commission after notifying both sides on the question mentioned here in above and submit his report before the Court, which shall, thereafter, proceed on to decide the appeal afresh.

Needless to mention that disputed wall cannot be demolished before the appeal is decided denovo after considering the report of the commissioner. Parties to appear before the learned appellate court on 09.01.2019.

In view of the above directions, appeal is disposed off.

(SUDIP AHLUWALIA)
JUDGE

05.12.2018

raman

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No