

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 14th September, 2018.**

+ **RSA 132/2018**

DEV RAJ & ORS

..... Appellants

Through: Mr. Jawahar Chawla and Ms. S. Chawla, Advs.

Versus

SATPAL GULIA

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.37510/2018 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

RSA No.132/2018.

3. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 16th May, 2018 in RCA No.60955/2016 of the Court of Additional District-11 (Central)] of dismissal of First Appeal under Section 96 of the CPC filed by the four appellants against the judgment and decree [dated 24th December, 1999 in Suit No.579/96 of the Court of Civil Judge, Delhi] of dismissal of suit filed by the appellants/plaintiffs for permanent injunction restraining the respondent/defendant “from closing the doors of the house of the plaintiffs bearing no.223, Village Mangolpur Kalan, Delhi, which opens in the back portion of their houses in the interest of justice”.

4. The counsel for the appellants/plaintiffs has been heard to decipher whether this Second Appeal raises any substantial question of law inasmuch as, as per dicta of the Supreme Court in **Surat Singh Vs. Siri Bhagwan** (2018) 4 SCC 562, before entertaining a Second Appeal and issuing notice thereof, substantial question of law has to be framed.

5. The counsel for the appellants/plaintiffs, on being asked the substantial question of law which this appeal entails, has raised two contentions. Firstly it is contended that this Court, vide order dated 21st February, 2018 in CM(M) No.423/2017 titled **Satpal Gulia Vs. Dev Raj** arising from the First Appeal in the subject case had directed the First Appellate Court to first decide the application filed by the appellants/plaintiffs under Order XLI Rule 27 of the CPC before hearing the arguments in the First Appeal. It is contended that the First Appellate Court has decided the appeal in violation of the mandate of this Court.

6. Though I am unable to see as to how this contention, without urging as to what illegality has been committed thereby, raises a substantial question of law but to deal with the same, it is deemed appropriate to set out hereinbelow the order dated 21st February, 2018 supra:-

“The civil suit (later registered as Suit No.579/1996) was instituted by the respondents on 06.09.1993 praying for a decree of permanent injunction against the petitioner, who was impleaded as the defendant. The suit was dismissed by the civil Judge by judgment dated 24.12.1999. The respondents (the plaintiffs) brought an appeal against the said judgment which was initially filed before senior civil Judge on 10.02.2000, but later transferred to the Court of Additional District Judge (ADJ), it presently being

registered as RC ADJ 60955/2016. The appellants had submitted an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (CPC) on 11.10.2010. It is clear from the copies of the proceedings recorded in its wake that there are directions for the said application to be considered at the time of final arguments on the main appeal. The appeal and the said application have not seen adjudication till date, even though they have been now pending for over eighteen years.

The petitioner (the respondent in appeal) is aggrieved because there is an interim order operating adverse to his interest, his grievance being that the proceedings are being protracted to avail undue benefit of said interim order.

The respondents had taken notice through counsel on 19.04.2017. The matter has come up for hearing but there is no appearance on behalf of the respondents.

Having heard the learned counsel for the petitioner and having gone through the copies of proceedings recorded on the file of the appeal since inception, this Court finds absolutely no justification for such protracted proceedings and inordinate delay. The appeal and the pending application have to be heard and adjudicated upon without further delay.

In the above facts and circumstances, the learned first appellate Court (ADJ) is directed to expedite the proceedings and not show any further indulgence. If either side does not render cooperation at the time of hearing, the first appellate Court would be within its right and jurisdiction to require written submissions to be filed, unless already filed, and if even that opportunity is not effectively availed, it would have the liberty to

proceed ahead with the adjudication on available record.

The Court is informed by the counsel for the petitioner that the matter is coming up before the ADJ on 27.02.2018. It is directed that the learned ADJ will hold effective proceedings on the said date and thereafter continue with the hearing of the matter, if it is so required, on day-to-day basis and decide the pending application and, in the light of the decision taken thereon, the appeal, as early as possible, preferably within three months of the said next date of hearing.

The petition is disposed of in above terms.

Copy of the order be given Dasti under the signature of Court Master.”

7. The aforesaid order cannot be read as issuing any such direction as contended by counsel for appellants/plaintiffs. Moreover, considering the nature of the order it does not constitute a precedent. Else, the settled law on the subject is otherwise. It has been consistently held in ***State of Rajasthan Vs. T.N. Sahani*** (2001) 10 SCC 619, ***Eastern Equipment & Sales Ltd. Vs. Ing. Yash Kumar Khanna*** (2008) 12 SCC 739, ***Savitri Devi Vs. Gayatri Devi*** 2010 (114) DRJ 327 and ***Gurnam Singh Vs. Saudagar Singh*** AIR 2005 P&H 267 that an application under Order XLI Rule 27 of the CPC has to be heard and decided along with the appeal and not before the appeal. There is thus no merit in the first contention urged.

8. The second contention urged is that the counsel for the appellants/plaintiffs before the First Appellate Court sought direction for the Revenue Authorities to carry out demarcation of the properties of the appellants/plaintiffs and the property of the respondent/defendant but the First Appellate Court did not order any such demarcation. On being asked as

to when and how the appellants/plaintiffs so applied to the First Appellate Court, attention is drawn to pages 204 and 205 of the paper book being a copy of an application dated 31st October, 2017 stated to have been filed before the First Appellate Court seeking such a direction. On further enquiry as to what order was passed on the application aforesaid, it is stated that the said application was returned to the counsel. The counsel however has nothing to substantiate the same save for stating that he himself is willing to step into the witness box to state so.

9. The counsel clarifies that the original application duly supported by an affidavit attested by the Oath Commissioner is lying with him. On further enquiry as to why the appellants/plaintiffs on their own did not apply to the Revenue Authorities for demarcation, it is stated that the appellants/plaintiffs indeed applied and also deposited the charges therefor; copy of receipt whereof is filed at page 207 and 208 of the paper book but the Revenue Authorities did not carry out any such demarcation.

10. This Court cannot, at the stage of this Second Appeal, start recording the statements of the Advocates as to what transpired before the First Appellate Court. Needless to state that the counsel who himself moved the application has decades of experience at the Bar and knows very well the procedure of filing an application before the Court. The counsel however, even if what is being said is true, was satisfied with the Court refusing to accept the application and did not pursue the matter further, the counsel cannot be now permitted to, as an afterthought, raise a substantial question of law in this respect. If the counsel for the appellants/plaintiffs had in accordance with law and procedure i.e. before the Filing Counter of the District Judge filed the application, the same would have come on record and

an order would have been passed thereon. The appellants/plaintiffs cannot on the one hand not follow the law and the procedure and on the other hand keep the proceedings pending.

11. Similarly, if the Revenue Authorities, though required to carry out demarcation proceedings, were not carrying out the demarcation proceedings, the appellants/plaintiffs had the remedies available thereagainst and cannot at this belated stage of the proceedings seek to have the Second Appeal entertained, contending so.

12. The counsel for appellants/plaintiffs next contends that the Suit Court on its own ought to have got demarcation done.

13. A practice has come into vogue, of the litigants themselves not doing what they are required to do for pursuing their *lis* and at the stage of Second Appeal contending that the Court on its own should have got the demarcation done. A plaintiff in a civil suit is required to, in support of his claim, lead all evidence in his power and possession and summon evidence not in his power and possession and cannot expect the Court to make an inquiry. We still follow adversarial, as distinct from inquisitorial system of administration of justice and the Civil Court is not required to make an inquiry, as is the want of the counsel for the appellants/plaintiffs in the present case. Moreover, the procedure under the Delhi Land Reforms Act, 1954, of demarcation is applicable only to agricultural land and not to *abadi deh areas* of the village abutting the agricultural land. Reference in this regard can be made to *Nilima Gupta Vs. Yogesh Saroha* (2009) 156 DLT 129 (SLP CC No.8987-8990/2009 preferred whereagainst was dismissed on 20th July, 2009), *Munish Tyagi Vs. Jai Singh* (2012) 187 DLT 37,

Gyanender Singh Vs. Narain Singh (2012) 190 DLT 469 and ***Raghubir Singh Vs. Mauji Ram*** 2013 SCC OnLine Del 1439.

14. It cannot also be lost sight of that the appellants/plaintiffs were seeking demarcation at the stage of First Appeal and that too by way of an application under Section 151 of the CPC and not by seeking to lead any additional evidence at the stage of appeal.

15. No other argument has been raised.

16. The counsel for the appellants/plaintiffs now states that only the appellants/plaintiffs were asked to prove their case and nothing was asked from the respondent/defendant.

17. The appellants/plaintiffs, having themselves approached the Court for the relief were required to prove their case and the same does not even constitute a argument of law much less a substantial question of law.

18. No other argument has been raised.

19. The dispute/controversy is purely factual and the Supreme Court in ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78 and ***Krishnan Vs. Backiam*** (2007) 12 SCC 190 has held that the First Appellate Court is the last Court of facts and the Second Appellate Court in the garb of substantial question of law cannot start re-appreciating the evidence.

20. This Second Appeal does not disclose any substantial question of law.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 14, 2018

‘pp’