

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

RSA No.2909 of 2006 (O&M)

Date of Decision : 30.05.2019

Mohan Lal

.....Appellant

Versus

Baldev Raj and another

.....Respondents

CORAM : HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present : Mr. C.B. Goel, Advocate
for the appellant.

Mr. Dinesh Ghai, Advocate,
Mr. Hitesh Ghai, Advocate,
Mr. Nikhil Ghai, Advocate
for respondent No.1.

None for respondent No.2.

SUDIP AHLUWALIA, J. (ORAL)

The Suit was filed by Respondent No.1 seeking a mandatory injunction for removal of the temporary tin sheds and other obstructions allegedly raised by the Appellant on the disputed piece of land, which was stated to be a twelve metres wide public land on the Western Side of the house of the Appellant/Defendant No.1, causing hindrance in the Plaintiff's ingress and egress from the side gate of his house situated on Plot No.184 on the further West, in the adjoining "Sharma Colony", whereas the Defendant's house bearing No.111, is

located in “Madhu Colony, Yamuna Nagar”. It may be mentioned that the disputed “public” land is otherwise a part of the said Madhu Colony. The Decree for mandatory injunction as sought for by the Plaintiff/ Respondent No.1 was granted in his favour by the Ld. Trial Court on 26th March, 2004.

2. The Appeal filed by the Appellant against the said Decree was dismissed by the Ld. Additional District Judge, Jagadhari on 19th April, 2006 vide the impugned Judgment. Thereafter, the present Appeal was initially disposed off by a Co-ordinate Bench of this Court on 21st May, 2010, with the following observations :-

“For the reasons aforesaid, I find that the plaintiff-respondent No.1 has no right of ingress and egress for his house through the disputed road. Finding of the Courts below to this extent is reversed. The decree of the Courts below directing defendant No.1 to remove encroachment from the disputed road is affirmed. The appeal stands disposed of accordingly.”

3. Respondent No.1 being aggrieved with the said decision preferred Special Leave Petition No.30916 of 2016, after which Civil Appeal No.5310 of 2013 in the Hon'ble Supreme Court of India, was disposed off after setting aside the aforesaid Judgment of this Court dated 21st May, 2010, and the matter was remitted back to this Court with the following directions :-

“(i) The High Court shall first consider whether any

substantial question of law arises in the second appeal filed by respondent no.1.

(ii) If the High Court comes to the conclusion that one or more substantial question of law arises/arise in the second appeal, then it shall frame such question(s) of law.

(iii) After framing the substantial question(s) of law, the High Court shall hear the parties with reference to such question(s) and decide the second appeal.

(iv) If during the course of hearing the High Court comes to the conclusion that any question of law, other than those already framed, arises for consideration, then such question shall also be framed and decided after giving an opportunity of hearing to the parties.”

4. Subsequently, however, a decision of a Constitutional Bench of the Apex Court was passed in '**Pankajakshi (Dead) through L.Rs & Others Versus Chandrika & Others**', 2016(2) R.C.R.(Civil) 245 on 25th February, 2016, in which it was observed *inter alia* -

“25. We are afraid that this judgment does not state the law correctly on both propositions. First and foremost, when Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 speaks of any amendment made or any provision inserted in the principal Act by virtue of a State Legislature or a High Court, the said Section refers only to amendments made and/or provisions inserted in the Code of Civil Procedure itself and not elsewhere. This is clear from the expression “principal Act” occurring in Section 97(1). What Section 97 (1) really does is to state that where a State Legislature

makes an amendment in the Code of Civil Procedure, which amendment will apply only within the four corners of the State, being made under Entry 13 of List III of the 7th Schedule to the Constitution of India, such amendment shall stand repealed if it is inconsistent with the provisions of the principal Act as amended by the Parliamentary enactment contained in the 1976 amendment to the Code of Civil Procedure. This is further made clear by the reference in Section 97(1) to a High Court. The expression “any provision inserted in the principal Act” by a High Court has reference to Section 122 of the Code of Civil Procedure by which High Courts may make rules regulating their own procedure, and the procedure of civil courts subject to their superintendence, and may by such rules annul, alter, or add to any of the rules contained in the first schedule to the Code of Civil Procedure.

26. Thus, Kulwant Kaur’s decision on the application of Section 97(1) of the Code of Civil Procedure Amendment Act, is not correct in law.

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 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. Shri Viswanathan's reliance upon this authority therefore does not lead his argument any further.

5. The net result therefore is that earlier provisions of the Punjab Courts Act, 1918, which permitted filing of Regular Second Appeals, was held to be still operative notwithstanding the restrictive conditions subsequently incorporated by way of amendment of Section 100 of the Code of Civil Procedure in 1976. Consequently, requirement of framing any substantial question of law is no longer a *sine qua non* for deciding a Regular Second Appeal by this Court, and the aforesaid decision of the Apex Court in *Pankajakshi's case (supra)*

has been explicitly followed by Co-ordinate Benches of this Court in **'Raj Pal and others Versus Smt. Chameli', 2016(4) Law Herald 3142** and **'Municipal Committee, Loharu Versus Jagdish Kumar and others', 2017(2) R.C.R.(Civil) 568.**

6. At any rate, a substantial mixed question of law and fact certainly has arisen before this Court to the effect as to whether *“Even where encroachments on the disputed land are directed to be removed by a Court, still would that give any right to the Respondent No.1/Plaintiff to use the said land for ingress and egress from the side gate of his house when the land falls in the area of the adjacent Madhu Colony, which is different from Sharma Colony, in which the Plaintiff's house is located ?”*

7. In compliance of the order passed yesterday, Respondent No.1 has tendered as many as thirteen photographs of the disputed area showing existence of his side gate situated in the Eastern side wall of his house, which according to him, has been blocked by raising of a 12 metre wide wall by the Appellant/Defendant No.1, adjacent to the Respondent's own boundary wall. It was, however, nowhere a case of the Plaintiff that he was using the disputed area for ingress and egress on account of any Easementary right, or even by way of “easement of necessity”. There is also nothing available from the material on record to indicate whether the side gate constructed by Respondent No.1 in the

Eastern wall of his house was with the approval of the Municipal Authorities. In such circumstances, the observation of the Co-ordinate Bench of this Court in the earlier Judgment passed on 21st May, 2010 to the effect that “*I find that the Plaintiff/Respondent No.1 has no right of ingress and egress for his house through the disputed land*” becomes significant as well as forceful.

8. This Court finds no reason to take any different view from that taken by the Co-ordinate Bench in the aforesaid earlier Judgment.

9. The Appeal is, therefore, disposed off on the same terms and conditions but with a rider that while the Appellant would be obligated to remove his tin-shed and other manmade structures, if any, raised by him, latest by 30th June, 2019, but the Respondent No.1/Plaintiff shall also not use the disputed land for the purpose of ingress and egress from his house unless construction of his Eastern side gate is expressly authorized by the Local Authorities. Further, the Respondent No.1/Plaintiff is at liberty to demolish the unauthorized concrete structures on the disputed land, in case, the same are not removed by the Appellant/Defendant No.1.

May 30, 2019

Dpr

**(SUDIP AHLUWALIA)
JUDGE**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No