

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

Sr. No.203

RSA No.1605 of 2016 (O&M)

Date of decision: 13.05.2019

Naveen Kumar

....Appellant

versus

Sandeep Kumar

....Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Vivek Khatri, Advocate
for the appellant.

Mr. Balraj Gujjar, Advocate
for the respondent.

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DEEPAK SIBAL, J. (Oral)

The facts, in brief, which are required to be noticed for adjudicating upon the present second appeal are that the respondent filed a suit seeking therein possession by way of partition of 170/250 share in respect of plot Nos.5, 6 and 7 detailed and described by him in his plaint (for short – the suit property). The case set up by the respondent was that since both the respondent and the appellant were closely related they had jointly purchased the suit property through a registered sale deed dated 18.03.2004 from one Dharampal son of Uday Ram for a total sale consideration of ₹1,25,000/-. Physical as well as symbolic possession of the suit property was delivered by the vendor to both the appellant as also the respondent. However, without getting the plots demarcated and without the respondent's consent, the appellant raised construction over the suit property and through such construction encroached upon the respondent's share. It

was further the case of the respondent that when the appellant was confronted with the unauthorized construction made by him, the appellant attacked the respondent. The respondent then registered a criminal case against the appellant as also instituted the instant suit.

On being put to notice, the appellant appeared before the Trial Court and admitted that the suit property had been jointly purchased by the appellant and the respondent. It was further submitted that the suit property, through an oral partition, had been partitioned by the parties in the year 2009 and as per such partition a boundary wall had been constructed by the respondent. Thereafter, the appellant had made construction on the part of the suit property which had fallen to his share.

The Trial Court framed issues and through preliminary decree dated 07.09.2012 partly decreed the respondent's suit by holding that no partition of the suit property had taken place and that the respondent was entitled to possession of the suit property to the extent of his share. The preliminary decree was not challenged by the appellant. The respondent then filed an application before the Trial Court for passing of the final decree. On receipt of the aforesaid application, the Trial Court appointed Sh. O.N. Kaushik, Advocate, as a Local Commissioner to visit the site and submit a report so that the Trial Court could be assisted to pass the final decree of partition. As directed by the Trial Court, Sh. O.N. Kaushik, visited the site and filed his report to which the appellant filed his objections. While such objections were pending, the respondent filed an application seeking appointment of a revenue official as a Local Commissioner which application was allowed by the Trial Court on 06.10.2014 and accordingly, the concerned Kanungo was appointed as a Local Commissioner, who

visited the spot and gave his report to which the appellant filed his objections.

On 12.01.2015, the Trial Court took up the objections filed to both the aforesaid reports i.e. the earlier report dated 28.05.2014 given by Sh. O.N. Kaushik and the other report given by the Kanungo. The objections filed by the appellant to the report given by the Kanungo were accepted and resultantly, such report was rejected. However, the appellant's objections to the report given by Sh. O.N. Kaushik were not found worthy of acceptance and therefore, the same were rejected. Resultantly, Sh. O.N. Kaushik's report was accepted.

The appellant then filed an application seeking review of the aforesaid order dated 12.01.2015 through which his objections to the report given by Sh. O.N. Kaushik had been rejected. The Trial Court considered the application but finding no merit in the same, through its order dated 04.03.2015, dismissed the same.

The afore-referred orders of the Trial Court dated 12.01.2015 and 04.03.2015 were challenged by the appellant before this Court through a revision petition being CR No.1881-2015 – Naveen Kumar vs. Sandeep Kumar which was dismissed on 17.03.2015 after holding that the remedy chosen by the appellant was not the correct one.

Through his report Sh. O.N. Kaushik had suggested a mode of partition. He had further reported that the appellant had exceeded construction portion by 5 sq. yds. as he has raised construction on 85 sq. yds. while his actual share was only 80 sq. yds. On 19.03.2015, relying upon Sh. Kaushik's report, the Trial Court passed the final decree. Qua the excess construction made by the appellant, the Trial Court directed the

appellant to pay compensation to the respondent. The respondent was further held to be the exclusive owner in possession of the land measuring 165/256 sq. yds. of the suit property towards southern side. The site plan attached with the report of Sh. O.N. Kaushik, was made a part of the decree.

The appellant filed an appeal against the aforesaid final decree which was dismissed by the Additional District Judge, Hisar (for short – the Appellate Court) on 21.03.2016. It is in these circumstances that the present second appeal has been preferred before this Court.

The sole argument raised by learned counsel for the appellant is that the report of Sh. O.N. Kaushik is dated 28.05.2014 to which objections were filed by the appellant on 25.08.2014 and while such objections were pending, the respondent filed an application for appointment of another Local Commissioner which was accepted. According to learned counsel for the appellant, the moment respondent filed an application for appointment of another Local Commissioner, the earlier report given by Sh. O.N. Kaushik, stood wiped out and therefore, no reliance on the same could have been placed. A judgment of a Division Bench of Kerala High Court in **Francis Assissi vs. Sr. Breesiya Mother Superior and others, 2017(1) ILR (Kerala) 33**, was cited in support of his arguments.

Learned counsel for the respondent simply defended the concurrent findings recorded by both the Trial Court and the Appellate Court.

After passing the preliminary decree, the Trial Court appointed Sh. O.N. Kaushik, Advocate, as a Local Commissioner to visit the site and suggest a mode of partition which he did through his report dated 28.05.2014. In such report the appellant was also found to be encroaching

upon 5 sq. yds. of the respondent's share. The appellant filed his objections to the report. However, while such objections were pending, the respondent filed an application before the Trial Court seeking the appointment of revenue official as a Local Commissioner which was allowed. Accordingly, a Field Kanungo was appointed as a Local Commissioner who inspected the site and also filed his report. The appellant filed his objections to such report also. The objections filed by the appellant to the reports submitted by both the Local Commissioners were considered by the Trial Court and through order dated 12.01.2015, the appellant's objections to the report given by the Field Kanungo were accepted and resultantly, such report was discarded. Obviously, the appellant has no objection to the passing of such order. Through the same aforesaid order, the objections filed by the appellant to the report by Sh. O.N. Kaushik were rejected after specifically returning a finding therein that the suit property had been properly demarcated by Sh. O.N. Kaushik and that too in the presence of the appellant. The Trial Court further found that specific measuring units given by Sh. Kaushik report clearly showed that the same had been given by him after actual and physical measurement. Thus, on or after 12.01.2015, on the record of the Trial Court there was only one Local Commissioner's report suggesting therein the mode of partition. Sh. O.N. Kaushik's report had nowhere been set aside by any superior Court. No factual error in Sh. Kaushik's report was shown before this Court as the only argument raised to attack the final decree of partition was that such report was required to be ignored the moment an application was filed by the respondent for appointment of a fresh Local Commissioner.

Both the Trial Court and the Appellate Court have directed the

suit property to be partitioned in terms of the report submitted by Sh. O.N. Kaushik in which no factual error has been pointed out. Thus, the concurrent findings of fact arrived at by both the Trial Court as also the Appellate Court warrant no interference.

Francis Assissi's case (supra) would not support the case of the appellant especially when no factual error in Sh. O.N. Kaushik's report has been pointed out.

In view of the above, no interference is warranted with the concurrent findings of fact returned by both the Trial Court as also the Appellate Court. No question of law much less any substantial question of law is also found to arise in the present appeal.

Dismissed.

(DEEPAK SIBAL)
JUDGE

May 13, 2019
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Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No