

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

RSA No. 1317 of 2018 (O&M)

Date of Decision:16.08.2019

Ajay Kumar and another

.....Appellants

Versus

Ashwani son of Mohan Lal and others

..... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr.Gopal Sharma, Advocate
for the appellants.

LISA GILL, J.

Appellants, who are the legal representatives of defendant no.2-A-Manohari Devi, are aggrieved of judgement and decree dated 29.09.2010, passed by learned Civil Judge (Jr. Division), Rewari, as well as judgement and decree dated 24.07.2013, passed by the learned Additional District Judge, Rewari, respectively, to the extent, counter-claim filed by defendant no.2-A has been dismissed.

Brief facts necessary for the adjudication of the case are that the plaintiff-Mohan Lal, now represented by his legal representatives (respondents no.1 to 4 in this appeal) filed a suit for mandatory and permanent injunction while claiming to be the owner in possession of the property as detailed in the suit, on the basis of a decree of partition in civil suit no. 465/1985, titled as 'Mohan Lal Vs. Shyam Sunder etc.', decided on 13.11.1995. It is pleaded that defendants no.2, 2 and 2-A i.e. two brothers and mother of the plaintiff-Mohan Lal, are strong headed and quarrelsome persons and they were adamant to demolish the intervening common wall on

the property. They had demolished a part of the wall, due to which cracks had appeared in the plaintiff's house. The defendants, it is alleged wanted to further demolish the intervening common wall without prior permission of defendant no.3. Despite request, the defendants, it is stated did not desist from their illegal acts. Hence the suit was filed.

It is to be noticed that defendant-Manohari Devi, was impleaded at a later stage as defendant no.2-A.

Defendants no.1 and 2, contested the suit while taking various preliminary objections including that of non-joinder of necessary parties. It is stated that the suit property was purchased by Bajrang Lal in the year 1958, who had raised construction thereon in the year 1959. A 14' wall was constructed on the ground floor and a 9' wall on the first and second floor was constructed. The house was constructed towards the south of Kanhiya Lal Bhargav's house. The northern wall which was towards the south of house of Kanhiya Lal, was constructed by Bajrang Lal, father of the plaintiff, in the year 1959 on his property and the plaintiff had no right over the same. It is further stated that the plaintiff-Mohan Lal, had raised a 4' wall adjacent to the house of Smt. Manohari Devi and it is on this 4' wall that a terrace as well as linter of the plaintiff's house was also constructed. The 4' wall of the plaintiff is separate from the 14' wall. The suit, it is stated was filed on account of previous enmity so as to prevent defendants no.1 and 2 from carrying out necessary repairs in the portion in their possession. A terrace as well as railing was constructed by the plaintiff in the year 1995 illegally and he encroached upon the defendants house, for which the defendants reserved their right to file a counter claim. Reliance was also

placed on the report dated 04.04.2000 by the Local Commissioner. Site plan submitted by the plaintiff is stated to be incorrect. No damage, it is stated was ever caused to the plaintiff's property by the defendants. Dismissal of the suit was prayed for.

A separate written statement was filed by defendant no.2-A-Manohari Devi claiming to be the owner in possession of the house marked by the letters 'ABCD' in the site plan attached with the written statement. House of the plaintiff-Mohan Lal is stated to be situated towards the northern side which was constructed in the year 1996 and a 4' wall and pillar were raised for constructing the building by the plaintiff adjacent to the northern wall of the house of defendant no.2. The roof of the plaintiff's house up to the 3rd floor is on his own 4' wall on the northern side of the defendants house. It is claimed that the plaintiff in-fact illegally enlarged some portion of his balcony towards the defendants house in the year 1996 in their absence. It is the plaintiff who encroached upon her area. Taking similar pleas as by defendants no.1 and 2, dismissal of the suit was prayed for.

Defendant no.3, also contested the suit.

Separate replication was filed to the written statements filed by the defendants.

A counter claim was filed by defendant no.2-A, claiming relief of mandatory injunction as well as permanent injunction while stating that defendant no.2-A, is the owner in possession of house no. 3702/3A as described in the counter claim. The plaintiff, it is stated had enlarged the balcony of his house towards the defendants house in their absence, without

any right or permission. Despite repeated request, the plaintiff had refused to remove the said encroachment. Prayer for removal of the encroachment and delivery of the space of balcony to defendant no.2-A was sought. A permanent injunction was also sought for restraining the plaintiff from interfering in their construction and repair work.

Written statement to the counter claim of defendant no.2-A was filed.

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

1. Whether disputed wall CD is the joint of the parties?OPP
2. Whether the construction of the defendant have cause damaged to the disputed wall and house of the plaintiff?OPP
3. Whether the suit of the plaintiff is not maintainable in the present form?OPD
4. Whether the plaintiff is estopped by his own act and conduct from filing the present suit?OPD
5. Whether the plaintiff has no locus standi to file the present suit?OPD
6. Whether the defendant no.2A is the owner in possession of the house mark ABCDEFGHIJKL shown in violet colour in the plan attached with the counter claim?OPD
7. Whether defendant no.2 A is entitled to decree for mandatory injunction as prayed for in the counter claim?OPD
8. Whether the counter claim of defendant no.2-A is time barred?OPP
9. Whether defendant no.2A is estopped by own act and conduct from filing the counter claim?OPP
10. Whether the counter claim is not maintainable in the present form?OPP
11. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the facts and circumstances, as well as the evidence on record concluded that the plaintiff failed to prove

his case on the basis of the evidence led by him. Reference was made to the report of the local commissioner, Ex.D-12 as well as site plan Ex.PW5/1 and Ex.PW5/2. While referring to the evidence on record, it is concluded that the 4' wall of the plaintiff is separate from the 14' and 9' wall of the defendants. Learned trial Court further concluded that defendant no.2-A (now represented by the present appellants), is not entitled to a decree for mandatory injunction because it was admitted by the defendants in their written statement that construction in question had been raised by the plaintiff in the year 1996. No objection to the encroachment carried out by the plaintiff was ever raised by the said defendants since the year 1996 till the filing of the suit by the plaintiff in the year 2002. Learned trial Court held that acquiescence on the part of the defendants *qua* the construction raised by the plaintiff, was apparent. Thus they/she was not entitled to the discretionary relief of mandatory injunction. Defendant no.2-A was concluded to be the owner in possession of House no. 3072/3 and the wall in question being a part of the property of the defendants, they were held entitled to carry out repairs in their property and raise any construction therein with the plaintiff having no right to restrain them from doing so.

Appeals were filed by the present appellants as well as the plaintiff (represented by his respective legal representatives).

Learned Additional District Judge, Rewari, dismissed both the appeals vide judgement and decree dated 24.07.2013. Appeal filed by the present appellants was dismissed on merits as well as being barred by limitation.

Aggrieved therefrom, present appeal has been filed by the legal

representatives of Manohari Devi, challenging the dismissal of her counter claim.

Learned counsel for the appellants (counter-claimant) vehemently argues that both the learned Courts below have grossly erred in dismissing the counter claim filed by defendant no.2-A. Learned trial Court, it is submitted rightly observed that the wall claimed to be joint was in-fact not so and defendant no.2-A is the owner of the wall, thus having a right to carry out repairs. It is further submitted that the encroachment carried out by the plaintiff, is accepted, therefore, in this situation, necessary relief should have been afforded to the appellants. Learned Additional District Judge, Rewari, it is contended has wrongly dismissed the appeal being barred by limitation. The delay in filing the said appeal, should have been condoned. It is thus prayed that both the judgements and decrees passed by the learned Courts below be set aside and the counter claim filed by the appellants be decreed throughout.

I have heard learned counsel for the appellants and have gone through the file with his assistance.

Learned trial Court has dismissed the counter claim filed by defendant no.2-A on the ground that no objection was ever raised when the encroachment was carried out in the year 1996. No complaint was ever filed by the said defendants against the plaintiff. Therefore, they have acquiesced as far as the construction raised by the plaintiff is concerned and are thus not entitled to the discretionary relief of mandatory injunction in this respect.

Learned Additional District Judge, Rewari, has specifically observed that the alleged construction was raised in the year 1996 and

Mohan Lal filed a suit in the year 2002. Manohari Devi filed a written statement along with the counter claim and it is only at this stage that demolition of the part of the balcony, constructed illegally by Mohan Lal and projecting on the defendant's property, was sought. Therefore, Manohari Devi had clearly acquiesced on this account. Learned Additional District Judge, Rewari, has also dismissed the appeal being barred by limitation. Argument of learned counsel for the appellants that the application for condonation of delay in filing the appeal should be allowed and the delay be condoned and the matter be remanded for a decision afresh, is devoid of any merit for the simple reason that apart from dismissing the appeal on the ground of delay and laches, the learned Additional District judge, Rewari, has clearly opined on the merits of the case as well in para no. 14 of the impugned judgement and decree dated 24.07.2013, which is reproduced as under:-

“Even otherwise, no ground is made out for allowing the appeal of the appellant Smt. Manohari Devi because it has been admitted in the written statement that the alleged construction was raised in the year 1996. There is no doubt that alleged construction was raised by the plaintiff-Mohan Lal on the property of the appellant-Manohari Devi. But appellant Manohari Devi has not filed any suit for removal of said encroachment/illegal construction. Mohan Lal was son of Manohari Devi and when Mohan Lal filed suit for injunction, Manohari Devi filed written statement along with counter claim. The alleged construction was raised in the year 1996 and Mohan Lal filed suit in the year 2002 and appellant Manohari Devi filed written statement alongwith the counter claim and prayed for demolition of the part of balcony constructed by Mohan Lal. Therefore, it is clear that appellant Manohari Devi remained mum and she has not taken any action for removal of the alleged encroachment. As such, Manohari Devi is guilty of acquiescence. The authority titled as **Korthapali Satyanarayana Vs. Koganti Ramaiah and others, 1983 AIR 452 SC** can be referred on this point and in these circumstances, the learned trial Court has rightly declined the relief of mandatory injunction in favour of defendant

no.2A/appellant Manohari Devi.”

Therefore, no useful purpose shall be served by remanding the matter to the learned First Appellate Court for a decision afresh.

Learned counsel for the appellants is unable to point out any ground whatsoever to interfere with the specific findings returned by both the learned Courts below in order to negate acquiescence of defendant no.2-Manohari Devi in regard to the alleged encroachment carried out by the plaintiff. Admittedly, Manohari Devi was the mother of the plaintiff-Mohan Lal. No action was ever taken by her from the year 1996 till 2002 when the suit was filed by Mohan Lal. The counter claim was filed by Manohari Devi along with her written statement seeking demolition of the part of the balcony projecting upon her property. Reliance has been rightly placed by the learned Additional District Judge, Rewari, on the judgement of the Hon'ble Supreme Court in **Korthapali Satyanarayana Vs. Koganti Ramaiah and others, 1983 AIR 452 SC**. Both the learned Courts below have rightly dismissed the counter claim filed by defendant no.2-A after proper appreciation of the evidence on record.

Learned counsel for the appellants, is unable to point out any question of law much less a substantial question of law which may be involved for consideration in this regular second appeal. Both the learned Courts below, after proper appreciation and consideration of the evidence on record have returned concurrent findings vide impugned judgements, which call for no interference.

There is a delay of 1456 days in re-filing of the present appeal.

It is submitted that the appeal was initially filed within the

period of limitation but the same was returned with certain objections. Thereafter, the applicants-appellants instructed the counsel not to refile the appeal as an effort was being made for an amicable settlement of the dispute. The appeal was accordingly not refiled, but thereafter, respondents violated the terms and conditions of the settlement and tried to damage the property of the applicants-appellants. It is in this situation that the appeal was refiled after a delay of 1456 days. The said application is accompanied by an affidavit of appellant no.1. However, no clear and cogent ground is forthcoming for condonation of delay of 1456 days in refiling of the appeal. There is neither any compromise which has been placed on record nor are any such terms which are alleged to have been violated, on record. However, as the matter has been adjudicated on merits, this application is rendered academic. Application is accordingly disposed of.

No other argument has been raised.

Keeping in view the facts and circumstances as discussed above, impugned judgments and decrees dated 29.09.2010 and 24.07.2013 passed by the learned Civil Judge (Jr. Division) Rewari and learned Additional District Judge, Rewari, respectively, are upheld.

Present appeal is, consequently, dismissed with no order as to cost.

16.08.2019
s.khan

[LISA GILL]
Judge

Whether speaking/reasoned : Yes/No.
Whether reportable : Yes/No.