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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RSA 57/2019 & CM APPL. 12658-12662/2019
BABU SINGH & ANR. Appellant
Through Mr. Sudhir Naagar, Adv.

versus

PRADEEP KUMAR Respondent
Through None.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER
% **18.03.2019**

CM APPL. 12660/2019, CM APPL. 12661/2019 & CM APPL. 12662/2019

Exemptions are allowed subject to all just exceptions.

Applications are disposed of.

RSA 57/2019 & CM APPL. 12658/2019 & CM APPL. 12659/2019

The present is a regular second appeal. Alongwith the same is an application seeking condonation of delay of 137 days in filing the appeal. The reasons explained therein do not suffice to bring forth any sufficient facts to condone the delay of 137 days in filing the appeal in as much as it has been stated that it was in the month of September, 2018 when the appellants enquired about the case from the erstwhile counsel who informed the appellants that a judgment dated 10.07.2018 had been passed in the case whereby the first appeal filed by the appellants/defendants was dismissed

RSA 57/2019

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and that thereafter, the appellant contacted the present counsel in the first week of October 2018 and the present counsel obtained the certified copies of the judgments and the entire lower court record and thereafter in January, 2019 filed the present appeal. Apart from the factum that there is no ground to condone the delay, the proposed substantial questions of law sought to be urged through the appeal are to the effect : -

“(i) Whether the courts below have mis interpreted and mis-read the report filed by the Local Commissioner, even as per which no one could be said to be in actual physical possession?

(ii) Whether the Report furnished by Local Commissioner can be accepted at its face value without examining the Local Commissioner?

(iii) Whether, the 'opinion' of the Local Commissioner derived from hearsay evidence as distinguished from the facts visibly seen by him can be treated as a substantive piece of evidence to prove possession of the plaintiff?

(iv) Whether, the courts below have failed to appreciate the principles governing law of evidence to determine possession in respect of vacant plot of land as per which the possession in such cases follows the title?

(v) Whether the plaintiff has not failed to prove the possession by any cogent evidence and hence, the courts below have erred in recording findings about the possession

of the plaintiff without there being any material, and hence, such findings are perverse and not supported by any evidence?”

in the facts and circumstances do not arise for consideration, taking into account the observations made by the learned Trial Court in CS No. 97349/16 vide judgment dated 28.11.2016 and by the learned First Appellate Court vide judgment dated 10.07.2018 in RCA No. 141/18.

This is so in as much vide judgment dated 28.11.2016, the suit filed by the plaintiff thereof arrayed as the respondent no. 1 to the present appeal vide which the plaintiff thereof had sought the grant of decree of permanent injunction against the defendant no. 1 arrayed therein i.e. the present appellant from taking forceful possession of the plot No. J-65, measuring about 22.5 yards, situated at Jahangir Puri, Delhi-110033. As per the observation of the learned Trial Court, the plaintiff of the suit i.e. the respondent herein claimed to have purchased the property in question from Mr. Arvind who in turn had purchased it from the original allottee Mr. Jagdish by way of requisite documents and it was submitted through the plaint that the defendant no. 1 i.e. the present appellant herein was falsely claiming to be the owner of the suit property qua which the defendant no. 1 i.e. the present appellant had contended that he was the real brother of Mr. Jagdish the original allottee and after the death of Mr. Jagdish, the defendant no. 1 i.e. the present appellant is the legal owner of the suit property by way of intestate succession, being his real brother and considering that the other brothers of Mr. Jagdish had relinquished their share by way of

relinquishment deed in favour of the present appellant and also considering that the mother of the defendant no. 1 and Mr. Jagdish had expired, it was also submitted before the learned Trial Court that the suit property had been allotted to Mr. Jagdish, the brother of the present appellant, in lieu of the demolition of the jhuggi in which he was residing under the policy of JJ (Slum) DDA claiming that the same could not be sold by Mr. Jagdish as he was a mere licensee. It has been observed by the learned Trial Court that both the plaintiff i.e. the respondent no. 1 herein and the defendant no. 1 i.e. the appellant herein claimed to be in possession of the suit property. During the course of the proceedings before the learned Trial Court, a Local Commissioner had been appointed and it was observed by the learned Trial Court to the effect that the Local Commissioner had concluded that the plaintiff has the possession of the premises. The learned Trial Court has taken into account the factum that despite the non-examination of the Local Commissioner as a witness in view of the settled law that in a case where no objection had been filed to the report of the Local Commissioner, it can be read in evidence without examination of the Local Commissioner as held by this Court in ***Kenneth Loyal @ Manmohan Singh Loyal Vs. Sh. Vipin Vinod Diwan 2011 (123) DRJ 368*** and that it is apparent through the factum that the defendant no. 1 through his cross-examination stated that it was correct that he had not filed any objections to the LC report and thus it was observed by the learned Trial Court that no objections having been filed by defendant to the report of the Local Commissioner, the same is to be read in evidence and it having gone unrebutted, stands proved and considering the

fact that the Local Commissioner was an officer of the Court, his report could not be said to be unbelievable.

It was also observed by the learned Trial Court to the effect that the defendant no.1 had claimed to be in possession of the suit property but had not brought any evidence in relation thereto and had rather deposed that he used to reside in the suit property but he had not filed any document to prove that he was residing in the same. The defendant no. 1 had relied upon the Ex.DW2/1 the relinquishment deed and the Ex.DW2/2 the indemnity bond and other documents but none of the documents proved that the defendant no. 1 was in settled possession of the suit property. DW-6, who was examined before the learned Trial Court was the defendant no. 2 i.e. SI Jai Singh Meena, who had not produced any document in relation to the defendant no. 1 i.e. the present appellant to prove that the defendant no.1 i.e. the present appellant was in settled possession of the suit property. The testimony of the retired SI Baljeet Singh, DW-7 was also not accepted by the learned Trial Court, who testified to the effect that the documents that he had sought to produce, had also been destroyed. *Inter alia* it was observed to the effect that even if a trespasser is in settled possession of a property, even a true owner shall have to take recourse through due process of law to evict him as held by the Hon'ble Supreme Court in ***Rama Gowda (D) LrS Vs. M. Varadappa Naidu (D) By Lrs. & Anr. AIR 2004 SC 4609***. It was thus held that on the basis of preponderance of probabilities the plaintiff was proved to be in settled possession in relation to the grant of the relief of decree of permanent injunction which was granted in favour of the plaintiff and

against the defendants.

The contention that has been sought to be raised on behalf of the appellant is to the effect that the report of the Local Commissioner is itself ambiguous and does not suffice to bring forth the contentions that had been raised by the plaintiff of the plaintiff being in possession in as much as what had been observed by the Local Commissioner was to the effect that there was no one in fact in possession of the premises in as much as it was plain plot of land and that the person examined at the spot had brought forth that the plaintiff of the suit was in possession. The report of the Local Commissioner reads to the effect : -

“It was confirmed by the said resident, residing in the above said premises, as per him, since the year 1978, that Sh. Pradeep Kumar is the owner/occupier of the land/suit premises. It was further stated that he has purchased this plot/suit premises 4-5 years back and since then he has been using this property, keeping some articles/material and continuously taking care of the land including the regular visits. It was further stated by him that from 4-5 years, no one has ever claimed ownership/possession of this plot/suit premises. The said witness/resident signed the rough report”

The factum that there have been no objections filed to the Local Commissioner's report by the appellant as the defendant no. 1 to the said suit, cannot be ignored and thus the observations that are there in para-33 of the said Local Commissioner Report would also have to be accepted. The

non-examination of the Local Commissioner when no objections have been filed to this report, cannot thus in any manner detract from the findings of the learned Trial Court and the First Appellate Court.

It is essential to observe that vide verdict dated 13.03.2019 of the Hon'ble Supreme Court in *Gurnam Singh (D) By Lrs. & Ors. Vs. Lehna Singh (D) by Lrs in Civil Appeal No. 6567 of 2014*, it has been observed vide para-15.1 and para-18 to the effect : -

“15.1 As observed hereinabove and as held by this Court in a catena of decisions and even as per Section 100 CPC, the jurisdiction of the High Court to entertain the second appeal under Section 100 CPC is confined only to such appeals which involve a substantial question of law. On going through the substantial questions of law framed by the High Court, we are of the opinion that the question of law framed by the High Court while deciding the second appeal, cannot be said to be substantial questions of law at all. The substantial questions of law framed by the High Court are as under :

“(i) Whether the Appellate Court can reverse the findings recorded by the learned trial court without adverting to the specific finding of the trial Court?

(ii) Whether the judgment passed by the learned lower Appellate Court is perverse and outcome of misreading of evidence?”

The aforesaid cannot be said to be substantial questions of law at all. In the circumstances, the impugned judgment and order passed by the High Court cannot be sustained and the same deserves to be quashed and set aside. At this stage, decision of this Court in the case of Madamanchi Ramappa v. Muthaluru Bojappa, AIR 1963 SC 1633, is required to be referred to.

In the aforesaid decision, this Court has observed and held as under:

“Whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by S.100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by Courts of fact; but on such occasions it is necessary to remember that what is administered in Courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the

High Court contravenes the express provisions of S.100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid.

*18. Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 of the CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 of the CPC, it is not permissible for the High Court to re-appreciate the evidence on record and interfere with the findings recorded by the Courts below and/or the First Appellate Court and if the First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in Second Appeal. We have noticed and even as repeatedly observed by this Court and even in the case of *Narayanan Rajendran v. Lekshmy Sarojini*, (2009) 5 SCC 264, despite the catena of decisions of this Court and even the mandate under Section 100 of the CPC, the High Courts under Section 100 CPC are disturbing the concurrent findings of facts and/or even the findings*

recorded by the First Appellate Court, either without formulating the substantial question of law or on framing erroneous substantial question of law.

Therefore, we are constrained to observe as above and remind the High Courts the limitations under Section 100 of the CPC and again hope that High Courts would keep in mind the legal position before interfering in Second Appeal under Section 100 of the Code of Civil Procedure. ”

observing thus to the effect that the High Courts in Second Appeal under Section 100 of the Code of Civil Procedure are disturbing the concurrent findings of facts, which ought not to be done.

On a consideration of the record in the circumstances of the case, no substantial question of law arises in view of the concurrent findings of fact by the learned Trial Court and the learned First Appellate Court taking into account that no objections were raised by the appellant to the Local Commissioner's report with specific observations in para 33 thereof. Furthermore, the record brings forth as brought forth through the verdict of the learned Trial Court and the learned First Appellate Court that the suit seeking declaration and injunction in relation to the same suit property has been filed by the appellant herein in relation to very same document qua which the plaintiff has sought to assert his rights and is also pending before the Courts. In the circumstances, there is no merit in the appeal, which is thus declined.

Nothing stated herein shall however amount to any expression on the merits of demerits of any redressal that the appellant herein may seek in accordance with law.

ANU MALHOTRA, J

MARCH 18, 2019/MK