

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

RSA No. 443 of 2008

Date of Decision : December 31, 2009

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Sh. Hira Singh and another

Appellants.

Versus

Sh. Shiv Lal and another

Respondents

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*Coram:*

Hon'ble Mr. Justice Sanjay Karol, Judge.

*Whether approved for reporting?*<sup>1</sup> No.

For the appellants : Mr. Satyen Vaidya, Advocate, for the appellants.

For the respondents : Mr. Romesh Verma, Advocate, for the respondents.

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Sanjay Karol, J. (Oral)

The appellants are the defendants and the respondents are the plaintiffs.

Sh. Gursahi, father of defendant No. 1 filed civil suit No. 98/1 of 1973 for injunction against sh. Shiv Lal (plaintiff No.1) and others. In terms of compromise dated 8.1.1974, the suit was decreed to the effect that Sh. Shiv Lal was allowed to construct a two cubic feet cement tank at the source of water flowing from khasra No. 64/16, Chak Patandoo, Pargana Dharti, Tehsil Theog and provide two water outlets of half inch diameter. Defendant Sh. Hira Singh was to take water through the outlet above the outlet of Sh. Shiv Lal. The compromise was accepted and the terms implemented under the supervision of the Court.

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<sup>1</sup> Whether reports of Local Papers may be allowed to see the judgment?

However in the year 2000, defendants (Sh. Hira Singh and Sh. Hem Chand) punctured the water tank and made one more hole at the bottom of the tank and diverted whole of the water to their fields. Consequently plaintiffs (Sh. Shiv Lal and Sh. Dharam Prakash) filed a suit for permanent prohibitory injunction restraining the defendants from damaging the water tank. The defendants resisted the same by filing written statement, taking a categorical stand that no new hole was made or new pipe inserted to divert the water to their land.

Based on the pleadings of the parties the trial Court framed the following issues:

- “1. Whether the defendants have caused one more hole in the bottom of source tank with a view to diminish the water supply, as alleged? OPP
2. If issue No. 1 is proved in affirmative, whether the plaintiff is entitled to the relief of mandatory injunction, as prayed for? OPP
3. Whether the plaintiff is estopped by his act or conduct from filing the instant suit? OPD
4. Whether the instant suit has been filed with malafide intention, as alleged? OPD
5. Relief.”

The plaintiffs’ suit was dismissed on merits in terms of judgment and decree dated 26.9.2003 passed by the Sub Judge Ist Class, Theog, Distt. Shimla. The trial Court found that the plaintiffs had failed to establish that the defendants had made a third hole at the bottom of the tank.

Assailing the same, the plaintiffs filed an appeal which stood allowed in terms of judgment and decree dated 27.5.2008 passed by the District Judge (F), Shimla in Case No. 66-S/13 of 2008/04. The lower

Appellate Court found that the trial Court had wrongly disbelieved the plaintiffs' witnesses and in fact from the statements of Sh. Shyam Lal (PW-2) and Sh. Kanshi Ram (PW-3) it was evident that in fact the defendants had diverted water by making a third hole. This had diminished the supply of water to the plaintiffs.

The defendants have thus filed the present Regular Second Appeal u/s 100 of the Code of Civil Procedure.

At the stage of admission itself record was called and perused. To my mind, the lower appellate Court has correctly appreciated the material on record while arriving at its conclusion. That the hole was made and new pipe laid down by the defendants to divert water towards their land stands established from the oral testimony of the plaintiffs' witnesses. The evidence led is cogent, convincing and reliable. Importantly it is the defendants pleaded case that no new hole in the tank was made out by them. It is also not the defendants' case that someone else has made a hole in the tank. At the spot, the water tank has three holes for outlet of water. The defendants' have obviously taken a false stand in the pleadings.

That apart, during the pendency of the present appeal learned counsel for the parties endeavoured to have the matter reconciled and consequently on 21.8.2009, a Local Commissioner was appointed in terms of the following order:

"S/Shri Hira Singh and Hem Chand, appellants and Shri Dharam Parkash, respondent No. 2, are present in the Court today. They have arrived at an out of Court settlement. The effort made by the learned counsel for the parties is highly appreciated. The parties agree to adhere to the earlier compromise arrived at between the parties.

However, to obviate any future dispute with regard to the identification of the water level, they have themselves requested Mr. Anand Sharma, Advocate to assist the parties. Complete paper book shall be supplied to Mr. Sharma by the appellants. The parties have also agreed to jointly pay a sum of Rs. 11,000/- as token fee to Mr. Anand Sharma, Advocate.  
List on 26.8.2009”

The Local Commissioner’s report is on record. Objections to the report have not been filed by the parties. Perusal of the report apparently shows that the water tank was in fact punctured by the defendants and a new hole was made from which the water was being diverted exclusively towards the defendants’ land. This has resulted into diminishing the supply of the water to the plaintiffs’ land. There was a confusion with regard to the level of the two earlier holes as shown in the diagram annexed along with the report. Consequently the Commissioner who asked to assist clarified that holes ‘A’ and ‘C’ as depicted in the diagram are in fact at different levels.

For the aforesaid reasons I find no perversity, material irregularity or illegality in the impugned judgment and decree. No ground for interference is made out. No substantial question of law arises for consideration, hence the defendants’ appeal stands rejected.

CMP No. 783 of 2008

Disposed of.

(Sanjay Karol),  
Judge.

December 31, 2009  
(PK)