# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**RSA No. 414 of 2000.**

**Date of decision: 31.3.2010.**

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**Smt. Sudarshna Devi ….. Appellant.**

**Vs.**

**Hari Kishan Master …. Respondent.**

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***Coram***

**The Hon'ble Mr. Justice Kuldip Singh, Judge.**

***Whether approved for reporting?*[1]**

**For the Appellant : Mr. Rajnish K.Lall, Advocate vice Mr. K.D.Sood, Advocate.**

**For the Respondent : Mr. S.M.Goel, Advocate.**

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***Kuldip Singh, Judge (Oral).***

The appellant was plaintiff and has come in second appeal against judgement, decree dated 27.12.1996 passed by learned District Judge, Kullu in Civil Appeal No. 42/1999 affirming the judgement, decree dated 24.11.1998 passed by learned Senior Sub Judge, Kullu in C/Suit No. 130/94.

***2.*** The facts in brief are that appellant had filed a suit for permanent prohibitory injunction and possession on the grounds that she is owner in possession of 2/3rd share of suit land measuring 0-14 biswas comprised in khasra No. 4234, Phati Shilihar, Kothi Kotkhandi, Tehsil and District Kullu vide jamabandi for the year 1988-89. The respondent is owner of adjoining land. The respondent has no right, title or interest over the suit land. On 5.8.1994, the appellant had found that respondent was raising construction of his building and

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***Whether the reporters of the local papers may be allowed to see the Judgment?***

before raising such construction he had removed fencing which was put by the appellant on the boundary of the suit land. The intention of the respondent was to encroach the suit land. The respondent had threatened to interfere on the suit land by raising construction including overhanging structure over the suit land. In these circumstances, the suit was filed.

***3.*** The suit was contested by the respondent by filing written statement and he took preliminary objections of limitation, maintainability and estoppel. On merits, it was submitted that in between the two plots, there is a municipal path, which is about 5' in width, general public including the respondent is using that path. It has been denied that respondent had started construction on 5.8.1994. The respondent is co-owner in possession of khasra No. 4256 measuring 1-2 bighas, on a portion thereof, there is abadi to the extent of 10 biswas over which houses of respondent and other co-sharers are standing since 1960.

***4.*** The respondent had replaced a portion of roof of his house which had fallen to his share and laid slab. He constructed second storey on the existing ground floor on which the slab was laid on 4.8.1994. The construction was raised by the respondent on his own land and on old structure. It has been submitted that adjacent to the house of respondent there is a drain which is 3' in width and after drain there is a public path 5' in width since time immemorial leading from Bhuntar school to Bhuntar Gadsa road. The path was metalled by Notified Area Committee, Bhuntar. The appellant filed replication and reiterated the stand taken by her in the plaint. The learned trial

court dismissed the suit on 24.11.1998. The learned District Judge has dismissed the appeal and affirmed the judgement, decree dated 24.11.1998. The second appeal has been admitted on the following substantial questions of law:-

1. Whether in view of the fact that the plaintiff has been held to be owner in possession of the property and her right threatened by interference and raising construction on property, the relief of injunction and in the alternative of possession could be denied to the plaintiff?

2. Whether the findings of the court below are based on mis-construction of oral and documentary evidence and also mis-reading thereof and inferences drawn that there exist three feet wide drain and 5 feet wide path between the land of the plaintiff and defendant is sustainable in law without demarcating the property by appointment of Local Commissioner?

***5.*** I have heard the learned counsel for the parties and have also gone through the record. The learned counsel for the appellant has submitted that the two courts below have erred in not appointing a local commissioner in order to identify the boundaries of the parties. He has also submitted that the two courts below have misconstrued, misinterpreted the oral and documentary evidence on record. The learned counsel for the respondent has submitted that appellant had filed an application, under Order 18 Rule 17-A CPC for proving on record copy of musabi, which was allowed. Thereafter copy of musabi was tendered in evidence on behalf of the appellant. The appellant neither in the trial court nor in the learned first appellate court had filed any application for appointment of local commissioner to identify the land. He has supported the impugned judgement, decree.

***6.*** The substantial questions of law No. 1 and 2 are interconnected, therefore, both of them are taken up together for disposal. The perusal of the record reveals that appellant had filed an application under Order 18 Rule 17-A CPC for proving on record copy of musabi. This application was allowed on 17.1.1998 by the learned trial court and on 28.3.1998 on behalf of the appellant copy of aks-musabi was tendered and the evidence was closed. The appellant has filed no application in the trial court or in the first appellate court for appointment of local commissioner to identify the boundaries of two plots.

***7.*** The submission of the learned counsel for the appellant that in view of facts and circumstances of the case the courts below should have themselves appointed the local commissioner is noticed only to be rejected. It is the case of the respondent that in between two properties, there is 5' metalled road and a drain. It is not a boundary dispute as has been contended by the learned counsel for the appellant. In case the appellant was so aggrieved, then the appellant should have applied for appointment of local commissioner in the courts below but she remained silent, therefore, there was no question for appointment of local commissioner by the courts of their own.

***8.*** The learned trial court has recorded a specific finding in paragraph-13 of the judgement at internal page-9 and held that defendant has also led evidence in order to show that adjacent to his house, he has also constructed a drain which is 3' in width and in front of this drain there is a public path 5' in width. This shows that

the house of the defendant is more than 8' from the suit land. The learned trial court has further recorded a finding that the very foundation on which the suit has been filed collapsed, in these circumstances, the case of the plaintiff that defendant has encroached upon her land by removing fence and making overhanging structure could not be accepted. The trial court has further returned the finding that plaintiff has proved that she is owner in possession of the suit land, but she has failed to prove the alleged encroachment/ interference.

***9.*** The learned lower appellate court after due appreciation of evidence on record has affirmed the findings returned by the trial court. The two courts below have dismissed the suit of the plaintiff after appreciation of evidence and recorded a finding of fact. In second appeal, the evidence cannot be re-appreciated unless it is shown that the view taken by the two courts below is perverse or some evidence which goes to the root of the case has been ignored or inadmissible evidence has been considered. But this has not been established at the time of hearing by the learned counsel for the appellant. It has not been established that two courts below have misconstrued, misread oral and documentary evidence. Likewise it has not been established that proper inference has not been drawn from the evidence by the courts below. Therefore, aforesaid substantial questions of law are decided against the appellant. There is no merit in the appeal which is liable to be dismissed.

***10.*** No other point was urged.

***11.*** The result of above discussion, the appeal fails and is accordingly dismissed with no order as to costs.

**March 31, 2010.** **( Kuldip Singh ),**
**(*Hem*)** **Judge.**