

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

**RSA No. 2734 of 1988
Date of decision : 29.9.2015**

Tek Ram and others

.....Appellants

v.

Kishori Devi

.....Respondent

CORAM : HON'BLE MR. JUSTICE RAMENDRA JAIN

Present : Mr. Avin Arora, Advocate, for the appellants

Respondents ex parte

Ramendra Jain, J.

Unsuccessful plaintiffs have preferred the present appeal against judgment and decree dated 20.8.1988, passed by the learned Additional District Judge, Karnal, dismissing their appeal for permanent injunction for restraining the respondent-defendant from digging any khal (water course) in land comprising Khasra No.532, while upholding the judgment and decree dated 27.2.1988, passed by the learned Trial Court.

Brief facts of the matter in dispute are that the appellants-plaintiff are owners in possession of agricultural land comprising Rectangle No. 60, Khasra No. 12 and 13 situated at Village Samalkha vide jamabandi for the year 1980-81. Besides above, they are also co-sharer of Gair Mumkin Chah Pukhta, measuring 1 kanal 4 marlas situated in Rectangle No. 66, killa No. 26. The ancestors of the respondent-defendant namely Risala was having agricultural land comprising Rectangle No. 60, killa No. 19/1 and 19/2 adjoining to the above land of the appellants-plaintiff. There was a permanent passage in between the lands of the plaintiffs for ingress and egress of all the inhabitants of

the locality comprising khasra No. 532.

Grouse of the appellants-plaintiff is that the respondent-defendant wants to dig a water course from the aforesaid passage to irrigate her fields, detrimental to their interest, causing hindrance in their use of it, without any right or interest and if she was not restrained from doing so, they would suffer irreparable loss.

Upon notice, respondent-defendant contested the suit. In her written statement, she alleged that she was irrigating her land through the water course running along the boundary line of the aforesaid passage bearing Khasra No. 532 since last 4-5 years. The appellants-plaintiff had no right to restrain her from doing so. Their suit was liable to be dismissed. Replication was filed controverting the stand of the respondent-defendant and reiterating that of the plaint.

The learned trial Court after framing necessary issues and recording evidence of both the sides, dismissed the suit vide judgment and decree dated 27.2.1988. The appellants before this Court also remained unsuccessful before the first Appellate Court, because as discussed above, their first appeal was also dismissed by the learned Additional District Judge, Karnal.

Learned counsel for the appellants argued that the learned trial Court had re-casted Issues No.1A to 1C on 26.2.1988 i.e. one day prior to pronouncement of its judgment i.e. 27.2.1988, without affording an opportunity to the appellants to lead their evidence upon the same, prejudicial to their legal right of adducing fresh evidence. The learned trial Court ought to have appointed some local commissioner to take judicial notice of the existing state of affairs at the spot, before deciding the matter in dispute. The impugned

judgments of both the Courts below are based on assumptions and presumptions and thus, are liable to be set aside. Both the learned Courts below were confused in differentiating the two water courses i.e. one which was in existence for taking the water from the well, before installation of tubewell and dug thereafter. The respondent had been using the water course for taking the water from well, but since now the well was not in working condition, so the same had no relevancy. Learned trial Court has erred in not appreciating the fact that the respondent had no right to dig any water course through the common passage situated in between the lands of the appellants, detrimental to their interest, because if she would be allowed to dig any water course in the common passage, in that event, the same would be of no use for them on account of leaking of water in it from the water course of the respondent. Even the appellants are irrigating their fields by putting pipes in the aforesaid passage and the respondent can also easily irrigate her fields by putting pipes in the like manner, instead of digging any permanent water course. Learned courts below also failed to appreciate that when no water course was carved out in the common passage by the Consolidation Authorities, in that eventuality, how the respondent had any right to dig the same in it. There was no evidence on record about existence of any water course in the passage comprising Khasra No. 532, but despite that the learned Courts below illegally dismissed the suit. The suit of the husband of the respondent-defendant was dismissed on 3.9.1985 and thus, their present suit was well within limitation. Hence, the findings of the learned trial Court in respect of Issue No.2 that the same was time barred, are liable to be reversed.

After giving my thoughtful consideration to the submissions of

learned counsel for the parties, I find the present appeal completely devoid of any merits for the reasons to follow :-

1. No substantial question of law has been raised, rather all the arguments raised by learned counsel for the appellants are qua the question of fact, which cannot be agitated at this stage of second appeal;
2. Perusal of the interlocutory order dated 26.2.1988 of the learned trial Court, on which date additional issues No. 1A to AC were framed, speaks as under :-

Written arguments have been fixed.

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Both the parties have asserted that they are not to lead any evidence upon these issues as both of them have already led their evidence earlier. Now the case is adjourned to 27.2.1988 for orders”.

From the above order, it is clearly evident that the appellants-plaintiff did not choose or made any application/oral request to lead any fresh evidence upon the additional issues framed on that date, rather submitted their written arguments and resultantly, the case was fixed for order. Therefore, at this stage of second appeal, they cannot be permitted to raise the plea that right of leading fresh evidence was curtailed by the learned trial Court being estopped by their own act and conduct. Even otherwise, a careful perusal of evidence led by both the sides makes it abundantly clear that no fresh evidence was required to be led by them upon any of the issues re-casted on 26.2.1988. Since additional Issue No.1B qua maintainability was legal one, therefore, did not require any fresh evidence. Onus of Issue No.1C, regarding suppression of material facts by the appellants-plaintiff, was upon the respondent-defendant and thus, she was required to prove the same. Sufficient evidence had already

been led by them on Issue No. 1A and thus, they had no other evidence with them to be led. Hence, from this angle too, it does not lie in their mouth that their right of leading fresh evidence had prejudiced by not allowing them to do so.

Even otherwise, learned counsel for the appellants could not show to this Court that what evidence, the appellants-plaintiff were having with them, so to be led after re-casting of Issues No.1A to 1C. More so, by this time, it is well settled that if the parties lead evidence to their satisfaction in support of their case, then the issues become immaterial. In the instant case, since both the parties had led evidence to their satisfaction, therefore, argument of learned counsel for the appellants-plaintiff in this respect is hereby turned down being devoid of any merits.

It is an admitted case of the appellants-plaintiffs that the passage in between lands comprising Khasra No. 532 is a common passage. Thus, the same can be used by every inhabitant of the locality. The appellants-plaintiff have admitted that they have also put their pipes in the said passage to irrigate their fields falling on its both the sides. Hence, they cannot be permitted to restrain the respondent-defendant to irrigate her fields by taking water either through pipes or by digging a water course in the said common passage; more particularly, when it is an admitted case of both the sides that there was a joint well of the parties in Killa No.26 of Rectangle No. 60 measuring 1 kanal 4 marlas, adjoining to the aforesaid common passage. Since the aforesaid Killa No.26 is joint ownership of the parties, therefore, the respondent has every right to use the said Killa No.26. It is also not disputed that both the parties are irrigating their fields through the water course running along the common

passage, because of having no permanent water course carved out by Consolidation Authorities. Either they are using the existing water course being used to take the water of the tubewell existing in Khasra No. 26 or have fixed their own pipes in the common passage for such purpose. The case of the respondent-defendant is on the same parity with that of the appellants-plaintiff. The dismissal of the suit of the respondent-defendant has no relevance with the present suit, because by this time, it is well settled that 'who knocks the door of the Court has to prove his case' or in other words 'one has to stand on its own legs. He cannot be permitted to take advantage of the weakness of the opponents case. Tara Chand PW1 has admitted in his cross examination that the aforesaid water course was 10 feet away from the common passage. Respondent-defendant as DW1 had categorically deposed in her cross examination that she does not want to dig any khal on the land of the appellants-plaintiff, rather she was using the water course situated on the killa line (boundary line of the passage) already in existence. Hence, by any stretch of imagination, the same cannot be said to be detrimental to the rights of the appellants-plaintiff.

No request was ever made by the appellants-plaintiff to appoint any local Commissioner to report about existing state of affairs before the trial Court or the learned Appellate Court. Even otherwise, the case was based on documentary evidence i.e. aks shajra Ex.P4 and jamabandi Ex.P 3 and thus, the appellants, at this stage of second appeal, are estopped by their own act and conduct to raise such plea. Hence, argument qua appointment of local commissioner raised by learned counsel for the appellants being completely devoid of any merits is also turned down.

In the written statement, the respondent-defendant had pleaded that she was using the disputed water course since last 4-5 years prior to the filing of the suit. The appellants-plaintiff by leading any cogent or convincing evidence could not rebut her said assertion. The limitation for a suit of declaration is 3 years. The defendant-respondent as DW 1 or any of her witnesses was not cross examined in this aspect. Even no suggestion was put to her that she had not ever used the disputed water course since last 4-5 years. Hence, I am not inclined to differ with the findings of the trial Court on Issue No.2.

Since, prima facie the appellants-plaintiff have miserably failed to show any cause of action against the respondent-defendant, therefore, I am not inclined to differ with the findings of the learned trial Court or Appellate Court.

No other point was urged before me.

I have gone through the impugned judgments of both the courts below and find no infirmity or illegality in the same.

In view of the discussion above, this appeal fails and is hereby dismissed with costs.

(RAMENDRA JAIN)
JUDGE

29.9.2015
Ashwani