

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Date of Decision: 07.01.2015

RSA No.1528 of 1989

Manohar Lal

...Appellant

Versus

Tek Chand & others

...Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA

Present: Mr. Sanjay Mittal, Advocate, for the appellant.

Mr. Ajay Jain, Advocate, for the respondents.

HEMANT GUPTA, J. (ORAL)

Defendant No.3 is in second appeal aggrieved against the judgment and decree passed by the first Appellate Court modifying the judgment and decree passed by the trial Court holding that the street in question is on the land owned by the plaintiffs.

The plaintiff-respondents filed a suit for injunction seeking restraint order against the defendants from constructing any latrine or from opening any *mori*, *parnala*, window etc. in the *gali* (street) in dispute falling towards West of the house of the plaintiffs and from using the street falling towards North of the house of the plaintiffs for discharge of dirty water and from creating any nuisance. The said relief was claimed inter alia on the assertion that the plaintiffs are the owners of a house situated at Mohalla Raoka, Narnaul and that they left 3 feet wide *gali* towards West of their house and a similar *gali* towards North. The ventilators and *moris* of the house of the plaintiffs open in the western street, which is used for getting light and air

and for out-let of water. It was further asserted that the defendants are constructing their house towards West of the *gali* and want to open ventilators, *parnalas*, *moris* and windows etc. of their house in that street as a result of which, the dirty water and night soil shall flow towards East from the *gali* falling towards North of the house of the plaintiffs and it will amount to nuisance.

The defendants contested the suit and denied that the plaintiffs are the exclusive owners of the street in dispute. It was asserted that the street is joint of all the residents of that locality including the defendants and that they have been using that street since long.

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

1. Whether the plaintiffs are owners and in exclusive possession of the site in dispute, as alleged? OPP (Onus objected to. Objection over-ruled)
2. Whether the plaintiffs are entitled to the injunction prayed for? OPP
3. Whether the plaintiffs have no cause of action? OPD
4. Whether the suit is bad on account of non-joinder of necessary parties? OPD
5. Whether the plaintiffs are estopped from filing the present suit? OPD
6. Relief.

To prove its case, the plaintiff – Tek Chand appeared as his own witness as PW-2 and deposed that they are owners of the street in dispute. He also proved the site plans Exs.P1 & P2. PW-3 Mool Chand, a neighbourer, supported the case of the plaintiffs and deposed that plaintiffs had left the street in dispute from their land. PW-1 Kailash Chand Sanghi, and PW-5

Pehlad Sharma, Draftsmen, deposed that they had prepared site plans Ex.P1 and Ex.P2 respectively at the instance of Tek Chand.

On the other hand, defendant No.3, the present appellant, appeared as DW-1 and stated that the street in question is common of all the inhabitants. Defendants also examined DW-3 Vidhya Sagar, Water Bill Clerk, Municipal Committee Narnaul, DW-2 Kishan Lal Sharma and DW-4 Kanwal Singh, Draftsman.

On the basis of evidence on record, the trial Court decreed the suit restraining the defendants from constructing a latrine projecting in the street in dispute, as it would amount to encroachment on the street. It was also held that the defendants like the plaintiffs shall be competent to use the street for getting air and light and for discharge of water from their house, but they cannot raise any construction or put any structure in the joint street without the consent of other co-sharers.

In an appeal by the present appellant, the first Appellate decreed the suit setting aside the decree of the trial Court holding that the street was carved out from the exclusive property of the plaintiffs. The other part of the decree of the trial Court was upheld. Still aggrieved, defendant No.3 is in second appeal.

Learned counsel for the appellant has vehemently argued that the first Appellate Court could not interfere with the findings of the trial Court holding that the street in question is joint of the plaintiffs and the defendants, when no appeal or cross-objections was filed. It is contended that the street in question is a public street and, therefore, the plaintiffs cannot claim any exclusive title over the said street.

Having heard learned counsel for the parties, I do not find that any substantial question of law arises for consideration of this Court. Even in the absence of cross-objections or appeal, Order 41 Rule 33 of the Code of Civil Procedure empowers an Appellate Court to pass any decree and make any order, which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. In view of the said provision, even in the absence of any cross-objections or appeal, the first Appellate Court could pass an order on the basis of evidence on record.

Learned counsel for the appellant could not refer to any evidence in respect of the argument that the street in question is a public street. Mere assertion of the appellant that the street in question is a public street is not a evidence and in the absence of any evidence on record, the finding recorded by the first Appellate Court that the street in question is not a public street cannot be said to be unjustified or untenable. Findings of fact recorded by the first Appellate Court are sought to be disputed in the present appeal only by re-appreciation of evidence. Even on re-appreciation of evidence, the findings recorded do not give rise to any substantial question of law.

Consequently, I do not find that there is any patent illegality or irregularity in the judgment and decree passed by the first Appellate Court, which may give rise to any substantial question of law in the second appeal.

Dismissed.

07.01.2015
Vimal

(HEMANT GUPTA)
JUDGE