

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

RSA No.1034 of 2014(O&M)
Date of decision: 10.02.2015

Kura

...Appellant

Versus

Lakhbir Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI

Present: Mr. RD Gupta, Advocate for the appellant.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

ARUN PALLI J. (Oral)

Suit filed by the plaintiff and the counter claim preferred by the defendants, were dismissed by the trial court vide judgment and decree dated 10.02.2011. Appeals preferred by the parties to the lis against the said decree failed and were accordingly dismissed on 23.07.2013. This is how, defendants is before this court, in this regular second appeal. Parties to the lis, hereinafter, would be referred to by their original positions in the suit.

In a suit filed by the plaintiffs, they prayed for a decree for injunction, restraining defendants No.1 & 2 from encroaching upon any part of the rasta, as depicted in para 1 of the plaint and shown in the site plan appended therewith. And also from reducing the width of the rasta by raising any

construction therein or in any other manner. It was averred that rasta in dispute was reserved at the time of partition, for common purposes of all the co-sharers, whose land abut the said rasta. It was maintained that the width of the rasta was 3 karam (16.5 feet) and reflected in the revenue record as gair mumkin rah. Further, the said rasta was purported to be leading to the houses of the plaintiffs and other residents of the locality. And was being used for ingress and egress by the plaintiffs and defendants and others whose houses abut on the said rasta. The said rasta was even shown in the site plan, prepared at the time of partition proceedings, bearing khasra No.130/27/6 & 27/7. And was depicted in red colour in the photo-stat copy issued by the Kanungo Guhlla. Although, defendants also happened to be the co-sharers with the plaintiffs, but they had no right to cause any encroachment upon any part of the said rasta. Thus, the suit.

In defence and by way of counter claim, it was pleaded, inter alia, that rect. No.130, killa Nos.27/6(0-18) & 27/2(1-1) were kept reserved for mustarka indraj by the co-sharers in case of partition No.12-T, titled Ram Dass etc. v. Fauja Singh etc., decided by Assistant Collector, Guhla, vide instrument of partition dated 05.04.1985. It was averred that the said khasra numbers were situated in between the ownership land of answering defendants and others including plaintiff No.1 i.e. Fauja Singh etc. However, with the consent

of all the co-sharers, the said khasra numbers were kept as gair mumkin passage. In fact, plaintiffs No.1 to 4 had illegally and forcibly encroached upon a part of the said passage by raising permanent construction. And thus, reduced the width of the passage. The site plan, produced by the plaintiffs, was said to be incorrect. The passage shown in red colour therein, was no longer in existence on the spot. It was maintained that the land owned by the defendants was situated on the eastern-southern side of the said land, bearing khasra/rect. No.130 killa No.27/5. And they were raising boundary wall of killa No.27/5 of rect. No.130.

On a consideration of the matter in issue and the evidence on record, the courts below concluded that demarcation report, Ex.PW3/A, could not be taken into consideration. Further, there was neither any oral nor any documentary evidence on record, to prove the encroachment that was purported to have been caused by the plaintiffs over the said passage. So much so, Jai Bhagwan, Architect (PW1) testified in his statement that the area, shown in red colour in the site plan, was lying vacant at the time, when he prepared the site plan. Further, DW1 admitted in his cross-examination that the houses of the plaintiffs were in the same position in which they were at the time of construction. It was never the case of the defendant-counter claimant that, plaintiff, at the time of raising new construction, encroached upon a part of

the passage. Accordingly, it was observed that as the defendants had admitted that the houses of the plaintiffs were in the same position in which they were at the time of construction in the year 1962, then certainly it was for the defendants to establish that a part of the passage was indeed encroached upon by the plaintiffs after 1985, when admittedly rasta in question came into existence. Further, there could not be any encroachment over a 2 feet wide rasta by the plaintiffs, as before coming into existence of the said passage, the houses of the plaintiffs were already constructed. And if at all the said passage came into existence beyond the constructed houses of the plaintiffs, certainly the same would begin from the outer boundary walls and in that eventuality encroachment, if any, could be towards the side of the defendants also. But, local commissioner reported the encroachment on both sides i.e. by plaintiffs on northern side and by defendants on southern side. Still further, defendants failed to plead as to at what particular time, the plaintiffs had caused encroachment upon the passage in question or any portion thereof. That being so, both the appeals i.e. preferred by the parties to the lis, were dismissed.

I have heard learned counsel for the appellant at length and perused the RSA paper book.

Learned counsel for the appellant simply seeks to reiterate the submissions that were advanced before the

courts below and rejected after a due and comprehensive consideration. No other argument was advanced.

On a due and thoughtful consideration of the matter in issue, I am of the considered view that the instant appeal is devoid of merit and is thus, liable to be dismissed for the reasons that are being recorded hereinafter.

It would be apposite to point out here that plaintiffs have not chosen to prefer any appeal against the decree rendered by the trial court and affirmed by the appellate court. Needless to assert, for defendant-counter claimant to succeed, he was required to substantiate that plaintiffs had indeed encroached upon over a passage in question. Records show that defendant himself (DW1) had admitted in his statement, that houses of the plaintiffs were in the same position in which they were constructed in the year 1962. Concededly, rasta came into existence in the year 1985, nothing was brought on record to show that plaintiffs usurped a part thereof, post 1985. However, it was sought to be claimed that plaintiffs had re-constructed their houses after they had fallen down, but still this was never the case of the appellant-defendants that in the process of re-construction, plaintiffs encroached upon the passage or any part thereof. In fact, counsel for the parties admitted before the first appellate court that the old boundary walls of the houses of the plaintiffs were still intact and plaintiffs had only reconstructed their houses. That being

so, it could be hardly maintained that plaintiffs encroached upon the passage. Photographs, Ex.P9, unraveled that the old boundary walls of the houses of the plaintiffs were still in existence. That being so, there could hardly be any occasion for the plaintiffs to have encroached upon the passage in question. Still further, defendant failed to plead as to when exactly the plaintiffs have caused encroachment, if any, upon the rasta in question or any portion thereof. Nothing was brought on record by the defendants to substantiate their claim. Learned counsel for the appellant could not point out as to how the conclusions that were concurrently recorded by both the courts were either contrary to the position on record or suffered from any material illegality.

In the wake of the position, as set out above, there hardly exists any ground, least plausible in law, to interfere with the decree being assailed in the present appeal. No question of law, much less any substantial question of law, arises for consideration. Appeal being devoid of merit is, accordingly, dismissed.

February 10, 2015
Rajan

(Arun Palli)
Judge