

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 3544 of 1987 (O&M)
Date of Decision : 16.09.2016

Gurmail Singh and another

....Appellants

Versus

Kartar Singh

....Respondent

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. M.S. Rana, Advocate
for Mr. Ashish Kapoor, Advocate
for the appellants.

Mr. Sukhdip Singh Brar, Advocate
for Mr. Udeyveer Singh Brar, Advocate
for the respondent.

Surinder Gupta, J.

This is appeal against judgment of Ist Appellate Court, Jalandhar, whereby appeal filed by plaintiff-respondent was accepted and suit of plaintiff was decreed for mandatory injunction directing defendants to remove the wall shown as 'AB' in site plan (Ex. P-1) at their own expenses and they were also restrained from blocking the passage shown in red colour denoted as 'ABCD' in site plan (Ex. P-1). Learned Ist Appellate Court also ordered that parties will be at liberty to raise construction over the land owned by them only after they get the property partitioned in due course of law.

2. Plaintiff-Kartar Singh filed suit seeking relief of permanent injunction to restrain defendants from blocking passage shown in red colour, running in *khewat* no. 48, *khatauni* no. 78, *khasra* no. 4188/2/1, 4188/2/2, south shown as 'ABCD' in site plan (Ex. P-1) and mandatory injunction directing defendants to demolish the wall shown as 'AB' or any

other construction raised by defendants in the passage in order to restore passage in its original position.

3. Case of plaintiff, in brief, is that he is owner of land measuring 2 *kanals* situated in village Chak Dana out of land bearing *khasra* no. 4193/2730/1360, 1490, 1468, 1463, 1469/2, as per entry in *jamabandi* for the year 1980-1981. He is also co-sharer in land bearing *khasra* no. 4188/2/2, 4188/2/1 measuring 14 *kanals* 8 *marlas* situated in village Chak Dana out of which defendants have purchased 1 *kanal* 2 *marlas* of land. There is a passage coming from *phirni* to fields of plaintiff measuring 2 *kanals* as fully shown in site plan (Ex. P-1). In order to block that passage, defendants have constructed a wall ('AB') about a day before filing of the suit. If defendants block the passage, plaintiff will be put to irreparable loss as there is no other passage for their agricultural land. Plaintiff sought the relief of permanent and mandatory injunction with the averments as contained in para 5 of the plaintiff, which is produced as follows:-

- (i) *That the plaintiff is a co-sharer in land measuring 14K-8Mls., as detailed in para no. 2 of the plaint and hence he has got a right to use the portion of the land shown in red colour and marked by words 'ABCD';*
- (ii) *that the plaintiff has been using this Rasta shown in red colour for more than 40 years, as of right, without interruption, peacefully, openly and in the presence of the defendants and their predecessors as of right. Therefore, the plaintiff has acquired a right of easement to use the passage for his fields, shown in green colour;*
- (iii) *that there is no other passage except the Rasta in dispute*

for going to the fields of the plaintiff, shown in red colour in the site plan. This disputed Rasta is a part and parcel of the Rasta coming from east to west from the phirni to the fields of the plaintiff;

(iv) that the plaintiff has been using this Rasta as a passage for coming and going and for taking of carts and yoked bullocks and for bringing the produce of the land, shown in green colour;

(v) that the defendants are threatening that they have already built the wall AB on the southern side of the Rasta and they are further threatening that they will also construct a wall on the eastern and western sides of the Rasta and in this way, they will block the entire passage. The defendants have got no right to block the passage by the construction of the wall AB. The width of the Rasta has become narrow and the cart and yoked oxen cannot pass, therefore, the plaintiff is entitled to a decree for permanent injunction restraining the defendants from blocking the passage in any manner by the construction of any wall, either on the east or on the western sides of the Rasta in dispute. The wall constructed AB is about 3½' in height and the defendants had no right to build this wall. Therefore, the plaintiff is entitled to a decree for mandatory injunction for having an order that the defendants should restore the Rasta to its original position by removal of the wall and any other

construction as a passage for use of the plaintiff.”

4. As defendants did not care for the request of plaintiff not to block the passage and remove the wall, hence this suit.

5. Defendants contested claim of plaintiff *inter alia* pleading that plaintiff is not co-sharer in the land bearing *khasra* no. 4188/2/2, which was purchased by defendants from Joginder Singh son of Hari Singh vide sale deed dated 09.08.1972 for a sale consideration of ₹8500/- with boundaries as follows:-

East	:	Gali
West	:	Property of Kartar Singh
North	:	Property of Jit Singh
South	:	Aad

6. Joginder Singh was in possession of specific portion which he sold to defendants and delivered possession. There is no passage to fields of plaintiff as alleged by him and as shown in site plan (Ex. P-1). The passage from *phirni* shown with yellow colour is only to the property of defendants. The construction at the site shown as 'ABCD' in site plan exists since long. On that portion, defendants had constructed a *pakka kotha*, which is in their possession since the year 1972. There is a passage to the well of plaintiff from metaled road, which further lead to the property of plaintiff and was being used by plaintiff.

7. Plaintiff reasserted his case in replication and contested and controverted the averments of defendants in written statement.

8. Pleadings of parties led to framing of the issues as follows:-

(i) Whether the plaintiff is entitled to the permanent injunction as prayed for? OPP

- (ii) Whether the plaintiff has no *locus standi* to file the present suit? OPD
- (iii) Whether the suit is not maintainable in the present form? OPD
- (iv) Whether the civil court has no jurisdiction to try the present suit? OPD
- (v) Relief.

9. On appraisal of evidence, learned Sub Judge, Ist Class, Nawanshahr dismissed the suit of plaintiff with the observations as follows:-

- (i) Plaintiff has admitted that Joginder Singh was in exclusive possession of property which he sold to defendants.
- (ii) No partition of joint land through revenue Court took place and he never asked defendants to leave the passage and to compensate them with some other land.
- (iii) Land of plaintiff measuring 2 *kanals* 2 *marlas* has been mortgaged by him with possession to Mohan Singh for the last 10 years and he is not cultivating the suit land.
- (iv) Plaintiff did not examine Mohan Singh to prove that he had been using the disputed passage for going to suit land.
- (v) PW-2 Kirpal Singh and PW-3 Chanan Singh are related to plaintiff, as such, are interested to depose in his favour.

(vi) Defendants by leading evidence have proved that they constructed house over the plot purchased by them.

(vii) In the sale deed executed by Joginder Singh, no passage of 2 *karam* towards southern side of plot was mentioned.

There was only Aad towards southern side of that plot.

(viii) No independent witness from village was examined to prove that wall over the passage was raised one day before filing of the suit.

10. Plea of plaintiff that he has been using the passage in dispute was discarded on the ground that his land measuring 2 *kanals* 2 *marlas* is mortgaged with Mohan Singh and he is not in cultivating possession of the same, as such, question of his using the passage does not arise.

11. On appeal, Ist Appellate Court set aside the finding recorded by learned Sub Judge, Ist Class with the observation that land out of which defendants have purchased 1 *kanal* 2 *marlas* was joint land in which plaintiff-Kartar Singh is also recorded as co-sharer. Co-sharer cannot sell specific portion of the property rather he can sell only the share out of joint land. Even if, the land of plaintiff is mortgaged with Mohan Singh, he cannot be deprived of the right of using his property. In para 8 of the judgment, learned Ist Appellate Court referred to statement of DW-1 Gurmail Singh (wrongly mentioned as statement of plaintiff-Kartar Singh) wherein he has stated that on eastern side of the land purchased by them there is no passage but in the sale deed Ex. D-2 there is specific mention of passage on eastern side and it is also so shown in site plan (Ex. P-1) produced on record by plaintiff and Ex. D-1 produced by defendants.

12. On the basis of suggestion to plaintiff-Kartar Singh that there is

passage upto the house of Gurmail Singh, Ist Appellate Court drew inference that there was passage right upto the land of plaintiff, which has now been narrowed down by defendants.

13. Learned counsel for the appellants has argued that plaintiff-respondent is co-sharer in the land bearing *khasra* no. 4188/2/2 and 4188/2/1 and a suit for injunction against a co-sharer is not maintainable. At the most plaintiff can seek partition of his share. So far as question of passage for the land of plaintiff in other *khasra* number is concerned, he cannot claim any passage through the land bearing *khasra* no. 4188/2/1 or 4188/2/2. Defendants-appellants purchased the land measuring 1 *kanal* 2 *marlas* from Joginder Singh and are in possession of the same. Plaintiff has utterly failed to prove that any passage as claimed by him existed at the spot.

14. Learned counsel for plaintiff-respondent has argued that the land of plaintiff is situated at the back of property purchased by defendants-appellants. A passage from *phirni* existed upto the land of plaintiff. Appellants after purchasing the land from Joginder Singh blocked that passage by raising a wall. Now plaintiff has no access to his land as on all the four sides of his land, which is part of *khasra* no. 4193, there is land of Modan Singh, Mohinder Singh and of appellants. There is no reason to disbelieve the statement of witnesses examined by plaintiff. Defendants-appellants after purchasing the plot from Joginder Singh blocked passage to land of plaintiff by raising wall in dispute only a day before filing the suit, which he is liable to remove to restore the passage for land of plaintiff.

15. The dispute in this case pertains to existence of passage 'ABCD'. While plaintiff is alleging existence of this passage and defendants

are denying the same. Land of plaintiff, which is part of *khasra* no. 4193 is under mortgage with Mohan Singh (or Modan Singh). However, this fact in no manner affect the existence or non-existence of passage 'ABCD'. It is clear from the site plan (Ex. P-1) produced on record by plaintiff-Kartar Singh and from site plan (Ex. D-1) that at present there is no passage for agricultural land of plaintiff. If for sometime this land was under mortgage with Mohan Singh, it does not mean that this land was not having a passage even prior to that. In the sale deed (Ex. D-2) vide which the appellants purchased 1 *kanal* 2 *marlas* of land from Joginder Singh, no passage has been mentioned towards southern side of their plot. Joginder Singh was not examined by appellants to prove that he had described boundaries of plot correctly as per spot. While appearing as PW-1 Kartar Singh has stated that passage in dispute is in existence for the last more than 25 years and he had been using it for passage of his carts and for other equipment to his 2 *kanals* 2 *marlas* of land. This passage by the side of their land was never purchased by appellants from Joginder Singh. There is no other passage except the passage in dispute for his land and now he cannot go to his fields due to blockage of passage. A suggestion was given to plaintiff that he had been cultivating his land in village Bheen right from 1947 and the passage (in question) still exists upto the house of Gurmail Singh (defendant). Perusal of site plan produced by defendants (Ex. D-1), show passage from village *phirni* upto the land of Jeet Singh, which is on northern side of house of Gurmail Singh. Plaintiff has categorically stated that possession of defendants was over the land (purchased by them) after leaving the passage. However, there is no written document or entry in the revenue record regarding existence of this passage. PW-2 Kirpal Singh has supported the

contention of plaintiff regarding existence of passage. PW-3 Chanan Singh has stated that passage existed at the spot where defendants-appellants have now raised the construction. Statement of both these witnesses, Kirpal Singh and Chanan Singh, is un-shattered. No doubt they are related to plaintiff but this could not be a reason for learned trial Judge to discard their statements. Gurmail Singh while appearing as DW-1 has stated that there is no passage for the land of plaintiff-respondent and possession of this land is with Mohan Singh. He has admitted passage of 2 *karams* from *phirni* upto their plot but has stated that plaintiff-Kartar Singh has no passage from *phirni* for his land measuring 2 *kanals* 2 *marlas*. First he has to go to his well and then by using aar he had to go to his fields. He was not aware if the land which defendants have purchased was lying vacant. He has further admitted that no bullock or cart can be taken to fields of plaintiff-Kartar Singh for cultivation. DW-2 Rai Singh has stated that there is no passage for the land of plaintiff-Kartar Singh. DW-3 Gurdev Singh is *Namberdar* and has also stated that there is no passage by the side of aar which is on southern side of the property purchased by defendants.

16. Above evidence has been discussed again in order to have a view of factual position as both the Courts below have differed on the claim of plaintiff concerning existence of passage.

17. Land of Kartar Singh is agricultural land. It is nowhere the case of plaintiff that he never cultivated the same. Though, he had mortgaged this land with Mohan Singh but this does not mean that he has lost right of passage to his land. Learned trial Court has discarded the plea of plaintiff, about existence of this passage as Mohan Singh was not examined to prove user of this passage. Non-examination of Mohan Singh cannot weigh

adversely against the claim of plaintiff when there is statement of plaintiff himself supported by two witnesses. Defendants-appellants have purchased the land only in the year 1992.

18. No doubt in the sale deed (Ex. D-2) passage of 2 *karams* towards southern side of the plot purchased by defendants is not mentioned but this sole factor cannot be a reason to discard the testimony of plaintiff and his witnesses when it is proved that plaintiff has no approach for his land from *phirni*. It is quite strange that defendants can have passage for their plot which touch the land of Jeet Singh on extreme right side (when one is standing facing plot of defendants). Defendants have further bifurcated the plot purchased by them into three portions as shown in the side plan (Ex. D-1) and each portion has a passage from *phirni* but land of plaintiff which is on backside of the plot purchased by defendants has no passage. It cannot be believed that a person will have his agricultural land without any passage or approach to take his carts and other equipment for cultivation. In these facts and circumstances, testimony of plaintiff and his witnesses is reliable and has been rightly relied upon by Ist Appellate Court while accepting the plea of plaintiff that the passage exists and allowing the relief of injunction and mandatory injunction. The land which forms part of *khewat* no. 48 in which plaintiff is also a co-sharer has not been partitioned so far. Whatever passage has been left for the plot of plaintiff, land of Jeet Singh and the house of other persons as shown in site plan (Ex. P-1), same has nowhere been shown in the revenue record. The site plan (Ex. P-1) shows that the passage in question starts from *phirni* and has land/houses of different co-sharers i.e. Mohinder Singh, Dilip Singh, Jagir Singh, plaintiff and defendants. As per site plan filed by plaintiff (Ex. P-1) and also by

defendants (Ex. D-1), the land of plaintiff has been shown without any passage as admitted by defendants themselves that it is not accessible.

19. Taking the above facts and circumstances into account, conclusion drawn by Ist Appellate Court that passage upto the land of plaintiff was in existence calls for no interference. Plaintiff has been rightly found to be entitled to relief of injunction/mandatory injunction. It is, however, made clear that parties in possession of joint land can utilize the same for its beneficial use, subject to right of all co-sharers that may be settled in partition.

20. As a sequel of my discussion above, this appeal has no merit. No substantial question of law requiring determination arises in this appeal.

Dismissed.

September 16, 2016
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No