

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

1 **RSA No.1495 of 2003 (O&M)**
Date of Decision-12.07.2016

State of Haryana and others

... Appellants

Versus

Anand Parkash and another

... Respondents

2. **RSA No.5631 of 2003 (O&M)**

Anand Parkash and another

... Appellants

Versus

State of Haryana and others

... Respondents

3. **RSA No.5632 of 2003 (O&M)**

Anand Parkash and another

... Appellants

Versus

State of Haryana and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Ashok Muthreja, DAG, Haryana for appellants in
RSA No.1495 of 2003 and for respondents in
RSA No.5631 of 2003 and RSA No.5632 of 2003.

Mr. Anil Kshetarpal, Senior Advocate with
Mr. Saurabh Garg, Advocate
for the respondents in RSA No.1495 of 2003 and
for the appellants in RSA Nos.5631 and 5632 of 2003.

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment, RSA No.1495 of 2003 titled as State of Haryana and others Vs. Anand Parkash and another, RSA No.5631 of 2003 titled as Anand Parkash and another Vs. State of Haryana and others and RSA No.5632 of 2003 titled as Anand Parkash and another Vs. State of Haryana and others are being disposed of.

[2]. Facts are being taken from RSA No.1495 of 2003.

[3]. Respondents/plaintiffs filed suit for recovery of Rs.3,80,000/- by way of damages along with cost and interest @ 18% per annum from the date of filing of the suit till final realisation of the amount. In alternative, the plaintiffs sought a mandatory injunction directing the defendants-appellants to reconstruct their building in the same position.

[4]. Plaintiffs asserted that they were owners of the building situated at Ismailabad, Tehsil Thanesar, Distt. Kurukshetra and was having defined dimensions. Plaintiffs contended that the defendants made drain and water line in the street and there was a continuous leakage at T-juncture and at certain points as shown in the water line attached with the plaint. Plaintiffs also asserted that due to heavy leakage in water line, building of the plaintiffs was damaged badly. Expert opinion was also sought after due inspection. On physical examination of the building, it was found that it started settling at certain levels. The settling of soil could be

visualized from the fact that building showed certain cracks in various directions in the wall and roof (lintel). These cracks were caused due to loss of bearing capacity of the soil which was caused due to leakage in the main water line passing in front of the house of the plaintiffs. The percolation of the water in the soil beneath the building of the plaintiffs was alleged and it was averred that the official of the PWD Department has also found sufficient damages to the building of the plaintiffs as it likely to collapse at some time thereby causing eminent danger to the life of the occupants and adjoining buildings and neighbours. The building had developed big cracks which were visible even from some distance.

[5]. Plaintiffs further alleged that despite their repeated requests, nothing was done by the defendants. No pipeline was replaced. Plaintiffs also filed a suit for mandatory injunction against the defendant in which Local Commissioner was appointed. The Local Commissioner after inspection gave his report on 16.05.1991. Plaintiffs also got the cost of re-construction assessed from an expert Engineer which was estimated to be Rs.3,80,000/-. After serving registered notice dated 17.05.1991, the suit came to be filed on 22.01.1992.

[6]. Defendants contested the suit on all counts. Defendants controverted the allegations of the plaintiffs by alleging that site plan of the plaintiffs was not correct according to the site. The

disputed water line was laid in the street for advantages of the general public in the year 1974. It was placed about 3' to 3 1/2' below the ground level. Defendants refuted the allegation of leakage of water supply at T-juncture, rather they claimed that whenever minor leakage occurred, the same was immediately rectified. No complaint was ever made of any leakage of water earlier to 08.05.1991. A complaint was received by defendant No.4 from plaintiff No.2 and the said complaint was promptly attended to. Leakage was traced out and was rectified within no time.

[7]. Defendants further pleaded that plaintiffs had constructed an unauthorized septic tank in the street in front of their house in between water line and the building which was created at the depth of 7 feet below the ground level just adjoining to water line. It was averred that slope of the street was such that if there was any leakage in the water line the water line could not flow towards the house of the plaintiffs, but would flow parallel to the building line as the natural slope of the street was having rapid flow from East to West. It was also alleged that after construction of the unauthorized septic tank by the plaintiffs, the building of the plaintiffs started developing cracks. There was leakage of water in septic tank which was got repaired by the plaintiffs. Plaintiffs had damaged the water line while carrying out the repair of their septic tank as there was a gap of only 1 1/2" to 2" between water line and septic tank of the plaintiffs and the plaintiffs themselves were responsible for illegal and negligent act in raising the construction

of unauthorized septic tank in the public street near the water line in question. Defendants also submitted that building of the plaintiffs may collapse due to fault in the construction or due to low bearing capacity or due to leakage in between the septic tank and the building. Other allegations of the plaintiffs were denied altogether.

[8]. After filing replication, parties went to trial on the following issues:-

“1. Whether the plaintiffs are entitled to recover Rs.3,80,000/- by way of damages along with costs of the suit and future interest @ 18% per annum from the defendants as alleged? OPP

2. If issue No.1 is not proved, then whether plaintiffs are entitled for the relief of mandatory injunction as prayed for against the defendants? OPP

3. Whether the suit is bad for want of notice under Section 80 CPC? OPD

4. Whether the suit is not maintainable in the present form? OPD

5. Whether the plaintiffs have got no locus standi to file the suit? OPD

6. Whether the plaintiffs have got no cause of action to file the suit? OPD

7. Relief.”

[9]. Both the parties led their respective evidence to prove their case. Trial Court decreed the suit of the plaintiffs to the tune of Rs.47,500/- with proportionate costs vide judgment and decree

dated 19.11.1998. The trial Court also granted simple interest @ 6% per annum from the date of decree till final realisation of the amount. Trial Court based its conclusion on the fact that building of the plaintiffs was damaged due to seepage of water in the sub soil. A water line was running in front of house of the building which was found broken. The leakage was not attended to promptly by the defendants, but at a very later stage. The trial Court was of the opinion that the damage to the building of the plaintiffs was partly by the defective septic tank constructed by the plaintiffs themselves and partly due to unattended leakage of main water line belonging to the defendants. Since, the complaint of the plaintiffs was not attended to promptly, the blame could not be put on the plaintiffs themselves. Both the parties have pointed out their accusing figures towards each other and had their own defences. Trial Court was not in a position to observe that the damages to the building of the plaintiffs were occasioned by single reason or default, rather it was pointed out that it was the result of contributory negligence on the part of both the parties. Plaintiffs were found at fault in raising the construction of septic tank adjoining to the foundation of the building and adjoining to the pipeline in the street. Defendants were found negligent in not repairing or replacing the damage water line promptly when it was complained of the plaintiffs. Trial Court also found that building of the plaintiffs was not very old as the same was constructed only in

the year 1985-86. The cracks and other defects in the building were not of permanent nature which could not be repaired.

[10]. Keeping in view the mechanism of Civil Engineer as available these days, it was opined by the trial Court that the contributory negligence on the part of both the parties would be squarely answered if $\frac{1}{4}^{\text{th}}$ of the amount as claimed by the plaintiffs towards re-construction of the entire building was assessed. Plaintiffs got assessed an amount of Rs.3,80,000/- as a cost of re-construction of the entire building since it was found to be a case of repairs only, therefore, $\frac{1}{4}^{\text{th}}$ of the amount was assessed to be appropriate for carrying out repairs to which concept of contributory negligence was made applicable. An amount of Rs.95,000/- was assessed as $\frac{1}{4}^{\text{th}}$ of the amount claimed and while applying the contributory negligence an amount of Rs.47,500/- was found to be a cost of repair of the building and the same was ordered to be granted while decreeing the suit of the plaintiffs partly along with simple interest @ 6 % per annum from the date of decree till the final realisation of the amount.

[11]. Feeling aggrieved against the judgment and decree of the trial Court, both the parties went in appeal. Defendants filed Civil Appeal No.100 of 2001 titled as State of Haryana and others Vs. Anand Parkash and another. Plaintiffs also filed Civil Appeal No.101 of 2001 titled as Anand Parkash and another Vs. State of Haryana and others. Both the appeals were clubbed by the lower

Appellate Court and were decided by common judgment and decree dated 18.01.2003. Lower Appellate Court was pleased to accept Civil Appeal No.100 of 2001 titled as State of Haryana and others Vs. Anand Parkash and another partly modifying the decree of the trial Court to the tune of awarding decree of recovery of Rs.35,000/- only with proportionate costs and future interest @ 6% per annum from the date of decree till final realisation of the amount. Civil Appeal No.101 of 201 titled as Anand Parkash and another Vs. State of Haryana and others was dismissed.

[12]. Three regular second appeals have been preferred against the judgment and decree dated 18.01.2003 passed by District Judge, Kurukshetra. RSA No.1495 of 2003 has been preferred by State of Haryana against the part decretal of the suit to the tune of Rs.35,000/- along with proportionate costs and interest by the lower Appellate Court. RSA No.5631 of 2003 has been preferred by the plaintiffs against the dismissal of the appeal by the lower Appellate Court. RSA No.5632 of 2003 has been preferred by the plaintiffs against the part acceptance of the appeal of the State by the lower Appellate Court.

[13]. Since, the controversy in all the three appeals is dependent upon legality of the impugned judgments passed by the Courts below, therefore, only one discussion would suffice to meet the requirement of disposal of all the three appeals.

[14]. At the time of admission of the appeal following substantial questions of law were framed by this Court vide order dated 14.07.2003:-

“1. Whether the State can be held liable to make the payment of compensation when plaintiff himself has been found to be contributory in negligence?

2. Whether the respondent-plaintiff can take advantage of contributory negligence, when a structure made by the respondent-plaintiff is in contravention of Section 2(g) (4) of the Punjab Village Common Lands (Regulations) Act, 1961?

3. Whether the contributory negligence can be attributed at all to the appellants in respect of a structure made against norms in the Manual of Sewerage and Sewage Treatments which has been prescribed by the Government of India and which is against all accepted norms of laying of pipe and sewerage?

[15]. I have heard learned counsel for the parties and have gone through the record of the case with their able assistance.

[16]. Both the Courts below have concurrently held that there was unauthorized construction of septic tank by the plaintiffs in the public street. As per evidence on record, it was found that Deepak Clerk produced summoned file of earlier litigation. Building expert was examined as PW 2 i.e. Subhash Chander Kansal who had inspected the spot on 13.05.1991 and gave his report Ex.P1

suggesting that leakage from water pipeline should be stopped immediately and then repair work of the plaintiffs building should be undertaken. He also prepared estimate Ex.P2 regarding the cost of re-construction of the building thereby estimating an amount of Rs.3,80,000/-. Tubewell operator-Satnam Chand PW 3 stated from the record that there was an entry dated 11.05.1991 in respect of checking of leakage by Sub Divisional Officer H.R. Rawal and there was also entry about seepage of water supply on 13.05.1991 due to leakage. Prithi Singh PW 4 was the Clerk in the defendant-Department and he produced various documents. With reference to documents, he stated that letter dated 08.05.1991 was issued by the plaintiff No.2 which was Ex.P3 on record and the same was received in the office on 10.05.1991. Thereupon Sub Divisional Officer (SDO) made an endorsement requiring the Junior Engineer to check the water pipeline and got the same repaired immediately. It was also found that the plaintiffs also sent a letter Ex.P4 dated 12.05.1991 to the department where the Sub Divisional Officer Mr. Rawal also made endorsement to the Junior Engineer to ensure remedial measures in stopping the leakage in the supply of water.

[17]. Similarly, the plaintiffs also submitted letter dated 14.05.1991 Ex.P5 and the same was duly proved by the witness. This witness proved the letters dated 15.05.1991 Ex.P6, 14.05.1991 Ex.P7 and 17.05.1991 Ex.P8. Similarly, the photographer-Pawam Kumar also proved the photographs taken

by him at the spot. Neighbours were also examined viz. Lakhapt Rai PW6 and Ram Parkash PW7 who have also deposed regarding the leakage of water pipeline and damage caused to the building of the plaintiffs. Local Commissioner appointed in the earlier suit submitted his report and the said report also corroborate the plea of leakage in the water pipeline. Plaintiff No.2- Ramesh Chand appeared as PW 9 and liberally submitted his case.

[18]. Defendants relied upon testimony of H.R. Rawal, Sub Divisional Officer who appeared as DW 1 besides examining K.L. Nagpal as DW 2. Factum of receiving the orders from the Sub Divisional Officer and visited the spot on 09.05.2011 was admitted by the witness where the place was dug on pointing out by the plaintiffs. No leakage was found as per the witness. On 10.05.1991, the leakage was again checked and it was detected in the evening near the septic tank of the plaintiffs constructed in the street in front of their house/building. No leakage was found either at 'T' point or elsewhere. According to the defendants, plaintiffs did not allow to repair the leakage as they demanded replacement of entire pipeline. The leakage which was found at the spot was plugged temporarily on 11.05.1991 by fitting rubber tube over the pipeline. Plaintiffs persisted with their demand of replacement of pipeline on 14.05.1991 and ultimately, on 16.05.1991 pipeline was replaced and leakage was permanently plugged. Leakage in the pipeline was caused while constructing and repairing the septic

tank by the plaintiffs and their labour as projected by the defendants.

[19]. DW 3 Ashok Kheterpal, Executing Engineer of Public Health Department was a technical expert. He inspected the site on 30.09.1998 and reported that damage to the building was occasioned due to septic tank of the plaintiffs as its design and location were faulty. The septic tank was constructed very close to the foundation of the building as well as the pipeline, the septic tank should have been constructed far away from the building and the pipeline. Seepage from the septic tank was bound to be there as no ventilation pipe was provided to the septic tank to release the pressure of gases generated in the tank. Effluent from the septic tank was discharged in the open drain flowing along the wall of the building. The drain was not even plastered. Seepage from the drain was also causing damage to the foundation of the building of the plaintiffs. The witness highlighted that the water pipeline was totally intact and did not allow any leakage of any drop of water from it. Whenever there was leakage from the pipeline due to damage caused by the plaintiffs, the water started flowing in the direction of the down slope. The leakage if any from pipe could not cause damage to the plaintiffs building as per slope of the street. House of the plaintiffs was found to worth habitable and repairable as per Ex.D14.

[20]. Plaintiffs themselves have admitted that their septic tank was just two inches away from the pipeline. The close location viz-a-viz the septic tank and the water pipeline was not desirable. The septic tank was just near the building of the plaintiffs. On the ground level, of course, there was some distance between septic tank and the building of the plaintiffs, but the foundation was always wider than the wall and therefore, the foundation of the building and the septic tank would obviously nearer to each other. The septic tank was full of water and so obviously there had to be some continues seepage form the same towards foundation of the building as the tank was not even plastered. The seepage caused damage to the building of the plaintiffs.

[21]. The plea of the defendants that water pipeline was damaged by the labour of the plaintiffs could not be proved by any direct evidence. The water pipeline was leaking since 08.05.1991 and it was repaired permanently on 16.05.1991 as per testimony of DW 2 K.L. Nagpal. The complaint was received by defendant No.4 on 09.05.1991 and ultimately, endorsement was made by defendant No.4 to Junior Engineer namely K.L. Nagpal on the same date. Junior Engineer-K.L. Nagpal went to the spot on 09.05.1991, but leakage could not be detected. It was only detected in the evening on 10.05.1991. It was temporarily repaired on 11.05.1991 and permanently plugged on 16.05.1991. As per evidence of the plaintiffs and defendants, the leakage was reported on 08.05.1991 and it was repaired permanently on 16.05.1991 as

per testimony DW 2 K.L. Nagpal, Junior Engineer which remained unshattered. So the alleged leakage was only for 8 days. During the period of 8 days, it was temporarily repaired on 11.05.1991. The complaint dated 08.05.1991 was addressed to the Junior Engineer by the Sub Divisional Officer who went to the spot on 09.05.1991, but ultimately detected the spot/leakage in the evening on 10.05.1991 and was temporarily repaired on 11.05.1991. The remedial measures undertaken by Junior Engineer on 11.05.1991 were not the permanent feature, but the leakage was temporarily repaired and the same was permanently plugged on 16.05.1991. No evidence was brought on record that the water pipeline remained leaking prior to 08.05.1991 and it kept on leaking from 11.05.1991 to 16.05.1991 i.e. the date when it was permanently plugged.

[22]. Lower Appellate Court while observing that the leakage might have been existing prior to 08.05.1991, only on the aforesaid terms of not adhering to the complaint promptly, a contributory negligence was fastened upon the defendants. The trial Court fastened the liability to the tune of Rs.47,500/- along with proportionate costs and interest, whereas the lower Appellate Court modified the amount thereby, fastened the liability of Rs.35,000/- along with proportionate costs and interest upon the defendants.

[23]. The septic tank of the plaintiffs was found existing in the public street which falls under the four corners of Section 2 (g) (4) of the Punjab Village Common Lands (Regulation) Act, 1961. Virtually that amounted to encroachment in the public street. According to provisions of Punjab Village Common Lands (Regulations) Act, 1961 street was being used for common purposes and it stood vested in Panchayat as *Shamlat Deh*. The testimonies of plaintiffs' witnesses namely Subhash Chander Kansal, Lakhpai Rai and the report of Local Commissioner proved that the septic tank was constructed in the street. Testimony of Ashok Kheterpal DW-3 would suffice to show that damage to the building of the plaintiffs was the handiwork of seepage from septic tank as no ventilation pipe was provided to the septic tank for release of pressure of gasses generated in the tank. Effluent from the septic tank was discharged in the open drain flowing along the wall of the building. The drain was also not plastered. The seepage from the drain was also causing damage to the foundation of the building of the plaintiffs.

[24]. I have considered the material in detail and found that the substantial questions of law as noticed by this Court in order dated 14.07.2003 arise in this appeal. When the plaintiffs themselves were at fault in constructing the septic tank in the public street and the act of the plaintiffs in not providing ventilation pipe to the septic tank resulting in generating gases in the septic tank and open drain of sludge from the septic tank along with drain

adjoining to the building of the plaintiffs also contributed in providing damage to the building of the plaintiffs. This act of the plaintiffs itself was sufficient to presume that the damage if any caused to the building was on account of the negligence on the part of the plaintiffs themselves. The water pipeline was existed in the public street. There was no occasion for the plaintiffs to encroach upon the public street by constructing the septic tank. The plaintiffs were themselves negligent and were at fault. According to provisions of Punjab Village Common Lands (Regulations) Act, 1961 street was being used for common purposes and it stood vested in Panchayat as *Shamlat Deh* and therefore, the defendants were well within their rights to act in accordance with law. Though no effort was made by the defendants to approve the septic tank but the maintenance of water pipeline in the street was an act of governance.

[25]. As per evidence on record, the complaint of leakage for the first time was made on 08.05.1991 and the same was attended to on 09.05.1991, but the leakage could not be detected on that day. The leakage was detected on 10.05.1991 and was temporarily repaired on 11.05.1991 itself. Thereafter, there was no evidence that the leakage persisted till it was permanently culled on 16.05.1991. If the controversy analyzed in the light of persisting leakage that was only from 08.05.1991 to 11.05.1991 when it was temporarily stopped and thereafter permanently plugged on 16.05.1991. The alleged leakage for about 3 days could not be

interpreted to mean that there was damage to the property on account of leakage of about 3 days as emerged from the evidence on record. Even as per evidence of the department including expert DW-3 Ashok Kheterpal, the damage caused to the building of the plaintiffs was attributable to the faulty construction of septic tank having no ventilation pipe in it. There was confirmation of gases in the septic tank and in order to release the pressure so generated in the septic tank, there was a requirement of ventilation pipe in it. Ventilation pipe was not provided to septic tank by the plaintiffs themselves, rather affluent from the septic tank was being discharged in the open drain flowing along the wall of the building of the plaintiffs. This drain was also not plastered and it kept on seeping in the building of the plaintiff.

[26]. Therefore, in my considered opinion, all the three substantial questions of law have to be answered against the plaintiffs inasmuch as that the plaintiffs themselves were negligent in stopping the seepage from septic pipeline and discharge of affluent along with the drain adjoining to their building. Construction of faulty septic tank in public street was an act of encroachment by the plaintiffs themselves. Septic tank was constructed very near to the foundation of the building. Septic tank was not constructed as per norms of the department and therefore, negligent act of the plaintiffs themselves was not attributable to the Government functionaries which acted promptly on the complaint made by the plaintiffs on 08.05.1991.

[27]. Looking to the material available on record, it is found that the Courts below have misread the evidence while concluding that there was a case of contributory negligence. In my considered view, it was not a case of contributory negligence, rather negligence was solely on account of handiwork of the plaintiffs for the reasons as mentioned in the preceding paras of this judgment.

[28]. As a result of aforesaid discussion, I have no hesitation in accepting RSA No.1495 of 2003. Resultantly, impugned judgments and decrees passed by the Courts below are hereby set aside. Suit of the plaintiffs is ordered to be dismissed, leaving the parties to bear their own costs. As a result of acceptance of RSA No.1495 of 2003, RSA No.5631 of 2003 and RSA No.5632 of 2003 are accordingly dismissed.

(RAJ MOHAN SINGH)
JUDGE

12.07.2016
Prince