

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

**R.S.A No.3743 of 2010(O&M)
Date of decision :22.08.2016**

Om Parkash

..... Appellant

Versus

Bhawani Sahai and others

..... Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. S.M.Sharma, Advocate
for the appellant.

Mr. J.P.Sharma, Advocate
for respondents.

DARSHAN SINGH,J

The present appeal has been preferred against the judgment and decree dated 08.03.2010 passed by learned District Judge, Narnaul, whereby the appeal preferred by plaintiff-respondent against the judgment and decree dated 19.01.2008 passed by the learned Additional Civil Judge (Sr. Division), Narnaul, has been allowed.

2. For the sake of convenience, the status of the parties is being mentioned as in the original suit.

3. Plaintiff-respondent no.1 Bhawani Sahai has filed the suit for permanent injunction restraining the appellant-defendant Om Parkash from raising any construction and obstruction over the passage shown by letters mark 'ABCD' shown in red colour in the site plan attached with the plaint situated at village Amarpur Jorishi, Tehsil Narnaul, District Mohindergarh. It was also prayed that if the contesting defendant raises the construction over the passage in dispute, then he be directed to

remove the same.

4. As per the averments in the plaint, the passage in question is being used by the parties to the suit and other persons whose houses are situated on the passage in dispute from long time as a private passage. The passage in dispute is not a public passage and does not vest in Gram Panchayat. On 08.03.1986, appellant-defendant has filed the suit against the grandfather of the plaintiff. In that suit, they had arrived at a compromise. On the basis of said compromise, the suit was decided on 27.02.1987. As per the said compromise, the plaintiff was allowed to lay a Chajja in front of his house and not to make any encroachment over the remaining part of the suit property. Now, the defendant wants to raise construction over the passage in question for which he has no legal right. Hence, the suit.

5. Appellant-defendant contested the suit on the grounds *inter alia* that he had never raised any obstruction over the passage in question. However, the plaintiff himself has made the encroachment over the passage and in order to protect his unauthorized encroachment, he has filed the false suit. The plaintiff has no right, title or interest with the ownership of the passage in dispute. Gram Panchayat was a necessary party as the passage in question is a *Shamlat* land and vests in the Gram Panchayat. It was further pleaded that appellant-defendant had never encroached upon the property in question. No one has any right to encroach upon the passage. With these pleas, appellant-defendant pleaded for dismissal of the suit.

6. From the pleadings of the parties, the following issues were

framed by the learned trial Court:-

1. Whether there exist any passage as alleged by the plaintiff, if so its breadth and its boundary?OPP
 2. Whether plaintiffs have no locus-standi to file the present suit?OPD
 3. Whether the plaintiff had encroached the Rasta in dispute, if so its effect?OPD
 4. Whether the Court has no jurisdiction to try the present suit?OPD
 5. Whether the suit of the plaintiff is bad for non-joinder of necessary party?OPD
 6. Relief.
7. The suit filed by the plaintiff-respondent was dismissed by the learned trial Court on the ground that the plaintiff has failed to establish the length and width of the passage and that the same was left by the plaintiff and others from their own land.
8. Plaintiff-respondent no.1 Bhawani Sahai aggrieved with the aforesaid judgment and decree preferred the appeal. The same was allowed by the learned District Judge, Narnaul, vide impugned judgment and decree dated 08.03.2010. Appellant-defendant was restrained from making any kind of obstruction in the suit property. The said restrain order was also made applicable to the plaintiff as well along with proforma defendants.
9. Aggrieved with the aforesaid judgment and decree, the present appeal has been preferred by appellant-defendant Om Parkash.
10. I have heard Mr. S.M.Sharma, Advocate, learned counsel for the appellant, Mr. J.P.Sharma, Advocate, learned counsel for respondents and have meticulously gone through the record of the case.
11. Initiating the arguments, learned counsel for the appellant at the very outset contended that the true position at the spot is depicted in the photograph which has been marked as mark 'X'. He contended that

appellant-defendant had no intention to encroach upon the passage shown in the photograph but the *kucha* portion in front of the doors of the appellant-defendant is the part of his house and he cannot be restrained to raise the construction in this portion. He categorically stated that the appellant-defendant will never encroached any part of the street in alignment and the white building in the photograph. He will only raise the construction in the *kuchha* portion, which is part of his house.

12. On the other hand, learned counsel for the respondents contended that the existence of the passage is fully established from the compromise Ex.P-1 recorded in Civil Suit no. 207 of 08.03.1986, decided on 27.02.1987, titled as 'Om Parkash Vs. Rameshwar Dayal'. He contended that the length and width of the passage has been shown in the site plan mark B. He contended that in village, streets are not in straight line. Thus, he contended that the learned First Appellate Court has rightly passed the decree.

13. I have duly considered the aforesaid contentions.

14. The suit filed by plaintiff-respondent no.1 was dismissed by the learned trial Court on the ground that the plaintiff was not able to establish the width of the passage. Plaintiff has placed on file only the site plan mark B. It is only a marked document and has not been proved in accordance with law. In order to seek a decree for injunction restraining appellant-defendant no.1 to encroach upon the passage in dispute, it was incumbent upon the plaintiff-respondent no.1 to establish the width of the passage. Only then the effective decree could have been passed restraining the appellant-defendant to encroach upon the part of the street.

But, no cogent evidence has been adduced by the plaintiff-respondent to establish the width of the passage. Plaintiff-respondent Bhawani Sahai has stepped into the witness box as PW-2 and he has categorically stated that he cannot tell the length and width of the passage. As already discussed, the site plan mark B is not proved in accordance with law. Moreover, there is no evidence to show as to on what basis the width of the passage has been mentioned in the site plan mark B. So, the plaintiff-respondent has not been able to establish the width of the passage at the site in dispute i.e. in front of the house of the appellant.

15. Ex.P-1 is the certified copy of the compromise filed in Civil Suit no. 207 of 08.03.1986 titled as 'Om Parkash Vs. Rameshwar Dayal. Appellant-Om Parkash' was the plaintiff in that suit. In the compromise Ex.P-1 again the width of the passage is not mentioned. However, existence of the passage in the eastern side of the house of the appellant is not disputed. Compromise Ex.P-1 further shows that the appellant was allowed to construct the *pucca* wall in alignment to the western wall of the room of Rameshwar Dayal, the defendant in that suit, who is none else then the grandfather of the present plaintiff-respondent no.1. So, even the compromise Ex.P-1 shows that *kucha* portion in front of the house of the appellant was not the part of the street. If that would have been so, there was no need for grandfather of the plaintiff to agree to close the window installed by him in his room towards this portion. In the compromise Ex.P-1, the appellant was allowed to construct the *pucca* wall in alignment of the western wall of the room of the predecessor-in-interest of the plaintiff. The photograph mark X taken on record today

clearly shows that there is a *kucha* portion in front of the house of the appellant towards eastern side and on the western side of the *kotha*/room of Rameshwar Dayal. This portion in alignment of the outer wall of the room of the plaintiff cannot be stated to be the part of the street and the same appears to be the open space in front of the house of the appellant in which he cannot be restrained to raise the construction. As already mentioned, learned counsel for the appellant has clearly undertaken that the appellant will not encroach upon any part of the street situated on the eastern side of his house.

16. Thus, keeping in view my aforesaid discussion, the present appeal is hereby partly allowed. The impugned judgment and decree dated 08.03.2010 passed by the learned First Appellate Court is hereby modified to this extent that appellant/defendant Om Parkash is restrained to encroach upon the street situated on the eastern side of his house in the alignment of the eastern wall of the house of the plaintiff and will not reduce the width of the street at any point less than 12 ft. 9 inch. The restrain shall not be applicable to the open Kucha portion situated in front of the house of appellant/defendant after leaving 12 feet 9 inch wide street on the eastern side. The remaining part of the decree passed by the learned First Appellate Court shall remain intact.

August 22, 2016

s.khan

(DARSHAN SINGH)
JUDGE

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No