

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

RSA No. 1428 of 2016 (O&M)

Date of decision: 25.04.2016

Mangal Singh and others.

... Appellants

Versus

Lehmber Singh now deceased through legal heirs

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.Malkeet Singh, Advocate
for the appellants.

AMOL RATTAN SINGH, J.

This is the second appeal filed by the plaintiffs in a suit instituted by them on 12.05.2009 in the Court of the Additional Civil Judge (Senior Division), Shaheed Bhagat Singh Nagar, seeking a declaration that they have easementary rights under Section 13 of the Indian Easement Act 1882, over the property/servient heritage in respect of the property described in the suit. The suit was dismissed by the learned Civil Judge, leading to the filing of an appeal before the first Appellate Court, which was also dismissed by that Court, leading to the filing of this second appeal by the said plaintiffs.

2. The facts, as taken from the judgment of the Civil Judge, are that the plaintiffs claimed to be owners in possession of a house shown in the suit property, being legal heirs of one Ajit Singh sonof Karam Singh, who was also the grand-father of the respondents-defendants. In other words, the appellants and the respondents are first cousins to each other.

The house is stated to have been raised in the year 1972 by the said Ajit Singh, with the consent of the respondents-defendants (hereinafter to be referred to as the defendants) and a passage leading to the house, from the land of the defendants, was also, as contended, being used by the appellants-plaintiffs (hereinafter to be referred to as the plaintiffs) and their father come predecessor-in-interest, since 1972, with no objection from the defendants.

Thereafter, the joint ownership between the plaintiffs and their father on the one hand and the defendants' father on the other, of land owned by their common grand-father, Karam Singh, was got partitioned in revenue proceedings (initiated under Section 111 of the Punjab Land Revenue Act 1887).

It was alleged that the defendants were now threatening to blockage the passage (hereinafter to be referred to as the suit property) and to prevent the plaintiffs from using it for ingress or egress to their house and agricultural land.

3. Upon notice having been issued to the defendants, they took a preliminary objection on the maintainability of the suit, the property already having been part of the partition proceedings before the revenue Courts, that reached finality, eventually before this Court (by way of CWP No.8864 of 2009, decided on 24.02.2011).

Other than that, the usual preliminary objections on lack of cause of action, lack of proper Court fee, were also taken.

On merits, it was submitted by the defendants that the house which the plaintiffs claimed to be in their ownership, is actually joint owned

by the parties and that two karams (about 11 ft.) 'rasta'/path was in existence, which was actually not being used as such by the plaintiffs.

It was further contended that the defendants were actually exclusive owners of the suit property.

With no replication having been filed, the following issues were framed by the learned Civil Judge:-

- “1. Whether the plaintiffs are entitled to the relief of declaration that the plaintiffs have easementary right under Section 13 of the Indian Easement Act, 1882? OPP
2. Whether plaintiff is entitled to the consequential relief of permanent injunction restraining the defendant from interfering in the user of the passage and from raising obstruction? OPP
3. Whether the suit is not maintainable in the present form? OPD
4. Whether the plaintiffs have got no cause of action to file the present suit? OPD
5. Whether the plaintiffs have got no cause of action to file the present suit? OPD
6. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD
7. Whether the site plan produced by plaintiff is incorrect? OPD
8. Relief.”

4. By way of evidence, appellant-plaintiff No.1 examined himself as PW1, reiterating the contents of the plaint and proving a 'jamabandi' (record of rights), as Ex.P1, an *Aks-shajra*/map as Ex.P2 and a site plan as Ex.P3, in addition to some other documents. The plaintiffs also examined one

Gurcharan Singh, Draftsman, as PW2.

5. The defendants, on the other hand, examined present respondent No.1 (the present respondents all being sons of the original defendant, Lehmbur Singh, fathers' brother of the appellants-plaintiffs), as DW1 and also tendered certain documents in evidence.

6. From the appraisal of the evidence, the learned Civil Judge found that the land of the grand-father of the parties was subject matter of partition proceedings initiated by the defendant, Lehmbur Singh, i.e. the father of the present respondents, in which partition was effected keeping the possession of all parties intact, and thereafter, the said partition proceedings before the District Revenue Officer-cum- Collector, were appealed against by the plaintiffs right upto the level of the Financial Commissioner, but with each appeal being successively dismissed, the final order of the Financial Commissioner Revenue, being of September 29,2008.

Against that order, the appellants-plaintiffs filed CWP No.8864 of 2009 before this Court in which after notice was issued and the respondents herein put in appearance, it was held by a co-ordinate Bench of this Court, vide order dated 24.02.2011, as follows:-

“Since the rasta connecting to the main road is two karams wide and the petitioners have had no grievance with the same, learned counsel for the petitioners in this writ petition have not been able to justify their demand for a rasta 2½ karams wide from out of the land of the private respondent/common land.”

7. Thus other than the fact that the issue of providing a path of 2½ karams, had already been rejected upto this Court, in the partition proceedings, it was further found by the learned Civil Judge, that it could be

discerned from the site plan, that the plaintiffs could approach their passage already provided, and there was no need for them to go through the property of the defendants. They however, wished to approach their property from the rear side of the house also, which contention was rejected by the learned Civil Judge, holding that if they wished to have another ingress into the rear portion of the house, they could do so by carving out a path from their own property. Hence, holding that the passage of two karams already provided by the revenue authorities in partition proceedings, was sufficient, as also found by this Court in the writ petition earlier filed, the suit was dismissed.

8. In the first appeal filed before the learned District Judge, other than the above, it was held by that Court that though easementary rights may otherwise be available as a civil remedy, even after partition proceedings had concluded, however, with necessary easement already provided by way of a path of two karams, the plaintiffs could not claim anything further, that right already having settled upto this Court.

Consequently, the first appeal was also dismissed.

9. Before this Court, Mr.Malkeet Singh, learned counsel for the appellants, firstly submitted in terms of the submissions made before the learned Courts below, to the effect that easementary rights being wholly civil rights, simply by finalization of partition proceedings, even upto this Court, such civil rights could not be denied to the appellants.

He next submitted that two karams path not being sufficient for the appellants to carry their agricultural implements into their house, the extra half karam, i.e. 2½ karams, of passage was necessary to be provided and further, that the path provided actually led upto the rear of the house of the

appellants, and was required to be extended upto the front of their house.

10. Having considered the arguments of learned counsel, this Court would not go into the factual aspect of whether or not 2½ karams land was necessary for agricultural implements to be taken into the house of the appellants. That issue, even by way of culmination of revenue proceedings, came up before this Court in extraordinary jurisdiction under Article 226 of the Constitution, wherein it was open to the appellants to provide all necessary material to show that such width of a path was actually required, even if they had not been able to prove that before the revenue authorities. They obviously having done so, at the time when notice was issued in CWP No.8864 of of 2009, and in fact, even notice regarding stay having been issued at that time, in that petition, subsequently, this Court recorded that the present appellants (petitioners in the writ petition) had not been able to establish that instead of 2, actually 2½ karams passage was needed.

11. As regards the contention that other than the width of the passage, the length is also not sufficient and the path needs to be extended to the front of the house of the petitioner, this Court would not go into that issue for two reasons. Firstly, again that argument was available before the revenue authorities and the writ Court, which, if the appellants had not taken at that time, they would be barred from taking in subsequent proceedings, even of a civil nature, they not having been able to convince this Court in writ proceedings.

Secondly, the learned Civil Judge, as already noticed, has recorded a finding of fact that the appellants have been provided with a two karam passage and in case they wished to extend it, they can do so from their

own land without having to disturb the respondents-defendants' property.

This Court would not interfere in such finding of fact, there being no perversity shown in that finding.

12. Mr.Malkeet Singh also relied upon a judgment of a single Bench of the Andhra Pradesh High Court, as relied upon before the first Appellate Court, in Undavilli Mangayamma (died per L.R.) v. Undavilli Veerayamma and others, 2007 RCR (Civil) 498, to submit that where an easement is necessary, finalization of partition proceedings would not preclude a civil suit, to establish such necessity by way of easement.

Having gone through that judgment, I do not see how that can be applicable to the present case, in view of the fact that, firstly, in that case there was no issue of the matter having been subject matter right upto the High Court earlier, whereas in the present case exactly the same issue was subject matter of CWP No.8864 of 2009.

Secondly, as already noticed hereinabove, the finding of fact, that the appellants can carve out a passage to a different portion of their house, from their own land, has not been shown to be perverse in any manner though learned counsel for the appellants did make an attempt to do so by stating that the path which reaches the appellants' house, reached an area which was residential, constructed in 1972. Even if that is accepted, though not specifically seen to be raised before the Courts below, change of internal boundaries, within the compound of the house, would not be impossible, by shifting one room to a different place in the courtyard, so as to create an entry at the point where the path is currently touching the boundary wall of the house of the appellants if it is indeed so necessary to enable another entry

from a particular side, into the house of the appellants.

Consequently, finding no merit in the appeal, it is dismissed *in limine*, with no order as to costs.

25.04.2016
anil

(AMOL RATTAN SINGH)
JUDGE