

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

RSA No.2167 of 2015

Date of decision: 03.03.2016

Matadin

... Appellant

Versus

Bani Singh (deceased) through his LRs.

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.Praduman Yadav, Advocate
for the appellant.

AMOL RATTAN SINGH, J.

1. This is the second appeal filed by the plaintiff, after his suit seeking a declaration and permanent injunction, was dismissed by the learned Civil Judge (Junior Division), Rewari and the appeal filed thereafter, was dismissed by the learned Additional District Judge, Rewari, vide their judgments dated 13.12.2013 and 23.03.2015 respectively.

As per the plaintiffs' case, he claimed to be the owner in possession of a house demarcated as ABCDEF in the site plan annexed with the plaint, that was situated in the 'Abadi Deh' of village Bharawas, Tehsil and District Rewari. It was stated that it was an old house with ventilators of the rooms opening towards the Southern part of the house and a "Mora" of the house opening towards the East, in the lane, from the time of its original construction.

It was further averred that the respondent-defendant had purchased a plot towards the Eastern side of the lane and wanted to illegally obstruct the free flow of the water in the lane and to raise a construction over the lane at point GH, shown in the site plan, and had even put some bricks at that point to obstruct the rain water from flowing the towards Northern side and then to the “Rasta” towards the East.

The plaintiff had further contended that the defendant was a head strong person who wanted to illegally raise construction in the lane, adjacent to the Eastern wall of the plaintiff and to obstruct the ventilators and “moras of the room of the plaintiff, thereby leading to irreparable loss of light and air to the plaintiffs' house. It was also contended that with the said construction, rain water would accumulate on the roof of the house and adjacent to the wall of the room of the plaintiffs' house, thereby causing damage to it.

With the defendant not allegedly heeding to the complaints and requests of the plaintiff, the suit was instituted on 28.10.2009.

2. In the reply that they filed, the respondents-defendants (the original defendant was one Bani Singh who is seen to have passed on during the pendency of the suit at the first stage itself, after which his legal representatives (respondents-defendants No.1(a) to 1(c) were impleaded in his place)), admitted that the plaintiff was the owner of the property shown in the site plan as ABCDEF but they denied that any “gali” (lane) was in existence on the Eastern side of the plaintiffs' house.

It was further alleged that the gali was wrongly shown in the site plan,

just to protect the “mora” and ventilators that the appellant-plaintiff had “illegally constructed towards the property of the defendants”.

Yet further, it was contended in the written statement that the previous owner of the plot that the defendant had bought, used to reside outside the village and during his absence, the plaintiff had constructed the “mora” and ventilator, because the property was lying vacant, though there was no gali between the property of the plaintiff and the defendants

It was further contended that the plaintiff had constructed his house on every single inch of land without leaving any buffer in between.

The property was stated to have been purchased by the respondents-defendants in the year 2007, after which they had put a tin shed over the property and had also constructed the boundary wall and installed a gate.

3. No replication having been filed, the following issues were framed by the learned Civil Judge:-

- “1. Whether the plaintiff is entitled for permanent injunction to the effect that defendants be restrained from raising any construction over the gali towards the east of the house of the plaintiff and from obstructing free flow of water in the gali, air and light of the plaintiff? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD
4. Whether the suit is not maintainable? OPD
5. Relief.”

4. To prove his case, the appellant-plaintiff examined one Dinesh Kumar, Draftsman, as PW1, who tendered his affidavit, Ex.PW1/A, in evidence, to prove the site plan as Ex.PW1/B.

Girish Chander, Photographer, was examined as PW2, who tendered his affidavit, Ex.PW2/A, in evidence and proved the photographs, Ex.PW2/B to Ex.PW2/D.

PW3 was one Mahender Singh, who also tendered his affidavit, Ex.PW3/A, in evidence. The plaintiff-appellant himself tendered his affidavit Ex.PW4/A, in support of his case.

5. The respondents-defendants examined another Draftsman, Om Parkash Yadav as DW1, who tendered his affidavit Ex.DW1/A to also prove another site plan (also shown to be Ex.DW1/A in the judgment of the learned Civil Judge).

DW2 was one Satish Kumar who proved photographs Ex.D1 to Ex.D6, Tara Chand, Raj Singh and Ramautar appeared as DWs3, 4 and 5 and tendered their respective affidavits, in evidence.

6. On appraisal of the aforesaid evidence, the learned Civil Judge found that though PW1, Draftsman Dinesh Kumar, had proved the site plan Ex.PW1/B, he himself suggested that it was wrong that no gali/lane existed towards the Eastern side of the plaintiffs' house. The other significant witness, Mahender Singh (PW3) deposed that the property was in the old Abadi Deh area with no revenue record available but the house of the plaintiff was constructed in the year 1978. As per this witness, no gali existed towards the Eastern side of the plaintiffs' property but he further stated that the ventilator and "moras" of the

house were not opening towards the property of the defendants.

As per the appellant himself, when he testified as PW4, after he had constructed the house in 1978, he also built upon it in the year 1980-81 and further, on three sides of his property the property of the defendants existed and on the 4th side there was a gali. He also stated that the “moras” and ventilators of the houses of Amba Parshad, Ramesh and Phool Singh, also opened onto the property of the respondent.

7. The learned Civil Judge however, found that as per the site plan, Ex.PW1/B, submitted by the appellant-plaintiff himself, houses were shown to be constructed on two sides of the property of Bani Singh and on one side there was a “Rasta Sare Aam” and on another side a gali existed, with no “moras” and ventilators opening in the property of Bani Singh. Thus, as per the finding of the learned Civil Judge, the plaintiff himself had not supported the site plan produced by him, while testifying in Court.

8. A Local Commissioner was also appointed, who placed on file his report Ex.PW4/D, stating therein that he had noticed in the presence of all parties, that behind the house of the appellant, i.e. on its Eastern side, “moras” existed and at the level of the roof, also on the Eastern side, there were six ventilators.

Other than giving the measurements between certain points and the age of the construction, as per witnesses present at the spot, it was stated by the Local Commissioner that whereas the “moras” and ventilators of Ramesh and Shyam Lal opened towards the Southern side of the respondents' property, no gali existed on the spot.

9. The Trial Court, on considering the above, found that it could not be clearly stated that there existed any gali on the spot, as claimed, or that the opening of the ventilators and “moras” towards that side had been enjoyed for too many years to entitle the plaintiff to easementary rights thereto.

It was also found that the appellant-plaintiff had not been able to show that any hindrance, in the peaceful enjoyment of his property, had been created by the respondents-defendants.

On the above finding, the suit of the appellant-plaintiff was dismissed.

10. The learned first Appellate Court also, on appraisal of the aforesaid evidence, found that on cross-examination, PW3, Mahender Singh, had also admitted that presently there was no gali towards the East side of the appellant-plaintiffs' house and after discussing the presence of other adjoining construction, found that if a gali had existed, it would have gone up towards the South side of the house upto a particular point, which was not so. This witness also admitted that a ventilator that had been opened by defendant, Bani Singh, towards one Kuldeeps' house had been closed by Bani Singh, when construction was raised by Kuldeep.

From the appellant-plaintiffs' testimony, the learned first Appellate Court found that during cross-examination, he had admitted that the defendants' house was surrounded by residential houses on three sides and on the 4th side there was a gali. But the said gali was determined by the first Appellate Court to be not at the point where the

plaintiff-appellant claimed it to be, but on a different side, which was a common passage.

11. Thereafter, noticing the report of the Local Commissioner (an Advocate), the first Appellate Court further came to the finding that there was no pleading of the appellant, in his plaint, that the gali in dispute was a common gali or a private gali, but it came to be admitted that it was not a common gali. In fact, the Court also found that had that been the case, the Gram Panchayat would have taken possession of it and laid it out with bricks etc., which was not the case.

Hence, it was concluded that no common passage existed as claimed by the appellant, towards which he had opened his ventilators and “moras” etc. Thus, the property towards which the ventilators had been opened, being the property of the respondent, it was held the appellant had no right to open ventilators on to it.

This conclusion was also reached on the basis of the fact that the respondent also, earlier had (as already noticed) opened “moras” towards that side but when his neighbours started constructing upon their side of the property, the respondent had closed the said “moras”.

Hence, holding as above, the first appeal filed by the appellant was also dismissed.

12. Before this Court, though Mr. Praduman Yadav, learned counsel appearing for the appellant, tried to show that there was a common passage on which the appellant had a right to open his ventilators, he could not, from the evidence, show that the finding of fact recorded by the Courts below, was erroneous in any manner.

He however, submitted that since it was only an issue of ventilators opening on one side, if notice be issued, the matter may be resolved amicably between the parties.

13. Having heard learned counsel, I am not inclined to issue notice in view of the concurrent finding of fact, in favour of the respondents, by the Court below. Hence, calling upon the respondents simply to try and resolve an issue which otherwise by factual finding stands settled by two Courts in their favour, is not found to be justified, especially as the issue is with regard to the opening of ventilators on a side which has been found to be not a common passage, but the property of the respondents.

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

It may be noticed here that though the appellant had contended that there was a passage on the side towards which his ventilators opened, the Gram Panchayat of the village was not impleaded as a party, so as to prove the existence of any common public passage. Hence, obviously whatever has been held by the Court below, affirmed by this Court, would only be binding *inter se* parties to the *lis*.

This observation has been felt necessary, in view of the fact that the learned first Appellate Court has referred to the fact that if the Gram Panchayat was the owner of the common passage, it would be paved etc. Thus, if there actually exists a common passage, encroached upon by a large number of private persons, so as to actually completely obliterate such passage, the Gram Panchayat, not being a party to the *lis*,

can obviously not be held to be estopped from doing any lawful act.

03.03.2016

dinesh

(AMOL RATTAN SINGH)
JUDGE