

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.5501 of 2015 (O&M)

Date of Decision: 23.11.2016

Bimla and another

... Appellants

Vs.

Munish

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Naveen S. Bhardwaj, Advocate,
for the appellants.

Mr. Manoj Kaushik, Advocate,
for the respondent.

Amol Rattan Singh, J.

This is an appeal by the defendants in a suit filed by the respondent-plaintiff (hereinafter to be referred to as the plaintiff), seeking a decree of permanent prohibitory injunction, as also mandatory injunction, against the present appellants-defendants (hereinafter to be referred to as the present appellants), to restore the original condition of a street shown in the site plan submitted alongwith the plaint. The prohibitory injunction was to the effect that the defendants be restrained from constructing any further in the street, in any manner, and encroaching upon it, thereby creating any type of nuisance and danger to the family of the plaintiff.

2. The facts, as taken from the judgments of the Courts below, are that the plaintiff is stated to be a permanent resident of Simliwas, Tehsil Tosham, District Bhiwani, otherwise residing at Bhiwani. The street in question was stated to be situated within the '*Lal Dora*' of the village and was

said to be 19-20 feet wide on its northern side and 15 feet wide on the eastern side, in Kirti Nagar, Bhiwani, and was being used by the plaintiff, the defendants and the general public.

It was further stated that it being a “kaccha” street, the appellant had dug up a foundation upto 3 feet deep, as shown in the site plan, to construct a house and had thereby encroached upon the street, making it narrower than it actually was.

It was further stated in the plaint that the house of the present appellants was situated near the land and that they were in the habit of exercising their muscle power and had no faith in law.

Consequently, the suit had been filed on 17.04.2008.

3. Upon notice issued, the present appellants (defendants) appeared and filed a written statement taking the usual preliminary objections with regard to locus standi, maintainability etc., further contending that the plaintiff was the owner of 6 marlas of land situated at Bhiwani Lohar, and had constructed on land more than was in his ownership. The appellants-defendants had purchased the land by way of two sale deeds bearing nos.63 and 64, dated 04.04.2008. The plaintiff also wanted to purchase the land but was unable to do so and consequently, bore a grudge against the present appellants.

It was further contended in the written statement that the house of the plaintiff was situated in Bhiwani Lohar, whereas the disputed land was in Palwas, with no passage of Palwas through the land of Bhiwani Lohar, and that no such passage had been recorded in the *aks-shijra* and *Mussavi*.

It was further contended that no encroachment had been made by the defendants and that the passage was in the southern direction of the

land purchased by the appellants-defendants, situated in village Palwas, and was 15 feet wide.

Other contents of the plaint were also denied by the appellants-defendants.

4. No replication having been filed, the following issues were framed by the learned Civil Judge (Junior Division), Bhiwani:-

- “1. Whether the plaintiff is entitled to decree of permanent injunction as prayed for in the head note of the plaint? OPP
2. if issue no.1 is proved, then whether the plaintiff is entitled to decree of mandatory injunction as prayed for in the head note of the plaint? OPD
3. Whether the plaintiff has no locus standi or cause of action to file the present suit? OPD
4. Whether the suit is not maintainable in its present form? OPD
5. Whether the suit is bad for mis-joinder & non-joinder of necessary parties? OPD
6. Whether plaintiff is estopped by his own act and conduct from filing the present suit? OPD
7. Whether plaintiff has not come to the Court with clean hands? OPD
8. Relief.”

5. The plaintiff examined himself by way of oral evidence and tendered the *jamabandi* of village Bhiwani Lohar, for the year 2002-03, as Ex.P1, a site plan Ex.P3, a ration-card and an application made to the Municipal Committee as Exs.P4 and P5 respectively and the *aks-shijra* as Ex.P6.

The defendants examined one Hari Ram, Incharge Building Instructor of the Municipal Committee as DW1, Vijay Kumar of the District

Town Planners' office as DW3, Bopat Ram, Patwari as DW4 and Amir Chand Taneja, Naksha Navees, as DW5.

Documentary evidence in the form of a reply received on a letter to the Municipal Committee, the *aks-shijras* of Bhiwani Lohar and Palwas, a power of attorney of one of the defendants in favour of Suresh Kumar and the sale deeds bearing nos.63 and 64, dated 04.04.2008, three site plans, a *jamabandi* of village Palwas and a mutation in favour of the defendants, were also exhibited by them.

6. Upon appraising the evidence and considering the pleadings and arguments, the learned Civil Judge held that the plaintiff was placing reliance merely on the site plan got prepared by him through a private draftsman and no official record had been produced by him. Further, even in the map placed on record by the Local Commissioner as Mark-B, no encroachment had been reflected therein, by the defendants, as was alleged by the plaintiff.

The defendants, on the other hand, had examined the Building Instructor of the Municipal Committee, who had produced a report from the Municipal Committee, to the effect that no record was available as regards any passage existing adjacent to murabba no.148 in village Palwas, where the house of the defendants was situated.

The witness from the office of the DTP, i.e. DW3, also testified that the boundary of village Palwas starts towards the side of village Bhiwani Lohar at murabba no.180.

7. From the aforesaid evidence, as also basing her finding on the testimony of the Patwari, who had produced the *aks-shijras* of the two villages, the learned Civil Judge held that the official record corroborated the stand taken by the defendants, which also tallied with the site plan, exhibited

by them as Ex.D9.

The Patwari, DW4, also proved, as per that Court, that no “gali” had been shown in the *aks-shijra* of village Palwas.

Thus, it was held that the plaintiff could not prove that the defendants had encroached upon any public street as contended and consequently, the suit was dismissed.

8. In the appeal by the respondent-plaintiff before the first appellate Court, the learned Additional District Judge, after noticing the pleadings and appraising the evidence and considering the judgment of the Civil Judge, found that the plaintiff in his testimony as PW1, had stated that there was no sewerage line existent in the street in question, which was a “kacchi” one, but there was also a “pucca” street paved with bricks towards the southern side of the house of the defendants and that the house of the defendants “had been constructed accurately” towards the southern side. Further, he had also stated that there was no path of village Bhiwani Lohar going towards the land of village Palwas. However, as regards the encroachment, he had testified, as stated in his affidavit, that the defendants had dug up a foundation upto 3 feet about three years ago.

9. It was further found by the lower appellate Court that though the defendants had examined five witnesses in support of their stand, and had tendered 13 documents by way of evidence, neither of the two defendants had testified personally and instead one Suresh Kumar (seen by this Court to be the husband of the 1st defendant and father of the 2nd defendant), had testified on their behalf on the strength of a special power of attorney executed in his favour by them. This witness (DW4) testified in terms of the written statement and his own affidavit, further stating that there was vacant land,

described as *jumla malkan* in the revenue record, to the western side of one of the two plots purchased on 04.04.2008 by the defendants. He further testified that he had constructed his house and that there was vacant land between his plot and the plot situated on the opposite side, with a distance of about 8/9 feet between the two places. Yet, he denied the existence of the street at the spot.

10. Further, a finding of fact was also recorded by the learned first appellate Court, to the effect that the houses of both the parties actually now fell in an area known as Kirti Nagar, near the Shiv temple in Bhiwani, and as such, the earlier existence of two revenue estates, of Bhiwani Lohar and Palwas, was meaningless, as no land formerly falling in either village was being cultivated. As a matter of fact, it was “gair mumkin” land falling within Kirti Nagar, Bhiwani, and as such, the *aks-shijras* pointed to by the parties had actually lost their meaning, as had the revenue record, with the entire locality now being a single (urban) locality.

In this regard, reliance was placed on a judgment of this Court in **Dropdi v. Kanhiya and others 2007 (1) Civil Court Cases (P&H) 73.**

11. Further discussing the documentary evidence led by both sides, it was found that Ex.D5 showed a street existent towards the western side and another street existent towards the southern side, which was also clear from the documents, Ex.D6 and Ex.D9.

Referring to another site plan, Mark-B, and the report of the Local Commissioner, Mark-A, the learned first appellate Court held that though they could not be read into evidence (not being exhibited documents), yet they corroborated the stand of the plaintiff (even as per the exhibited documents).

12. On the aforesaid findings of fact, it was held that the plaintiff had been able to prove that the defendants had dug up a foundation at least upto 3 feet in the street in question and therefore, the plaintiff was entitled for the relief claimed by him.

13. Referring to an argument raised by learned counsel for the defendants, based on Section 91 of the CPC, it was held that even though the encroachment alleged by the plaintiff was on a public street, however, the plaintiff had also come for the protection of his own right to the Court, as his house also exists on the spot and as such, he was not bound by the terms of Section 91, his individual right also being affected.

14. On the aforesaid reasoning, the appeal of the plaintiff was allowed, the judgment and the decree of the Civil Judge set aside and the suit decreed in his favour.

15. Before this Court, Mr. Naveen Bhardwaj, learned counsel for the appellants, submitted that the lower appellate Court had wholly misappreciated the evidence, inasmuch as, neither the Municipal Committees' record nor the revenue record, showed any street on the spot and as such there is no encroachment made by the appellants-defendants upon any such street.

Learned counsel also reiterated the stand taken by the respondents-defendants in the written statement and the reasoning given by the learned Civil Judge.

16. On the other hand, Mr. Kaushik, learned counsel for the respondent-caveator (plaintiff), submitted that even in the absence of municipal and revenue record, the sale deed by which the appellant purchased the suit property, showed that what he had constructed on was more than the

land that he had purchased, as was found by the learned first appellate Court.

He further submitted that the appellants-defendants also could not show that the land upon which they had built, was not outside what they had purchased and even from whom they purchased their plot and as such, the learned lower appellate Court had rightly held that simply because the municipal and revenue record did not show the existence of the street, did not mean that there was no encroachment by the appellants-defendants upon the area what they had actually purchased.

17. Having heard learned counsel for the parties and considered the judgments of the Courts below, I am in agreement with the arguments of learned counsel for the respondent-caveator, inasmuch as, a finding of fact has been recorded by the learned first appellate Court, after scrutinizing in detail documentary record exhibited, that there was actual encroachment upon area not belonging to the appellants-defendants and that on the spot actually a passage/street existed, upon which the appellants-defendants had dug up a foundation upto 3 feet beyond their own private property.

As can be seen from a perusal of paragraph 15 of the judgment of the learned first appellate Court, even DW4 himself had admitted that there was a distance of about 8/9 ft. between his house and the plots towards the Western side of his house. From that admission, the learned lower appellate Court rightly inferred that a gap of 8 to 9 ft. would actually be only in the form of a street. It was further found that the appellant-defendants had actually dug up a foundation upto at least 3 feet in the street.

Hence, with that finding of fact recorded, alongwith another finding that actually there was no agricultural land existing on the spot any longer, and that the revenue estates of Palwas and Bhiwani Lohar had

actually merged into one urban locality of Kirti Nagar, I find no reason to interfere in those factual findings of the lower appellate Court, with no perversity pointed out by the counsel for the appellants.

18. Though no arguments were addressed on Section 91 of the CPC before this Court, I also find no error in the reasoning adopted by the lower appellate Court, to the effect that simply because the street/passage in question may have been used by the public, did not mean that the plaintiffs' own rights were also not affected, he also being a resident of the same spot and consequently, he was personally affected by encroachment made by the appellants-defendants on land that was not their own, thereby narrowing the passage, even for the use of the plaintiff and his family.

Section 91 CPC reads as follows:-

“91. Public nuisances and other wrongful acts affecting the public.—

“(1) in the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted,—

(a) by the Advocate General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.]

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.”

Hence, in the opinion of this Court, in fact, it would be sub-

section (2) of Section 91 that would be applicable to the present circumstances and not the provisions of sub-section (1) of the said section.

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

November 23, 2016

dinesh

(AMOL RATTAN SINGH)

JUDGE

Whether speaking/reasoned

Whether Reportable

Yes/No

Yes/No.