

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

RSA No.861 of 2015

Date of decision : 23.11.2016

Municipal Corporation, Gurgaon

.....Appellant

Versus

Ashok Kumar and others

...Respondents

CORAM : HON'BLE MR. JUSTICE DARSHAN SINGH

Present: Mr. A.K. Bura, Advocate for appellant.

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment and decree dated 30.08.2014 passed by the learned Additional District Judge, Gurgaon, whereby the appeal filed by the appellant-plaintiff against the judgment and decree dated 30.10.2012 passed by the learned Civil Judge (Junior Division), Gurgaon has been dismissed.

2. Appellant Municipal Corporation, Gurgaon has filed a suit for permanent injunction restraining the respondents-defendants from encroaching upon 22' wide passage which lies towards the southern side of the residential property bearing No.138 and from raising any sort of construction in the red portion shown in the site plan, which is part of the passage.

3. As per the averments in the plaint, the respondents-defendants are owners in possession of the residential house comprised of Khasra No.138 situated within the *Abadi* of village Molhahera, Tehsil and Distt. Gurgaon. The said house of the respondents-defendants is in existence for the last 70 years. Towards the western and southern side of the said residential house there exists the passage. Towards the southern side of the property of the respondents-defendants is the Phirni comprised of Khasra No.49 having 22' width. The said passage is also in existence since the last 70 years *i.e.* the inception of village Molhahera. On the spot, the width of the disputed passage is 22' and excess land falling under the disputed passage is part of the *bachat* land. It is further pleaded that the respondents-defendants are bent upon to encroach upon the portion of the disputed passage by raising construction. The said conduct of the respondents-defendants is illegal and unwarranted. Hence, the suit.

4. The respondents-defendants contested the suit by filing the written statement as well as the counter-claim wherein they *inter alia* pleaded that they are in possession of the residential house comprised of Khasra No.138 and their house exists therein since the last 70 years. Towards the western and southern side of their property there exists the passage. Their father had raised the construction in phased manner and ultimately, the construction was completed in the year 1992. It is further pleaded that the width of the disputed passage *i.e.* Phirni No.49 is 03 Karam, whereas the passage towards western side of their property is 04 Karam wide. Due to development in Sector 22 in the year 1987-88, the

disputed passage as well as the properties situated towards northern side of the disputed passage including the property of the defendants became low-lying. Subsequently, the disputed passage as well as the house were subjected to earth-filling by the Panchayat and the owners and in that process, the main gate of the house of the respondents-defendants was removed and re-affixed at the higher level. The *Chabutra* etc. of the defendants still remains low-lying. Defendants also got the sewerage connection in the said area. They are using the said portion without any hindrance from the society. It is further pleaded that the portion shown with the letters 'M O P Q' in the site plan attached with the counter claim is the part and partial of their property. The demarcation was also got conducted in the presence of the defendants and it was found that the said portion is part and partial of the property of the defendants and the plaintiff corporation has no right, title or interest therein. The disputed passage is 03 Karam wide and there is no encroachment on the said passage. With these pleas the respondents-defendants pleaded for the dismissal of the suit and for decreeing their counter claim restraining the appellant-Municipal Corporation from interfering in the portion marked by letters 'M O P Q' in the site plan. They also claimed the damages of ₹ 50,000/-.

5. The appellant-plaintiff filed the replication as well as reply to the counter claim controverting the pleas raised therein.

6. On the basis of the pleadings of the parties, the following issues were framed by the learned trial Court vide order dated 26.04.2011:-

1. Whether the plaintiff is entitled to injunction on the grounds as taken in the plaint? OPP
2. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
5. Whether the plaintiff is liable to be restrained from interfering in the possession of the counter claimants over the suit property detailed and described in the written statement on the ground alleged in the counter claim? OPD
6. Whether the defendants are liable to damage of ₹50,000/- from the plaintiff on the basis of their counter claim? OPD
7. Relief.

7. On appreciating the evidence on record and contentions raised by learned counsel for the parties the learned trial Court vide the impugned judgment and decree dated 30.10.2012 dismissed the suit filed by the appellant-plaintiff, whereas the counter claim filed by the respondents-defendants was decreed to the extent that the disputed passage is having the width of 16.6' only and the area in excess thereof is possessed by the respondents-defendants. Accordingly, the appellant-plaintiff was restrained from interfering into the possession of the respondents-defendants qua the said excess portion except in due course of law. Aggrieved with the aforesaid judgment and decree, the appellant-plaintiff Municipal Corporation preferred the appeal. The same has also been dismissed by the learned first appellate Court. Hence, this regular second appeal.

8. Learned counsel for appellant-Municipal Corporation

contended that the appellant-plaintiff is the owner in possession of the Phirni comprised in Khasra No.49 having width of 22' but the respondents want to encroach the portion of the said Phirni. He further contended that the learned courts below have wrongly relied upon the demarcation report as the demarcation has not been conducted by following the instructions issued by the Financial Commissioner. He further contended that the learned Courts below have wrongly held the width of the passage to be 16'6" whereas the same is 22'. The report of the Local Commissioner Ex.PW3/1 relied upon by the appellant-plaintiff, has not been properly considered by the courts below. Thus, he contended that as the disputed portion is part of the passage comprised of Khasra No.49, so the respondents-defendants have no right to encroach upon any portion thereof and the appellant-plaintiff Corporation is entitled for injunction and the counter claim filed by the respondents has no merits.

9. I have duly considered the aforesaid contentions.

10. Appellant-Municipal Corporation, Gurgaon has filed the suit for permanent injunction restraining the defendants from encroaching upon any portion of the passage comprised of Khasra No.49. It is the admitted case of the appellant-Corporation that the respondents-defendants are owners in possession of the residential house comprised of Khasra No.138, which is in existence for the last since 70 years. This fact is also supported from the documents Ex.DA, Ex.DB and Ex.DC, which show the ownership of the respondents with respect to Khasra No.138. The respondents-defendants have claimed that the disputed portion is the part of

their house being *Chabutra*, so the point in controversy in the present suit is as to whether the disputed portion shown in red colour in site plan of the appellant is comprised of Khasra No.138 or it is part/portion of the passage comprised of Khasra No.49. It is the settled principle of law that where the dispute is regarding boundary or measurement, the only effective method to resolve such dispute is the demarcation of the disputed property.

11. It is an admitted fact that there exists passage towards western and southern side of the properties of the respondents. The dispute is with respect to the passage situated on the southern side which is comprised of Phini/Khasra No.49. As per the case of the appellant-plaintiff the width of this passage is 22’.

12. However, as per *Aks Sijra* Ex.P5 for the year 1951-52, relied upon by the appellant-plaintiff itself, the width of this passage is 03 Karam *i.e.* 16½ feet. In the demarcation report Ex.DW5/A also it is categorically mentioned that as per revenue record the width of Phirni/Rasta No.49 is 03 Karam. DW-2 Inderjit Naib Tehsildar also in his demarcation report Ex.DW2/A has mentioned that passage in front of Khasra No.138 is 22 feet but as per record this passage is 16 ½ feet.

13. The appellants have relied upon the report Ex.PW3/1, which has been prepared by PW-3 Ajay Sharma, Assistant Engineer, Municipal Corporation, Gurgaon. But in the cross-examination he admitted that no notice was given to the respondents prior to the measurements. They were also not having the revenue record at that time. He further admitted that the width of the disputed passage shown in his report Ex.PW3/1 also

includes the wall as well as *Chabutra*, if any, of the house owners as he has measured the width from wall to wall. So, the said measurements were carried out by PW-3 Ajay Sharma, Assistant Engineer without having revenue record and in the absence of the respondents-defendants. Moreover, the report Ex.PW3/1 itself reflects that the disputed passage does not have the equal width and varies from place to place. So, this report cannot establish that the width of the disputed passage is 22 feet and the disputed portion is part of the passage/Phirni No.49.

14. Respondents-defendants have examined DW-2 Inderjit Singh, Naib Tehsildar, who has proved the demarcation report Ex.DW2/A, which does not show any encroachment of Phirni No.49 by the respondents rather it shows that at the spot the available width in front of Khasra No.138 was 22 feet whereas as per record it is 16 ½ feet. They also examined DW-3 Sita Ram, Assistant O/o E.E. III, who proved the copy of the Letter dated 08.02.2012 Ex.DW3/A written by Executive Engineer to Naib Tehsildar, Municipal Corporation, Gurgaon. This letter contains the report of Patwari verified by Naib Tehsildar that 5 feet land of respondents has been mixed in this Phirni. It is evident from the demarcation report Ex.DW2/A prepared by DW-2 Inderjeet Singh, Naib Tehsildar and the demarcation report Ex.DW5/A prepared by DW-5 Ganga Ram retired Kanungo that the vacant space lying in front of the houses of the respondents-defendants is not the part of the street, rather the same belongs to them being part of Khasra No.138. Learned counsel for the appellant-plaintiff could not point out any infirmity in the aforesaid demarcation reports. Thus, in these circumstances

the appellant Municipal Corporation has not been able to establish that the width of Phirni/Rasta No.49 is 22 feet and the space lying in front of the house of the respondents-defendants beyond 16 ½ feet wide is the part of the aforesaid passage, rather the same is proved to be the part of Khasra No.138, which is owned by respondents-defendants. Thus, learned counsel for the appellant-plaintiff could not assail the findings of the Courts below that at the disputed site/place the width of the passage *i.e.* Phirni No.49 is proved to be 16.6' and the remaining portion is the part of the house of the respondents.

15. Thus, the appellant-Municipal Corporation was certainly not entitled for the injunction and has no right to interfere in the disputed portion, which is the part and parcel of the house of the respondents. Therefore, the concurrent findings recorded by the learned Courts below in dismissing the suit filed by the appellant-plaintiff and decreeing the counter claim filed by the respondents does not call for any interference by this Court in the absence of any perversity and legal infirmity therein.

16. Resultantly, the present appeal has no merits and the same is hereby dismissed.

23.11.2016

sunil yadav

(DARSHAN SINGH)
JUDGE

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No