

In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No. 7184 of 2017

Date of Decision: 13.10.2017

Thamanpreet Singh

.....Petitioner

Versus

Jagdish Kaur and another

.....Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Ashish Gupta, Advocate
for the petitioner.

ANITA CHAUDHRY, J

This petition has been filed under Article 227 of the Constitution of India assailing the order dated 16.8.2017 (Annexure P-5) passed by the Additional Civil Judge (Sr. Division), Moga who dismissed the application filed by the petitioner for treating the issue of maintainability of the suit as preliminary.

Jagdish Kaur filed a suit restraining the defendants from digging a *Khal* at point X and Y which was shown in the red colour in the site plan attached with the plaint, except in due course of law.

The defendants took the plea that the plaintiff had concealed facts that there was a previous order dated 2.7.2014 which reiterated the fact that the *Khal* was in existence for the last 30-35 years and had been demolished by the plaintiff three years ago and the *Khal* had been ordered to be reinstated under Section 30-FF of the Drainage Act. It was pleaded that plaintiff had the remedy to file appeal and had *malafidely* filed the suit and the same was not maintainable. The plea of non-joinder and *locus standi*

was raised.

Issues had been framed and the case was fixed for plaintiff's evidence when the defendants moved an application that the issue of maintainability should be treated as a preliminary as the Court had no jurisdiction to entertain the suit.

In reply to the application, it was pleaded that they had already examined two witnesses in chief and were not cross-examined and it will have to be determined whether the order passed by the Canal Authority was illegal. The lower Court dismissed the application holding that the issue of maintainability was a mixed question law and fact.

The relevant portion of the order reads as under:-

“The issue of maintainability is mixed question of law and fact. Order of restoration of Khal can be made only if (i) watercourse was sanctioned under the relevant provisions of Canal Act, (ii) watercourse had been dug at site subsequent to a mutual agreement between the parties and (iii) watercourse had run for a continuous uninterrupted period of 20 years at least, has been established. Whether or not the order dated 2.7.2014 by Division Officer River has been passed after taking into account of above mentioned conditions, has to be proved by the parties. As such, if the order is illegal, the civil court has the jurisdiction to try the present suit. Thus, in view of above discussion, present application is hereby dismissed being devoid of any merit.”

Heard, the lower Court has given reasons for declining the application. It would indeed be a matter of evidence. The defendants will have to prove that the *Khal* was sanctioned or it was dug after mutual agreement or show that it was running uninterruptedly for a period of 20 years.

There is no illegality in the order passed by the Court below.

The case is fixed for plaintiff's evidence for last over 10 months. The petitioner has not cross-examined the witnesses. The trial has got delayed because of the application filed by the petitioner.

The petition is dismissed in *limine*.

(ANITA CHAUDHRY)
JUDGE

October 13, 2017
Gurpreet

Whether speaking/reasoned : Yes
Whether reportable : No