

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

RSA No.2898 of 2016

Date of Decision: 30.03.2017

Sheel Jain

...Appellant

Vs.

Raj Dulari and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Gopal Sharma, Advocate,
for the appellant.

Mr. Mukesh Verma, Advocate,
for respondent no.2.

Amol Rattan Singh, J.

This is an appeal by the plaintiff who filed a suit in the Court of the learned Civil Judge (Junior Division), Rewari, seeking permanent injunction and “in the alternative for mandatory injunction”, against the defendant, i.e. the respondent herein.

2. The facts, as taken from the judgments of the learned Courts below, are that the appellant-plaintiff contended that he is the owner in possession of House no.5522-23, located in Mohalla Jain Puri, Tehsil & District Rewari, 'on the basis of' a decree dated 19.12.2008 passed in his favour. The detailed description of the location of the house was further given in the plaint.

It was averred that between that house and the house of one Pawan Kumar, falling on the east side, there exists an over bridge for several

years but the defendant, who had purchased the house of Pawan Kumar in November 2012, intended to demolish the over bridge, i.e. the property in dispute (hereinafter to be referred to as the suit property).

The plaintiff contended that if the suit property was demolished then the eastern part of his house, on which the bridge was constructed, shown in red colour in the site plan annexed with the plaint, would also be demolished, thereby causing an irreparable loss which could not be monetarily compensated.

Consequently, the suit was instituted on 04.12.2012, seeking that the defendant be restrained from demolishing the suit property and if during the pendency of the suit, she actually demolished it, then a decree of mandatory injunction be issued to restore it.

3. Upon notice issued, the respondent-defendant appeared and filed her written statement, to the effect that the over bridge, i.e. the suit property, existed on a public street, with no site plan sanctioned for its construction by the Municipal Committee, Rewari and therefore, it actually amounted to encroachment by the plaintiff.

Further, it was stated that the plaintiff was not the owner of House no.5522-23 and that the decree dated 19.12.2008 was illegal and void and that the defendant being a bonafide purchaser, for valuable consideration, of the property shown in green colour in the plaintiffs' site plan, had every right to raise construction over her property and therefore, even if the illegal encroachment was removed, there was no question of any loss to the plaintiff as the over bridge was in any case constructed in violation of the Haryana Municipal Act, 1973 and the bye-laws framed thereunder.

4. From the aforesaid pleadings of the parties, the following issues

were framed by the learned Civil Judge:-

- “1. Whether the plaintiff is entitled to the relief of permanent as well as mandatory injunction as prayed for? OPP
2. Whether the suit of plaintiff is not maintainable in the present form? OPD
3. Whether the plaintiff has no locus standi to file the present suit? OPD
4. Whether the plaintiff is estopped by his own act and conduct to file the present suit? OPD
5. Whether the plaintiff has not come with clean hands before the Court? OPD
6. Whether the plaintiff has no cause of action to file the present suit? OPD
7. Whether the plaint is liable to be rejected under Order 7 Rule 11 CPC? OPD
8. Relief.”

5. The plaintiff examined one Mahabir Yadav, Sunil Kumar and himself as PWs1 to 3, whereas the defendant examined Shri Amar Singh Yadav, Advocate, one Om Parkash, Chatarbhuj, Pawan and Ashok Kumar as DWs1 to 5.

6. Upon considering the evidence, including various documents and photographs exhibited by the two contesting parties, the learned trial Court came to the conclusion that “admittedly the plaintiffs' construction rested upon the suit property”, (actually the suit property rested upon the plaintiffs' construction), which though not owned by the plaintiff, was also not owned by the defendant.

Noticing that though DW5, Ashok, had stated in his affidavit that even if the suit property was removed it would not result in any loss to the plaintiffs' construction, however, as no 'expert' had been examined by the

defendant to that effect, whereas PW2 Sunil Kumar was an 'expert' examined by the plaintiff, who had testified that if the suit property was demolished it would result in demolition of the plaintiffs' construction, it was held that the defendant has no right to demolish the over bridge. While noticing so, the learned Court also held that since the suit was only one seeking permanent injunction, ownership of the suit property in any case did not have to be gone into.

7. Essentially on the aforesaid findings, on issue no.1, the suit of the plaintiff was decreed in his favour, with the other issues also decided against the defendant. Thus, a decree of permanent injunction, restraining the defendant from demolishing the suit property, was issued.

8. The defendant having appealed against the aforesaid judgment and decree, the learned Additional District Judge, Rewari, after noticing the facts and the evidence led in the light of the issues framed by the trial Court, noticed the argument that the defendant (appellant before that Court), had purchased her house on 06.11.2012 and was keen to demolish the construction and to raise a new construction, but the plaintiff was denying her the right to do so, by way of suit the filed, on the ground that his house would be damaged.

9. Having considered the aforesaid and the other arguments raised before it, the learned first appellate Court found that, as a matter of fact, the house of the plaintiff and the defendant were once owned by the same person and the over bridge was made 13 ft. above a public street, as a connection across the street by the said owner. However, with two houses sold by the original owner to different persons, the dispute arose. One of the witnesses, i.e. DW4 Pawan, Numberdar, had also deposed that the structure had been in

existence since 1972 and that if the defendant demolished her house, then the over bridge would crumble. However, this witness “feigned ignorance as to the consequences of the demolition of the garters of the plaintiff”.

(The learned Court was probably referring to the girders on which the structure was constructed.)

10. The learned first appellate Court also held that, as a matter of fact, the over bridge was constructed over the public street at the first floor level of the houses on the street and that, actually, it did amount to utilization of public space but at the same time, allowing it to be demolished without precaution, could endanger the property of the plaintiff. Further, it was observed that permanently restraining the defendant from demolishing the over bridge amounted to thereby curtailing her right to enjoy her property in the manner she liked, though her right obviously had to be balanced against the enjoyment of their property by other persons.

It was also noticed that the defendant had specifically stated that she would raise the construction of her new house only after seeking prior sanction from the Municipal Committee.

11. Consequently, recording findings as above, from the testimony of the witnesses as also the pleadings and other documentary evidence, it was held that the defendant could not be restrained from enjoying her property within the four corners of the law, but at the same time safeguards would need to be taken at the time of demolishing the over bridge, so as to ensure that the property of the plaintiff was not damaged.

Still further, holding that eventually it would benefit the public also, as the public street would be open to sky for all passers by as it should be, the learned Court held that while demolishing the over bridge the

defendant would take all precautions to provide necessary support to the house of the plaintiff and that she would also ensure that no damage would be caused to his house. The expenses for removal of the bridge, as also to ensure the safety of the plaintiffs' house, would also borne by the defendant.

12. Holding as above, the appeal of the defendant (respondent herein) was allowed and the judgment and decree of the lower Court set aside and the suit of the plaintiff dismissed.

13. Before this Court, when the matter had first come up for hearing on 08.07.2016, learned counsel for the appellant-plaintiff had submitted that the lower appellate Court had erroneously observed that the structure in question was an illegal one which as a matter of fact it was not.

Consequently, this Court had felt it necessary to implead, even at the stage of a second appeal, the Municipal Committee, Rewari, as a respondent. Therefore, exercising jurisdiction under Order 1 Rule 10(2), read with Section 107 of the Code of Civil Procedure, it was directed that the Municipal Committee be impleaded as respondent no.2, with notice issued to that body. It was also directed that the bye-laws of the Council be placed on record alongwith an affidavit of its President, stating therein as to whether the structure in question was legal or illegal. (No notice was issued to the respondent no.1-defendant in the suit, by this Court).

14. In response to the notice issued to the Council (newly impleaded respondent no.2), an affidavit of Smt. Shakuntala Bhandoriya, President of the Municipal Council, Rewari, was filed, annexing with it, as Annexure A-1, the Haryana Municipal (Immovable Encroachment) Bye-laws, 1978. In the affidavit, it was stated that the over bridge in question, i.e. the suit property, was constructed before the enactment of the Haryana Municipal Act, 1973,

and thereafter, it was found from the official record that no permission can be given to construct an over bridge either under that Act or under the bye-laws of 1978.

Reiterating what the learned first appellate Court had held, to the effect that the over bridge was about 13 ft. above a public street, it was further stated that it comes within the definition of immovable encroachment/overhanging structure over a street, as specified in Section 181 of the Act of 1973. The said provision, as given in the Act and reproduced in the affidavit, is also reproduced hereinunder:-

“[181. Punishment for immovable encroachment or overhanging structure over street.-- (1) Whoever without the written permission of the Committee, makes any immovable encroachment on or under any street, on, over or under any sewer, or water course or erects or re-erects any immovable overhanging structure projecting into a street at any point above the said ground level shall be punishable with imprisonment for a term up to six months or with a fine which shall not be less than {two thousand rupees} and more than {ten thousand rupees} or both.

{(2) Without prejudice to the provisions of sub-section (1), the committee, the executive officer or the secretary, as the case may be, by notice, call upon any person who has committed a breach of the provisions contained in the said sub-section, to stop the unauthorised construction forthwith and to remove or alter such immovable encroachment or overhanging structure as aforesaid within a period of seven days and if such person fails to show cause to the satisfaction of the committee, the executive officer or the secretary, as the case may be, within the said period of seven days, the committee, the executive officer or the secretary, as the case may be, shall proceed to remove the unauthorised construction and the cost of such removal shall be recovered from the defaulter. If the defaulter fails to pay the cost

of removal of unauthorised construction on demand within the fifteen days, the cost shall be recoverable from such person as arrears of land revenue and the committee shall dis-connect the water supply and the sewerage connections:

Provided that if a period of more than five years has elapsed from the completion of encroachment or overhanging structure, no prosecution shall lie under sub-section (1)}]"

15. As per the affidavit of the President of the Municipal Council, the appellant-plaintiff never produced any sanctioned plan of the over bridge and therefore, the affidavit states that the construction is illegal but no action under Section 181 can be initiated, the structure being more than five years old and even older than the Act itself.

Even having stated as above, the affidavit closes with the statement that the bridge not being sanctioned either by the Act or bye-laws, it is an illegal structure.

It is necessary to notice here that the affidavit and the bye-laws annexed with it were taken on record by this Court on the next date of hearing, collectively as Ex.AC-1, by way of additional evidence called for under Order 41 Rule 27 CPC.

16. Mr. Gopal Sharma, learned counsel for the appellant, on the basis of the affidavit filed, reiterated that the structure admittedly being in existence prior to the coming into effect of the Haryana Municipal Act, it was not an illegal structure and that therefore, it could not be removed, its removal being dangerous to the structure of the residential house of the appellant.

This Court, while noticing that argument on the date when the judgment had been reserved, had observed that the lower appellate Court had given a very detailed finding with regard to the nature of the structure,

including the supports that it was built on, and thereafter, had put the onus on the respondent (defendant) to ensure that if it is to be demolished, the house of the appellant-plaintiff was duly protected by adequate safeguards.

Learned counsel for the appellant had then submitted that the direction of the lower appellate Court, with regard to the safeguards to be adopted, did not actually form part of the decree sheet and as such, the respondent-defendant may not take steps to ensure that the house of the plaintiff is safeguarded.

17. Having considered the aforesaid arguments, as also the contentions of learned counsel for respondent no.2, i.e. the Municipal Council, made in terms of the affidavit filed, this Court is of the opinion that the judgment of the lower appellate Court does not require interference with.

Undoubtedly, the structure, i.e. the suit property, is existent prior to 1973, as stated in the affidavit of the President of the Council. Even if that is so, it does not alter the fact that the structure is running over a public street, and in terms of Section 181 of the Act, an over hanging structure over a street, is an illegal structure, for the construction of which there is even a punishment provided of six years imprisonment in sub-section (1). However, that provision is not applicable if a structure is existent for more than five years, with no objection raised to it by the Municipality.

Yet, the averment in the affidavit of the President, to the effect that though it is an illegal structure no action can be taken whatsoever for its removal, as it is more than five years old, it was not found to be a statement wholly in consonance with Section 181(2) of the Act of 1973, because the said provision only bars action under sub-section (1), i.e. with regard to imposing the punishment of imprisonment or a monetary fine. The proviso to

sub-section (2) does not prohibit the municipality to get the structure removed in terms of sub-section (2) itself.

Even presuming that, without a provision for punishment, it may not be practically possible for the municipality to get it removed, two things needs to be noticed.

Firstly, that prior to the coming into effect of the Haryana Municipal Act, 1973, municipalities in Haryana were governed by the provisions of the Punjab Municipal Act, 1911, which Act was repealed by Section 279 of the Act of 1973. Thus, prior to 1973, the Punjab Municipal Act, 1911 was applicable in all Municipalities of Haryana also and Section 172 thereof reads as follows:-

“172. Punishment for overhanging structure over street--(1) Whoever without the written permission of the committee erects or re-erects any immovable overhanging structure projecting into a street at any point above the said ground level, shall be punishable with imprisonment of either description which may extend to one month and shall also be liable to fine which may extend to one thousand rupees.

(2) The committee may, by notice require the owner or occupier of any building to remove or alter, within a specified time not exceeding six weeks, such overhanging structure as aforesaid, and no compensation shall be claimable in respect of such removal or alteration:

Provided that if a period of more than three years has elapsed from the completion of the [over hanging structure, no prosecution shall lie under sub section (1) nor shall such] overhanging structure be required to be removed or altered without payment of reasonable compensation].”

Thus, whereas Section 172(1) of the Act of 1911 is also almost

pari-materia with Section 181(1) of 1973 Act, (except that the latter Act provides for a more stringent punishment), sub-section (2) of each Act is pari-materia, one to the other, to the extent that the power of issuing notice for removal of an illegal over hanging structure has been given to the Municipality in each provision.

18. Be that as it may, obviously it is seen that no power was exercised under either Act by the Municipal Council at any stage.

However, with the rights of a person who has independently purchased the house across the street affected by the over hanging structure, inasmuch as the presence of the structure prohibits a private owner of property from exercising his right of erecting a new building on his own property, inaction by the Municipal Council, cannot be allowed to trample over such legal right of that person.

Hence, with the learned lower appellate Court having gone into, in detail, the nature of the structure and the safeguards to be taken by the respondent-defendant while demolishing such structure, so as to ensure that the building of the appellant-plaintiff is not damaged, I see no reason whatsoever, to interfere with the judgment of that Court.

However, learned counsel for the appellant is correct to the extent that with the direction given by the lower appellate Court to the respondent-defendant to maintain adequate safeguards while demolishing the structure, being absent from the decree actually issued by that Court, the said direction needs to be incorporated therein.

19. Consequently, while dismissing this appeal, it is directed that a decree sheet be issued, adding to the already existent decree of the lower appellate Court, the following directions contained in paragraph 17 of the

judgment of that Court, to the following effect:-

“While demolishing her house and the over bridge, the defendant shall take all precautions of providing support and shall further provide necessary infrastructure for the sustenance and support of the house of plaintiff and she shall ensure that no damage to the house of the plaintiff is done and in case some pillar or other support is required to support and bear the load of the rooms and verandah of the house of plaintiff, then the plaintiff will not object to the said move of the defendant and it is defendant who shall bear all expenses of the removal of the over bridge and the expenses for supporting the construction of the rooms and verandahs as shown in letters P, Q, R, S in the site plan Ex.PW2/C.”

20. The appeal is thus, dismissed, but in the circumstances, there is no order as to costs.

March 30, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No