

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

RSA-5721-2016(O&M)

Date of decision: 10.1.2017

Darshan Singh

...Appellant/ plaintiff

Versus

Gurdev Singh and another

...Respondents/defendants

CORAM: HON'BLE MRS.JUSTICE SNEH PRASHAR

Present: Mr.SS Walia, Advocate for the appellant

SNEH PRASHAR, J.

The instant appeal has been filed assailing the judgment and decree dated 30.9.2016 passed by learned Additional District Judge, Ludhiana upholding the judgment and decree dated 29.2.2016 passed by learned Civil Judge (Senior Division), Jagraon by virtue of which the suit for permanent injunction filed by the appellant – plaintiff was dismissed.

The relevant facts are that appellant- plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for permanent injunction seeking to restrain the respondents -defendants (hereinafter referred to as 'the defendants') from causing obstruction or raising the level of passage comprised in Khata No.715/792, Rect. No.51, Killa No.2/1/2 (0-7) as per the 'Jamabandi' for the year 2002-03, situated at village Cheemna, Tehsil Jagraon, District Ludhiana (for short 'the disputed passage') shown in red

colour in the site plan annexed with the plaint. He alleged that at the time of partition of the agricultural land between him and his brother Gurcharan Singh, a common passage (disputed passage) was carved out and it was being commonly used by both of them for the last 25 years. Gurcharan Singh sold a portion of his property to Gurdev Singh-defendant No.1, who purchased the same in the name of his brother Teja Singh to avoid any departmental complication being a government employee. Gurdev Singh constructed a residential house on some portion of the land in his possession. Gurdev Singh and his brother Cheta Singh (defendant No.2), who was Sarpanch of the village threatened him (plaintiff) to demolish the disputed passage and to raise its level without any reason. Submitting that in case, they succeed in doing so, he will suffer irreparable loss and injury, the plaintiff prayed for an injunctive order against them.

The defendants contested the suit. In the joint written statement filed by them, they admitted the existence of the disputed passage and pleaded that Teja Singh, who had purchased the property from Gurcharan Singh vide registered sale deed dated 11.10.1999, had been given right to use the disputed passage. Teja Singh had expired and his inheritance had devolved upon Surender Kaur wife of Gurdev Singh (defendant No.1) and said Surender Kaur was a necessary party to the suit but had not been impleaded by the plaintiff. Cheta Singh- defendant No.2 was stated to be having no concern with the disputed passage. The defendants denied that they had ever threatened to demolish the disputed

passage or to raise any obstruction on the same. Simultaneously it was pleaded by Gurdev Singh that the disputed passage is at a lower level from his house. The sullage and rainy water that accumulates in the disputed passage leads to breeding of mosquitoes and causing foul smell, because of which he suffers inconvenience and hardship. For that reason, he intends to raise the level of the disputed passage and construct 'pucca' passage besides a drain on its side for drainage of water of his house, rainy water and sullage, which would be connected to the main drain and that will cause no loss or injury to the plaintiff. He added that a pipe laid at a height of two inches from the ground level by the plaintiff to irrigate his land was causing flooding of water and inconvenience to his house.

On the rival submissions of the parties, the following issues were framed by learned trial Court:-

- 1.) Whether the plaintiff is entitled to decree for permanent injunction as prayed for?OPP
- 2.) Whether plaintiff has got no locus standi?OPD
- 3.) Whether plaintiff has not come to court with clean hands and has concealed material facts from the Court?OPD
- 4.) Whether suit is bad for misjoinder and non-joinder of necessary parties?OPD
- 5.) Whether suit of the plaintiff is without cause of action?OPD
- 6.) Relief.

Both the parties adduced their respective evidence in support of their rival contentions.

Considering the ocular and documentary evidence lead by the parties and the submissions made on their behalf, learned trial Court dismissed the suit vide impugned judgment and decree dated 29.2.2016. Against the said judgment and decree, the plaintiff- appellant preferred an appeal, which was also dismissed by learned Additional District Judge, Ludhiana vide judgment dated 30.9.2016.

Feeling aggrieved, the plaintiff- appellant preferred the instant regular second appeal.

The submissions made by Mr.SS Walia, Advocate representing the appellant have been considered.

The existence of the disputed passage was not denied by the defendants. The plaintiff alleged that the defendants had threatened him to demolish the disputed passage and to raise its level without any reason, which will cause loss and injury to him. First of all, the allegation of the plaintiff on its own was inconsistent. On one hand, he alleged that the defendants intend to demolish the disputed passage and on the other, he pleaded that they want to raise the level of the disputed passage. By no stretch of imagination, it can be accepted that raising of level of disputed passage, which admittedly is lower than the level of the house of Gurdev Singh (defendant No.1), would cause any loss or injury to the plaintiff. It is evident from the judgment of learned First

Appellate Court that in their statements, plaintiff Darshan Singh (PW4)

and his witness Amrik Singh (PW1) had admitted that there is no other passage for approaching the house of Gurdev Singh (defendant No.1) except the disputed passage. They also admitted that the disputed passage was at lower level than 'phirni', which is already a concrete / brick-lined. In said set of facts raising of level of the disputed passage upto the level of 'phirni' is almost necessary and in the interest of the plaintiff as well. It is obvious that the level of the disputed passage being low, rainy water and water of adjoining houses must be accumulating and remaining stagnated in the disputed passage.

Learned First Appellate Court noticed that the plaintiff had not correctly depicted the location of his house in the site plan Ex.P1 annexed with the plaint. It was observed that from the oral and documentary evidence led by the parties it is clear that considerable inconvenience and hardship is suffered by defendant No.1 in approaching his house during rainy season and it is also difficult to maintain cleanliness and hygiene in the disputed passage without it being brick lined or tarred with concrete mixture. Indeed, improvement of the condition of the disputed passage by the defendants would not amount to raising obstruction or making a change in the purpose for which the disputed passage, is in existence.

Learned counsel for the plaintiff argued that although, no counter claim was filed by the defendants, yet learned trial Court had given them the relief of raising level of the disputed passage by saying that he would be entitled to do so provided the level of the passage does

not become higher than 'pucca' passage of 'Phirni' at the other end. It was also held that the defendants would be constructing a drain along the disputed passage on the edge opposite to the side, on which, land of the plaintiff adjoins the passage in question. Learned counsel asserted that the said findings of learned trial Court as well as First Appellate Court are erroneous.

There appears to be no merit in the arguments of learned counsel for the plaintiff. Indeed, no counter claim was filed by the defendants but the fact remains that the defendants in their joint written statement had pleaded that they intend to raise level of the disputed passage by brick lining/ concretising the same and also want to construct a drain alongwith the passage for draining the water of his house, rainy water etc. In the facts and circumstances of the case, finding the plea of the defendants to be genuine and reasonable, learned trial Court as well as First Appellate Court observed that the defendants can rightly raise the level of the disputed passage and construct a drain but at the same time imposed a restriction not to raise the level of the disputed passage higher than the level of the 'Phirni', which is brick lined / concretized. It was also observed that since the disputed passage is two karams wide i.e. 11 feet and usage of one foot area for constructing drain would not cause any hindrance in passing of tractor or any other agricultural implements of the plaintiff, it was observed that the drain be constructed on the edge of the passage that too opposite to the side on which the house of the plaintiff exists. Apparently, it was to meet out the

objection raised by the plaintiff that the aforesaid observations were made and no relief as such, was allowed to the defendants.

The entire facts levelling the controversy between the parties were discussed in detail and determined.

In the above premise, there is no merit in the present appeal filed by the defendants and also there is no substantial question of law involved for intervention by this Court. As such, the present appeal is dismissed in limine.

Since, the main appeal has been dismissed, the miscellaneous application also stands disposed of.

10.1.2017
gsv

(SNEH PRASHAR)
JUDGE

Whether speaking / reasoned?	Yes	/	No
Whether reportable?	Yes	/	No