

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

R. S. A. No. 5534 of 2014
Date of Decision:- 21.03.2017

Santokh Singh

....Appellant

vs.

Gobind Singh and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. J.S. Khattar, Advocate for
Mr. Deepak Sharma, Advocate,
for the appellant.

DAYA CHAUDHARY, J.

Plaintiff-appellant-Santokh Singh filed a suit for mandatory injunction before Civil Judge (Junior Division), Ambala which was dismissed vide judgment and decree dated 22.10.2011. Thereafter, aggrieved by said judgment and decree passed by the trial Court, he filed appeal before Additional District Judge, Ambala which was also dismissed vide judgment and decree dated 19.3.2014.

Aggrieved by said judgments and decrees passed by the Courts below, the present second appeal has been filed by raising various grounds.

Learned counsel for the appellant submits that both the Courts below have not properly appreciated the evidence adduced by the plaintiff-appellant. While dismissing the claim of the plaintiff-appellant, both the

Courts have failed to consider the fact that the land which was left by the parties for the passage has been encroached by the defendant-respondents by raising a wall without any right. The appellant has proved this fact by leading cogent evidence i.e. oral as well as documentary but a wrong finding has been given by both the Courts below that defendant-respondents have not encroached upon the passage by raising a wall. Learned counsel submits that finding recorded by both the Courts are contrary to facts and evidence available on the record. Learned counsel also submits that the First Appellate Court has dismissed the appeal by recording the finding that the appellant has not mentioned the compromise arrived at between the parties in the suit, whereas, said compromise was never obeyed by the defendant-respondents and, as such, it could not be implemented between the parties. At the end, learned counsel for the plaintiff-appellant submits that the judgments and decrees passed by both the Courts below be set aside and the present regular second appeal be allowed.

Heard arguments of learned counsel for the appellant and have also perused the findings recorded by both the Courts below.

The following issues were framed by the trial Court:-

- “1. Whether the defendants have made encroachment on a 13' wide passage by constructing wall shown as AD in the red colour in the site plan attached towards the northern side of the passage left for the common use of the parties? OPP
2. In case, if issue no. 1 is decided in favour of the plaintiff, then whether plaintiff is also entitled to the

relief of mandatory injunction as well as permanent injunction, as prayed for? OPP

3. Whether the suit filed by the plaintiff is not maintainable in the present form? OPD

4. Whether the plaintiff has not approached the court with clean hands? OPD

5. Relief.”

The finding recorded by the trial Court is reproduced as under:-

“11. The defendants have also produced and proved site plan Ex. D1 on record. The defendants have examined Sh. Atul Kumar Sharma Draftsman as DW2 who prepared the site plan Ex. D1. DW2 has deposed that he prepared the site plan Ex. D1 with respect to Khasra No. 9//20/2, Mauja Patti Suba Akbarpur on the spot which is correct and in accordance with the site. The testimony of said DW could not be shaken by the plaintiff even after pertinent cross-examination. More so, during cross-examination plaintiff PW2 categorically admitted that the site plan of the defendants is correct and perfect. He also admitted that the person who prepared the site plan of the defendants visited the spot and also conducted demarcation. Therefore, the position emerges is that the defendants have made any encroachment over the passage in question.

12. Furthermore, if the land/property of any person is

encroached than that person should not sit quietly and he will bring or produce best evidence in his favour to show the encroachment over the property particularly when he has opportunity to produce best evidence to show the encroachment. The plaintiff has not made any effort for appointment of the Local Commission for the demarcation of the passage in question before the Court to prove the alleged encroachment by the defendants over the passage in question despite the fact that the plaintiff has full opportunity to do so during the course of trial of this case. There is no evidence on record to show the encroachment on the passage in question by the defendants. Hence, it cannot be assumed or presumed that the defendants had made any encroachment over the passage in question. The plaintiff has miserably failed to prove that the defendants had encroached upon the passage in question. Accordingly, these issues are decided against the plaintiff.”

Similarly the finding recorded by the Lower Appellate Court is as under:-

“10. After hearing learned counsel for the parties, it can be ascertained that Teja Singh, the father of Santokh Singh, the plaintiff had purchased 16 Marla of land in Khewat/Khatauni No. 9//22, Khasra no. 132 from Banta Singh, the defendant, since deceased

vide sale deed dated 27.9.1960 as Ex. P2, the Hindi translation thereof is as Ex.P2/A. It is specifically mentioned and agreed between the parties as per Ex.P2 that both the parties will leave passage of 5 feet each from their land and in this way, total width of the passage will be 10 feet. It is further mentioned therein that, this passage can be used by the vendee. It is pleaded in para 4 of the plaint that, plaintiff had left 8 feet land from his own land whereas defendant no.1 had left only 5 feet from his own land and thus, the total width of the passage was 13 feet. It is apt to mention here that, on 1.7.1999, parties entered into a settlement as Ex.P3 vide which plaintiff agreed to raise wall towards his own land after leaving 2' 11" towards the road and Banta Singh also left 12 feet wide passage and thus this passage was to be used by both the parties; however, learned counsel for the plaintiff/appellant has failed to convince this court that why this compromise effected between the parties was not pleaded in the plaint. It is pertinent to mention here that, plaintiff/appellant in order to show encroachment has placed reliance upon site plan as Ex.P1 but the same is of no help to the case of the plaintiff/appellant as it is not proved to have been prepared as per the spot position because Balwant Singh, PW1 has deposed in his cross examination that he never

visited the spot regarding this site plan. On the other hand, site plan as Ex.D1 stands fully proved from the testimony of Atul Sharma, DW2. He has deposed that on 12.4.2006 he had visited the site and prepared the site plan as Ex.D1 wherein he has shown 12 feet wide passage as shown red in colour. During cross-examination, he has denied that he did not prepare the site plan as Ex.D1 as per the spot position. Though, the plaintiff/appellant has claimed that he had left 8 feet wide passage from his own land but there is no cogent evidence on record to prove the same and moreover even from the site plan as Ex.D1, it cannot be made out that he had left the passage towards the southern side and particularly when Santokh Singh, PW2 has categorically admitted in his cross examination that site plan relied upon by the defendants/respondents is correct, as the same was prepared on the spot after carrying out necessary measurements. Thus, from the oral as well as documentary evidence on record, the plaintiff has utterly failed to prove that defendants have in any manner encroached upon the passage by constructing wall marked as AD in the site plan relied upon by the plaintiff as has also been rightly held by the learned lower court. Accordingly, in view of discussion made above, I find no illegality or irregularity in the impugned judgment and

decree passed by learned lower court; hence, I agree with the findings of learned lower court.”

On perusal of finding recorded by both the Courts below, which was proved on record it transpires that both the parties had agreed to leave passage of 5 feet each from their land and in this way total width of the passage will be 10 feet. It was proved on record on the basis of site plan Exhibit D-1 and from testimony of Atul Sharma, DW2, who deposed that he had visited the site on 12.4.2006 and prepared the site plan in which 12 feet wide passage was shown in red colour. But subsequently, in cross-examination, he denied that he did not prepare the site plan as Exhibit D-1. As per case of the plaintiff-appellant, he had left 8 feet wide passage from his land but he failed to prove this fact on record as also that the defendant-respondents have encroached upon the passage by constructing a wall marked as 'AD' in the site plan.

There is no merit in the contentions raised by learned counsel for the appellant.

Accordingly, the concurrent findings given by both the Courts below against the appellant is just and appropriate and, as such, the appeal being devoid of any merit is hereby dismissed.

March 21, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes