

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

**RSA No. 879 of 2017(O&M)
Date of Decision: 31.05.2017**

Vijay Singh through Lrs.

... Appellants

vs.

Hoshiyar Singh & Ors.

... Respondents

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

**Present:- Rao Ajender Singh, Advocate
for the appellants.**

ANITA CHAUDHRY, J.

The defendants are aggrieved of the judgment and decree dated 12.01.2017 passed by the first Appellate Court, whereby it partly allowed the appeal of the plaintiffs and reversed the judgment and decree dated 15.01.2016 passed by the trial Court, dismissing the suit.

The plaintiffs had filed a suit seeking permanent injunction restraining the defendant Vijay Singh, predecessor-in-interest of the appellants from raising any construction over any part of the passage shown at point Mark-AB in the site plan or from blocking the same. A prayer in alternative was made for issuing mandatory injunction directing the defendant to remove the obstruction so as to restore it to its original position.

It was averred that a common passage existed between the houses of the plaintiffs and defendant, who were co-sharers in the land measuring 23 kanals 8 marlas. Both the parties used it for egress and ingress to their respective houses. It was claimed that the defendant

wanted to block the passage as shown at point Mark AB.

The defendant questioned the maintainability of the suit. The case set up by the defendant was that the plaintiffs have 2/15 share in the total land measuring 82 kanal 5 marlas. The passage which was left with mutual consent of the parties for their use was situated towards the northern side of the rectangle No.2 killa No.s 23-24 and was 13 feet wide. The door of the house of the plaintiff also opened towards this passage. The passage in dispute had been left by the defendant and his brother from their own land for their personal use which existed on the eastern side of the house of the plaintiff. Under the garb of the present suit, the plaintiffs wanted to use that passage also. Earlier the matter was compromised and partition proceedings were pending.

Issues were framed and the parties led evidence. During pendency of the suit, a local commissioner was appointed and the report was placed on record.

The trial Court dismissed the suit by observing that the parties were co-sharers and no injunction could be granted against co-sharer, especially when the partition proceedings were pending between the parties. The other factor which was considered by the trial Court was that the passage was not shown in the revenue record and that the plaintiffs had failed to establish that they had contributed from their share towards the passage in question. The disputed passage was left by the defendant from his share for his exclusive use and the plaintiffs had no right to claim injunction in respect thereof.

The plaintiffs preferred an appeal. The appellate Court reversed the judgment of the trial Court and decree of permanent injunction restraining the defendants from blocking the private passage was passed till the joint khewat was finally partitioned by metes and bounds. Liberty was granted to the parties to use the passage in dispute for ingress and egress to their houses and to make opening towards the said passage subject to the final outcome of the partition proceedings. A decree of mandatory injunction was also issued by directing the defendants to remove the temporary wall raised by them by stacking bricks within a period of one month.

Aggrieved with the same, the defendants have filed the instant regular second appeal.

I have heard learned counsel for the appellants and have gone through the records carefully.

Learned counsel for the appellants had urged that the appellate Court has erred in reversing the well reasoned judgment of trial Court. According to him, no injunction can be granted against a co-sharer by restraining him from raising construction over the passage which was carved out on the exclusive share of the defendant and it cannot be said to be prejudicial to the plaintiffs since they have another common passage for egress and ingress to his property. According to him, the suit was not maintainable especially when the partition proceedings are pending between the parties and the defendant was legally entitled to protect his possession. He further urged that the appellate Court had erred in placing implicit reliance on

the report of the local commission which was merely an opinion and not conclusive. He had referred to **Bachan Singh Vs. Swaran Singh 2000(3) RCR(Civil) 70, Kehar Singh & Ors. Vs. Joginder Kaur @ Jogindero & Ors. 2004(3) RCR(Civil) 37, Karam Singh & Anr. Vs. Lakhbir Kaur & Ors. 2011(2) PLR 698, Jangir Singh Vs. Naranjan Singh & Ors. 2015 RCR(Civil) 149, Sudesh Kumari Vs. Ram Parkash & Anr. RCR(Civil) 319, M/s Delhi Towers Limited & Ors. Vs. Jai Chand, RSA No. 725 of 2014, decided on 22.01.2016 and Shiv Dei Enterprises & Anr. Vs. Udami & Ors. 2015(3) RCR (Civil) 555.**

Admittedly, the parties are co-sharer in the joint khewat. The dispute between the parties pertain to the passage as shown in yellow colour in site plan Ex.PW4/A as well as in brown colour in the site plan Ex.D4 produced by the defendants. The defendants claimed it to be their personal passage. The defendant had not denied that the said passage exists upto point GH towards the eastern side of the house of the plaintiffs and that part of their house extended beyond the passage in dispute towards the property of the plaintiffs and one door of their house open into the vacant space beyond the portion where temporary wall was raised by them. When the defendants admitted the existence of the passage in dispute, the factum of it not been reflected in the revenue record loses its significance. There was overwhelming evidence on record in the shape of testimonies of defendants' own witnesses i.e. DW3 Ram Singh, DW4 Rattan Singh and DW5 Jai Singh who admitted the existence of the private passage in dispute that

was left by the co-sharers for ingress and egress to their houses. The other circumstance that speaks about the existence of passage was the photographs that were placed on record wherein it was shown that a temporary wall was raised in between the passage by stacking bricks and on the other side of the temporary wall in-between the houses of the plaintiffs and one of the doors of the house of defendants opened into the aforesaid open space, leading to the conclusion that had there been no passage in existence beyond the wall towards the house of the plaintiffs, there was no occasion for the defendants to open the door towards the open space beyond the wall on the side of the plaintiffs.

The learned counsel stressed on writing/ compromise dated 12.05.2011(Ex.D5). A perusal of record reveals that its original was not produced. It was found that some lines were added therein at a different time. Its first part was only admitted by the plaintiffs. The same was dealt with by learned Appellate Court and it was held as under:-

“26. The respondents have relied upon the writing dated 12.05.2011 Ex.D5. The same is the photocopy. Neither its original has been got produced nor permission has been sought to lead secondary evidence to prove the photocopy. Even otherwise a perusal of the photocopy of the said writing Ex.D5 shows that the last five lines have been written in different ink, pen and handwriting. These lines does not seems to have been written at the same time when the original writing bearing the signatures of the parties and other witnesses present was written. Rather they seem to have been written

lateron. The respondents have also failed to show as to who scribed the said writing. The appellant No.1 while appearing in the witness box as PW1 has admitted the only first part of the said writing.

27. The oral witnesses of the writing i.e. DW3 Ram Singh, DW4 Rattan Singh and DW5 Jai Singh have also admitted the existence of the private passage in dispute that was left by the co-shares for ingress and egress to their houses. They tendered their affidavits Ex.DW3/A, Ex.DW4/A and Ex.DW5/A specifically stating in para no.3 of the affidavits that a passage 16 feet 6 inch wide as shown by plaintiffs in their site plan was left by defendant Vijay Singh son of Johrimal. In para no.4 of the affidavits they stated that as per writing dated 12.05.2011 the said passage was opened for a period of one year. It is thus evident that the private passage in dispute had been in existence at the spot even prior to the date when the aforesaid writing was made. A perusal of the recitals made in the photocopy of the writing was made. A perusal of the recitals made in the photocopy of the writing Ex.D5 show that in the first part it is stated that nobody will block the passage and the obstruction raised in the passage will be removed forthwith and in case during partition proceedings the same very passage is provided by the Revenue Court, the parties would be entitled to make openings of their houses towards the said passage. However in the later part of the aforesaid writing, which has been written in different ink, pen, handwriting and seems to have inserted lateron after obtaining the signatures of the parties and the witnesses, show

that a rider has been placed that 11 feet wide passage would remain open for a period of one year and in case the partition is not effected within the aforesaid period, Kamal Singh would be again entitled to close the passage. All these facts go a long way to show that a private passage left by the parties had been in existence at the spot leading through the joint properties to the appellants and the respondents. In these circumstances, no benefit can be derived by the respondents from the recitals made in the last five lines of the aforesaid writing dated 12.05.2011. PW2 Bir Singh only admitted his signatures on the photocopy of the aforesaid writing at point DX. No suggestion was put to him to the effect that the said private passage had never been in existence at the spot.”

The report of the local commission is not conclusive, but the same coupled with the circumstances and evidence on file, established the existence of private passage at the spot in between the houses of the appellants and the respondents, which was found blocked by the defendants by stacking bricks. The objections filed against the report of LC by the appellants were dismissed. That order was never challenged by the appellants. Both the parties are co-sharers and every co-owner has a right to use the joint property in a husband like manner but not in consistent with the rights of other co-owners. The partition proceedings are pending between them. Merely existence of another passage as depicted in orange color in Ex.D4 does not debar the plaintiffs to use the passage in dispute. It was, thus, rightly

held that the plaintiffs being co-sharers had the right to enjoy the passage till the conclusion of the partition proceedings. The appellants cannot get any assistance from the case law referred to above.

There is no illegality or perversity in the findings returned by the appellate Court while reversing the judgment of the trial Court. It cannot be said that the same are based on misinterpretation of evidence. The appeal is dismissed in limine.

31.05.2017

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**(ANITA CHAUDHRY)
JUDGE**

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No