

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA-1734-1995 (O&M)

Date of Decision: 7.5.2018

Jag Parvesh

....Appellant.

Versus

Mohar Singh and others

...Respondents.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL,
ACTING CHIEF JUSTICE.**

PRESENT: Mr. Mohit, Advocate for
Mr. R.A. Sheoran, Advocate for the appellant.

Ms. Nidhi Garg, Advocate, Amicus Curiae,
for respondent No.1.

AJAY KUMAR MITTAL, ACJ.

1. The appellant-defendant No.2 has approached this Court by way of instant Regular Second Appeal against the judgment and decree dated 16.2.1995 passed by the Additional District Judge, Bhiwani allowing the appeal filed by the plaintiff-respondent No.1 and reversing the findings of the trial Court dismissing the suit of the plaintiff vide judgment and decree dated 11.8.1993.

2. Briefly stated, the facts necessary for adjudication of the present appeal as narrated therein may be noticed. Plaintiff-respondent No.1 was owner in possession of a house marked by letters ABCD as shown in the site plan. He had a private gali marked by letters AEFG as shown in the site plan which was meant for his use only and no other inhabitant had

any right to pass over it. The defendants had no ventilators, windows and doors in the said gali and they were threatening to make encroachment on the private gali of the plaintiff-respondent No.1. Accordingly, the plaintiff filed a suit for permanent injunction restraining the defendants from making any encroachment on any part of the street. Upon notice, the defendants filed written statement raising various preliminary objections. It was pleaded that the alleged gali was a public thoroughfare and the doors of the house of the defendants open in the said gali. The other averments made in the suit were denied and a prayer for dismissal of the suit was made. The plaintiff filed replication controverting the averments made in the written statement and that of the averments made in the plaint were reiterated. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the suit property AEFG shown in the site plain is a private gali? OPP
2. If issue No.1 is proved whether the gali EFG is only way to the house of the plaintiff? OPD
3. Whether the suit is against facts and law? OPD
4. Whether the plaintiff has got no locus-standi to file the suit? OPD
5. Whether the plaintiff has no cause of action to file the present suit? OPD
6. Whether the site plan is not correct according to the factual position? OPD
7. Whether the plaintiff has concealed the true facts from the court, if so to what effect? OPD

8. Whether the suit is false and frivolous, if so, to what effect? OPD
9. Whether the defendants are entitled to special costs under Section 35-A of CPC, if so, to what amount?
OPD
10. Relief.

3. In support of his case, the plaintiff examined himself as PW1, Shri R.C. Sheoran, Advocate as PW2, Prabhu Dayal as PW3, Mahinder as PW4 and Lakhmi Chand as PW5 and produced certain documents in his evidence. On the other hand, the defendants examined defendant No.2 as DW1, Laxmi Narain as DW2 and Hoshiar Singh as DW3.

4. The trial court took issues No.1 and 2 together and on appreciation of the oral as well as the documentary evidence led by the parties, decided both the issues against the plaintiff and in favour of the defendants holding that the gali in dispute was a public thoroughfare being used by the plaintiff and the defendants. It was further held that if the gali in dispute ends at the house of the plaintiff, it cannot be considered as his exclusive property but the said gali being public thoroughfare was used by all the inhabitants of that locality. Issues No.3 to 6 and 8 were decided in favour of the defendants and against the plaintiff on the basis of the findings recorded on issues No.1 and 2. Further, issues No.7 and 9 were decided against the defendants being not pressed. Accordingly, the trial court vide judgment and decree dated 11.8.1993 dismissed the suit of the plaintiff. Feeling aggrieved, the plaintiff-respondent No.1 filed an appeal before the lower appellate court. The lower appellate court while reversing the findings on issues No.1 and 2, held that the gali in dispute was not properly

measured and, therefore, the Local Commissioner was appointed who after visiting the spot submitted his report dated 29.4.1989. The said report was not disputed by the defendants before the trial court and, therefore, the same had attained finality. It was mentioned therein that the defendants had broken open the wall and had put up 6' width door and it was freshly constructed door. Further, the patnalas and ventilators put by the defendants were not in existence earlier. The gali in dispute was a blind alley and ends at the door of the house of the plaintiff. By holding that the gali in dispute was not a public thoroughfare and the defendants had attempted to encroach upon it by raising construction of door, patnalas and ventilators in it, the lower appellate court allowed the appeal vide judgment and decree dated 16.2.1995 and restrained the defendants from encroaching upon any part of the site in disputed marked by letters AEFG shown in the rough sketch prepared by the Local Commissioner vide report dated 29.4.1989 which shall form part of the decree. Hence, the present appeal.

5. I have heard learned counsel counsel for the parties and have also gone through the record with their assistance.

6. Learned counsel for the appellant, *inter alia*, submitted that to the report dated 29.4.1989 of the Local Commissioner, the objections had been filed on 14.9.1989 whereas the lower appellate court had recorded that no objections were filed. Accordingly, the report of the Local Commissioner was vitiated and no finding thereupon could be legally recorded and relied upon. Learned Amicus Curiae was unable to controvert the same.

7. From a perusal of the record, it has been found that the objections dated 14.9.1989 to the Local Commissioner's report dated

29.4.1989 were filed by the appellant which were not considered by the lower appellate court.

8. In the light of this, it would be considered appropriate if the matter is remanded to the lower appellate court for fresh decision. Accordingly, the appeal is allowed and the judgment and decree dated 16.2.1995 passed by the learned Additional District Judge, Bhiwani is set aside. The matter is remanded to the lower appellate court who shall decide the appeal afresh in accordance with law after hearing the parties.

May 7, 2018
gbs

(AJAY KUMAR MITTAL)
ACTING CHIEF JUSTICE

Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No