

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.2923 of 2015 (O&M)

Date of Decision: May 18, 2018

Varinder Pal

...Appellant

Versus

The Nagar Panchayat Mahilpur & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Munish Gupta, Advocate,
for the appellant.

Ms.Jasvir Kaur, Advocate,
for respondent No.1.

AMIT RAWAL, J.

The present appeal is directed against the judgments and decrees of the Courts below, whereby the suit of the appellant-plaintiff seeking injunction restraining the Nagar Panchayat governed by the Punjab Municipal Act (for short “the Act”) from removing the lintel and the iron pipe running in between two houses of the plaintiff shown red in the site plan attached, has been dismissed by both the Courts below.

Appellant-plaintiff instituted the suit on the premise that the aforementioned lintel was running between the two houses. The streets of the said Mohalla are narrow and various houses are in the said Mohalla, which have made coverings over the street in order to connect their houses existing on either side of the street, which coverage is more than 4 or 5 and in the entire Mahilpur there are 20 or 25 over hangings/joining of the houses of either sides of the streets. Earlier, there was a threat at the hands of defendant No.2 and the plaintiff instituted Civil Suit No.88 of 16.5.2000 for

permanent injunction seeking identical relief, which was decreed by the trial court vide judgment and decree dated 22.4.2002 in the following manner:-

“This suit is coming for disposal on 22nd day of April, 2002 before me (S.P.Singh, Civil Judge (Jr.Div.) Hoshiarpur) in the presence of Sh.A.K.Soni, counsel for the plaintiff and Sh.Brij Thakur, counsel for defendant No.1.

It is ordered that the suit of the plaintiff decreed to the effect that plaintiff can not be singled out for taking action and defendants are restrained from dismantling the projection of plaintiff and removing the iron pipe, except as per law and except following due course of law. Parties are allowed to bear their own costs.”

The Nagar Panchayat did not follow the procedure as per the aforementioned decree, but sent notices, which constrained the appellant-plaintiff to institute a petition under Order 21 Rule 32 CPC, but the same was disposed of with liberty to challenge the aforementioned notice. It is in this backdrop of the matter, the present suit had been filed, for, the relief of declaration is inherent in the suit for permanent injunction.

The defendants led evidence and disclosed that they have already adopted the course in accordance with law and by noticing the aforementioned facts, the trial Court dismissed the suit. The appeal laid was also dismissed by the Lower Appellate Court.

Mr.Munish Gupta, learned counsel representing the appellant-plaintiff submitted that the judgment and decree of the Courts below are not sustainable as the Nagar Panchayat, which is governed by the Act, has not followed the procedure as envisaged under Section 175 of the Act, for, it has not been clarified in the notice as to whether similar action had been taken against the alleged violators or offered the compensation, which is mandatorily required to be followed, therefore, the notices be set-aside.

Per contra, Ms.Jasvir Kaur, learned counsel representing respondent No.1 submitted that there is no defiance to the judgment and decree dated 22.4.2002. The suit had already been dismissed, for, the Nagar Panchayat had taken the measure as per the Act. The construction was raised without any sanction and, therefore, the Courts below rightly declined the injunction and, thus, prayed for affirming the findings under challenge.

I have heard the learned counsel for the parties, appraised the paper book and also seen the judgment and decree dated 22.4.2002. In Paragraph 13 of the aforementioned judgment, it has been categorically held that the appellant-plaintiff had raised the construction after taking permission from the Nagar Panchayat. Para 13 reads as under:-

“13. In this manner, it stands concluded from the above that plaintiff is owner of his two houses. To connect each other plaintiff has made a projection at the height of 13/14 feet with the permission of Gram Panchayat Ex.P-1, duly proved on the file. This is proved by the signatory member panchayat. If panchayat did not pass any resolution and did not complete the formalities, the same is not the fault of plaintiff. It is also categorically proved on the file that as many as at least 13 other projections exists in the locality out of which some are recently made as is reported by Local Commissioner. While making these projections, people stated that they took oral consent of the committee. It has also categorically proved on the file that Municipal Committee never objected to raising of these projections, rather Executive Officer is coming to know regarding these projections, while deposing in this court. Before coming into the witness box, Executive Officer was not even aware of the existence of so many other projections. It is also proved on the file that plaintiff has applied for the sanction of site plan, which is not done, for the reasons, best

known to them. It is also established on the file that projections of plaintiff is causing no obstruction to traffic or light air. In these circumstances, it is affirmed hereby that all the citizens of India are having right equality. They are entitled to equal treatment of law. Municipal committee Mahilpur can not single out plaintiff alone for taking action, ignoring projections of so-many other people, existing at the spot and having been recently made. Further more, Municipal Committee can not take any forcible or illegal action. They are to follow the law and the rules i.e. due process of law. It is to be seen, as per Municipal Act and Gram Panchayat Act, whether a projection, permitted by Gram Panchayat can be demolished by Municipal Committee or not. It is further to be seen as per law whether a projection made 10 years ago with permission of Gram Panchayat can be objected to presently. To clarify all this, Municipal Committee is to follow the script of Municipal Committee Act and Gram Panchayat Act. It is also to be seen, what actual loss is being caused by such projection. If such projections are common in the locality and are implicitly allowed by the Local Bodies, then the plaintiff can not be singled out for taking action with the help of police. Admittedly, no notice has yet been served upon the plaintiff. In the absence of notice and following due process of law, no action can be taken against the plaintiff. The action has to be justified as per law, whether the projection caused any obstruction or hindrance. Further, the action is to be taken against all the projections in the locality and not against the plaintiff alone, that too, if the same can be taken as per law. Plaintiff raised his projection 10/12 years ago after taking the permission of Gram Panchayat as is proved on the file. Present Municipal Committee has taken over the record and charge of Gram Panchayat in 1998. There is nothing wrong with the site plan of plaintiff. Photographs and reports of Local Commissioner on the file confirms the existence of so many other new and old projections existing without any permission.

People are going to the extent that they received oral consent of local bodies and officials of Local Bodies never obstructed their construction. Whereas, on the other hand, the plaintiff is having the permission of Gram Panchayat predecessor of present Municipal Committee. It is also to be seen as per law, whether such projections, made in the air amounts to encroachment in the street or not. In the cities, people are having projections over the windows and the doors which intrude in the street but are in the air. The same have never been considered as encroachment by any local body, being in the air and causing no obstructions in traffic, light or air.”

Section 175 of the Act envisages the provision for initiating action for removal of the construction at the instance of the Municipal Committee only after offering compensation. For the sake of brevity, Section 175 of the Act reads thus:-

“175. Removal or alteration of any balcony, projection or structure, etc., on payment or compensation:- 5[*The committee may subject to the payment of reasonable compensation, by notice, require the owner or occupier of any building within a period of not less than six weeks to be specified in such notice to remove or alter any balcony, projection, structure or verandah, erected with the sanction of the committee, overhanging, projecting into or encroaching on any street or into or on any drain, sewer or aqueduct therein.*]

Concededly, the notice under challenge did not disclose the compliance of the provisions. In such circumstances, the Courts ought to have granted the injunction with the rider as noticed above.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in

Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR

2016 SC 1213, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back. For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29] ”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would

have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the reasons stated above, the judgments and decrees of the Courts below are set-aside. The suit of the appellant-plaintiff is decreed with the rider that it will not prevent the Nagar Panchayat to initiate the proceedings as envisaged under Section 175 of the Act and as well as comply with the previous judgment and decree dated 22.4.2002.

Appeal stands allowed.

May 18, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No