

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

RSA No.86 of 2017 (O&M)

Date of Decision.04.05.2018

Budh Ram

.....Appellant

Vs

The Executive Engineer and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Krishan Singh, Advocate
for the appellants.

-.-

AMIT RAWAL J.(ORAL)

C.M. No.164-C of 2017

For the reasons stated in the application, delay of 15 days in
filing the appeal is condoned.

Application is allowed.

RSA No.86 of 2017

The regular second appeal is directed against the judgment and
decree dated 31.05.2016 whereby the judgment and decree dated
24.03.2014 decreeing the suit has been set aside, in essence, suit of the
plaintiff has been dismissed.

The appellant-plaintiff instituted the suit for permanent
injunction against the defendants from digging/constructing any
drain/channel for carrying/passing water in or over or through or otherwise
interfering into the actual and proprietary possession of the plaintiff in any
manner over plot No.5 forming part and carved out of land measuring 3
kanals 16 marlas comprised in Khewat No.117 Khasra No.29///1/2 situated

District Yamuna Nagar on the premise that he constructed a Chhan and planted about 50/60 trees of various kinds like poplar, eucalyptus, guava and papaya etc. The suit land was being used for the purpose of residential, domestic and tethering cattles. The defendants in collusion with each other were proposing and threatening to forcibly dig a drain/channel in the suit property for carrying/passing water into the *bara* bearing khasra numbers *ibid*. The ownership and possession of the plaintiff not only supported by revenue records but also by the judgment and decree dated 02.09.2004 rendered by the lower Appellate Court, Jagadhari. The suit property was neither acquired by the Government for irrigation scheme nor any such irrigation scheme was framed or sanctioned, thus, cause of action arose to file the aforementioned suit against the Executive Engineer, Water Services Division Haryana Irrigation, Dadupur Head, Tehsil Chhachhrauli, District Yamuna Nagar.

The aforementioned suit was contested by the defendants by filing written statement. In the written statement filed by defendant No.1, it was categorically averred that one Fakira son of Mukanada Ram, resident of Malakpur Khadar, Tehsil Chhachhrauli District Yamuna Nagar made complaint dated 19.07.2007 that the son of plaintiff namely Shiv Dayal along with one Loti Ram son of Chhaju Ram wrongly and illegally dismantled the running water course on the eastern line of Khasra No.29//1/2 in the chak of outlet RD No.16800/Right of 2-R Distributory. After making the investigation, the then SDO, Water Services Sub Division, Tajewala issued notice under Section 24 of the Haryana Canal and Drainage Act, 1974 ordered for restoration of the water course. In order to circumvent the aforementioned proceedings, the suit aforementioned was

instituted.

Defendant No.2 and 3 had filed joint written statement and reiterated the stand taken by defendant No.1 in the written statement.

On the basis of pleadings, the trial Court framed as many as 7 issues including the issue of relief.

The plaintiff examined as many as three witnesses in lieu of the issues framed and tendered documents Mark 1 to Mark 7. On the contrary, defendants examined two witnesses and tendered into evidence documents Ex.D1 to D11.

The trial Court on the basis of the aforementioned evidence and noticing the fact that the plaintiff had concealed some facts like photocopy of the application Ex.D7, D8, D9, D11 and D1 but despite that it could not help the defendants and decreed the suit, for, the proceedings initiated under Section 24 of the aforementioned Act were proceeded against Shiv Dayal i.e. son of the plaintiff and not against the plaintiff. In appeal preferred by the defendant No.1-Executive Engineer, the lower Appellate Court reversed the finding regarding the concealment of notices under Section 24 of the Act to Shiv Dayal and the decision dated 19.09.2007 under Section 24 of the Haryana Canal and Drainage Act, 1974 and held the suit to be not maintainable, in view of the provisions of Section 24 of the Act.

Mr. Krishan Singh, learned counsel appearing on behalf of the appellant submitted that the lower Appellate Court has gravely erred in holding that the water course was in existence in khasra No.29//1/2 but while rendering the aforementioned erroneous finding overlooked the fact that the defendant could not produce any evidence or revenue record to prove that the water course was in existence in the suit property of the

plaintiff. DW2, SDO Water Services admitted in his cross-examination that

he did not have any record with regard to the existence of the water course nor Government had allotted any plot for canal. Surjit Singh, DW1, Lambardar also feigned ignorance with regard to water course, thus, there is abdication. The lower Appellate Court could not have dismissed the suit in view of the non-existence of the water course by invoking the provisions of Section 25 of the aforementioned Act. The lower Appellate Court had appointed the local commissioner to inspect the spot with regard to existence or non-existence of water course, who pointed out in his report that there was no water course but while rendering the finding, it did not consider the same, therefore, there is illegality and perversity.

As regards the notice under Section 24 of the Act, it was mentioned that the same was issued to the son of plaintiff and not to the plaintiff, thus, urges this Court for setting aside the judgment and decree under challenge.

I have heard learned counsel for the appellant, appraised the paper book, records of the Courts below and of the view that there is no force and merit in the submissions of Mr. Krishan Singh. The suit property involved in the suit was khasra No.29//1/2. The question that arises for adjudication is whether the plaintiff, who was not party in the proceedings initiated under Section 24 of the Act would be fatal or prejudice to the rights of the plaintiff, the answer would be 'no', for, the trial Court erroneously ignored the proceedings initiated under Section 24 of the Haryana Canal and Drainage Act against Shiv Dayal as it pertained to the very same khasra numbers, *de hors* of the fact that it was the plaintiff or his son. No person can be permitted to circumvent the statutory provisions of the Act under the garb of alleviation of his alleged grievance. Section 25 of the Act puts an

embargo which clearly imposes prohibition for maintaining the suit, as the remedy to assail the finding rendered by the Divisional Canal Officer is appealable before the Superintending Canal Officer and against the finding of Superintending Canal Officer, an appeal/revision lies before the Chief Canal Officer. Ex.D11 dated 19.09.207 had not been denied by either of the parties except that it was not against the plaintiff.

The lower Appellate Court being the last court of fact and law while appreciating the aforementioned facts, in my view, has rightly exercised the power in noticing the fact that it was the optional on behalf of the plaintiff to over-come the decision rendered under the 1974 Act but he chose to take assistance of the Court for seeking injunction. Therefore, the argument of Mr. Krishan Singh has not been able to bring the case within the realm of illegality and perversity enabling this Court to form a different opinion than the one already arrived at by the Courts below, much less, no substantial question of law arises for determination by this Court. No ground for interference is made out. The appeal is dismissed.

(AMIT RAWAL)
JUDGE

May 04, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No