

RSA Nos.721 & 722 of 1986 (O&M)

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

Date of decision : 30.04.2019

1. RSA No.721 of 1986 (O&M)

Gogi @ Daljeet (deceased) through LRs

... Appellant

Versus

Amrik Singh and others

... Respondents

2. RSA No.722 of 1986 (O&M)

Gogi @ Daljeet (deceased) through LRs

... Appellant

Versus

Amrik Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sanjay Majithia, Senior Advocate with
Mr. J.S. Brar, Advocate
for the appellant(s).

Mr. Amit Dhawan, Advocate
for the respondent(s)

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two regular second appeals bearing **RSA No.721 of 1986** titled as **“Gogi @ Daljeet (deceased) through LRs V/s Amrik Singh and others”** arising out of the decision of Civil Suit No.43 of 1982 (hereinafter called 'First Suit'), whereby injunction against the appellants-defendants from affixing any permanent door/gate on the entrance of street shown in red colour in the site plan and roofing the same

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being source of egress and ingress along with other occupants of the same street, has been granted by the trial Court and affirmed in appeal and **RSA No.722 of 1986** titled as **“Gogi @ Daljit (deceased) through LRs V/s Amrik Singh and others”** arising out of decision of Civil Suit No.166 of 1982, whereby the mandatory injunction against the defendant-Amrik Singh directing him to close down for ever the newly and recently opened hole as patnala of his first floor room shown as marked H in the site plan, has been rejected by the trial Court and affirmed in appeal.

In both the suits, the parties are the same, therefore, are being decided by common order.

In the first suit, Amrik Singh, plaintiff, sought the injunction, aforementioned, against the defendants-Gogi and others, on the premise that he along with his brothers, Gurmit Singh, Sarwan Singh, had four houses and in between the houses, there was common street 67' x 9' shown in red for the common use of the occupants and owners. The right of egress and ingress was also common and no other co-owner and occupant was legally authorized to make ill use of the same street in any way or create any nuisance. The defendants intended to affix a gate/door, at the very entrance of the said street and thereafter, covered up the roof and a cause of action accrued to file the suit.

It was further pleaded that all the parties had left the gali/street for common use and the defendants, who were also co-owners and occupants, were asked time and gain to refrain and abstain from affixing any door or to roof the said street, but they did not accede.

Defendant No.2 did not contest the suit. Defendant Nos.1, 3 and 4, opposed the suit by taking preliminary objection regarding

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maintainability of the suit, *locus standi* and denied the existence of any common street, shown as red, in the site plan. The defendants had their own houses. Major Singh, deceased, also owned a house, which was now owned by his heirs i.e. defendant Nos.1 and 2. The gali/street shown as red in the site plan was in exclusive ownership of the defendants as it was left by the defendants and their predecessors-in-interest, for approaching to their houses from the main street. No body else had ever used the street. House of the plaintiff was built in 1979 and there was no door or any window, in the western wall of the first storey towards the passage. The plaintiff had no entrance from this passage and had no right at all to use this passage. The existence of Patnala of the plaintiff's house towards the passage was denied.

It was further alleged that the plaintiff, firstly opened the window towards the passage and the matter was reported to the police and the plaintiff removed the window, but again attempted, which was not permissible.

In the second suit, identical relief of mandatory injunction of removing the patnala, was sought by the plaintiffs, who were the defendants in the first suit.

The trial Court on the basis of the pleadings framed the following issues:-

Issues in First Suit

- 1. Whether the street shown in the site plan is common street of the parties? OPP*
- 2. Whether the suit is not maintainable in the present form? OPD*
- 3. Whether the plaintiff is entitled to the injunction prayed for? OPP*

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4. Relief.

Issues in Second Suit

- 1. Whether the plaintiffs are entitled to the relief of mandatory injunction as prayed for? OPP*
- 2. Whether the suit is liable to be stayed under Section 10 CPC as mentioned in para No.2 of the preliminary objections? OPD*
- 3. Whether the suit is not maintainable in the present form? OPD*
- 4. Relief.*

Both the parties led extensive evidence in support of their respective cases.

The trial Court after appreciating the evidence brought on record decreed the first suit, whereas dismissed the second suit. The appeals preferred before the lower Appellate Court also met with the same fate.

Mr. Sanjay Majithia, learned Senior Counsel assisted by Mr. J.S. Brar, learned counsel appearing on behalf of the appellants in both the appeals, in support of the memorandum of appeal, submitted that the judgments and decrees of both the Courts below are not sustainable in the eyes of law, as the plaintiff, in the first suit, was required to prove his own case, which he miserably failed to do so. The site plan, Ex.D1, has not been taken into consideration in correct perspective. There is misreading of the same, viz-a-viz the sale deed Ex.PX and Ex.PY. Since the defendants were owner of the property and had full right to open the door and deal with in the manner, they wanted to. The dimensions of the street, mentioned in the sale deeds (Ex.PX and Ex.PY), did not tally with the site plan, Ex.D1. In a

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suit for permanent injunction, the plaintiff is required to establish, on the basis of the evidence, the existence of street, which he miserably failed to do so. No cogent reasons were assigned by the lower Appellate Court being the last court of fact and law, in affirming the judgment and decree of the trial Court. Neither there was reference Ex.D1, Ex.DX and Ex.DY and the oral testimony of DW1 and DW-5.

In other appeal, it was argued that the material evidence Ex.PW6/1, Naksha Shajra, Shajra Kishtwar and oral evidence of PW3 to PW8, has not been looked into in correct perspective. The trial Court though found that Sondhi was the predecessor-in-interest of vendor of appellant, who was owner of two khasra numbers 1797 and 1798, on which the plot was located and the passage. The street cannot be treated as joint property of owner of the house (abutting). If it was a street meant for the use of all the inhabitants, it would have been so mentioned in the record relating to immovable property situated within abadi deh of the Village, thus, urges this Court for setting aside the concurrent findings of fact, under challenge.

Per contra, Mr. Amit Dhawan, learned counsel appearing on behalf of the respondents submitted that judgments and decrees of the Courts below are perfectly legal and justified, which are based upon the appreciation of oral and documentary evidence. The concurrent findings cannot be interfered until and unless, there is gross illegality and perversity.

I have heard learned counsel for the parties, appraised the paper book and of the view that the following 'Substantial Question of Law' arises for determination:-

- 1. Whether the judgments and decrees of the Courts below suffer from illegality and perversity and based upon the*

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misreading of oral and documentary evidence?

There is no force and merit in the submissions of Mr. Majithia, for the simple reason that in the first suit, none of the parties had given the khasra numbers of the property. However, Amrik Singh, in the other suit as the defendant, sought the permission of the Court for appointment of the Local Commissioner as PW6 to ascertain as to whether the passage was part of Khasra No.1805 or not. As per the report of the Local Commissioner, the passage is not on khasra No.1805, but on 1797 and 1798. The report of the Local Commissioner, as per the provisions of Sub-Clause 2 of Rule 10 of Order 26 of the Code of Civil Procedure, shall be the evidence in the suit. For the sake of brevity, the aforesaid provisions reads as under:-

" Sub-Clause 2 of Rule 10 of Order 26 of CPC

(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation."

Jamabandi, Ex.DX and Ex.DY, revealed that khasra No.1797 and 1798 were owned by one Vadhawa and Tarloka in equal shares. The defendants asserted the right through Sandhi, who had been in possession of these khasra numbers along with one Inder and Khema, whereas the plaintiff through one Inder. Since the defendants were also not recorded owners of khasra number, they could not assert the right in the passage, in

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dispute and therefore, reliance to the sale deed was meaningless. In the absence of any entitlement of the land, as reflected in the jamabandi, the defendants, in the first suit and plaintiffs in the second suit, cannot assert the right on the passage and it has to be used for all inhabitants of the area, therefore, cannot be permitted to obstruct the same by creating obstacles and roofing the same. In my view, injunction granted by the trial Court and affirmed in appeal, cannot be said to be suffering from illegality and infirmity.

In view of the aforementioned findings, dismissal of the second suit was inevitable as obstacles was on the property of the defendant in the second suit and the plaintiff in the first suit. The Substantial Question of Law, as framed above, is answered in the aforementioned term.

Resultantly, both the appeals are dismissed.

The interim order, if any, stands vacated.

30.04.2019
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned **Yes/ No**

✓

Whether Reportable **Yes/ No**