

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

RSA-497-2013(O&M)

Date of decision:-25.7.2019

Smt.Lakham Panjwani @ Luxmi

...Appellant

Versus

Vikram Rana and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.G.C.Shahpuri, Advocate and
Ms.Naina Issar, Legal Aid Counsel for the appellant.

Mr.Sahil Choudhary, Advocate
for respondent No.2.

H.S. MADAAN, J.

Briefly stated facts of the case are that plaintiff Smt.Lakham Panjwani aged about 52 years daughter of Sh.Seth Bakshi Ram and wife of Sh.J.P. Goenka, resident of House No.797 Old Hamida, Yamuna Nagar had brought a suit against defendants Vikram Rana son of Sh.Baljeet Rana, Smt.Krishan Devi wife of late Sh.Banarsi Dass (since dead) represented by legal representatives as well as Municipal Council, Yamuna Nagar through its President/Executive Officer seeking grant of permanent injunction restraining the defendants from blocking, encroaching upon or

making any alteration or changing the existing position of the public street located on the western side of the plot of the plaintiff as shown in the site plan attached and fully described in the head note of the plaint, by way of raising construction and also for restraining the defendants from interfering in the peaceful use and enjoyment of the plaintiff over the public street, in addition to that craving for grant of mandatory injunction directing defendants No.2 and 3 to remove the encroachment by way of demolishing the construction raised by defendant No.2 over the public street.

Inter alia, in the plaint, the plaintiff contended that she had purchased a plot vide registered sale deed dated 3.4.1974; that on the western side of the plot was reflected a *gali sare-am*, which was being used by the plaintiff for coming and going to her plot for last more than 27 years; that the defendant No.2 had also purchased a plot adjoining to the plot of the plaintiff on the northern side; that the public street in question is 7-8 feet wide; that defendant No.2 in collusion with defendant No.3 raised construction of her house in the plot after getting the site plan sanctioned from defendant No.3 – Municipal Council, in the process encroaching upon the public street. The plaintiff requested the defendant No.3 to demolish such illegal construction but to no effect, giving rise to a cause of action to the plaintiff to bring the suit.

On being put to notice, the defendants appeared in the

Court and filed separate written statements. In the written statement submitted on behalf of defendant No.1, he denied the material assertions in the plaint and raised legal objection that the suit was not maintainable and the plaintiff had no locus standi to bring the same, therefore the suit be dismissed.

In the written statement filed on behalf of defendant No.2, she had taken up a preliminary objection that the suit was barred under Order 2 Rule 2 CPC and the plaintiff had no right, title to claim any passage because the passage in question was not a public street but a private passage left by the defendants. On merits, the material assertions in the plaint were denied contending that the plot, which is alleged by the plaintiff to be her own, was in fact part and parcel of the house, which was owned by the father of the plaintiff Sh.Bakshi Ram, who had an access to the road on the southern side i.e. between the house of Vikram and Bakshi Ram; that the other passage of the house is situated on the eastern side of the house of answering defendant and the said property was owned and possessed by Bakshi Ram, which had its opening on two sides i.e. on the southern side and on the northern side towards the eastern side of the answering defendant. Such defendant denied that any such public street is in existence or that she had encroached upon it. In the end, such defendant prayed for dismissal of the suit.

In the written statement filed on behalf of defendant

No.3, it also came up with several legal objections contending that the street in question is a private passage as has been held in Civil Suit No.147 of 1993 decided on 19.10.1974 by the Court of Sub Judge, Jagadhri. It was held to be a private passage of Mangla @ Krishan and the plaintiff has no locus standi to bring the suit; that suit is barred by the principles of resjudicata. Such defendant also prayed for dismissal of the suit.

Issues on merits were framed. The parties were afforded adequate opportunities to lead evidence.

After hearing the learned counsel for the parties, the trial Court decided issue No.1 against the plaintiff, issues No.2 to 4 being not pressed. Resultantly, the trial Court dismissed the suit of the plaintiff with costs. This was so done vide judgment and decree dated 20.11.2009.

Feeling aggrieved by the said judgment and decree, the plaintiff had filed an appeal in the Court of District Judge, Yamuna Nagar at Jagadhri, who vide judgment and decree dated 15.6.2012 dismissed the appeal.

Dissatisfied with the judgments and decrees passed by the Courts below, the plaintiff has knocked at the door of this Court by way of filing regular second appeal praying that the same be accepted, the impugned judgments and decrees passed by the Courts below be set aside and the suit filed by her be decreed.

Notice of the appeal was given to respondents.

I have heard learned counsel for the parties besides going through the record.

Learned District Judge, Yamuna Nagar at Jagadhri has considered the legal position, firstly when the plaintiff while withdrawing the suit had not taken the leave of the Court to file a fresh one and secondly she had not pursued the relief of claiming mandatory injunction for removal of the alleged encroachment from the street in question against the heirs of the deceased defendant Banwari Lal, meaning thereby, that the plaintiff had abandoned her right of claiming mandatory injunction for removal of encroachment made by Banwari Lal, the predecessor-in-interest of present defendant No.2 and had withdrawn the suit without the permission of the Court, resultantly provisions of Order 23 Rule 1, Sub-Rule(4) are attracted, which provides that when the plaintiff abandons any suit or part of claim under Sub-Rule (1) or withdraws from a suit or part of a claim without the permission referred to in Sub-Rule (3), then he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

Learned District Judge, Yamuna Nagar at Jagadhri has rightly interpreted the provision in light of the factual position of the case while drawing the inference that the withdrawal of previous suit

filed by the plaintiff disentitles her from instituting the present suit in respect of the street, which was even subject matter of previous suit. All the attempts by counsel for the appellant/plaintiff to wriggle out of such situation by stating that previous suit was withdrawn on assurance by the defendants at that time to remove the encroachment and since they had not acted upon such assurance a fresh cause of action arose for the plaintiff to file the suit, were found to be a futile exercise holding that the language used by the legislature in Order 23 CPC clearly provides that if a person withdraw from a suit without seeking permission of the Court, then such plaintiff shall be precluded from filing a fresh suit on the same subject matter and the words used by the legislature in this provision of law are 'same subject matter' and not 'same cause of action. Therefore, such argument by learned counsel for the plaintiff/appellant was rejected and that was rightly so done. Learned District Judge, Yamuna Nagar at Jagadhri has also observed that plaintiff in her pleadings had maintained a complete silence about the institution of previous suit and she had nowhere pleaded that the defendants had given some kind of assurance in the previous suit and she had withdrawn the said suit on the basis of such assurance.

The judgments and decrees passed by the Courts below are well reasoned, based upon proper appraisal and appreciation of evidence and correct interpretation of law. There is no illegality or

infirmity therein.

No substantial question of law arises in this appeal.

Therefore, I do not find any merit in the present appeal and do not see any reason to disturb the legal, valid and well reasoned judgments and decrees passed by the Courts below.

The appeal stands dismissed accordingly.

25.7.2019

Brij

(H.S.MADAAN)
JUDGE

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No