

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

**CM-1466-C-2023 in/and
RSA-785-2021 (O&M)
Date of Decision: 16.02.2023**

Darshan Singh (Since deceased) through LR ...Appellant
Vs.
Santosh Kumari @ Sokho and another ...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Malkeet Singh, Advocate
for the applicant/appellant.

ARUN MONGA, J. (ORAL)

CM-1466-C-2023

For the reasons stated, the application is allowed subject to all just exceptions. Main case is restored to its original number and the same is taken up for hearing at Bench today itself.

RSA-785-2021 (O&M)

For convenience, parties herein are addressed as per the recitals before learned trial Court.

2. Having suffered concurrent adverse findings by the two Courts below, plaintiff (appellant herein) is in second appeal before this Court assailing trial Court judgment and decree dated 14.12.2018, as upheld by learned First Appellate Court vide its judgment and decree dated 07.11.2019.

3. Briefly stated, facts as noticed by Courts below are that plaintiff filed a suit for mandatory injunction to the effect that defendants may be directed to remove illegally constructed wall measuring 3'x24' shown red in the site plan

along with relief for permanent injunction for restraining the defendants from

making any construction or opening any door or windows in the private passage shown red and blue in the site plan. Plaintiff was exclusive owner of the residential house shown green in the site plan. There exists a private passage owned and possessed by plaintiff measuring 13' in width and 24' in length shown red as well as blue in the site plan and there also exists a gate installed therein along with two pillars on the both sides of it for the last more than 20 years. There exists a house of Harbhajan Singh, the predecessor-in-interest of Gurpreet Singh, who requested the plaintiff to facilitate him to pass through the private passage in dispute and the plaintiff vide written agreement dated 11.09.1996 allowed him to use the said passage in dispute jointly. The said passage was entirely a private passage owned by the plaintiff. There exist a Shamlat towards the western side of the said passage and also a small kacha construction over it owned by one Madho Ram, father of defendant No.1. Even otherwise, there never existed any construction or wall of said Madho Ram towards the passage in dispute nor any drain had been constructed thereon. The plaintiff was residing with his sons in USA. In the month of June, 2011, the plaintiff came to know that both the defendants had illegally encroached upon the private passage owned by the plaintiff and had also illegally constructed a drain in it as well as constructed a wall thereby opening a door, window and ventilator in it. Even the defendants had also constructed a wall as well as projection existing on the ground floor as well as first floor shown in the site plan without the consent of the plaintiff. The plaintiff immediately came to India and requested the defendants to deliver back the possession of the encroached portion of the private passage owned by the plaintiff after removing the illegally constructed wall along with projection thereon. However, defendants were bent upon opening doors and windows towards rest of the passage and also make further construction on it. Plaintiff also made a police complaint but to no avail. Hence, the present suit.

4. Upon notice, defendants-respondents appeared and filed written statement contesting the suit and taking preliminary objections of maintainability of suit being frivolous and baseless.
5. Based on the rival pleadings, following issues were framed:
1. Whether the plaintiff is entitled to mandatory injunction as prayed for?OPP
 2. Whether plaintiff is entitled to the relief of permanent injunction as prayed for?OPP
 3. Whether plaintiff is entitled to the recovery of Rs.20,000/- as damages as prayed for?OPP
 4. Whether the suit of the plaintiff is not maintainable in the present form?OPD
 5. Whether the plaintiff has not come to the Court with clean hands?OPD
 6. Relief.
6. The parties to the suit adduced their oral as well as documentary evidence in support of their pleadings and to discharge their respective onus as per the issues, *ibid*.
7. On appraisal of evidence vis-à-vis pleadings, all issues were decided in favour of defendants and consequently, the suit of the plaintiff was dismissed with costs by the learned Civil Judge (Senior Division), Phillaur.
8. Aggrieved, plaintiff-appellant preferred first appeal which was dismissed by the learned First Appellate Court.
9. Learned First Appellate Court dismissed the appeal, resulting in instant Regular Second Appeal before this Court.
10. In its judgment, learned First Appellate Court, *inter alia*, observed, as under:

“XXXX XXXX XXXX XXXX

14. In order to establish his case, the appellant/plaintiff had examined-Amandeep Viridi, Draftsman, as P.WI, who has proved on record original site plan Ex.P1. The said witness when cross-examined has admitted that he had not seen the ownership proof of the plaintiff. He has also stated that he cannot identify the disputed property in the photographs. The next witness is PW2-Kewal Singh, who has stated as per the case of the plaintiff in his affidavit Ex.PB.

However, in paragraph 2 at Page 2 of his affidavit, it is categorical statement made by him that "the above mentioned passage is measuring 13 ft x 24 ft and same is part and parcel of the residential house owned and possessed by the defendants." Such a positive and categorical statement made by the witness of the plaintiff himself would clearly show that the disputed passage was common with defendants. P.W3-Gurmit Singh is the photographer, who has proved on record the photographs. The next witness is PW4-Davinder Singh, who is stated to have inherited the property owned by Darshan Singh, the original plaintiff. In his examination-in-chief, he has deposed as per the case put up by the plaintiff. However, during his cross-examination, he has stated that he did not have any ownership proof of the property in question as the same is ancestral. He has further admitted that where the house of Santosh Kumari is existing, earlier there was a 'dana bhathi' in existence at the said place. He has also admitted that along both sides of the disputed passage, there are doors and windows. Apparently in the aforesaid evidence on record, there is no proof submitted by the appellant/plaintiff for establishing his exclusive ownership and possession over the street in dispute. Moreover, as noted above, the photographs would clearly show that doors and windows of the other houses on both sides of the disputed passage are in existence since long qua which no dispute has been raised by the appellant/plaintiff at any point of time. Had the passage been left over by the appellant/ plaintiff from his own land for his own use and occupation, then, he would not have allowed his other neighbourers to open doors, windows and to extend projections towards the disputed passage even earlier. This would clearly reflect upon the act and conduct of the appellant/plaintiff that he at no point of time had disputed the existence of the openings left by his other neighbourers towards the passage and for the first time has raised dispute only qua the respondents/defendants without claiming any relief against the other neighbourers whose doors and windows are also opening towards the disputed passage. The construction resting over both the pillars of the gate in question is very much evidenced on the file as can be ascertained from the photographs produced on the record. Not only the aforesaid openings, the projection of the house existing on the other side of the passage can also be seen in the photograph. As such, it appears to this Court that the appellant/plaintiff has chosen only the respondents/defendants as respondents while seeking the relief of Mandatory injunction and Permanent injunction and also recovery of damages for which no reasons have been assigned by him. In case the passage was meant exclusively for the appellant/plaintiff and he had left the same out of his own piece of land, then, there was no reason for him to abstain from seeking relief of mandatory injunction against the other neighbourers as well whose windows and doors are opening towards the passage in question and the projections are also existing. As such, the learned trial Court has rightly dismissed the suit of the appellant/plaintiff.

15. The next question, which needs consideration, is that the appellant/plaintiff has failed to bring on record any document of title showing his ownership over the suit property i.e., passage in question.

As such, the suit for the relief of mandatory injunction simpliciter without seeking declaration of the ownership would not be maintainable, in other words, when the ownership of the disputed passage is not established on record, then the relief of mandatory injunction cannot be granted.

16. No other point was urged or argued before this Court.

17. Thus considered on the aforesaid discussion, this Court finds no ground to interfere in the well reasoned judgment passed by the learned trial Court and the same is accordingly upheld. Finding no merits in the appeal the same is ordered to be dismissed with costs. Decree sheet be prepared. File of the learned trial Court be sent back and file of this Court be consigned to Record Room.

XXXX XXXX XXXX XXXX”

11. Mainstay of the grounds of appeal is that the plaintiff had proved on record that the disputed passage is part of his private property but the learned Courts below misread the evidence and wrongly held that he had failed to prove that it was part of his private property. On perusal of the impugned judgments, I am of the considered opinion that the learned two Courts below had duly considered and appreciated the evidence, recorded a concurrent finding of fact that the plaintiff had failed prove that the disputed passage is part of his private property. The said finding, in my opinion, is based on a correct view of the record and is in accordance with law. I see nothing wrong therein and am inclined to agree with the same.

12. Resultantly, no fault can be found with the findings rendered by learned trial Court as affirmed by learned First Appellate Court since the same were based on cogent evidence adduced by both parties.

13. Having perused the impugned judgments, my considered opinion is that the submissions made before the Courts below were duly considered and repelled by recording sound and sufficient reasons consistent with evidence on record and the applicable law. I am inclined to agree with the same. There seems

no substance in the submissions that the impugned judgments were passed in hot haste as is canvassed or that the same are based on conjectures and surmises.

14. In the premise, there seems no perversity or illegality in the concurrent findings of facts returned by the Courts below. No interference is thus called for to disturb the said concurrent findings.

15. Furthermore, no question of law, much less substantial one, a *sine qua non* for entertaining regular second appeal, is involved herein, for exercise of appellate jurisdiction of this Court under Section 41 of the Punjab Courts Act read with Section 100 of Civil Procedure Code.

16. As an upshot of my preceding discussion, this appeal is dismissed, being bereft of any merit. Resultantly, both the impugned judgments and decrees passed by learned Courts below are upheld.

17. Pending application/s, if any, shall also stands disposed of.

18. No order as to costs.

(ARUN MONGA)
JUDGE

February 16, 2023
ashish

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No