

(1992) 12 P&H CK 0006

High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 1465 of 1991

Bachan Singh

APPELLANT

Vs

Surain Singh

RESPONDENT

Date of Decision: Dec. 14, 1992

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 35A

Hon'ble Judges: N.K. Kapoor, J

Bench: Single Bench

Judgement

N.K. Kapoor, J.

This is Plaintiff's Regular Second Appeal against the judgment and decree of the Additional District Judge, Gurdaspur, dated 10.4.1991 whereby the judgment and decree of the trial Court was set aside and the suit of the Plaintiffs was dismissed with costs.

2. The parties are real brothers. The dispute between the parties is regarding the passage which, according to the Plaintiffs, exist between the house of Bachan Singh and Surain Singh. On the northern side of these houses, there is a pucca street measuring 18" wide and on the southern side of these houses is phimi of the village. According to the Plaintiffs, there is small street which connects the house of Mohinder Singh, Plaintiff to the main road and from the small street, another small street goes to the haveli of Bachan Singh. It is when the Defendant threatened to encroach upon the said street that the Plaintiffs filed suit for permanent, injunction restraining the Defendant not to encroach upon the said street.

3. The Defendant put in appearance, filed written statement and raised the objection regarding the maintainability of the suit as well as the correctness of the site plan. The Defendant further averred that there is no such street and so the question of encroachment does not arise.

4. The learned Judge framed the following issues on 17.5.1988:

1. Whether the street is in existence since 1970 as alleged in para No. 2 of the Plaintiff? OPP.
2. Whether the suit is not maintainable in the present form? OPD.
3. Whether the site plan as prepared by the Plaintiffs is wrong. OPD.
4. Whether the site plan as prepared by the Plaintiffs is wrong? OPD.
5. Whether the Defendant is entitled to special costs u/s 35A of Code of Civil Procedure. OPD.
6. Whether the Plaintiffs are entitled to the injunction prayed for? OPP.
7. Relief.

Since there was some ambiguity, the issues were recast and framed as detailed below on 8.8.1989:

1. Whether there is a street existing on the spot as shown in the site plan and marked and described in the head note of the plaint? OPP.
2. If issue No. 1 is proved, whether any part of the street is a part of the property of the Defendant, if so, how and to what extent? OPD.
3. Whether the street in dispute is also used by the Defendant. If so, to what effect? OPD.
4. Whether the suit in the present form is not maintainable because of non-existing of the street? OPD.
5. Whether the site plan of the Plaintiff is wrong. If so, how, and to what extent and to what effect? OPD.
6. Whether the Plaintiffs are entitled to the injunction prayed for? OPP.
7. Relief.

The trial Court decided issue No. 1 in the favour of the Plaintiffs whereas issue Nos. 4 and 5 were decided against the Defendants. Issues No. 2 and 3 decided against the Defendant. Issue No. 6 was decided in favour of the Plaintiffs. Resultantly, the suit of the Plaintiffs was decreed.

5. The lower appellate Court examined the case on facts as well as on law and reached to a conclusion that the Plaintiffs have failed to prove on record that they a right of easement by way of prescription. The lower appellate Court further observed that the Plaintiffs have failed to prove that they are entitled to this passage/street by way of necessity. Accordingly, the appeal was accepted and the judgment and decree of the trial Court was set aside.

6. The first submission of the learned Counsel for the Appellant is that the lower Appellant Court has erred in law in not referring to the compromise arrived at between the parties which was placed on record on 4.1.1991. The compromise deed bears the thumb-impressions of Surain Singh-respondent and signatures of Bachan Singh-appellant. The compromise also bears the signatures of Sarvsh. Dilbag Singh Saini and Balraj Mohan, Advocates. The compromise arrived at between the parties is as under:

That Sh. Surain Singh shall give 4" side street on the eastern side of his plot, which adjoins the house of Bachan Singh, which will be from Pacci Street upto the "Haveli Gate". The cose of the "Gali" (Street) shall be given by Bachan Singh to Surain Singh, which will be fixed by the Court. Bachan Singh will raise 4" all on his side and on the other side or will raise "paces Burjees" fitted with "Khandian Wali Tar" on his land, Mohinder Singh shall have no claim with the litigation or with the street have no claim with the litigation or with the street. LTI (Surain Sigh) Sd/-Bachan Singh, Sd/-Dilbag Singh Saini, Advocate, 4.1.91. Sd/- Balraj Mohan, Advocate.

This being the factual position, this compromise petitiion is gennine and lawful and thus is to be acted upon.

7. I have perused the compromise dated 4.1.1991. Though this document was ordered to be placed on record by the additional District Judge as per his order dated 4.1.1991 yet the same escaped his notice at the time of decision of this case. Vide compromise the parties have mutually settled the dispute who are real brothers. Neither the Respondent nor his counsel has turned up today and in their absence it would not be safe to accept the compromise without any further proff. I accordingly accept the appeal, set aside the order of the Additional District Judge and remand the case for a fresh decision. The Additional District Judge will keep in mind the witnesses before treating it to be genuine and lawful. The Appellant is directed to" appear before the Additional District Judge on 28.1.1993 who would thereafter issue notice to the Respondent (in this appeal) and try to dispose of the appeal expeditiously preferably within six months.